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## Lessons of the Colombian Constitutional Reform of 1991

### Toward the Securing of Peace and Reconciliation?

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The idea that a political constitution embodies a society's deepest level of consent is ancient in Western civilization. In *The Laws*, Plato defined a constitution as a framework that had to be built before a society's laws could be authoritatively drafted and promulgated.

The polestar of constitutionalism as a means of securing democratic government has guided Latin America since 1811, shortly after the wars of independence began. Simón Bolívar, creator of the short-lived Gran Colombia, convened a constitutional assembly in 1819 and later drafted a constitution of 151 articles for Bolivia. Some of his early ideas, such as a national chamber of civic virtue to direct morals and punish vice, were unfeasible, but his constitutional thoughts were presciently directed at curbing anarchy and violence among deeply antagonistic peoples and at developing a consensual framework for government. While dying in exile, he recognized the quixotic nature of his life's ambition; about the region that he had sought to unify, he prophesied that

The situation of America is so singular and so horrible that it is not possible for anyone to hope to conserve order for a long period, not even in a city. Never have I considered a danger so universal as now menaces the Americans; I express this badly; posterity never saw a scene as frightening as America offers, more for the future than for the present because where has anyone imagined an entire people to fall into a frenzy and devour its own race as cannibals?<sup>1</sup>

The history of Colombia tragically demonstrates Bolívar's fears, as the entire nineteenth century was marked by civil wars interrupted by sporadic periods of relative peace. That said, a gradual solidification of democracy also characterizes Colombia, which possesses one of the oldest democracies in Latin America. On a political level, the competing ideologies of liberal and conservative were embodied in parties fighting for control of the central government and regional economies. The military defeat of liberal forces in 1885 garnered conservative control and ushered in the nearly fifty-year period of so-called Conservative hegemony.

Among its first acts, the conservative government abolished the federal constitution of 1863, promulgated under the auspices of the Liberal Party, and adopted the authoritarian constitution of 1886. This iteration of the Colombian constitution placed the government under the firm control of the president, allowing him to suspend constitutional rules and rights by frequently declaring a state of emergency (*estado de sitio*), as would occur throughout the late nineteenth and twentieth centuries. Declaring a state of emergency was an exceptionally grave situation for the political and juridical order of the nation, as, apart from suspending constitutional rights, it permitted delegation of extraordinary faculties to the military. The constitution of 1991 would add the power to invoke *el estado de comoción interior*, a domestic uprising or situation of violent tumult.

The explosive growth of coffee cultivation led to the development of regional economies; growth of the oil industry and foreign investment led to prosperity, but the wealth was not shared with the majority of the population, nor were those who held it enlightened enough to invest in extending efficient government outside the major cities. As a result of discontent among the poor and of the weak state, the violence continued. Between 1899 and 1902, the Thousand Days' War became the longest and cruelest civil war the country had yet experienced. The conflict ended when the government defeated rebel forces and imposed an armistice.

In 1910, the first significant reform of the constitution of 1886 was adopted in response to the forced departure of President Rafael Reyes, who had assumed dictatorial powers. The constitutional assembly of 1910 introduced some moderating changes to the constitution of 1886, such as abolishing the death penalty and inserting the judicial power of the Supreme Court to review the constitutionality of laws.

Popular protest against the Conservative hegemony increased in the late 1920s, especially after armed forces in Bogotá killed two students and the Army massacred workers from the United Fruit Company in 1928. The Liberal Party won the 1930 elections and inaugurated a sixteen-year period known as the Liberal Republic. A second reform of the constitution of 1886, adopted in 1936, attempted to introduce some elements of a welfare state, such as government intervention in the economy, and diminished the constitutionally granted influence of the Catholic Church over public institutions and society.

In 1945, a third reform of the constitution of 1886 sought to modernize the state's administrative organization, though the Conservative Party recovered power with the 1946 presidential election of Mariano Ospina Pérez. Liberals had obtained more votes, but were divided between two candidates. One of them was Jorge Eliécer Gaitán, leader of a liberal faction called the Union of the Revolutionary Left. As he obtained the larger percentage of the vote between the two liberal candidates, he became the leader of the party and headed the opposition against the new Conservative government. Gaitán was murdered on April 9, 1948, and his death opened a new ten-year period of violence between Liberals and Conservatives known as *la violencia*, a bit of a misnomer, as the increase in political violence had begun some years before. Gaitán himself had addressed the growing violence in his most well-known speeches.

The year 1950 witnessed the inauguration of a new Conservative government, with Laureano Gómez as president. The Liberal Party did not participate in the elections in protest against the murder of its candidate, Camilo Echandía, during a parade. The country had in fact been under a state of emergency since November 9, 1949, when President Ospina

Pérez had closed down the Congress. New President Gómez organized a constitutional assembly to provide some legitimacy to his government and promote a new constitution based on a more authoritarian model, inspired by the regimes of Franco and Hitler.

In the face of growing violence, military chief Gustavo Rojas Pinilla declared that “the principles of Christ and Bolívar” required him to take charge, which he did in June 1953. The dictatorship lasted until the political parties, reacting to their exclusion from power, created a coalition that forced Rojas Pinilla from office in May 1957. The Liberal and Conservative parties forged a deal to reduce the political violence between them by rotating control of the presidency, thus establishing the parties’ dual hegemony. This deal, the Covenant of the National Front, was approved for a twelve-year period as a constitutional reform by plebiscite on December 1, 1957. The system of shared hegemony proved so satisfactory to the principal parties that the system of alternating control and proportionate participation of each party was followed until President Virgilio Barco abandoned it in 1982.

