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CONSTITUTIONAL COURT AND "TUTELA" LEGAL ACTION[1] IN COLOMBIA

ABSTRACT. *The historical background of the control of constitutionality in Colombia, the 1991 Political Constitution and the proximity of individuals and judges through the tutela action, gave life to a well-defined constitutional jurisdiction, with virtues and defects, which endanger the stability of decisions and the security of res judicata. This panorama, whose protagonist is the Constitutional Court, with its tutela rulings on the fundamental right*[2] *to due process, together with the effects of its decisions, constitute the real key to deciphering the real autonomy and independence of the other High Courts, or, in other words, their practical subordination to the constitutional court, with a full nomophilactic duty.*

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[1] Translator's note. In Colombia, tutela is the name of an injunction that was added to the 1991 Constitution in order to make it easier for people to access the justice system. It then allows the people to seek immediate protection of their constitutional rights (medical care, education, among other rights otherwise considered civil rights other countries such as the United States, for example). Tutela can be used when someone's rights are violated by a public authority or private individual and can be employed at any time without legal representation. In sum, the *tutela* action is what in the U.S. we would label as a *bill of rights legal action* (if it were possible as described above in the case of Colombia).

[2] Translator's note. Modern theory, mainly of German origin, has opted for the term 'fundamental rights' when it comes to codify human rights, i.e., enshrined as positive law by the Constitution. In Colombia, a "fundamental right" may then be considered something alike a right stemming from the United States "Bill of Rights", for there is, explicitly, a Chapter labelled "On Fundamental Rights" in the Constitution and is commonly referred to as the "catalogue of fundamental rights".

1. Introduction

The modern prominence of the Colombian Constitutional Court, when it comes to the *tutela* action against judicial decisions, invites legal scholars to examine the complexities of *res judicata*, the effect of judgments, and the true nomophilactic duty.

In order to delve deeper into the proposed topic, this research paper examines the historical background of the control of constitutionality in Colombia, thereby classifying it by periods and placing the Political Constitution of 1991 at the centre. In this way, it identifies what the control of constitutionality was like before and after this *magna carta*, with the creation of the Constitutional Court, which has within its list of tasks, the eventual review of tutela actions.

After explaining the birth of the Constitutional Court in Colombia, research then brings its analysis down to earth, delving into the tutela action for the protection of the fundamental right to due process, the complexities regarding *res judicata*, and the effects of its rulings. This opens the door to discovery, that is, who truly carries out a nomophilactic duty.

The methodological components of this paper are marked by the history of the control of constitutionality in Colombia, constitutional and legal norms, jurisprudence, and national and foreign doctrinal contributions which allow us to answer the question, with real and unmasked support, as to whether the Constitutional Court currently carries out a nomophilactic duty.

2. Historical background on the control of constitutionality in Colombia

In Colombia, the birth of the Constitutional Court dates back to 1991. The constituent assembly was aware, since 1990, of the need to create a jurisdictional body in charge of ensuring the prevalence of the Political Constitution. However, in order to understand the birth of the Constitutional Court, it is useful to understand the background of the control of the validity of laws in this country. For this reason, a brief and precise historical reference will be made to the control of constitutionality from

the period after independence (1810) to the period prior to the Political Constitution of 1991.

2.A. Period before the 1991 Political Constitution

Explaining the existence of a Constitutional Court and the exercise of control requires differentiating historic concepts related to political control, mixed control, and legal control.[3] Likewise, distinguishing events within the historical account.

2.A.i. Political Control of Constitutionality from 1811 to 1853

At first, after the cry for independence in 1810, the control of the constitutionality of laws, between 1811 and 1853, was based on political control.

The Cundinamarca Constitution of 1811, which followed the orientation of the French Constitution of 1789, stipulated in Section 9 that it was the Senate that had the duty of suspending, until a new legislature, a law to which the executive had objected on the grounds of unconstitutionality.[4] This was also enshrined in other constitutions, such as that of Tunja in 1811 (Chapter II), Cartagena in 1812 (Section 20) and Antioquia in 1815 (Section 10).

Subsequently, in 1830, with the new Political Constitution of Colombia, Section 110 provided that the body in charge of administering justice, the High Court, would be responsible for hearing the hesitations or uncertainties of the High Courts on the understanding and application of a given law, which allowed Congress to be consulted, but through the Executive Branch of public power.[5]

In 1843, with the Neo Grenadian Political Constitution, Section 169 established that any uncertainty about the true understanding of any of its provisions could be resolved by a special and express law. To this end, Congress was provided with the power to interpret laws or legislative acts.

[3] Cf. Luz Zoraida Rozo Barragán, 'Origen y evolución del régimen de control constitucional en Colombia' (1997) 3 *Revista Derecho del Estado*, 45.

[4] Cf. María Teresa Garcés Lloreda and José María Velasco Guerrero, 'Ponencia sobre control de constitucionalidad, Corte Suprema de Justicia y Consejo de Estado (1991), 18. Retrieved from: <https://babel.banrepcultural.org/digital/collection/p17054coll28/id/266>. Last accessed: 11 July 2024.

[5] *Ibid.*

2.A.ii. Political-Judicial Control, Political-Legal Control or Control of a Mixed Nature from 1853 to 1886

Initially, the Constitution of 1853 was pioneer in establishing judicial control of regulations that were considered unconstitutional, and for this reason, in paragraph 6 of Section 42, this duty is conferred to the Supreme Court, entrusting it with decisions over nullity claims of municipal ordinances issued contrary to the provisions of the Constitution and the laws.

In 1858, the Constitution of the Grenadian Confederation established for the first time[6] judicial control over the laws of the States. To this end, according to Section 50, the Supreme Court was vested with a special power to suspend the acts of the State legislatures if such acts were contrary to the Constitution, or if they were contrary to the laws of the confederation. However, the decision as to the validity or invalidity of such acts was to be taken exclusively by the Senate. However, Section 51 of also established that the Court would examine queries from judges and from courts on the application of national laws to later send them to Congress with its opinion, thereby indicating how to deliberate.

Five years later, 1863, Federal Constitution provided, Section 72, on the one hand, for the power of the Federal Supreme Court to suspend unconstitutional laws of legislators, and on the other hand, for the power of the Senate to annul such laws. Should a national law be in contravention of individual rights or state sovereignty, such a law could be nullified by a majority of the state legislatures, but it was for the Court to declare when a particular law was nullified by a majority of the legislatures.

2.A.iii. Exclusively Legal or Judicial Review from 1886 to 1991

Section 151 of the 1886 Constitution established an exclusive jurisdictional clause regarding control of constitutionality. It exclusively attributed the Supreme Court of Justice jurisdiction over the constitutionality of bills having been questioned by the President, in which case they were to be considered unconstitutional; and also jurisdiction over validity or nullity of departmental ordinances that had been suspended by the Government or denounced before the courts by the interested parties, on the

[6] *Ibid.*

grounds that they were harmful to civil rights.

