The judge in neoconstitutionalism and his role in the diffused control system of constitutionality in Colombia*

El Juez en el neoconstitucionalismo y su papel en el sistema de control difuso de constitucionalidad en Colombia

O juiz do neoconstitucionalismo e seu papel no Sistema de Controle difuso da constitucionalidade na Colômbia

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Abstract
This essay has a qualitative research approach and a descriptive scope, therefore the methodology used for its construction corresponds to the documentary or bibliographical review that would allow analyzing the role of judges in the diffuse control of constitutionality, in the context of Colombian neoconstitutionalism. The main finding is that the role of judges in a legal system should not be understood as the fulfillment of pre-establish, mechanical functions, but they must obey the social context in which they work and go hand in hand with the development of peoples significantly marked by the evolution of the law governing them. Thus, neoconstitutionalism as legal theory takes into account, among other things, the study of new forms, concepts, and procedures arising from modern constitutions and posing challenges to all institutions, including the judiciary. The system of diffuse control of constitutionality is one of the figures that demand to be analyzed, structured and accepted as a challenge in the light of the Colombian experience and context.
Keywords: Neoconstitutionalism, Diffuse control of constitutionality, Constitutionalization.

Resumen
El presente ensayo tiene un enfoque de investigación cualitativo y un alcance descriptivo, por ello, la metodología utilizada para su construcción corresponde a la revisión documental o bibliográfica que permitiese analizar el papel de los jueces en el control difuso de constitucionalidad, teniendo en cuenta el marco del neconstitucionalismo colombiano. El principal hallazgo obtenido es que el papel de los jueces en un ordenamiento jurídico no debe sobreentenderse como el cumplimiento de funciones mecánicas y prestablecidas, sino que debe obedecer al contexto social en el que se desempeña e ir de la mano con el desarrollo de los pueblos, ampliamente marcado por la evolución del derecho que rige en ellos. Así pues, el neoconstitucionalismo como teoría del derecho, plantea el estudio de las nuevas formas, conceptos, procedimientos, entre otros; que surgen a partir de las constituciones modernas y que imponen retos a todas las instituciones, entre ellas las judiciales. El sistema de control difuso de constitucionalidad es una de las figuras que exige ser analizada, estructurada y asumida como un reto a la luz del neoconstitucionalismo en la experiencia y el contexto propio colombiano.
Palabras clave: Neoconstitucionalismo, Control difuso de constitucionalidad, Constitucionalización.

Resumo
Este ensaio tem um enfoque em pesquisa qualitativa e um alcance descritivo, portanto, a metodologia utilizada para a sua construção corresponde ao documentário ou revisão bibliográfica que permita analisar o papel dos juízes no controle difuso da constitucionalidade, tendo em conta o quadro de neconstitucionalismo colombiano. A principal conclusão obtida é que o papel de juízes em um sistema legal não deve ser entendido como o cumprimento das funções mecânicas e pré-estabelecida, mas deve obedecer ao contexto social em que trabalham e caminhar com o desenvolvimento dos povos, amplamente marcado pela evolução da lei que os regula. Então, o neoconstitucionalismo como teoria de direito suscita o estudo de novas formas, conceitos, procedimentos, entre outros; decorrentes das constituições modernas e impõem desafios para todas as instituições, incluindo as judiciais. O sistema de controle difuso da constitucionalidade é uma das figuras que exige ser analisada, estruturada e assume-se como um desafio à luz do neoconstitucionalismo na experiência e no contexto próprio da Colômbia.
Palavras-chave: Neoconstitucionalismo, Difundir controle de constitucionalidade, Constitucionalização.

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Introduction

Neo-Constitutionalism as a theory of law seeks to understand the functions and contents of new constitutions and all the effects they bring in the States in which they are proclaimed. However, the law needs to be understood in every social, political and cultural context; since from there, we understand the universality of elements that are part of Constitutionalism in a given place, and how to exalt what they should be. The diffuse control of constitutionality at the head of ordinary judges represents because it is a characteristic of Neo-Constitutionalism, one of the elements that must be better understood and developed, especially in the Colombian context, where challenges of historical situations are imposed.

The following is an attempt to approximate the role that ordinary judges in Colombia should play in developing the diffuse control of constitutionality; taking into account the historical-legal context of this modality of control, and trying to question the differentiation between these and the constitutional judges; a matter of Neo-Constitutionalism.

Origin and Concept of the Diffuse Control of Constitutionality

Generally, *judicial review* is considered to be the historical antecedent of the diffuse control of constitutionality (Landa Arroyo, cited by Barbosa, 2011). This figure represented the result of the confidence placed in the American judges to exercise the control of constitutionality and to make the supremacy of the Constitution prevail; as a consequence of the distrust in the parliament that had dictated the laws before the independence. The *judicial review* also counted with the English influence of the not very expanded *higher law*, as a right superior to the laws, necessary to give them validity.