However, new sources of violence arose that the political truce could not contain, as the disparities in economic and political power provided rich fodder for the explosive growth of the guerrilla movement. In 1963, student activists and Catholic radicals, including Camilo Torres, a priest, founded the National Liberation Army (ELN), hoping to emulate Castro’s revolution in Cuba. The Popular Liberation Army (EPL) broke away from the traditional Communist Party and declared itself to be the armed faction of the Marxist-Leninist Party of Colombia. In 1964, the Revolutionary Armed Forces of Colombia (FARC) formed around a group of guerrillas formerly established by the Liberal Party that refused to abandon armed struggle in return for amnesty. To this nu-

cleus were added groups of *campesinos* trying to organize protests against landowners.

In 1970, The Movement of April 19 (M-19), an urban guerilla group, was organized in reaction to alleged fraud in the May 19, 1970, elections. The presidential contest that year was won by the conservative representative of the National Front, Misael Pastrana, who ran against the former dictator, General Rojas Pinilla. General Pinilla had the support of a growing number of people who felt politically excluded by the National Front’s institutions. Later, in 1984, the M-19 started a peace process with the conservative government of President Belisario Betancur; other guerrilla groups, such as the FARC and EPL, did so, as well. The government broke off the process in early 1985. That same year, the M-19 seized the Palace of Justice, which housed the Supreme Court, in an effort to force the government to reinstate the peace process. Rather than negotiate, the Betancur government consented to a full-scale military attack that resulted in the destruction of the building and the deaths of about 100 people, including twelve judges.<sup>2</sup> Hostilities increased with the termination of the peace process. None of the armed groups would join in a common front, although some of them created the *Coordinadora Guerrillera Simón Bolívar* in the 1980s, a body that, in practice, did not act in a very coordinated way.

In addition to the violence spawned by the guerrilla groups, the United Self-Defense Force of Colombia (AUC), a loosely affiliated group of paramilitaries formed to oppose the guerrilla groups, directed their attacks largely against rural laborers. The AUC was protected by the Colombian army as an ally in the antiguerilla struggle. But the organization’s brutality against peasants suspected of sympathizing with the guerillas and its practice of kidnapping civilians for ransom, even in neighboring Venezuela, led most Colombians to consider the paramilitaries as

criminals. Meanwhile, narcotics traffickers, whose annual income since the mid-1980s is estimated at \$2.5 billion to \$3 billion, have paid both the guerilla groups and the AUC for protection and have invested in many sectors of the economy. The corruption, public and private, generated by these vast sums of money is a source of shame that many elements of society deprecate strongly.

Successive governments made limited efforts to end guerilla violence peaceably. Until the M-19 abandoned armed struggle to create a political party that participated in the 1991 constitutional assembly, however, there was no real effort to change the structures of power through the political process.<sup>3</sup>

### **Broadening Public Participation through a Constitutional Assembly**

The movement to convene a constitutional assembly (*constituyente*) composed of the broadest range of social and political representation possible commenced in 1981 with the Second National Forum for Human Rights, attended by a diverse group representing a range of views across the political spectrum. The vision for the assembly sought to provide a constitutional means to overcome the political exclusion that had characterized Colombia's history. A National Commission for a constitutional assembly was created in 1987 and included representatives of the most powerful trade unions and non-governmental organizations, and some political leaders who formed a National Committee of Unity.

In December 1989, the National Commission proposed using the elections of March 11, 1990, to hold a referendum as to whether a constitutional assembly should be held. Notably, the newspaper *El Espectador* backed the initiative. A student-led movement, organized after the murder of Liberal leader and presidential candidate Luis Carlos Galán in August 1989, proposed a refer-

endum text that became known as the *séptima papeleta*, or "seventh ballot," given that the election already involved six ballots. The students pledged to actively support democratic institutions and to bring about respect for human rights. Out of this effort grew the so-called *mesas de trabajo* (working groups) that functioned through December 1989 in an effort to analyze possibilities for judicial reform and promoting the *séptima papeleta*.

The "students' seventh vote" (*séptima papeleta de los estudiantes*) was so named by another periodical, *El Tiempo*, which also supported the text of the referendum. The six formal issues in the March 1990 elections dealt with the selection of mayors, senators, and representatives to the municipalities, regional chambers, and House of Representatives. As prevailing electoral rules prohibited the inclusion of an issue on the ballot by popular request, the authorities did not formally include the *séptima papeleta* in the March 11 elections. Instead, the *séptima papeleta* was distributed to voters through the newspapers. At the time, voting was not performed by filling in a printed ballot, but by depositing paper votes in the ballot box. This permitted the informal casting of votes on the proposal to convene a constitutional assembly. The overwhelming number of affirmative votes—five million—cast in the *séptima papeleta* led then-president Virgilio Barco to issue a decree, under state-of-emergency powers, to pose the issue formally in the presidential election on May 27, 1990.

Under the existing constitution and the traditional interpretation of it that had prevailed since 1957, Congress held the exclusive power to reform the constitution (Article 218). Accordingly, the constitutionality of President Barco's decree, issued as it was pursuant to his constitutionally granted state-of-emergency powers, was subject to review by the Supreme Court of Justice. Although the presidential state-of-emergency powers have

been justly criticized for their undemocratic nature and potential for enabling repressive action by the executive branch, in this case President Barco sought to call for a democratic reform of the constitution for the very purpose of restoring public order to Colombia and strengthening the country's democratic institutions.<sup>4</sup> The Supreme Court ultimately upheld the decree principally on the grounds of popular sovereignty. The court considered that according to general principles of Colombian constitutional law, governance of the state derives from the people's will. Consequently, if the Colombian people decide to reform their constitution, they are free to do so without restraint. The court reasoned that popular demand for reforms was evidence that existing political organs were incapable of achieving them. When the Supreme Court boldly sidestepped the constitutional restriction of reform to legislative action, its jurisprudential and philosophical reasoning was based on the potential of the constitutional assembly to achieve peace.