Subsequently, in accordance with Section 2 of Law 2 of 1904, the control of constitutionality over the Decrees issued during a State of Siege was established. This control was entrusted to the Supreme Court of Justice, which was to be activated at the request of any citizen and required a prior hearing by the Attorney General.

As for constitutional control over regulatory decrees, there was discussion as to who possessed said jurisdiction, the Supreme Court of Justice according to Legislative Act 3 of 1910 (Section 41), or the Council of State, taking into account that the latter could be formed under provisions of the 1886 Constitution. Said possibility, however, was abolished in 1905 and reestablished in 1914. This discussion came to an end thanks to Legislative Act 1 of 1945 (Sections 41 and 42), which granted the Council of State with jurisdiction, and would then be the judicial body responsible for hearing complaints and ruling on the constitutionality or unconstitutionality of decrees issued by the President of the Republic, and for provisionally suspending administrative acts.[7]

In 1960, under Section 1 of Legislative Act 1, Congress was granted the power to submit State of Siege Decrees to the Supreme Court of Justice, so that this High Court could decide on their constitutionality.

Eight years later, in 1968, with Legislative Act 1, Section 71, the Constitutional Chamber of the Supreme Court of Justice was created, which would be made up of experts in Public Law and was to give its opinion on constitutional matters to be decided by the Full Chamber. In this sense, the acts issued by the Government in development of the State of Economic and Social Emergency or public calamity would be subject to constitutionality control.

Additionally, in the paragraphs of Sections 42 and 43 of Legislative Act 1 of 1968, the Supreme Court of Justice was assigned the automatic or informal review of Decrees issued during a State of Siege.

As can be seen, prior to the issuance of the Constitution of Colombia, the task

[7] Alberto Montaña Plata, *Fundamentos de Derecho administrative* (Universidad Externado de Colombia, 2010) 265: "In 1945 (Legislative Act 1) a new reform was carried out (in this case structural to the Council of State) whereby the appointment of the councillors was modified and some duties were attributed to the ministers, but mainly jurisdiction over the unconstitutionality of the decrees issued by the President over which the Supreme Court of Justice did not have jurisdiction, and the capacity to provisionally suspend administrative acts were attributed to it".

of judging the constitutionality of laws was in the hands of the Supreme Court of Justice, which, in various reforms and periods of history, records the antecedent of a Chamber specialised in Public Law. Evolution prior to the 1991 Constitution is summarised by Diego Younes Moreno as follows:

In the past, this responsibility was entrusted to the Supreme Court of Justice, but let us remember how, in the constitutional reform of 1968, a chamber specialised in public law was created within the Court to prepare projects for decision by the Full Chamber. Later, in the 1979 reform, this Chamber was increased to eight judges. Since the 1991 Constitution, the protection of the integrity of the Political Charter has been entrusted to the Constitutional Court.[8]

Now, let us analyse how to consolidate an iron control of constitutionality entrusted to a negative legislator, i.e. a Constitutional Court.

2.B. Period after the 1991 Political Constitution

Section 241 of the Colombian Constitution entrusts the Constitutional Court with the power of safeguarding both the integrity and the supremacy of the Constitution. That is, mainly, deciding over claims of unconstitutionality brought by citizens, thereby carrying out prior control of constitutionality of statutory laws, and reviewing judicial decisions made by others on *tutelas*, whereby the protection of fundamental rights is sought.

The action of unconstitutionality can be presented by any citizen due to the fact that this action constitutes one of the exceptions to the right of nomination or *ius postulandi* in Colombia. An action of unconstitutionality is defined as follows:

The public action of unconstitutionality is a procedural mechanism by which a legal norm of lower than constitutional rank is sought to be declared unconstitutional because it contradicts the Constitution, and thus such a provision is expelled from the legal system.

This action of unconstitutionality can be brought by any citizen, either by himself or through someone acting as his proxy or on his behalf. In the latter case, if he grants power of attorney for another to act as his proxy, this power of attorney must

[8] Diego Younes Moreno, *Derecho constitucional colombiano* (Legis, 2014) 376.

also meet the requirements of the law, otherwise the person who claims to be the representative of another cannot be recognised as such, as he has not accredited his capacity as proxy, and in this sense the action of unconstitutionality must be inadmissible.[9]

3. Constitutional jurisdiction

Constitutional justice dispensed by the Constitutional Court is based on the duty to ensure the prevalence of the Constitution of Colombia, when another norm is incompatible with it, and likewise, ensuring the integrity of the *magna carta* by protecting the fundamental rights of individuals. To this effect, recalling the provisions of Section 4, which provide that in any case of incompatibility between a norm and the Constitution, the latter prevails. This is the backbone of the philosophical foundation, the normative basis and the reason for the existence of constitutional jurisdiction.[10]

Based on the above, the Constitutional Court was created as the body located at the apex of the constitutional jurisdiction,[11] pursuant to Chapter 4 of Title VIII of the Constitution, Sections 239 to 245. It should be noted that this constitutional "jurisdiction" includes also all other judges of the Republic, as all judges in Colombia have the duty to apply the Constitution, but, in addition, a large number of them have jurisdiction over the *tutela* action, in accordance with Decree 2591 (1991) and Decree 1983 (2017).

The nature of the Constitutional Court in Colombia goes beyond the original Kelsenian duty of the negative legislator, because, beyond declaring the

[9] Carlos Iván Moreno Machado, 'Right to nomination in Colombia, legal representatives, and termination of power in the General Procedural Code' (2022) Revista de la Facultad de Derecho y Ciencias Políticas, 46.

[10] In this sense, Carlos Bernal Pulido, *El derecho de los derechos* (Universidad Externado de Colombia, 2008) 29: "Control of constitutionality of laws constitutes the very jurisdiction of the Constitutional Court, that is, to establish whether a given law is compatible with the Constitution. It is a guarantee of the Constitution, but above all, of fundamental rights. It is a counter-majoritarian mechanism that aims to prevent the freedoms of individuals (minorities, above all) from being left to the whims of daily politics. In Colombia, the constitutionality control is exercised by the procedural means described in Section 241, and by the exception of unconstitutionality, Section 4".

[11] For general ideas on Constitutional jurisdiction, see Robert Alexy, 'Tres escritos sobre los derechos fundamentales y la teoría de los principios' (2003) Serie de teoría jurídica y filosofía del derecho, 41-49.

unconstitutionality of a norm that contradicts the Constitution, it has other dutys related to prior control of constitutionality, such as those regarding *fundamental* rights. That being said, it carries out duties that have given rise to the name of another contentious scenario that we have baptised as "constitutional litigation".