The *judicial review* does not have its development in the North American Constitution in a textual form; but it is of jurisprudential construction (Highton, pp.112-114), being the case Marbury vs. Madison (1803) the failure in which Judge Marshall gives a complete turn to the judicial practice prevailing until then in the Supreme Court of Justice of North America, and also gives a passage to a new conception of the role of judges. The Court is showed as the decisive interpreter of the Constitution, it is pointed out the importance of the interpretative function and resolution of conflicts between law and Constitution made by all judges because it is "the very essence of the judicial function" (Garay, 2009, p.130).

However, as Elena I. Highton points out, the current American judicial system is reduced to the American and the Argentine model because in the rest of the continent mixtures are present, also influenced by the European experience, whose main characteristic is the presence of "Constitutional Courts of last instance interrelated with the diffuse act of common justice" (p.118). That is to say, a combination of the concentrated and diffuse systems of the control of constitutionality.

The diffuse control of constitutionality is one that cannot only be exercised by a specialized institution, but also by ordinary judges, who could interpret in the light of the constitution a concrete case and by means of the procedural figure of the *exception of unconstitutionality* to cease to apply a law that is openly contrary to the Constitution; as long as there are other elements that will be explained. Because it is an interpretation of a particular case, the effects of the decision would be *inter partes*.

It differs from concentrated control, which occurs when powers are granted to a Courthouse or Constitutional Court to control the laws in the light of the constitution and to give *erga omnes* effects to its decisions, as would be the case with constitutional sentences pronounced by the Colombian Constitutional Court as the main constitutional safeguard institution. Being this the generality, as the result of the mixture that prevails in the continent, some decisions can also be given with *inter partes* effects, as is the case of the custody sentences that the Constitutional Court fails under the mechanism of custody revision, which nevertheless constitute a judicial precedent for all judges of lower rank with regard to the constitutional doctrine elaborated in them.

In Colombia, the diffuse control of constitutionality has its origins with the Political Constitution of 1991 (Pulido, 2011, p.166) in hand with several legal figures and social and political institutions, among other structural changes that would lead to the birth of a new State model and gradually to its constitutionalization.

In a precise way, its foundation is found in the article 4° Superior that consecrates a modality of constitutional control "in order to obtain that in the concrete case, before the conflict between the subordinate norm and the constitutional precepts, these have prevailing effectiveness and observance and that they will not be applied, all with strictly particular effects" (Hernández Galindo, 2001, p.57). However, in the National Constitution of 1886, a similar provision was established, not very much attended by Colombian jurists, who mostly, adhering to the principle of legality, were in favor of "the invulnerability of the law once in force for reasons of legal certainty" (Hernández Galindo, 2001, p.59). Although that and other critics based on the legitimacy and power of ordinary judges to exercise control over the constitution and its role as mere enforcers continue to be raised under the 1991 Constitution, the juridical breadth of the law is undeniable. The textual fragment of the article 4° says: "In any case of incompatibility between the law *or another legal norm*, the constitutional provisions will be applied" (emphasis added); that transcends legal conflicts with the law and the Constitution, and extends this modality of control to those that can be presented between this and decrees, resolutions, ordinances and agreements. In addition, it also highlights its acceptance and jurisprudential development in the Colombian legal system from the consecration in the current political Constitution.

Neo-Constitutional Context in Colombia

Viciano and Martínez (2013, pp.4-5) make clear the concept of *Neo-Constitutionalism* in order to distinguish it from others as *new constitutionalism* which it is often confused with others. For the authors, the first of these appears as a denomination for the study of a new era of constitutions that are specific for democratic States, with functions within the legal system and similar contents. In addition, as a concept that covers the analysis of the role and application of the principles present in those constitutions. That is to say, this concept contains a new theoretical and analytical way of understanding the law by virtue of the contemporary changes that have been given to legal systems and to processes characteristic of them, such as constitutionalization.

The authors, citing Pozzolo, mention some elements that particularize Neo-Constitutionalism: a) The essential role of principles in the function of interpretation and legal argumentation of judges; b) Weighing or balancing as a method that integrates the interpretation and application, and the abandonment of the traditional subsumption; c) Subordination of the entire legal system to the Constitution; and d) Defense of the creative interpretation of the jurisprudence and freedom of the judge for the substantiation of the Constitution (Viciano & Martínez, 2013.)

The most notorious of the *peculiar notions* raised by Pozzolo is the role played by the judge in each of them. Since it is him who has the knowledge of the principles to make a proper interpretation and argument, it is him who must make the value judgment in front of the weighted or pondered principles, who is in charge of making prevail the constitutional supremacy and finally, who must appear in the creative faculty and the "freedom" granted to him to interpret the Constitution.