The referendum demonstrated overwhelming support for constitutional reform: 88 percent of voters favored convening a constitutional assembly to "strengthen participatory democracy." To push the popularly mandated reform forward, César Gaviria, the new Liberal Party president, whose government was inaugurated on August 7, 1990, conferred with representatives of the other principal political parties, which had collectively received 96 percent of the popular vote in the May elections. These parties—including the Movement of National Salvation, a faction of the Conservative Party; the Democratic Alliance M-19, which had participated for the first time in the elections after signing a peace agreement with Barco's government; and the Social Conservative Party—entered into an agreement on the mechanics of the constitutional assembly. This agreement called for the assembly to meet for a limited number of days, pro-

vided for preparatory commissions representing diverse political, social, and regional interests, and set forth the necessary organizational details. In addition, the agreement called for the popular election of delegates to the assembly on December 8, 1990.

Under the agreement, seventy members of the constitutional assembly were to be elected nationally by means of electoral lists to assure representation of different political, social, and regional groups. In addition, two seats were reserved for guerrilla groups, which would agree to demobilize. The participation of the M-19, which received many votes in the presidential election of May 27, 1990, was considered very significant, as was the participation of the EPL, Partido Revolucionario de los Trabajadores (PRT; another guerrilla group), and Quintin Lame, an indigenous group. The FARC and ELN, however, refused all offers to participate in this process. The agreement provided further that sitting congressmen were ineligible to serve in the assembly. President Gaviria incorporated the details of the agreement into a decree, *Decreto numero 1926*, issued under his state-of-emergency powers on August 24, 1990, and upheld by the Supreme Court.

*Decreto numero 1926* put careful limits on the constitutional assembly. It called for the assembly to begin work on February 5, 1990, and to meet for 150 days (Article 3). The assembly was mandated to approve a single text containing the constitutional reform within the duration of its sessions and was required to act within limits set not only by the decree incorporating the vote in the popular referendum but also by the Political Agreement of the constitutional assembly entered into by leaders of the principal political parties and the M-19.

The government set up 1,580 working groups throughout the country to receive proposals from diverse social and political groups, ranging from academics and lawyers to laborers and farmers. Over 100,000 pro-

posals for constitutional reform were submitted for review by the working groups, with the logistical support of the faculty of the Escuela Superior of Public Administration.

Initially, the working groups were conducted by student leaders between September and November 1989 to analyze how to control the generalized violence through juridical means. *Decree numero 1926* promoted the preparatory work of such groups, representing social organizations throughout the country, universities, and indigenous communities. The groups' work was coordinated by the municipalities in which they were created, and they could call on the assistance of commissions of experts set up by the president. Thus, when the constitutional assembly was organized and established commissions to consider reform proposals, they had the benefit of significant preparatory work and the widespread public debate that the proposal had received.

### **Democratic Representation in the Constitution-Making Process**

The campaign for seats in the assembly was largely waged by established political groups, with opportunities created through new electoral rules for independent groups to participate. The new electoral rules were designed to modernize and democratize the old electoral system, creating the most open and egalitarian process in Colombian history. Private voting booths were provided for the first time, and official ballots replaced the old system in which each candidate printed and distributed his or her own ballots. A national vote was taken to facilitate meaningful participation by new parties, minorities, and those unaffiliated with a political party. In the past, departmental votes had been taken to elect congressional representatives, giving rise to cronyism within the individual departments and favoring established parties. Significantly, the nationwide vote also assured that those elected

would have a national rather than a localized mandate. As a result, the constitution they would develop—which would require national rather than local consensus building—would have nationwide legitimacy. Given the task of developing a new constitution for the entire country, this was a significant step. Finally, for the first time in the history of Colombian elections, public finances supported the campaigns of the constituent candidates. This, too, had a democratizing effect by improving the chances of election for a broader group of candidates than would otherwise have been possible. As a result, the election produced an assembly with a more democratic and nationally spirited character than had previously been true for the national legislature; over 35 percent of the votes went to groups other than the traditional parties (i.e., Liberals and Conservatives), an anomaly in the history of Colombian elections up to that point.

Perhaps the new electoral rules contributed to the relatively low turnout—26 percent—for the December 9, 1990, elections. Nevertheless, independent or new political movements obtained a significant percentage of the vote: The Democratic Alliance–M19 received 27.14 percent, followed by Indigenous with 2.85 percent, Patriotic Union with 2.85 percent, and Christians or Evangelists (non-Catholics) with 2.85 percent, for a total of 35.69 percent of the vote. Never before had independent forces obtained more than 4 percent of votes in congressional elections. Having one-third of the votes for the constitutional assembly, even if Liberals and Conservatives gained the majority of votes, indicated significant electoral support for independent political forces. Moreover, representatives of minority groups won seven seats in the constitutional assembly.<sup>5</sup> Of these seven, three were Colombian Indians, representing six hundred thousand of their people.<sup>6</sup>

By government decree issued pursuant to the agreement President Gaviria had estab-

**Table 17.1 Final Composition of Constitutional Assembly in Colombia**

Movement	Seats	Percent of total
Liberals	25	33.78
Democratic Alliance–M-19	19	25.67
National Salvation (faction of Conservative Party)	11	14.86
Social Conservative Party	5	6.75
Independent Conservatives	4	5.40
Indigenous	2	2.70
Patriotic Union	2	2.70
Christians	2	2.70
EPL (by decree)	2	2.70
PRT (by decree)	1	1.35
MAQL	1	1.35
Total	74	100

lished to govern the workings of the constituent, seats were given to two EPL representatives, one PRT representative, and one representative (without vote) of the Quintín Lame Armed Movement (MAQL), an organization of indigenous people, after those guerrilla organizations signed a peace accord with the government. The constitutional assembly also made new offers to the FARC and ELN later, but those groups refused to join. As a result of both the elections and the appointments made by decree, the final composition of the assembly was as follows in Table 17.1.