4. Composition of the Constitutional Court

With regard to the composition of the Constitutional Court, Section 44 of Law 270 of 1996 provides that it shall be composed of nine (9) magistrates, elected by the Senate of the Republic. This election is made from three (3) shortlists presented by the President of the Republic, three (3) shortlists presented by the Supreme Court of Justice and three (3) shortlists presented by the Council of State. The Senate of the Republic shall elect one magistrate for each slate, thereby ensuring that the composition of the Constitutional Court is diverse in terms of the specialities of its members.

The duration of the individual judgeship, or rather, the term for which a magistrate of the Constitutional Court is elected, is eight (8) years. However, in the event of an absolute absence among the magistrates that make up the Court, the body in charge of the corresponding shortlist, from which the incumbent was elected, must once again present a shortlist for the Senate of the Republic to make the corresponding election. To this end, the Constitutional Court shall communicate the vacancy to the nominating body so that, within a period of fifteen (15) days, it may submit the list of three candidates to the Senate of the Republic. The latter, once it has received the list of three candidates, has a period of thirty (30) days from the date of filing of the list of three candidates, or from the beginning of the ordinary period of sessions in the event of a recess in Congress.

It is to be noted that while the position of magistrate of the Constitutional Court is being filled, either because of an absolute or temporary absence of its members, the Constitutional Court will directly fill the vacancy.

5. Constitutional Court Rules of Procedure

Upon the appearance of the Constitution, the Constitutional Court began to set forth its own rules of procedure under Paragraph 12 of Section 241 of the Constitution. This duty not only applies to the Constitutional Court, but also to the other High Courts.[12]

Currently, the original Rules of Procedure are those adopted by Agreement 01 of 1992, recodified, in turn, by Agreement 05 of 1992 (also, amended and added to by Agreements 01 of 1995, 01 of 1996, 01 of 1997, 01 of 1999, 01 of 2000, 01 of 2001, 01 of 2004, 01 of 2007, 02 of 2007, 01 of 2008, 01 of 2010, 01 of 2015, 02 of 2015 and 01 of 2020).

Said regulation of the Court constitutes an administrative act as an independent regulation or *praeter legem*, whose existence and issuance is authorised by the constituent. Therefore, it does not depend on a previous authorising law, so that it regulates particular matters that have not been recognised by law. They are specific matters, which, as one moves down from the top to the bottom of the system, are found to be self-regulated in numerous scenarios.[13] It is not an executive or *secundum legem* regulation that requires the existence of a prior law or that is issued by the likes of a preexisting law in order to develop, complement, or otherwise execute it.

[12] This is recognised in the Council of State, Third Section, Judgement of 14 August 2008, File: 11001032600019990001201(16230), C.P.: Mauricio Fajardo Gómez, referring to the autonomous constitutional regulations issued by constitutional bodies not located in the Executive Branch, but in the Judicial Branch, such as the Supreme Court of Justice, the Council of State, the Constitutional Court, and the Superior Council of the Judiciary, in accordance with the norms of the Constitution, Paragraph 9 of Section 235, Paragraph 6 of Section 237, Paragraph 12 of Section 241, and Paragraph 3 of Section 257, respectively. On the nature of these regulations: "In line with what has just been stated, both national jurisprudence and the most authoritative scholars on the matter have coincided in pointing out that the word regulation refers to the normative set of rules that generate or regulate general, impersonal, or abstract legal situations, issued by those State bodies that do not carry out a legislative duty, but which, on the contrary, are constitutionally assigned, primarily, jurisdictional or administrative duties (whether they are bodies located within the Executive Branch of Public Power, or autonomous and independent bodies within the structure of the three 'classic branches': legislative, executive and judicial).

[13] Norberto Bobbio, *Teoría general del derecho* (Temis, 2016) 149: "The same relationship exists between constitutional norms and ordinary laws, which can sometimes be considered as the executive regulations of the principled orientations contained in the Constitution. As one moves up the hierarchy, the rules become fewer and more generic; conversely, if one moves down, the rules become more numerous and specific".

The rules of procedure of the Constitutional Court, when deliberating over specific situations not regulated by law, focus on the meetings of the Constitutional Court, sessions, quorum, majorities, the presidency and vice presidency of the Constitutional Court, the duties of the president and vice president, the duties of the Full Chamber of the Constitutional Court, its seat, its sessions, the non-attendance of judges at sessions, the appointment, requirements and dutys of auxiliary judges, the General Secretariat and their duties, the Administrative Coordination, the Systems Area, the Press Office, the Work and Distribution Programme, the addition of claims and accumulation of proceedings, the citizen's appeal, the selection process and possible review of *tutela* judgements, decrees and evidence, public hearings and concepts, rectifiable formal defects, decisions on excuses to appear before Congress, the electoral powers of the Constitutional Court, the participation of the president of the Constitutional Court in the election of the National Registrar of the Civil Status, the participation of the president of the Constitutional Court in the appointment of the manager of the judicial branch, decisions regarding internal dutying, impediments and recusals, and miscellaneous provisions regarding the duties of employees, working hours, and public service, calls for attention, prohibitions of judges, officials and employees of the Constitutional Court, applications for nullity, clarifications, appointment, and possession of co-judges, vehicles assigned to judges, reduction of distribution to the president of the Constitutional Court, working days according to the rules, reform of the rules, the Complaints and Grievances Committee, and transitory provisions related to the validity of the rules of procedure.

6. Tutela [bill of rights legal] action

This legal action is a public action of constitutional rank brought for the protection of *fundamental* rights of individuals, whether naturally or legally recognised, pursuant to Section 86 of the Political Constitution of Colombia, Decree 2591 of 1991 and Decree 1983 of 2017. However, as it is a public action to protect the constitutional guarantees of the individual, it requires that the protective essence or condition of the *fundamental* right is interpreted and expanded thereby taking into account the human

rights[14] enshrined in the American Convention on Human Rights or in other international treaties ratified by Colombia.

It is an action that can be brought directly by the citizen, devised by the constituent to materialise a direct relationship between the citizen and the Constitution.[15] Therefore, constitutes another exception to the right of nomination or *ius postulandi*,[16] which does not prevent this action from being brought through a legal representative, if needed.

It is now appropriate to study two variables of such a legal action that will be differentiated in this paper. First, the *tutela* legal action for the protection of *fundamental* rights other than due process. Second, the *tutela* action when the protection of the *fundamental* right to due process is invoked.

