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The court speaks first? Problems and challenges of prior judicial review[1]

O Tribunal fala primeiro? Problemas e desafios do controle prévio de constitucionalidade

¿El tribunal habla primero? Problemas y desafíos del control previo de constitucionalidad

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Abstract

Comparative constitutional law studies on who has the last word in a democratic system have focused on models of *ex post* control of the constitutionality of laws. However, models of constitutional justice incorporate some forms of prior review of constitutionality. This article focuses on those cases in which judges speak first. For that reason, it refers to the problems and challenges that prior review of constitutionality represents for democracy. Specifically, those challenges related to exercise it and to act dialogically with the other branches of government. In particular, the issues related to the need to imagine the problems of constitutionality, the lack of citizen participation and the inevitable rupture of *res judicata* are

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[SUMÁRIO]

addressed. All this is studied within the contextual framework of one of the most active and sophisticated prior judicial review systems in the world, as it's the case for the Colombian system.

Keywords
Prior judicial review; dialogic justice; cooperative constitutionalism; judicial deliberation; participative judicial review.

Contents

Resumo
Os estudos de Direito Constitucional comparado sobre quem tem a última palavra num sistema democrático têm-se centrado em modelos de controle *a posteriori* da constitucionalidade das leis. No entanto, os modelos de justiça constitucional incorporam algumas formas de controle prévio da constitucionalidade. Este artigo centra-se nos casos em que os juízes se pronunciam primeiro. Por essa razão, refere-se aos problemas e desafios que o controle prévio da constitucionalidade representa para a democracia. Em particular, para o seu exercício e para a atuação em diálogo com os outros Poderes. Em particular, são abordados os desafios relacionados com a necessidade de imaginar os problemas de constitucionalidade, a falta de participação dos cidadãos e a inevitável quebra do caso julgado. Tudo isso é estudado no contexto de um dos sistemas de controle prévio mais ativos e sofisticados do mundo, o da Colômbia.

Palavras-chave
Controle prévio; justiça dialógica; constitucionalismo cooperativo; deliberação judicial; controle participativo da constitucionalidade.

Sumário

Resumen

Los estudios de derecho constitucional comparado sobre quien tiene la última palabra en un sistema democrático se han centrado en los modelos de control de constitucionalidad posterior de las leyes. Sin embargo, los modelos de justicia constitucional incorporan algunas formas de revisión previa de constitucionalidad. Este artículo se centra en los casos en los que los jueces hablan primero. Por esa razón, se refiere a los problemas y los desafíos que representa para la democracia el control previo de constitucionalidad. En especial para ejercerlo y para actuar dialógicamente con los demás poderes del Estado. En especial se abordan los retos relacionados con la necesidad de imaginar los problemas de constitucionalidad, la falta de participación ciudadana y la inevitable ruptura de la cosa juzgada. Todo esto se estudia con el marco contextual de uno de los sistemas control previo más activos y sofisticados del mundo como el de Colombia.

Palabras clave

Control previo; justicia dialógica; constitucionalismo cooperativo; deliberación judicial; control de constitucionalidad participativo.

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del amicus curiae ciudadano. 3.5 La inevitable ruptura de la cosa juzgada. 4. El futuro del control judicial previo. 4.1 Audiencias públicas y participación ciudadana. 4.2 Flexibilización creciente de la cosa juzgada. 4.3 Conclusión.

1. Introduction

The Political Constitution of Colombia of 1991 reinforced the principle of constitutional supremacy and established a model of judicial review of the law based on three pillars. First, the creation of a Constitutional Court specialized in judicial review (validity control). Secondly, the power of all the judges of the country to disregard the provisions that they consider to be contrary to the Constitution, by means of the exception of unconstitutionality. Thirdly, the political right of citizens to challenge laws and other normative acts before the Constitutional Court through a public action[4].

Of the three pillars, only the first one was a novelty in the Colombian constitutional system. Before 1991, the judicial review was carried out by the constitutional chamber or the Plenary chamber of the Supreme Court of Justice, according to the historical period in question[5]. The second pillar, the exception of unconstitutionality, dates back to the period of independence and the influence of the constitutionalism of the United States in the constitutional thought of the nineteenth century[6]. The existence of public action has its origin in the third constitutional reform of 1910 to the Constitution of 1886[7].