The multiparty character of the assembly marked was a bold departure from the entrenched bipartisanship of Colombian politics in distributing the greatest number of seats among three parties, as the recently demilitarized M-19 party stood side by side with the Liberal and Conservative parties.

### Structure of the Process

The constitutional assembly convened on February 5, 1991, and elected a collective presidency composed of the leaders of the three principal groups: Antonio Navarro Wolf (Democratic Alliance M-19), Horacio Serpa

Uribe (Liberal Party), and Alvaro Gómez Hurtado (Movement of National Salvation, a faction of the Conservative Party). After adopting regulations to govern its procedures and time limits, the assembly elected a Codification Committee of lawyers representing all political groups, with technical assistance provided by a Colombian institute, Instituto Caro y Cuervo.

The constituent invited the government, Senate, House of Representatives, Supreme Court, and Council of State to submit reform proposals, and the Gaviria administration submitted a full reform proposal the day after the assembly convened. Non-governmental organizations, universities, and guerrilla groups involved in the peace process also presented proposals, which did not carry the weight of official proposals, but were taken under serious consideration by the constituent. In all, 131 official and 28 other proposals for reform were submitted.

Many of the proposals that the non-governmental organizations generated reflected their particular mandates. For example, the Colombian Workers' Federation proposed reforms to the constitution's articulation of social and labor rights, and the Colombian Association of Retired Police Officers addressed the constitution's treatment of the national police force. Others, however, ranged more broadly in subject, such as the proposal submitted by the Foundation for the Future of Colombia and universities that participated in this step of the reform process.

To deal with diverse reform topics, the assembly organized five permanent commissions. The First Commission focused on the study of principles, rights, obligations, guarantees, and fundamental liberties; mechanisms and institutions of democratic participation, the electoral system, political parties, and the status of the opposition; and mechanisms for constitutional reform. The Second Commission was responsible for studying territorial regulation and regional and local

autonomy. The Third Commission was dedicated to the study of reforms to the structure of the state, Congress, the police force, the state-of-emergency regime, and international relations. The Fourth Commission studied the administration of justice, principles of criminal law and due process, and the function of the Inspector General (Public Ministry). The Fifth Commission was mandated to study economic, social, ecological, and fiscal issues, as well as public services.

The commissions' decisions were not binding, but were brought to the full assembly for debate. The specific function of the commissions was to conduct a comparative study of the proposals within their respective areas of focus. For a proposed provision to gain approval as part of the new constitution, majority approval was required in both of two plenary debates. At the outset, the idea was to reform the existing constitution, but it became clear that the reform could best be accomplished not by amending the old constitution, but rather by proclaiming a new one. The commissions produced a collective 560 articles for such a new constitution, but in the first plenary debate, many of these were seen to be repetitive or inconsistent. Consequently, the number was reduced to about 400 articles, following which the Codification Commission produced a first draft of the new constitution. This draft was submitted for discussion at the second plenary debate. A final grammatical revision by a committee on style refined the constitution's text. The assembly adopted the new constitution on July 4, 1991.

The *constituyente* overcame two major obstacles in the course of its work. First, the Council of State, the principal administrative tribunal under the existing constitution, sought to impose its administrative authority on the assembly; to forestall this intervention, the assembly adopted a resolution declaring that the referendum had made provisions of the existing constitution relating to

constitutional revision inapplicable, and that any regulations that the assembly adopted did not constitute administrative acts subject to Council of State review.

Second, as the Third Commission neared consensus on abolishing existing congressional subsidies and irregularities, members of Congress, fearful of their political future, undertook a campaign against the assembly. Years of abuse by the political class in Congress had led to public clamor for reform of the legislature, and to give these reforms the greatest chance for success, the *constituyente*, with President Gaviria's agreement, ordered Congress to be dissolved on July 5, 1991, the day after adopting the new constitution, and called for new congressional elections on October 27, 1991. The assembly established a special legislative commission, called *el Congreso* (the little Congress), proportionately representing the parties participating in the assembly. The assembly authorized *el Congreso* to promulgate laws related to implementing the new constitution. This commission of thirty-six leaders met between July 15 and October 4, and again from November 18 to November 30. Pursuant to the new constitution (transitional articles 6–8), *el Congreso* held the power to approve by majority presidential decrees issued during the interim, veto any decrees deemed overly broad, and propose legislation (*proyectos de ley*) to be submitted to the newly elected Congress that would enter office on December 1, 1991.

Unfortunately, the disqualification of members of the constitutional assembly to run in the new congressional elections led to a reelection of practically all of the old political class. The deal worked out with President Gaviria had the effect of marginalizing the Movement of National Salvation (MSN), a faction of the Conservative Party, and the M19, which had been most influential in the constitutional assembly. The victory of the old political class was probably due to the naïveté of their opponents. However,

the new electoral rules did secure more seats for the new political parties than would have been achievable under the old rules, including seats for indigenous peoples.