The authors (2013, p.7) cite the elements of the Neo-Constitutional doctrines raised by Guastini, among which it is needed to emphasize the axiological superiority of the Constitution over the law and of the principles of the rules, the Constitution as a limiting factor of the public power and the Constitution as a shaper of the society; and therefore must "not only prevent (in negative) a harmful legislation to the rights, but also guide (in a positive way) the whole legislation".

It is important to bear in mind that these are general principles of Neo-Constitutionalism that may or may not be present in the regions that are considered as a sample of this new theory of law, especially in the Latin American experience, which has been so varied and influenced by other models (Viciano & Martínez, 2013, p.6), it is crucial to recognize that the experiences of Neo-Constitutionalism are very different from those of the rest of the world.

For Diaz Arenas (1997, p.489) Neo-Constitutionalism is a connection between modernization, postmodernity and neoliberalism and

> it materializes in diverse forms not only because of the structural nature of the regions (nucleus, surface and periphery), but between them because of cultural, geopolitical or strategic factors. Thus, the neo-liberalizing phenomenon has different meanings, applications and consequences in the United States, Spain, Bosnia or Peru, for example.

According to the characteristics that were mentioned, it would be understood that in Colombia, as a Social State of Law, the road of Neo-Constitutionalism began from 1991, that is, the development of a series of precepts where the most important thing is the constitutional supremacy in the legal system, addressing the action of institutions serving the citizens, as well as the development of that role conferred on the judge, not only to the collegiate but also to the ordinary, in defense of the Constitution.

A similar concept is presented by Santiago (2008, p.4), who points out Neo-Constitutionalism as a historical process, as a theory or conception about legal reality and as a doctrinal and institutional position, "one could also say that it is ideological the function that Judges are called to perform in a constitutional democracy". In Colombia, there is not only a relatively new constitution, but also a historical context linked to the conflict, a very conservative cultural and ideological conflict that has just began to open debate on issues of broad constitutional relevance such as equality in the rights of the LGBTI community, the right to life and voluntary termination of pregnancy, the right to a dignified death and to the euthanasia, among others. And recently, it is presented a new sociopolitical context of the search for peace that creates already multiple structural changes in the State, and therefore, it affects and modifies the roles of all the institutions and branches of the public power for the accomplishment of this end. That is to say, Colombian Neo-Constitutionalism, in addition to being characterized by a gradual development of jurisprudential and normative in matters related to fundamental rights, is now framed in the matter of peace, which entails that all the organs act according to such task.

Role of the Judge in the Diffuse Control of Constitutionality and Neo-Constitutionalism

If one of the main characteristics of Neo-Constitutionalism is the supremacy of the constitution in the legal system, which is guaranteed by constitutional control, the diffuse system has a direct relationship in the development of Neo-Constitutionalism and it represents one of its most relevant topics of analysis.

For José Gregorio Hernández G. (2001, p.64)

> It is now clear, especially from the established jurisprudence of the Constitutional Court, that disputes about the scope of the inapplicability exception, based on the open opposition between a norm and the Political Constitution have been overcome.

Sentences such as T-389 of 2009 (Colombian Constitutional Court) mention several points on which there is such clarity mentioned by the author, for example, the precept of the article 4° of the Constitution gives the judge more than a faculty, a tool, as it does not have to be presented as an action by the parties in a process. However, it points out that a duty is set, "while the authorities cannot stop making use of it in events where they detect a clear contradiction between the provision applicable to a specific case and constitutional rules".

Likewise, there is clarity regarding the *inter partes* effects, that is to say to the specific case, and the permanence of the norm in the legal order, since its departure could only be given by virtue of a judgment of unconstitutionality, with *erga omnes* effects, of the Constitutional Court as the highest institution of constitutional control. It has also been said by the corporation that it cannot constitute a mechanism to favor the custody, but its essence is in the protection of the fundamental principles and rights of the Constitution.

That does not mean that criticisms continue to be presented in the light of different legal theories, which in addition are related to political, social, ideological and cultural issues of the Colombian context.

The most common of these criticisms revolves around the legitimacy of the ordinary judge to exercise the most important control of the Social State of Law, as presented by Velásquez Turbay (2004, p.52)

> the study and control of the constitutionality of a legal norm requires specialized knowledge. Just as there are judges in the different branches of law (labor, criminal, civil judges) there must be constitutional judges. (...) there is a risk that there are criteria found between different jurisdictions or judges on the constitutionality of a law.

The previous critique also includes a detraction to the Neo-Constitutionalism because it defends the role of ordinary judges and their freedom to interpret the Constitution when they do not have the democratic and political legitimacy for it, as it does the Constitutional Court (Viciano & Martínez, 2013, p.9). In the Colombian context this thought, which is usual, is aggravated by a recent loss of confidence in judges, because unfortunately, the image of the judge as a venerable subject and distinguished in society, has been reduced by the acts of a few who do not honor their profession or their function, for example, by acts of corruption. This situation has not only occurred between the so-called ordinary judges but also among those who are supposed to have a high academic and moral education, and by virtue of this they are part of the supreme organ for constitutional protection and control.