6.A. Protection of fundamental rights other than due process

Generally speaking, the *tutela* legal action claims the protection of each and every one of the fundamental rights, either those enshrined in the Political Constitution

[14] For an explanation of this concept, see Luis Villar Borda, 'Derechos humanos: responsabilidad y multiculturalismo' (2004) Serie de teoría jurídica y filosofía del derecho, 46-47: "Faced with the countless problems that arise from the versatility of the concept of human rights and the diversity of definitions that have been tried and tested around it, whether as an ethical-philosophical principle or a legal norm of international law, modern theory, mainly of German origin, has opted for the term 'fundamental rights' when it comes to codify human rights, i.e., enshrined as positive law by the Constitution. Most of the new constitutions have followed this trend, including Colombia's 1991 Constitution".

[15] Manuel Fernand Quinche Ramírez, *La acción de tutela* (Temis, 2017) 22-23: "The tutela action, like no other, favours the direct contact of the citizen with the administration of justice, insofar as it does not require the mediation of a "scholar" or attorney, as is the case with the actions provided for in the codes and laws. In this sense, and in accordance with Section 86 of the Charter, the action can be brought by 'anyone', i.e. by minors, persons with some degree of disability, legal persons, unofficial agents, public defenders, representatives of associations, etc. This feature is very important because, in addition to trying to ensure that the action belongs more to the people than to the lawyers, it encourages changes in the understanding of judicial practice and in the relationship between the citizen and his or her Constitution".

[16] Moreno Machado (n. 9) 44: "This action can be brought by any citizen, without the need for a lawyer. However, in those cases in which a citizen grants power of attorney to a lawyer, the power must comply with each and every one of the requirements of the law; in the event that a tutela action is initiated and the power of attorney does not comply with the requirements, then this constitutional action must be inadmissible or decided as such, because the person acting as the legal representative of the plaintiff has not accredited his or her capacity as an attorney-at-fact for this purpose. Likewise, it is necessary to indicate that a power of attorney granted to process an action other than the tutela action is not valid for filing this action".

or in statutory laws, or those contemplated in the American Convention on Human Rights or in other international treaties ratified by Colombia.

Generally, the *tutela* action must comply with two requirements: ***immediacy*** [i.e. timing], and ***subsidiarity*** [i.e. no other mechanisms available]. **The first requirement of *immediacy*** refers to the fact that the tutela action should only be filed when there is a current violation of fundamental rights, or also, when there is a real risk or specific threat of violation of fundamental rights. It should focus on a current and not a past violation, due to the fact that its purpose is to avoid irremediable damage, imminent damage, and therefore, it has a sense of urgency, which is why the seriousness of the facts does not allow waiting in time, otherwise, the violation of *fundamental rights* will be realised, and damage will be suffered. **The second requirement of *subsidiarity*** refers to the unavailability of other ordinary procedural actions or mechanisms, or that, if these actions or mechanisms do exist, these mechanisms are inoperative or ineffective to achieve immediate protection of fundamental rights. The requirement of subsidiarity which, in principle and not absolutely, imposes certain limits on the constitutional judge, such as the fact that the tutela action cannot be used to recognise economic obligations or compensation.

The observance of the requirement of subsidiarity and the prohibition to recognise financial obligations or compensation, I reiterate, is in principle a limit. A limit that ceases to be present, and therefore is not absolute, if the claimant has no other judicial mechanism or, if in the case of having one, it is not effective and the gravity of the circumstances warrant for an immediate filing of a *tutela* legal action, because in such circumstances, the tutela judge may recognise financial obligations or compensation. This occurs, for example, with the recognition and payment of a pension, as decided by the Constitutional Court in *Ruling T421 of 2013, M. P.: Gabriel Eduardo Mendoza Martelo*, a case in which the plaintiff, who had worked as a soldier in the Armed Forces and had lost his right eye, was granted a disability pension, protecting his *fundamental* rights to life dignity, health, social security, and the minimum wage. The same happened in the case decided by the Constitutional Court in *Ruling T-282 of 2016, M. P.: Gloria Stella Ortiz Delgado*, whereby an insurer was ordered to pay a life insurance debtor within forty-eight (48) hours, protecting the *fundamental* rights to due process in a relationship between individuals (insured and insurer) and the right to the minimum wage.

On the other hand, when the protection of the *fundamental* right to due process is sought, the tutela action must comply with general requirements indicated above as well as with specific grounds indicated below.

6.B. Protection of the fundamental right to due process

The tutela action can also be brought exceptionally against judicial decisions (orders or sentences) of judges or against arbitration awards issued by arbitration tribunals to obtain and achieve the protection of the fundamental right to due process under Section 29 of the Constitution, this being an undeniable achievement of the constitutionalisation of procedural guarantees in the 20th century[17] for any type of process (e.g. civil, commercial, family, administrative, contentious-administrative, criminal, disciplinary, labour).

The filing of a tutela action against judicial rulings or arbitration awards must meet, on the one hand, some general requirements, and on the other, specific grounds. The general requirements that must be met are the following: i) constitutional relevance; ii) subsidiarity; iii) immediacy; iv) defect or irregularity with a decisive effect on the ruling; v) identification of the facts that violated fundamental rights, the identification of such rights, and that these have been alleged timely; and vi) that, in principle, it is not a tutela action against a tutela ruling (which is all the more exceptional in order to annul a fraudulent tutela ruling[18]). Likewise, specific grounds must be met: i) material or substantial defect; ii) factual defect; iii) procedural defect; iv) decision without reasoning; v) disregard of precedent; vi) organic defect; vii) induced error; and/or viii)

[17] For a comprehensive study on how procedural guarantees are intertwined in constitutional law, Angelo Dondi, Vicenzo Ansanelli and Paolo Comoglio, *Procesos civiles en evolución. Una perspectiva comparada* (Marcial Pons, 2017) 64-65: "The notion of principle, referring to the process, is compared to that of *garanzia*, referring to the constitutional context or, in any case, to the fundamental laws of each legal system. In truth, the constitutionalisation of the basic fundamental guarantees constitutes a reality for a large part of the Western civil procedural systems or those of close Western derivation, such as the Latin American ones. This circumstance has characterised the second half of the 20th century as a distinctive sign of a vision of the civil process and as emblematic of its substantial democratisation".

[18] For the sake of understanding the exceptional applicability of the tutela action against tutela judgments, analyse Ruling SU - 627 of 2015, Constitutional Court, Full Chamber, M. P.: Mauricio González Cuervo and Ruling T - 073 of 2019, M. P.: Carlos Bernal Pulido.

direct violation of the Constitution.[19]

To conclude this section, it is necessary to indicate that, in order to comply with the requirement of immediacy, the tutela action against a judicial decision or arbitration award is brought within a reasonable period of time, six (6) months, starting from the notification or execution of the judicial decision or arbitration award against which it is filed. This is not a time limit, nor is it a legal term, but a "jurisprudential" term, but it must be complied with, unless there is a reason justifying the plaintiff's inactivity.[20]

6.B.i. Judgment

Res judicata is the phenomenon of stability and legal immutability of the decisions handed down by the judges, that is, they prevent a new ruling regarding cause, object, and subjects involved to come about. For this reason, *res judicata*, once its meaning is known,[21] is analysed from two angles: i) from the process, with *res judicata* being a guarantee for the parties; and ii) from the judicial branch of the public power, as a determining factor for its effectiveness (i.e. fulfilment of justice administration).