The new constitution was never subjected to popular ratification. The preexisting constitution had not foreseen a successor or contemplated a mechanism for ratifying one. Rather, in accordance with President Gaviria's decree of August 24, 1990, concerning the powers of the constitutional assembly, the assembly itself was empowered to proclaim a new constitution, as it did on July 4, 1991, subject to affirmation by the Supreme Court of Justice that the reform had been conducted in conformity with the vote taken by the Colombian people on December 9, 1990, when the assembly's members had been elected. Upon proclaiming the new charter, Alvaro Gomez Hurtado, the elected president of the constitutional assembly, exhorted:

We proclaim the Constitution of Colombia. It is the end of an effort. . . . We achieved it running risks. It is a text that seeks to represent Colombia, a new country that we wanted to find. Between remaining behind or pushing ahead, we preferred the vanguard. . . . Every Constitution is a beginning. Here, today something is born. . . . We hope that new generations will not live in a state of corruption as that we suffer today. We fulfilled our mandate to clean up the Congress. . . . We established bases on which justice can be restored. . . . Colombia is a young country that has to experiment. It must experiment. It cannot limit itself to opportunities that present no danger. Dangers have come upon us and to oppose them timorous measures will not suffice. We are not going to let the reform movement stagnate. This would be an injustice. We want it to be a living organism and not a document for the archives. This Constitution will have to be the source of all judicial and institutional organization. But we want it to be much more, that it be considered the navigational chart of our nationality. . . . The Constitutional transformation that we proclaim today has the objective of restoring our moral values. We intend that there be a rebirth of the essential

concepts of goodness, honesty and truth. And to complete our wishes—that we Colombians will value anew the meaning of peace and the spiritual condition of mankind. There, standing tall, are the possibilities of preserving human dignity forever.<sup>7</sup>

### Timing of the Reforms

Gaviria seized the momentum of successful peace negotiations with the M-19 and a window of optimism throughout the country to carry forward a bold constitutional reform project to open the political process to a more inclusive group of participants and strengthen the state's capacity to secure democratic order. However, the absence of the FARC and ELN in the process has proven over time to be a definitive blow to the new constitution's capacity to achieve the peace that was among its goals. With impeccable timing, on December 9, 1990, the day of the elections for the constitutional assembly, the government carried out a military attack on the FARC's headquarters, Casaverde. Casaverde had hosted meetings between the FARC and many representatives of the government, political parties, and society over the prior months and years, all aimed at exploring the possibility of a negotiated peace. As a result, Casaverde symbolized the hope—but also the continued failure—of a negotiated peace. Although at that time a peace process was not formally open, the expectation, or perhaps merely the hope, prevailed that talks would be renewed and peace promoted through new avenues, including the FARC's participation in the constitutional assembly. The attack on Casaverde the same day that Colombians elected the members of the constitutional assembly closed the assembly's doors to the FARC. This mistake was deepened by the attitude of the FARC itself, which rejected the subsequent invitation by key members of the constitutional assembly to present their proposals. In any case, the actions of both the government and the FARC reduced the abil-

ity of the constitution of 1991 to secure peace in Colombia.

Had the government more vigorously negotiated with the FARC and ELN so that those groups could have been represented in the assembly, would it and the resulting constitution have been any more effective at establishing an enduring peace? The subsequent years of efforts to negotiate a peace with the guerrilla groups suggest that including FARC and ELN representation would have been impossible without serious compromises by the government, and that postponing the efforts to reform the state would only have reduced further its capacity to deal with the destructive forces that oppose it. Furthermore, given the depth and breadth of popular support for constitutional reform, the timing of the 1991 constitution was poised for success; to have gambled the moment away for the possibility of greater success at a later date would have carried risks and arguably diminishing returns.

### **Role of the International Community**

The peace process that resulted in the proclamation of the 1991 constitution derived from the vision of Colombian leaders and the Colombian people, the negotiations held with the guerrilla groups during the 1980s, and a long constitutional tradition. No representatives of supportive countries or the United Nations were involved in the conversations leading up to the constitutional assembly, nor did they serve as guarantors of the peace accords. However, the international community did provide some financial support to the effort, and this went toward expanding the technical capabilities of the government, strengthening the proactive role of civil society, and disseminating information concerning the assembly's debates and the constitution itself.

To ensure the smooth running of the assembly, a UN-funded presidential agency op-

erated as technical support in the preparation of the constitution and during the assembly's deliberations. The same agency contributed to elaborating the government draft of the constitution submitted for the assembly's consideration and, after the proclamation of the constitution, preparing bills for its legislative implementation. A final component of the program publicly promoted the new constitution, mainly to the legal community and government agencies. The dissemination of the constitution among the population, which included education about new constitutional rights and their guarantees, such as the new legal vehicle of *tutela* (discussed below), was developed only through a few short-term initiatives.

European agencies funded a pool of national non-governmental organizations that joined efforts and expertise around an initiative called *Viva la ciudadanía*. This program was important to the process of creating the new constitution, as it provided a bridge between the assembly and those sectors of the population linked to social and political organizations. Through public debates around the country and the publication of a monthly paper, the project channeled proposals from citizens and popular organizations to the assembly, continuously updated the public on discussions in assembly sessions, and developed an education campaign after the constitution was proclaimed. However, the program's impact was limited because its publications did not use the mass media, and, therefore, did not reach the general public.