Another critic is oriented to the legal uncertainty that would create the diffused interpretation of the Constitution, but it is almost

overcome with clarity on the effects of a decision that is taken by applying the exception of unconstitutionality as a result of the legal interpretation involved in the diffused control.

Critics can be summarized in the diffused control of constitutionality, in the conception that the Constitution has a fundamental value in the Social State of Law and therefore cannot be entrusted to ordinary judges, not legitimized, not prepared for it.

Monroy Cabra (2005, p.114 et seq.) points out the importance of constitutional courts in a Social State of Law that is not only important but also necessary for the achievement of the objectives of democracy, where the most important control is the constitutional one. In addition that they interpret with authority and "suppose the acceptance of the supremacy of the Constitution and the recognition that this is a supreme norm that is at the top of the legal order".

But it is precisely this task the one that ordinary judges have, to honor that supremacy of the Constitution, it is them who will know cases that by their apparent simplicity will not come to the knowledge of the Constitutional Court by the mechanism of revision of custody, but that require a defense by them, that also have merits, so that the fundamental rights of the people are not violated. Or it will be them who, because of the urgency of a particular case, should not apply a rule, but with the discovery of a certain contradiction that may arise in other cases; to motivate the citizenship, to bring an action of unconstitutionality front of the Court, where it will have *erga omnes* effects.

That is to say, in one way or another, ordinary judges know these common cases, in small and remote parts of the country where they continue to represent a figure of authority and respect on the part of the inhabitants, who expect from them the protection and guarantee of their fundamental rights. Even more in the context of peace in which Colombia is developing and in which it will continue to move, judges play an important role in bringing the judicial function closer to all people, the diffuse control mechanism being ideal for the great protection of victims that will be needed in an eventual peace agreement, which will surely require special procedures throughout the country, and the Constitutional Court could not be congested with hundreds of cases for its knowledge, but rather the freedom of judges to carry out constitutional control under the parameters established jurisprudentially, must represent a vote of confidence, not only of the judiciary, but also of the institutions and other powers of the State in harmonious collaboration to achieve a crucial end for Colombia.

It is necessary, in front of the above, to remember that although there is a Supreme Constitutional Court in Colombia, such as the Constitutional Court, who has the duty of guarding and protecting the Political Charter, highlighting even more that mixture in terms of control, the ordinary judges acquire con-

stitutional investiture in custody. Thus, for the mechanism of protection of fundamental rights par excellence, which is the tutelage, as established in Decree 2591 of 1991 that regulates it, are competent to hear from it all judges and courts with jurisdiction in the place where the violation or threat of the fundamental right occurs (Article 37). Therefore, the Colombian legal system is emphasizing by this provision the role of the ordinary judge, who, while recognizing the superiority of the Constitutional Court, plays an active role in defending the interests of Colombians.

In addition, in the context of peace, there may be a minimization of rights on the part of the legislature, especially on political issues, whereby judges must appropriate their activism to maximize them (Pisarello, p.6); that is to say, it could be presented cases where the legislator, following government guidelines, enact laws that may sometimes violate fundamental rights of individuals, or that the executive dictates decrees and measures, which should be inapplicable by judges and legal victims of conflict, when they are openly against the Constitution. That would not justify that for ending the conflict, more victims will be generated and their rights will continue to be violated, not in the countryside and in the cities, but in the courts.

The role of the constitutional judge must then be to represent that faculty-duty it has, to honor not only its investiture, but also the Constitution, which seeks to be protected by all possible means. Thus, the work of the judge must be taken by himself with responsibility, especially when he performs a constitutional interpretation and argument that should be today to overcome that conception of the judge as "translator of the law".

Conclusions

Many of the inconsistencies presented in the past with the figure of control of diffuse constitutionality in Colombia have been overcome thanks to the jurisprudential development that has been given in this regard. Especially from the gradual recognition, that the Constitutional Control in Colombia represents a mixture, and as such, its correct application should be sought. Despite this criticism based on Colombian social, political, cultural and historical experience, they survive; but theories such as Neo-Constitutionalism have been responsible not only for the analysis of this new era of law from the constitutions characterized by their supremacy, but also to look for how elements that guarantee such supremacy should be properly projected, such as the role of the judges.

In Colombia it is necessary for judges to represent their constitutional functions to exercise diffused control of constitutionality, for which they are legitimized, under the established parameters, since the context of peace calls for active, creative judges who abandon old methods of interpretation and bet on putting all their legal knowledge and moral training in the pursuit of altruistic goals such as peace.

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