When a *tutela* is brought against a judicial decision or an arbitration award, and as a consequence the decision under attack is rendered ineffective, a major problem arises pertaining the stability of the decision provided by the judge or the court of the jurisdiction and speciality in question. Because *res judicatas* exist in civil, commercial, family, agrarian, contentious-administrative, arbitration, labour or criminal matters, a constitutional *res judicata* in matters of *tutela* would render the former ineffective

[19] For a detailed examination of the specific grounds for tutela action against judicial rulings, see Quinche Ramírez (n. 15).

[20] This has been indicated by the Constitutional Court in multiple pronouncements, for example, in Ruling T - 466 of 2022, M. P.: Jorge Enrique Ibáñez Najar. Also, Council of State, Fourth Section, Judgment of 8 June 2016, File: 11001031500020150148001, C.P.: Hugo Fernando Bastidas.

[21] To delve deeper into the millenary phenomenon of *res judicata*, its history, concept, requirements, and complexities, study Carlos Iván Moreno Machado, 'Cosa juzgada: entre el Código General del Proceso y la Constitución Política', in Ramiro Bejarano Guzmán and Diego Fernando Rojas (ed.), *Lecciones constitucionales del Código General del Proceso. Tomo I* (Universidad Externado de Colombia, 2022) 111: "Res judicata can be defined as the legal stability of the decisions issued by the jurisdiction that prevents a new ruling regarding cause, object, and subjects involved in the decision, because should a new pronouncement come to be issued, it could be useless. If talking about terms, there are multiple that can be used to fill in the meaning of res judicata of a judicial decision, such as: inalterability, binding, immutability, unchangeability, firmness, enforceability, definitiveness, stability, unassailability, among others that exist or that may exist in the future".

thereby. That is to say, a previous and known ruling in, say, civil matters, considered to be standard is now left in doubt and gives way to said *res judicata* provided by that judge in fundamental rights matters regarding due process to be rendered no longer effective. In addition to the fact that, once a judgment or an order has been handed down and has become *res judicata* in its respective speciality, the *tutela* action can be brought in legitimate pursuit of the objective of protecting the fundamental right to due process. However, on the contrary, in some cases it happens that the tutela action is brought with the illegitimate and twisted aim of preventing the application of the definitive effects of a ruling by placing obstacles in the way of its full compliance.

Despite the challenges that can be filed against the judgments deliberating over *tutelas*, as indicated in Sections 31 and 32 of Decree 2591 of 1991, all judgments that resolve tutela actions must be sent to the Constitutional Court for possible review, under Paragraph 9 of Section 241 of the Constitution and Clause 2 of Section 31 and Section 33 of Decree 2591 (1991). This indicates that, should the Constitutional Court decide not to review, it becomes *res judicata*, whereas if it decides to review it, judgment issued by the Constitutional Court shall be the one considered *res judicata*, which definitively closes the study of the violation.

With regard to the body of constitutional jurisdiction, provision of the *norma normamarum* in Paragraph 1 of Section 243 establishes that, like judgments on constitutionality, tutela judgments set forth by Constitutional Court are *res judicata*, which obviously means that the controversy concerning the violation of fundamental rights cannot be subject to re-examination or decision, either by the Constitutional Court or by any other collegiate or single judge.

The central complexity of the tutela action against judicial decisions for the protection of the fundamental right to due process lies in a panorama full of uncertainty regarding the definitive closure of the trial and its verdict. This action, although it is true that it is a democratic mechanism that serves and will serve to remedy injustices and legal errors, it is equally irrefutable that it creates insecurity and uneasiness, mainly for the parties involved in the litigation decided and which is reactivated to be reviewed in the tutela venue, as well as for their representatives, and also for the judges and arbitrators who issued the decisions of instance in their respective speciality or in the tutela grades or scenarios before the file is sent to the Constitutional Court for possible review.

The injustices and legal errors that have been remedied through tutela actions against judicial rulings do not exclude the errors of the High Courts. For example, the Constitutional Court, in rendering ineffective ruling provided by the Council of State in a case of direct compensation in medical civil liability, Sent*ence SU - 155 of 2023, M.P.: Diana Fajardo Rivera*. In this pronouncement, the Constitutional Court, after finding a factual defect due to improper evidentiary assessment whereby the medical history was analysed without observing testimonies and a delay overseen as well as the responsibility of carrying out an abdominal ultrasound, among other factors, highlighted:

The approach above is arbitrary as to the study on the delay in the practice of the abdominal ultrasound and its implications. What created questions about the care provided by the E.S.E. Hospital San Jorge de Pereira was not whether the abdominal ultrasound should have been performed before the bilateral thoracostomy, as both procedures had been ordered at the same time, or whether it was not possible to carry out the abdominal ultrasound – due to emphysema – and a CAT scan had been ordered quickly; but whether the delay of more than 17 hours in carrying out the ultrasound scan from the time it was ordered constituted negligence on the part of the defendant that could give rise to liability, especially when the abdominal ultrasound or CT scan were the appropriate means of diagnosis to establish the true situation of the patient. This is the issue raised by the plaintiffs based on the patient's medical history and the testimonies referred to above, and which the Judgment of 25 February 2021 misses.

The Constitutional Court has also corrected in tutela judgments the errors of the Civil Cassation Chamber of the Supreme Court of Justice, pronouncement *SU - 573 of 2017, M. P.: Antonio José Lizarazo Ocampo*, wherein it is declared that there was procedural defect due to manifest ritual excess, substantive defect, and factual defect. The Court examined the lack of acknowledgement of the applicant's status as heir and her corresponding right to obtain part of an inheritance due to a failure to assess an ecclesiastical certificate, a baptismal certificate, and a public deed, which reliably accredited the acknowledgement of paternity. These documents, moreover, had not been found to be false. The Constitutional Court then stated that *"the objective legal truth was consciously renounced despite the facts proven"*, emphasising that judicial autonomy is not a licence to circumvent the rule of law.