Although no foreign technical experts participated in or advised the assembly, several came to Colombia to observe the process. Several international non-governmental organizations participated in the debates, however, and thereby enriched the discussions with proposals inspired by international human rights law. For example, the secretary general of Amnesty International and the director of Human Rights Watch's

Americas program addressed the plenary of the assembly, describing their concerns about the human rights situation in Colombia and their views on how a modern human rights framework and checks on the public security forces could help to reduce the high number of human rights violations occurring in Colombia.

### **Role of International and Foreign Law**

Undergirding the entire reform process—from parting of the judicial seas to permit a democratic movement to override the congressional lock on constitutional reform to electing the members of the constitutional assembly to formulating the provisions of the constitution itself—lie the principles of popular sovereignty and democratic participation. Although the process itself took its democratic course apart from international legal theory, *de facto*, the emerging international norm of self-governance prevailed in the Colombian constitutional reform experience.

International law, and international human rights law in particular, played an important and explicit role in the adoption of the 1991 constitution as the constituent sought to secure a newly democratic and peaceful order in Colombia. While it would be impossible to identify any one international legal norm involved in the process that led to the peace settlement and the consensus around the new constitution, the international human rights instruments provided the basic standards considered by all parties at the time of debating the future bill of rights, as well as some aspects of the organization of state organs and their powers. The constitutional assembly looked also to foreign legal systems and procedures in deliberating on reforms to the Colombian constitution. For example, the common law injunction and habeas corpus actions were considered in the First Commission and in

plenary session deliberations on the protection and application of rights.<sup>8</sup>

The 1886 constitution had been modeled on the Spanish constitution, which was in turn infused with French constitutional structures and principles. In addition, the rich intellectual tradition of legal scholarship in Colombia informed the research of the assembly's commissions. Among the commission members were some of the most respected legal scholars in the country, who were familiar with the importance of studying comparative legal systems. Legal experts in the Gaviria administration working on the constitutional-reform process brought their comparative legal knowledge and contacts with foreign administrations to the task of presenting reform proposals to the assembly.

Constitutional borrowing is evident in the separate treatment of a *carta de derechos*, or bill of rights, firmly set out in the first two sections of the new constitution, which echoes French and American legal traditions. Article 88, providing for citizens' rights for protection of collective interests, derives from constitutional provisions in Brazil, Spain, and Portugal. Establishing a human rights ombudsman, or *defensor del pueblo*, was borrowed from the successful experience of Scandinavian countries. The constituent chose to adopt it with the objective of strengthening the protection of human rights in the country. The overhaul of the justice system to shift away from the European inquisitorial system to the American prosecutorial system of justice is notable in its establishing of a prosecutor general's office: A government prosecutor rather than a Colombian judge would be responsible for bringing charges against defendants. A separate constitutional court was also established, following the Spanish example (again, based on that of France) of charging a separate court with determining the constitutionality of laws and treaties issued or entered into by the other branches of government (Article 239).

## Issues of Substance

In the effort to secure democracy and peace for all in Colombia, the constituent embraced tenets of international law throughout the 1991 constitution, giving international human rights law superior status in cases of incompatibility with domestic law. Article 93 provides that ratified treaties that recognize human rights and prohibit their limitation in states of emergency must be recognized in domestic law. In this effort, the assembly drew on international human rights instruments as well as a number of contemporary constitutions, shown in the wording of some articles of the Bill of Rights and the adoption of new guarantees that were not present in the old constitution. In addition, as the international human rights treaties ratified by Colombia had been neglected, marginalized, or simply ignored, the constituent confirmed and emphasized their validity in domestic law (Article 93).

The constituent established protective procedures for those rights considered fundamental. The 1991 constitution prohibits the suspension of those rights protected by international treaties to which Colombia is party, including the norms of international humanitarian law, particularly in a state of emergency declared by the president.<sup>9</sup> International human rights law has also restrained the effects of the internal conflict in Colombia and promoted the peace efforts that followed the launch of the new constitution. By checking executive powers, particularly emergency powers, and those of the army and the police, the 1991 constitution's elaboration of human rights norms protected civilians from abuses by those in power. International humanitarian law has also served as a barrier to the abusive use of force in Colombia. It is true that as the hostilities have increased in scale, so have violations of human rights and humanitarian law. However, the constitutional restrictions on the power of the state and the new procedures for implementing

them have removed from the government the dubious distinction of being a primary cause of human rights violations.

The 1991 constitution also established new procedures for strengthening controls over executive powers, including the creation of the aforementioned human rights ombudsman (*Defensor del Pueblo*). The office of the *Defensoría del Pueblo* was established alongside the attorney general's office to focus on human rights protection and promotion. To this end, the *defensoría* works to denounce human rights violations, promote human rights by educating the public as to their rights and how to protect them, and defend those whose rights have been violated.

Article 86 of the 1991 constitution established the action of tutela, or writ of protection, one of the most important mechanisms for protecting fundamental rights. Through an action of tutela, every citizen has the right to seek immediate judicial judgment if one of that citizen's fundamental constitutional rights is threatened or violated by the act or omission of a public authority. The remedy of tutela has been widely used, and remains among the significant successes of the 1991 constitution.

A constitutional court was established to adjudicate the constitutionality of laws and treaties issued or entered into by the other branches of government; the court may be accessed not only by government officials but also by Colombian citizens. To prevent counterreforms that might endanger the basic pillars of the constitution and the viability of its efforts for peace, the assembly established particularly high requirements for adopting legislation regarding human rights, the judiciary, the political parties, the opposition, the mechanisms of participation (defined in Article 103 as elections, plebiscites, referendums, consultations of the people, open town meetings, legislative initiatives, and revocations of official powers), and states of exception that suspend the application of certain

human rights under Article 152. Congressional legislation in these fields must be by *leyes estatutarias*, which have the seriousness of constitutional norms. The constitution also requires a referendum on constitutional amendments approved by Congress when those amendments affect norms regulating human rights and their guarantees or the procedures of popular participation in law-making activities (Article 377).