Even though the first and second pillars already existed, the great change produced in 1991 consisted in their integration. The Constitution assigned to the Constitutional Court the function of resolving, with the effect of constitutional *res judicata*, public actions brought by citizens against laws they consider unconstitutional. As it was configured, the Court is a tribunal within the judiciary, composed

[4] Roa-Roa, Jorge Ernesto. "El diseño institucional de la acción pública de constitucionalidad en Colombia". En: Sierra Porto, Humberto; Robledo Silva, Paula y González, Diego (eds). *Garantías judiciales de la Constitución. Temas de Derecho Procesal Constitucional Colombiano. Tomo II. Acción* Pública de *Inconstitucionalidad, Procedimiento y Sentencia.* Universidad Externado de Colombia, 2023.

[5] Restrepo Piedrahita, Carlos. *Control de Constitucionalidad*. Universidad Externado de Colombia, Bogotá, 2006.

[6] Santamaría, Alejandro. "El control constitucional por vía de excepción en el pensamiento constitucional colombiano: 1811-1886". In: Barbosa Delgado, Francisco (ed.). *Historia del Derecho Público en Colombia*. Universidad Externado de Colombia, Bogotá, 2012, pp. 265-320.

[7] Roa-Roa, Jorge Ernesto. *La acción pública de constitucionalidad a debate*. Colección Temas de Derecho Público nº 96. Universidad Externado de Colombia, Bogotá, 2015.

of nine judges elected by the Senate, from shortlists sent by the president, the Council of State and the Supreme Court of Justice[8]. To be a magistrate of the Constitutional Court it is required to be of Colombian nationality and citizenship, a law degree, a minimum of fifteen years of experience in the judicial career, the Public Prosecutor's Office, the practice of the profession or university teaching in legal areas[9].

The judicial review performed by the Constitutional Court is regulated by article 241 of the Constitution and Decree 2067 of 1991. The former establishes a catalog of functions assigned to the Court and is attributed the review of different normative acts in order to guarantee – in each case – the supremacy of the Constitution. The decree regulates the procedure of the public action of constitutionality.

A systematic reading of article 241 of the Constitution allows to affirm that the concentrated judicial review is governed by a set of rules that combines three parameters: the *controlled act*, the *object of control* and the *origin of the control*. According to the criterion of the *controlled act*, the Court has jurisdiction over: legislative acts (constitutional amendments); ordinary laws; laws that call for constituent assemblies, referendums to reform the Constitution or legal referendums; decrees with force of law issued by the president of the Republic when Congress grants him extraordinary powers or those issued when he declares a state of emergency; statutory bills or any law challenged on grounds of unconstitutionality by the president; and laws approving international treaties.

According to the second criterion, the *object of control*, the Court may exercise the judicial review on procedural defects, material defects or defects of content, or both types of defects[10]. Finally, according to the *origin of the control*, it can be of three forms: based on a citizen's public action, automatic or semi-automatic. The following table summarizes the interaction of the three criteria mentioned, which make up the scope of the Constitutional Court's competence[11].

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[8] *Vid.* Political Constitution of Colombia (article 239).

[9] *Vid.* Political Constitution of Colombia (article 232).

[10] Article 242.3 of the Constitution provides that judicial review of procedural defects expires within one year. The time is counted from the publication of the act.

[11] To the elements in the following table must be added other normative acts whose judicial review is within the competence of the Constitutional Court of Colombia by mandate of other constitutional provisions or interpretations of the Court itself. These are norms that may be controlled by means of the public action of constitutionality: international treaties approved and ratified prior to the 1991 Constitution (Judgment C-400 of 1998), decree that puts into effect the public investment plan (Constitution Article 341-3), decree that puts into effect the annual budget when the Government correctly presented the project but the legislator abstained from processing it (Constitution

Controlled act	Origin of control	Object of control	Moment in which the control is carried out[12]
Legislative acts (constitutional amendments)	Public action	Procedural defects and substitution test	Posterior
Laws that call for constituent assemblies, referendums to reform the Constitution	Automatic	Procedural defects	Prior to the assembly or referendum
Legal referendums and national popular consultations	Automatic	Procedural or material defects	Prior to the referendum or consultation
National plebiscites	Automatic	Procedural defects	Prior to the plebiscite
Ordinary laws	Public action	Procedural or material defects	Posterior
Decrees with force of law issued by the president of the Republic when Congress grants him or her extraordinary powers	Public action	Procedural or material defects	Posterior
Decrees with force of law issued when he declares a state of emergency	Automatic	Procedural or material defects	Posterior
Statutory law bills	Automatic	Procedural or material defects	Prior
Any law challenged on grounds of unconstitutionality by the president of the Republic	Semi-automatic	Procedural or material defects	Prior
Laws approving international treaties	Automatic	Procedural or material defects	Prior
Laws approving international treaties before 1991	Public action	Material defects	Posterior
Decree with force of law that enacts the public investment plan	Public action	Procedural or material defects	Posterior