For these reasons, while I do think being possible to file a tutela action against judicial decisions issued by judges, tribunals, or High Courts may yield fruits, I also express my disagreement with this being so against arbitral awards (private or state), as anything emanating from the will of the parties to an arbitration agreement conducted, therefore, before judges, should not return to said servants. In other words, what leaves the jurisdictional apparatus should not return to it, except if it returns because the parties to the agreements so chose, as happens when the appeal for annulment of the arbitral award is filed. For this reason, it is not logical that, in addition to the existence of an appeal for annulment of arbitral awards (exclusively for errors *in procedendo* according to the exhaustive grounds contained in Section 41 of Law 1563 of 2012) and an appeal for review (only for grounds established in Section 355 of the General Code of Procedure), the parties, their representatives and the arbitrators have to go through the tunnel of uncertainty created by the filing of a *tutela* against the award that settled the dispute, to which the parties themselves agreed.

This has been a visible cause of two current difficulties, on the one hand, the increase in litigation, and on the other hand, the lack of definition of the trial, as it is not clear when the litigation should end, that is, which is the final decision.

Understanding the approach described herein, what should be done in Colombia is to broaden or extend the grounds for the extraordinary appeal for annulment of arbitral awards, these being either substantial or procedural grounds. This was proposed to the drafting commission of the arbitration law, but the commission did not accept it, which resulted in more *tutela* actions for protection against arbitral awards for substantial or procedural errors.[22]

[22] Ramiro Bejarano Guzmán, *Procesos declarativos, arbitrales y ejecutivos* (Temis, 2023) 470-471: "[…] the extraordinary appeal for annulment imposes on the appellant the burden of asserting the specific grounds provided by law. Such grounds seek to remedy a procedural defect, i.e., in annulment proceedings no controversies can be raised that attack the substantive aspects of the appealed award, but only procedural defects. In our opinion, this restriction in the scope of the grounds for annulment has been detrimental and has multiplied litigiousness. In effect, given that grounds for annulment appeals that allow the substantive aspects of an award to be challenged are prohibited, this has ended up being done by means of tutela, which, therefore, is today a reiterated instrument for challenging said rulings. For this reason, within the commission that prepared the draft law on the arbitration statute, we proposed, unsuccessfully, that a ground for annulment similar to the first ground for cassation, at least that of direct violation of substantive law, be enshrined as a ground for annulment, a proposal on which no one joined us, as the majority considered that this would delay the process. Today it is clear that the failure to authorise a ground

Continuing to allude to the difficulties, it is entirely useful to note the following:

[…] But the issue of the tutela action against arbitral awards does not end here, so I will allow myself to waste some ink to highlight an inconsistency in the judicial system in relation to this legal action against arbitral awards, a matter that involves the phenomenon of res judicata. Let us start with this example: in a private arbitration proceeding, between Z and Y, an arbitral award was rendered condemning Y, for which the latter filed an appeal for annulment against the award, obviously on the grounds that it incurred in procedural errors. The Civil Chamber of the Court of the place wherein the arbitration tribunal operated declared the award valid. However, subject Y argues that the award did not apply the substantive rules that regulate the matter, for which reason he files a tutela action supporting the generic grounds for proceeding and invoking the specific ground of material or substantial defect, or other; but the **jurisdiction of the tutela judge is only limited to whether the arbitral award incurred in the defects indicated**. If his conclusion is negative, he will stay or maintain the award. On the other hand, if its conclusion is affirmative, it must exclude said defect or defects, rendering the award without ineffective thereby, but it can never resolve the controversy that was submitted to the arbitrators by means of the legal business of the arbitration agreement (arbitration clause or compromise); said question of substance cannot be the object of constitutional justice,[23] for the plain and simple reason that it

that allows awards to be challenged on substantive grounds is the reason that justifies the filing and processing of tutela actions, which have notoriously congested the judicial offices, and incidentally exposed the awards to the uncertainties of the tutela actions". An aspect on which Professor Bejarano has insisted, including in previous editions of his work, such as Ramiro Bejarano Guzmán, *Procesos declarativos, arbitrales y ejecutivos* (Temis, 2017) 445.

[23] I refer to the decision of the Constitutional Court in Ruling SU - 556 of 2016, M.P.: María Victoria Calle Correa, in the process of the tutela action filed by Banco de la República against the Third Section - Subsection C- of the Council of State and the Arbitration Court convened to resolve the differences between Banco de la República, on the one hand, and Seguros Generales Suramericana S. A. and Allianz Seguros S.A. On this case, the Full Chamber of the Constitutional Court protected the fundamental right to due process of Banco de la República and annulled the arbitration award issued by the Court of Arbitration. A. and Allianz Seguros S.A. In this case, the Full Chamber of the Constitutional Court protected the fundamental right to due process of Banco de la República and annulled the arbitration award issued on 12 November 2014 by the Arbitration Tribunal convened. In its considerations, it held: "[...] in this case, the Court deliberates over a tutela against an award and a judgment of annulment is produced thereby, which is why its jurisdiction is limited to deciding whether they were flawed and, if so, to exclude them. The definition of the scope of the protection and other issues initially submitted to litigation are not the object of constitutional justice. This does not prevent it from declaring that, given the claims, the decisions to revoke the tutela

cannot go beyond the will of the parties, who sought that the controversy be resolved by arbitrators, not by judges. This will surely lead to a new arbitration tribunal having to be convened, a new arbitration process being processed, and another arbitration award being rendered, in respect of which – again and again – an appeal for annulment or an action for protection may be filed, as it is a new award.

This constitutes an additional reason for which I reiterate my disagreement with the tutela action against arbitral awards. The sum of these complexities surrounding the tutela action are what today in Colombia lead us to maintain that the res judicata in any specific matter (including constitutional res judicata over tutelas whereby ruling is passed by a judge or court other than the Constitutional Court), is going through moments of uncertainty and it is not easy to determine when the judicial debate will end. For this reason, the legal community proposes solutions for the tutela legal action against judicial rulings.[24]

Having studied *res judicata*, with its complexities, sharp aspects, and doctrinal proposals for resolving inconveniences,[25] let us now examine the legal effects of the Constitutional Court's rulings on *tutelas*.

6.C. Effects of tutela judgments from the Constitutional Court

The *tutela* judgements passed by the Constitutional Court are known by the acronyms "T" which stands for *tutela*, and "SU", which stands for unified ruling [from the Spanish "sentencia unificada"], both with binding *inter partes* effects, that is, for the parties to the dispute, as they apply and only affect the procedural ends formed in the process of the legal action. These acronyms differ from "C" rulings, which are those of constitutionality and therefore have *erga omnes* effects, that is, for everyone, as they deal with the stay or expulsion of a law.

judgment of 26 November 2015 and to vacate the arbitration award of 12 November 2014 do not exhaust the jurisdiction to settle the differences between the parties to the legal transaction that gave rise to the arbitration dispute".

[24] Moreno Machado (n. 21).