The 1991 constitution furthered the aim of achieving peace, both through provisions that specifically related to peace negotiations and by virtue of the constitutional reform itself. Given that the peace settlement achieved before the reform did not include the two largest guerrilla groups, and that the hostilities continued during the assembly's tenure, the constituent included in the constitution a framework of provisions intended to foster continued peace efforts. At the same time, the assembly ensured that the new constitution would provide a helpful instrument for consolidating the peace accord already reached, and for the objective of securing a stable peace.

Regarding the provisions intended to facilitate new peace talks, the most significant of these sought to enable the government to support and advance peace talks. Transitional Article 30 authorized the national government to grant pardons and amnesty for acts committed by guerrilla groups before the constitutional assembly if they agreed to reincorporate into civil life. As approved on June 19, 1991, this article provided that these benefits would not apply to instances of atrocities, murders of defenseless persons, or acts committed outside of combat. In addition, according to Transitional Article 12, the president could designate new members of Congress from names presented by guerrilla groups engaged in a peace process. Transitional Articles 13 and 47 required the government to improve the economic and social conditions of areas where guer-

rillas operate and to organize a plan to assist those zones affected by acute violence. Although the peace process with the main guerrilla groups broke down in 1990, these powers were used to conclude negotiations with at least a faction of one of these groups. The impact of social programs born in this context, however, was very limited in terms of both efficacy and extent.

The constitutional process itself played an important role in the Colombian peace process thanks to these provisions, which helped to win the adhesion of several former guerrilla units and representatives of indigenous communities. Moreover, the constitutional reform as a whole was an attempt to resolve the armed conflict and its causes, and to ensure peace. Most notable among the causes of conflict are the exclusion of a majority of the population from political life and access to power, constant abuses committed by the military forces against the population, the neglect of the basic needs of the poorer sectors of the society, and the concentration of power in the hands of the executive branch.

After establishing peace as one of the main ends of the state and as a right and duty of all members of society (Preamble and Articles 2 and 22), the constitution attempted to open and democratize the political debate and access to power. In this regard, the constitution reformed the Congress, adopted a regime for political parties, called for legislation on the status of the opposition, and provided for a number of new mechanisms for popular participation in political life. Against a background of repeated and gross violations of basic liberties, the assembly adopted a very advanced bill of civil rights, including prohibitions of torture, disappearances, and the death penalty, the right not to be detained without judicial authorization, and the rights to habeas corpus and to a fair trial (Articles 11–41). A charter of social, economic, and cultural rights extended more power to individuals, associations, and members of cer-

tain groups—such as children, women, the elderly, disabled, indigenous peoples, and the black community—to claim attention to their needs in the areas of health, housing, work, land, education, and culture (Articles 42–77).

While state power in Colombia historically has been skewed toward a strong presidency and weak legislature and judiciary, the *constituyente* redressed this imbalance by significantly scaling back the expansive powers of the presidency in favor of the other two branches of a democratic government. The 1991 constitution particularly diminished the extent of the president's emergency powers, such that the legislature and constitutional court<sup>10</sup> now play a role in any declaration of a state of exception from human rights treaties. In addition, the constitution established stricter constraints on the duration and extent of all three forms of exception, which suspend the application of certain human rights when a state of emergency is declared.

### Subsequent Developments

In the decade following promulgation of the 1991 constitution, the FARC escalated its campaign of terror, including kidnapping, extortion schemes, and an unofficial tax levied in rural areas for protection. The group is estimated to have an annual income ranging from \$200 million to \$400 million, at least half of which comes from the illegal drug trade. With a membership of 12,000 to 18,000, and between 9,000 and 12,000 armed combatants, it is the largest and richest insurgency in the world. In 1998, the Andrés Pastrana government launched peace negotiations with the FARC, ceding control of a 42,000-square-kilometer safe haven in Colombia's southeastern region. In February 2002, the negotiations collapsed with little result beyond deeply felt frustration. Much of the responsibility for this failure lies with the

FARC, which arrogantly abused the prerogatives accorded to them to facilitate the peace process. For its part, however, the government did not make an effective effort to avoid and punish human rights violations committed by state agents or demand of FARC a minimum respect for humanitarian law as a condition for maintaining a demilitarized zone. The government also failed to protect the civilian population against the many violent actions carried out by paramilitary groups, often with tolerance or complicity from public servants. After the peace process ended, the FARC increased its kidnapping of civilians, involvement in the drug business, and extortion. The FARC also launched a campaign of threats to eliminate elected mayors and destabilize every governmental authority.

With about 4,000 members, the ELN operates mainly in northeastern Colombia. Its income comes mainly from ransom or protection payments, but it also participates in the drug trade. The government attempted peace negotiations with the ELN, but refused to grant it a zone of control as it had granted the FARC. In May 2002, due to the failure to arrive at any agreement as to the procedural basis on which to structure negotiations, the Colombian government broke off the negotiations.

In the presidential election of 2002, President Álvaro Uribe, a dissident Liberal, garnered the support of 53 percent of the vote (though only 25 percent of the voting population turned out for the election). He maintained the confidence of other dissident Liberals as well as the Conservative Party, repeatedly declaiming the phrase of Bolívar that “order is the value on which liberty is based.”