Article 348), decrees that compile norms with the force of law (Judgment C-506 of 1996) and decrees issued by the president based on an authorization established in a Legislative Act (Judgments C-1154 of 2008 and C-461 of 2011).

[12] In relation to the enactment of the provision.

This article will only refer to one part of the map of the competence of the Constitutional Court: the normative acts that are subject to prior judicial review (PJR).

2. Dispositions subject to previous judicial review and the characteristics of the review

The PJR has five characteristics[13]: it is (i) prior, (ii) integral, (iii) automatic or semi-automatic, (iv) jurisdictional and (v) definitive. The purpose of this section is to explore the content of these five categories. Nonetheless, a preliminary note is necessary. As it has just been stated in the introduction, the PJR only applies to a certain type of dispositions: (i) the statutory laws, (ii) the statutory decrees, (iii) laws that approve an international treaty and (iv) the government's constitutional objections to a bill. This multiplicity of dispositions subject to the review implies that the five characteristics will have specifications or variations regarding the type of provision.

A precision is necessary. In the previous table we stated that other three norms are subject to PJR: laws that call for constituent assemblies, referendums to reform the Constitution; legal referendums and national popular consultations and national plebiscites. However, we do not include these provisions in our analysis because they are prior to the citizen mechanism of participation but posterior to the act that summons those mechanisms. Specifically, article 241.2 of the Constitution provides that the Court shall "decide on the constitutionality of referendums about laws and popular consultations and plebiscites of a national scope; the Court shall review national popular consultations and plebiscites exclusively for procedural errors in their convocation and implementation"[14].

The following table presents a provisional definition of each one of these characteristics. It is only provisional because of the announced variations. Because of this, the following descriptions correspond to the PJR of statutory laws, which we will use as the general framework, to be later specified.

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[13] For a period, the Constitutional Court considered a sixth characteristic: the PJR was participative. Specifically, the Judgments C-011 of 1904, section A.6, and C-787 of 2011, section 2.3.2., stated that "the judicial review is participative, since according to articles 153, paragraph 2 and 242, paragraph 1, of the Constitution any citizen may intervene in the constitutionality process with the purpose of defending or challenging the constitutionality of the bill". However, in the present study we will not consider these as a particular characteristic of the PJR given that this is an intrinsic feature of all the constitutional judicial review in Colombia.

[14] Vid. Political Constitution of Colombia (article 241.2).

Characteristic	Definition
Prior	The judicial review is carried out before the enactment of the provision. This typically means that it takes place after the approval of the disposition by Congress but before its sanction by the president of the Republic.
Integral	The Court must study both the formal and the material aspects of the provision under review. This typically means that the judicial review must verify that (i) the requirements for the formation of the dispositions have been fulfilled and (ii) the norms remain constitutional after being confronted with the totality of the Constitution.
Automatic	This characteristic has two meanings. Firstly, it implies that there is no need for a citizen to file a suit against the norm to enable the judicial review[15]. Secondly, it means that "no other organ of public power will attempt to omit the participation of this Court and, thus, disregard its constitutional competence, for which reason the Court must order the referral of the draft normative act if Congress evades this obligation"[16].
Jurisdictional	Even though what the Court is reviewing is not a law but a bill, it does not "assume the role of co-legislator; its jurisdiction (...) remains judicial and, to this extent, does not involve judgments of convenience or inconvenience"[17]. This means that the judgments "are in law, based on the confrontation of a bill with the entirety of the Political Charter"[18].
Definitive	The Court's review implies the establishing of the *absolute res judicata* regarding the provision reviewed. This typically means that "the prior decision of the Court exhausted any debate on the constitutionality of the accused norm, since 'it is understood that the norm is executory or unenforceable in its entirety and in relation to the entire constitutional text'"[19].