[25] The analysis of jurist Rodrigo Uprimny, "Una sola corte?", in our national newspaper *El Espectador*, 7 April 2018, cannot escape this essay: "What would a single court solve? It is not clear. The "choque de trenes" [conflicts between branches]? There is a much simpler solution, which is to clarify the cases in which the Constitutional Court, by *tutela*, can review the rulings of other high courts, as is done in Germany, where that issue is practically resolved". Retrieved from: <https://www.elespectador.com/opinion/una-sola-corte-columna-748683/>.

Normative foresight regarding the effects of the tutela "T" and the "SU" judgments passed by the Court is found in Section 36 of Decree 2591 of 1991 and in Paragraph 2 of Section 48 of Law 270 of 1996. These two Sections precisely establish the *inter partes* effects of these decisions. The Constitutional Court, however, expressing the mission entrusted to it by the constituent assembly in Section 241 of the Constitution, developed two mechanisms to **broaden the effects** of its decisions in **tutela-matter jurisdiction**, which are the effects *inter pares*[26] and the effects *inter comunis*,[27] which are applied exceptionally and when the Constitutional Court itself so indicates in the operative part of the judgment in order to preserve the integrity of the higher order or the constitutional norm. The *inter pares* effects indicate that the Constitutional Court's decision must be applied to similar cases without exception, and on the other hand, the *inter comunis* effects indicate that the Constitutional Court's decision will benefit third parties who, although they are not parties to the *tutela*, are part of a group of affected persons with common factual circumstances with the plaintiffs in the case decided upon.

It is these *inter pares* and *inter comunis* effects of the Constitutional Court's tutela judgements that have led the scholars to ask themselves the following question: Is there a nomophilactic duty of the Constitutional Court? This question will be answered below.

7. Nomophilactic duty of the Constitutional Court?

The nomophilactic duty is that which is divided, on the one hand, into the surveillance and observance of the law, and on the other hand, into the uniform interpretation of it.[28] Its meaning (whose etymological root derives from the Greek word

[26] Constitutional Court, Order 071 of 2001, M. P.: Manuel José Cepeda Espinosa; Sentencia T - 697 of 2011, M. P.: Humberto Antonio Sierra Porto; and Sentencia T - 100 of 2017, M. P.: Alberto Rojas Ríos.

[27] Constitutional Court, Ruling SU - 1023 of 2001, M. P.: Jaime Córdoba Triviño; Ruling SU - 587 of 2016, M. P.: Luis Guillermo Guerrero Pérez.

[28] In relation to this dual nature of the nomophilactic duty, Bruno Nicola Sassani, *Lineamenti del processo civile italiano. Impugnazioni, esecuzione forzata, procedimenti speciali, arbitrato*, Vol. II (Giuffrè, 2021) 107: "Today we tend to speak generically of the nomophilactic duty in relation to both purposes, but the origin of the term observes

nomophýlax) is composed of the words *nómos*, which means law, and *phýlaxis*, which means vigilance: surveillance of the norm or protection of the norm.

Although it is not the only duty of the Supreme Court of Justice,[29] the nomophylactic duty falls upon it and constitutes one of the main purposes of the cassation appeal, the natural remedy through which we hear its judgments. The word cassation comes from the verb "cass", which means to break, annihilate, or destroy, as in breaking, annihilating, destroying, or breaking down the decision of a high court of a judicial district, thus achieving the other aim of cassation, which is the uniformity of jurisprudence.[30]

Section 333 of the General Code of Procedure (on purposes of the extraordinary appeal of cassation) provides:

Goals of the Cassation Appeal. The purpose of the extraordinary appeal of cassation is to defend the unity and integrity of the legal system, ensure the effectiveness of the international instruments signed by Colombia in domestic law, protect constitutional rights, control the legitimacy of the judgements, unify national jurisprudence, and redress the grievances of the parties due to the ruling against which they appealed.[31]

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the former rather than the latter. The current use of the term seems to favour the prospective ('normative' one might say) duty of the Courts' pronouncements over the duty of control and repression of the violation of the law".

[29] Humberto Murcia Ballén, *Civil Cassation* (Ibáñez, 2005) 77, is right when points out: "However, the nomophilaquia, that is, the protection of the law, is not the only purpose attributed to cassation: this remedy was also established to achieve jurisprudential unity. No less important for monitoring the application of the rule of law is the need to unify its interpretation, to such an extent that, in many cases, this becomes the obligatory path to arrive at the rule of law. It is necessary, in order to honour the principle of equality of the parties before the law, to give certainty to the interpretation that judges make of it, as a means to ensure that rights are not violated when different solutions are simultaneously applied to identical situations on the basis of the same legal texts".

[30] In this sense, the German scholars on civil procedure or *Zivilprozessrecht*, Burkhard Hess and Othmar Jauernig, *Manual de derecho procesal civil* (Marcial Pons, 2015) 430-431: "The *guarantee of the uniformity of case law* is in any case the *fundamental duty* of cassation and, consequently, the most relevant ground for admission in practice among those provided for in § 543 ZPO. Essentially only the legal aspect of the judgement under appeal is examined, and by a court on which all appeals are concentrated. In order to ensure uniformity of case law also within the court of cassation itself, measures have been taken to ensure that all organs of the BGH (the sections) answer the same questions of law in the same way (*see infra* § 74, marg. 19)".

[31] From this rule, six (6) purposes of the cassation appeal in Colombia can be extracted, five of which are of a public nature and one, that of "redressing the grievances of the parties", is of a private nature.

From the reading of this norm and the daily work of the Supreme Court of Justice resolving cassation appeals[32] it is evident that this high court is the one that historically carries out a nomophilactic duty. However, when the Constitutional Court, in *tutela* proceedings, issues "T" or "SU" judgements and assigns them *inter pares* or *inter comunis* effects, it is undeniable that it is too carrying out a nomophilactic duty.

Even in the case of "SU" tutela rulings, the Constitutional Court unifies internal positions and sees that lower-level judges apply them. Additionally, when the "SU" judgment is passed, it comes from the Full Chamber, reason for which this type of judgment becomes a decision with a broad and nondifferentiated effect.[33] Observed in practice and in theory, this is no different from the exercise of a nomophilactic duty, because when the Constitutional Court ensures the integrity of the Constitution,[34] it

[32] Important is the synthetic and classic explanation of Carlo Lessona, *Procedura civile* (Società Editrice Libraria, 1932) 339: "[...] the institute of cassation guarantees only the correct application of the law for the fact that was submitted to the judge of merit. The Court of Cassation is precisely instituted to maintain the exact observance of the laws [...], hearing appeals against judgments handed down at the appellate level in civil and commercial matters".