Four days after his inauguration, Uribe tested the constitutional limitations on his emergency powers. On August 11, 2002, he declared a state of internal unrest under the 1991 constitution's provisions affording him emergency powers for ninety days, with the

possibility of two renewal periods. While declaring determination to guarantee respect for human rights, he emphasized the need to structure democratic authority to protect against illegal armed groups. To regain control over the country, the Uribe government committed to increasing the number of security troops from 250,000 to 850,000 over four years, while increasing defense expenditures from 3.6 percent of GDP to 6 percent of GDP by 2006. A program was established to provide human rights training to these troops and to establish offices to receive complaints by citizens of misconduct by military personnel. According to the U.S. State Department, the Colombian government's respect for human rights continued to improve and the majority of violations are committed by illegal armed groups. Although impunity for military personnel who collaborate with paramilitary forces remains a problem, the Office of Inspector General (Public Ministry) successfully charged 22 military persons with human rights violations and secured long prison terms for the offenders. Civilian courts adjudicate all serious violations of civilian human rights. Over a four-year period beginning on January 1, 2005, a new accusatory code of criminal procedures was set to replace the inquisitorial system traditional in Latin America, in jury trials open to the public.<sup>11</sup>

With substantial assistance from the United States, the Uribe administration established Plan Colombia to strengthen public institutions, reform the judicial system, combat corruption, and reduce the illegal drug trade. In part, the plan was implemented by destroying illegal coca crops while assisting poor farmers to replace the coca with legal crops. Nine hundred million dollars were allocated to building roads to the Putumayo region, increasing the government's presence there through schools, health clinics, and social services. This helped the negotiation of voluntary coca eradication agreements while

the government employed Black Hawk helicopters and national police to destroy industrial coca plantations and laboratories.

Uribe has enjoyed strong public support for his authoritarian approach to governing. On October 19, 2005, the Colombian Congress amended the constitution to allow the president to serve two consecutive four-year terms. On May 25, 2006, Uribe was reelected by an overwhelming 62 percent of the votes cast. The electorate clearly approved of Uribe's pragmatic approach to further economic growth and achieve stability by cracking down on left-wing guerrillas and reaching an amnesty agreement with the paramilitary AUC. Although the crime rate has dropped, serious human rights issues remain. It remains to be seen whether the constitution's checks on executive authority are adequate, and whether the balance of power is flexible enough to enable the country to be governed well and democratically during this drive for stability.

## Conclusion

The constitutional assembly's attempt to create a better framework for a functioning democracy represented an act of political will that, in the light of Colombia's history of violence, was nothing short of prodigious. Obviously, neither the assembly nor the constitution it created brought peace to Colombia, but it did as much as could be expected under the circumstances: It moved in the direction of consigning organized violence to the realm of outlaws, restricting the capacity of the government to exercise power illegally and creating new mechanisms and powers to protect individual rights against both the outlaws and the government.

However much the process of making the 1991 constitution diminished the duopoly of political power, fostered open dialogue and democratic cooperation, and strengthened the capacity of the legal system to protect

the constitutional order, the ensuing decade demonstrated its inadequacy before the challenges presented to a weak state lacking the political will to address the root causes of violence. Despite the sincere effort in convening representatives from across the political spectrum and hammering out the consensual mandate that is the 1991 constitution, the potent cocktail of the internal conflict, narcotics trafficking, and a weak state unwilling to implement human rights norms defied the capacity of Colombia's democratic institutions to achieve peace and stability throughout the state, and particularly in rural areas.

In recent years, there has been progress in the effectiveness of government and an increase in stability. If the Uribe administration is to achieve lasting success, it will have to continue to reduce the violence that has plagued Colombia and promote a pattern of economic development that benefits the great majority of its citizens. The process that led to the adoption of the 1991 constitution is an example of political cooperation in the interest of the common good. Following the spirit of this *constituyente* would help secure peace and justice, along with order.

## Notes

1. Vicente Lecuna Salboch, ed., *Cartas del Libertador*, vol. 9 (Caracas: Editorial Tip. del Comercio, 1929), p. 11; Augusto Mijares, *El Liberta-*

*dor* (Caracas: Fundación Eugenio Mendoza, 1967), p. 531. For a fictional depiction of Bolívar's state of mind, see Gabriel García Márquez, *El general en su laberinto* (Bogotá: Editorial Oveja Negra, 1989).

2. See Joseph B. Treaster, "Colombia Siege Survivors are Bitter," *The New York Times*, November 11, 1985. Eleven judges were killed during the government's attack; one later died of a heart attack in a hospital.

3. See Comisión Andina de Juristas, *Violencia en Colombia* (Lima: Comisión Andina de Juristas, 1990).

4. This irony is well noted by Manuel José Cepeda, presidential counselor for the development of the constitution under President Gaviria, in his collection of addresses on the administration's success in securing a constitutional reform, *Introducción a la Constitución de 1991: hacia un nuevo constitucionalismo* (Bogotá: Presidencia de la República, Consejería para el Desarrollo de la Constitución, 1993).

5. See "Colombia: Cooling It," *The Economist*, March 30, 1991, p. 4.

6. James Brook, "Door Opens a Crack for Colombia's Indians," *New York Times*, May 2, 1991, p. A10.

7. *Gaceta Constitucional* no. 114, p. 35.

8. Carlos Heras de la Fuente and Marcel Tangarife Torres, *Constitución Política de Colombia*, vol. 1 (1996), pp. 332–44.

9. Arts. 93 and 214 (2).

10. The constitutional court has asserted its competence to judge the constitutionality of presidential decrees that declare states of exception under arts. 4, 213, 215, and 241 of the constitution.

11. U.S. Department of State, "Human Rights Practice in Colombia 2005," released March 8, 2006.