The following sections explores the types of norms subject to the PJR and the specifications of the five characteristics in each case. Also, there is a section dedicated to the detailed description of the last characteristic, for its implications in the problematization of the PJR[20].

[15] Judgments C-011 of 1994 and C-787 of 2011.

[16] Judgment C-153 of 2022, section 59.

[17] Ibidem.

[18] Judgments C-011 of 1994 and C-787 of 2011, section 2.3.2.

[19] Judgment C-009 of 2023, section 22.

[20] Infra 3 and 4.

2.1 Statutory laws

Article 152 of the Political Constitution of 1991 establishes the rank of *statutory* for laws regulating certain six specific matters: fundamental rights and duties and their guarantees; the administration of justice; the regime of political parties and movements; mechanisms for citizen participation; states of exception and the conditions for equal participation amongst candidates for the presidency. This category corresponds to the *organic* laws of the Spanish Constitution of 1978 and is different from the statute laws or statutes of autonomy, which are not contemplated in Colombia due to the different configuration of the territorial order.

The importance of these laws has been stressed by the Constitutional Court. In Judgment C-015 of 2020 the Court stated that "the reservation of statutory law seeks to subject to greater democratic discussion and control the regulation of certain matters that are subject to a qualified legislative process, due to their importance for the Social State of Law"[21].

This typology of laws demands the fulfillment of special requirements. Article 153 of the Constitution indicates that "the approval, amendment, or repeal of statutory acts shall require an absolute majority of the votes of the members of Congress and shall be completed within a single legislative term"[22]. Also, the legislative procedure is regulated by articles 206 and 207 of section 6A of the Law 5th of 1992. The first one reiterates the matters subject to regulation by this type of law. On this subject, the Constitutional Court has considered that, eventually, any law can have an impact on a fundamental right, but this does not mean that every law has to be an statutory one because "applying this broad criterion would imply emptying the distinctions made by the Constitution with respect to the classification of laws of their content, as well as nullifying the competence of the ordinary legislator"[23].

When the Court exercises the PJR of dispositions that may impact any fundamental right, it has outlined on multiple occasions five criteria for deciding if certain regulations should have been enacted through statutory law[24]. These criteria demand that the regulation: (i) addresses fundamental rights and duties; (ii) aims to

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[21] Judgment C-015 of 2020, section 7.

[22] Political Constitution of Colombia (article 153). Translation by the Constitutional Court of Colombia. Available at: https://www.corteconstitucional.gov.co/english/Constitucio%CC%81n%20en%20Ingle%CC%81s.pdf

[23] Judgment C-015 of 2020, section 7.2.

[24] Judgments C-015 of 2020, C-370 of 2019 and C-204 of 2019.

provide a regime for a fundamental right; (iii) regulates these rights integrally, completely and structurally; (iv) involves the essential core and fundamental principles of each a right or duty involved and (v) sets out limits, restrictions, exceptions and prohibitions that impact the overall framework of the right.

Article 208 of the Law 5th of 1992 establishes three conditions for statutory laws bills: (i) they shall be issued in a single legislature; (ii) there will be PJR carried out by the Constitutional Court and (iii) these laws can't be issued through extraordinary powers granted to the president of the Republic. In addition to these requirements, the bills must be passed following the rules for the ordinary legislative process.

Finally, Article 153 of the Constitution establishes that the parliamentary process of approval of a statutory law includes the prior judicial review, and that any person may intervene in that process before the Constitutional Court. The article provides: "[t]his process shall include the prior review, by the Constitutional Court, of the *exequibility* of the bill. Any citizen may intervene to defend or challenge it".

As it was previously stated, the general descriptions of the five characteristics of the PJR are typically applied for statutory laws. For this type of norms, it means the following.

Prior. The judicial review is carried out before the sanction of the bill. The Constitutional Court has stated that the 1991 constituent foresaw a special legislative procedure and the PJR because applying these mechanisms "promotes the validity of regulatory texts whose compatibility with the Political Charter is much more strongly guaranteed than the presumption of constitutionality that protects all laws, and hence why such texts are subject to the [PJR]"[25]. The Court has also considered that the prior characteristic is given "because it is not appropriate to sanction the bill before it passes judicial review, thus preventing a statutory content from entering into force before this Court validates its correspondence with the Constitution"[26].