[33] For a reflection on the extension of jurisdiction in the extension of the effects of the tutela judgment and a 'non-express norm', Pablo Moreno Cruz, 'Efectos inter comunis: una acción de tutela colectiva y obligatoria', in Ramiro Bejarano Guzmán, Pablo Moreno Cruz and Marcela Rodríguez Mejía (ed.), *Aspectos procesales de la acción de tutela* (Universidad Externado de Colombia, 2017) 74-76: "The jurisprudential creation of the non-express rule that extends the jurisdiction of the Court as to extend the effects of the judgment to absent subjects is done through a customary reasoning of the Court. [...] Finally, on the basis of this non-express rule (which I have wanted to express in these terms, but which in reality has had various formulations, more or less, of this tenor) the Court, through subsequent interpretative exercises, proceeds to consolidate its content in different decisions, thus opening up space for the different forms or techniques of extending the effects of the judgement to absent subjects, in light of the complexity deriving from the pluri-subjective violation of fundamental rights".

[34] In this sense, H.F. Arévalo, 'Jurisdicción constitucional, sus competencias en el ámbito legal colombiano', in Eduardo Andrés Velandia Canosa (ed.), *Derecho Procesal Constitucional. Litigio ante la Jurisdicción Constitucional* (Universidad La Gran Colombia, 2019) 436, who refers to the nomophylactic duty of the Constitutional Court, but goes beyond its meaning, stating: "The nomophylactic duty includes the defence of the legal norm, both constitutional and legal. The former are called upon to fulfil this duty with the high courts, including the Constitutional Court, in terms of superior norms with their prevailing and binding nature in relation to other norms. With regard to the legal norm, this unifying duty of criteria, interpretation and normative scope in terms of the factual assumption that contains it and the legal consequence that it entails, is exercised by both the Supreme Court and the Council of State. Now, we consider that the Superior Council of the Judiciary has the same duty with regard to the regulations governing the disciplinary duty. The Public Prosecutor's Office, the Office of the Attorney General of the Nation, has an extensive scope in disciplinary matters concerning public officials". Terminological imprecision, together with other references made by the author H. F. Arévalo, which I obviously do not agree with, as it ignores the birth of the nomophylactic duty and what it means to monitor the law in order to preserve legal integrity and

also ensures the integrity of the law and the uniformity of jurisprudence, especially when it annuls and renders ineffective a judgement of another high court or judge with a different subject-matter jurisdiction. The Constitutional Court, in numerous judgements, replaces other closing bodies, thereby undermining both judicial independence and the supremacy of other high courts, sometimes causing what we know as "choque de trenes" [clash of judicial organisms].[35]

If we were to assert that all the high courts in Colombia (Supreme Court of Justice, Council of State, Superior Council of the Judiciary and Constitutional Court) fulfil a nomophilactic duty, we would produce a careless and somewhat bittersweet statement insofar as we understand that the nomophilactic duty, because it focuses on monitoring the law to ensure its integrity, seeks in the same way to unify jurisprudence. Therefore, although these courts create jurisprudence, only one of them closes the debate and interpretation, namely, the Constitutional Court, as it renders ineffective *tutela* judgements passed by the Supreme Court of Justice, the Council of State, and

the uniformity of jurisprudence. Although there are high courts, each one at the top of its jurisdiction, it cannot be said that they all carry out a nomophylactic duty, especially when the Constitutional Court in tutela proceedings has rendered the judgments of the other high courts ineffective. This is not to say that the Public Prosecutor's Office carries out a nomophylactic duty, since the decisions it issues are not judgements, but administrative acts, which can be challenged through the means of control of nullity and restoration of the law before the administrative jurisdiction, and in this case, if it is a matter of nomophylactics, it is exercised by the Council of State in the matter, and in the last instance, by the Constitutional Court.

[35] See Iván Daniel Otero Suárez, *La migración de las ideas constitucionales en la jurisprudencia de la Corte Constitucional colombiana* (Universidad Externado de Colombia, 2023) 294, when analysing the point of judicial independence and the office of the Constitutional Court. The author does not hesitate to state: "On the other hand, it is considered that in order for there to be greater respect for the principles of judicial autonomy and independence within the Judicial Branch itself, and legal security in the application of the law, as well as the unification of judicial interpretations, the Constitutional Court should use the DDV in all the judgements of constitutionality it makes, with the aim of not constructing a hypothetical norm based on the analysis of isolated precedents. This would avoid so-called 'choque de trenes' [conflicts] between high courts and make it possible to know for certain whether judges are interpreting contrary to the Constitution. While it is true that guaranteeing the effective application of the Constitution includes, under certain parameters, verifying that judges and other authorities interpret and apply laws harmoniously with higher prescriptions, what can be observed in case law analysed is that the Court uses a large part of its discretion to apply the DDV and identify the existing law in each specific case. This is without taking into account what has already been referred to regarding the application of the principle of interpretation in accordance with the law. In this sense, the constitutional judge, as a result of the control of constitutionality over existing law, has also become the highest interpreter of the law, without consideration for the other judges and their jurisdictions".

the Higher Council of the Judiciary. Therefore, if it is held that all the high courts carry out a nomophilactic duty, it is necessary to affirm too that the Constitutional Court is the only one that, protecting the fundamental right to due process, annuls the validity and effects of judgements passed by other courts, which does not happen the other way around, nor among the other judicial bodies.

8. Conclusions

8.1. The history of constitutional control in Colombia can be classified into two main periods: before and after the 1991 Constitution, grouping together the periods that embrace a historical evolution and later demanded the existence of a Constitutional Court.

8.2. The appearance on stage of the constitutional jurisdiction with the 1991 Constitution places the Constitutional Court at the cusp of all courts, and so carries out constitutional control and can hear claims regarding *tutela* judgements produced by other judges, that is, review them.

8.3. The protection of *fundamental* rights in Colombia has two forms. One can file a *tutela* to claim the protection of fundamental rights different from the right to due process and also to claim the protection of the fundamental right to due process. Both are clearly differentiated by general requirements and specific grounds.

8.4. The tutela action against judicial rulings creates instability as for *res judicata*, putting this legal figure at risk, particularly when it comes to *tutela* actions against arbitration awards. This spreads uncertainty, thereby stimulating the appearance of proposals to improve it, among other vicissitudes of the justice system.

8.5. The judgments of the Constitutional Court, in the case of a constitutionality trial, have *erga omnes* effects, whereas the effects of tutela judgments are *inter partes*. Through case law, however, this organ can assign *inter pares* or *inter comunis* effects to its tutela decisions in order to extend the consequences of its rulings and measures regarding the protection of *fundamental rights* to other parties that were not parties to the dispute from which they originated.

8.6. The reality of the Colombian Constitutional Court's decisions in the

processing of *tutela* actions against judicial decisions teaches us, from a practical and theoretical perspective, that this organ fully carries out what has been known for a long time as a nomophilactic duty, displacing the Supreme Court of Justice thereby, and similarly, the Council of State and the Higher Council of the Judiciary each time it renders their decisions null and void.