Integral. The Constitutional Court has stated that the review must "confront the materiality of the bill with the totality of the Constitution; and likewise, analyze whether or not there was a procedural flaw in its formation"[27]. Two implications arise from this notion: the Court (i) must review that the statutory law bill has fulfilled

[25] Judgments C-787 of 2011, section 2.3.2., and C-162 of 2003, section 4.

[26] Judgment C-153 of 2022, section 59.

[27] Judgments C-011 de 1994, section A.6 and C-787 de 2011, section 2.3.2.

the requirements established by the article 153 of the Constitution and the articles 207 and 208 of the Law 5th of 1992 and also (ii) it has to confront the disposition with all the principles, values, rights and rules that the Constitution contains.

Automatic. It is not necessary for a citizen to challenge the constitutionality of the law for the judicial review to take place. Specifically, article 39 of the Decree 2067 of 1991 establishes that the "president of Congress shall send to the Constitutional Court an authentic copy of the statutory laws bills immediately after they have been approved in the second debate".

Jurisdictional. As it was stated in the provisional descriptions table, the Court does not act as a co-legislator, but its rulings are in law, confronting the provision with the entirety of the Constitution.

Definitive. Article 241.8 of the Constitution determines as one of the Constitutional Court functions to "decide definitely on the constitutionality (...) of proposed statutory bills"[28].

2.2 Statutory decrees

In principle, only Congress may pass statutory laws. However, there are exceptional cases in which the president of the Republic issues decrees regulating matters that are reserved to statutory laws. This occurs when a constitutional amendment orders the president to regulate a matter. In that case, the president regulates a statutory matter based on a direct, concrete, and limited mandate that was exceptionally established in the Constitution. Therefore, there may be statutory decrees that were not approved by the procedure established in Articles 152 and 153 of the Constitution.

This is a very special case because it involves a paradox. A law that should be approved by the Congress with qualified majorities is finally approved by the president without any majority and without any deliberative or parliamentary procedures. For this reason, the Constitutional Court has indicated that this type of statutory decrees must have the same judicial control as statutory laws. This means that the president must adapt the procedure of these statutory decrees so that they have a prior judicial review.

[28] Vid. Political Constitution of Colombia (article 241.8).

In other words, although these statutory decrees are not approved by Congress but by the president, Article 153 of the Constitution applies to them. Of course, only with regard to the prior judicial review. Consequently, the president must send them *ex officio* or automatically to the Constitutional Court before these decrees enter into force. The objective is that the Court performs the prior judicial review with the same characteristics of the control it performs on statutory bills.

Recently, in Judgment C-302 of 2023, the Constitutional Court declared unconstitutional a statutory decree that was approved by the president. The main reason for declaring it invalid was that the president put it into effect without a prior study by the Court. Thus, the president omitted his obligation to automatically send it to the Constitutional Court. Some citizens filed unconstitutionality lawsuits against this decree for material or substantive reasons. However, the Court declared it invalid for a procedural reason. The procedural defect or error was the failure of the president to send the decree for prior judicial review by the Constitutional Court. In that judgment, the Court established that:

> "(…) judicial review of the decrees that regulate matters of statutory content has been approached from a demanding perspective and restrictive interpretation of these authorizations. This is justified because, by means of this type of rules, the Constituent Assembly temporarily alters the competence for the issuance of statutory laws. This implies that the normative attributions conferred to bodies – other than Congress – to issue this type of regulation must be evaluated based on their exceptional and extraordinary condition"[29].

This means that all the characteristics described regarding the judicial review of statutory bills apply to this type of decree. Nonetheless, there are three differences. First, it is not a statutory bill that is sent but a decree that is not in force. Second, it is not sent by the Congress because it did not issue the decree, but by the president of the Republic himself. Third, the Court has stated that the "scrutiny is not only prior, automatic, integral and definitive, but also includes the verification of 'compliance with the temporal and material limits established by the enabling norm'"[30].

[29] Judgment C-302 of 2023, section 76.

[30] Judgments C-302 of 2023, section 71, C-523 of 2005, section 3, and C-672 of 2005, section 10.

2.3 Laws approving an international treaty

In Colombia the approval of an international treaty involves the participation of the three branches of public power. Article 189.2 of the Constitution states as a faculty of the president of the Republic to "make international treaties or agreements with other states and international bodies, which shall be submitted for the approval of Congress"[31]. This faculty implies that the legislative initiative in the matter is exclusive to the executive branch. This is stated by the article 142 of the Law 5th of 1992[32].

Article 150.16 of the Constitution establishes that one of Congress's functions is to "approve or reject treaties that the Government makes with states or international law entities"[33]. The Congress must approve or reject the complete text of the treaty. According to the Constitutional Court, it cannot "introduce new clauses or modify those provided for in the treaty, because, according to the Constitution, its function is to approve or disapprove the agreement as a whole"[34]. The article 217 of the Law 5th of 1992 provides the special regime for the passing of these bills. It states that: (i) the Congress may present proposals of for non-approval, deferral or reservation; (ii) the text of the treaties cannot be subject of amendments; and (iii) the proposals of reservation can only be formulated in treaties that provide for this possibility or whose content so admits. On the remaining aspects, article 204 of the law states that the bill shall be "passed through the ordinary or common legislative procedure, with the specialties established in the Constitution and in these Rules of Procedure".

During the approval by the Congress the bill must complete eight steps identified by the Constitutional Court:

> "(i) The presentation of the bill to the Senate of the Republic by the Government (art. 154 of the [Constitution]); (ii) the official publication of the approving bill (art. 156 of Law 5th of 1992); (iii) the beginning of the legislative process in the respective permanent

[31] Vid. Political Constitution of Colombia (article 189.2).

[32] Article 142 of the Law 5th of 1992. "Laws may only be enacted or amended at the initiative of the Government in the following areas: (...) 20. Laws approving treaties or Conventions that the Government enters into with other States or international law entities".

[33] Vid. Political Constitution of Colombia (article 150.16).

[34] Judgment C-320 of 2022, section 8.

> constitutional commission of the Senate of the Republic (art. 154 of the [Constitution]); (iv) the publication of the report for debate in the commissions and in the plenary sessions (arts. 157 and 185 of Law 5th of 1992); (v) the prior announcement of the votes (art. 160 of the [Constitution]); (vi) the vote and the quorum and majority requirements (arts. 145 and 185 of Law 5th of 1992); (vii) the lapse between debates (art. 160 of the [Constitution]), and, finally, (viii) that the bill has not been considered in more than two legislatures (art. 162 of the [Constitution])"[35].

Finally, article 241.10 of the Constitution states as a function of the Constitutional Court to "decide on the execution of international treaties and laws approving them". This disposition also provides the PJR for this typology of laws. The article states that the Government shall submit the treaty within six days of their approval by the Congress and, only if the Court declares it constitutional, it can proceed to the exchange of notes, that is, to the perfecting of the treaty.

This locates the PJR after the ratification of the treaty, but prior to its perfecting. For this reason, this type of control is placed as part of the prior judicial review. However, it is important to clarify that, unlike all the others, in this case the law already effectively exists. The judicial review is only prior to the perfection of the international obligation. In contrast, in all the other norms discussed in this paper, the control is (truly) prior because it occurs before the norm exists in the domestic legal system.

Once the bill has been approved by the Congress, reviewed by the Court and perfected by the president through the exchange of notes, it becomes a law. Here it is important to make a distinction between (i) human rights treaties[36] and (ii) the rest of international treaties. The first group acquires constitutional rank while the second one maintains the rank of an ordinary law.

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[35] Judgment C-252 of 2019, section 23.

[36] This is provided both by the Constitution and the Constitutional Court. First, article 93 of the Political Charter states that "international treaties and agreements ratified by Congress that recognize human rights and prohibit their limitation in states of emergency prevail in the internal legal order. The rights and duties mentioned in this charter shall be interpreted in accordance with international treaties on human rights ratified by Colombia". Second, recently in the Judgment C-030 of 2023 (section 179) the Court reiterated its own jurisprudence in the sense that "the only reasonable meaning that can be given to the notion of prevalence of human rights and international humanitarian law treaties is that they form with the rest of the constitutional text 'The Constitutional Block', whose respect is imposed on the law".

The characteristics of the PJR have certain variations for this type of provisions. *Prior*. The judicial review takes place after the ratification of the instrument by the Congress but before the exchange of notes or perfecting of the treaty.

Integral. As for statutory laws, for the laws approving an international treaty the review implies the study of both formal and material aspects. For the formal control the Court must verify that throughout the process of subscription and approval of the treaty it fulfills the procedural requirements, which are specific to each step. The following table shows every requirement reviewed by the Court:

Formal aspects of the subscription and approval of a treaty According to the Judgment C-252 of 2019	
Phase of the norm generating process	Requirements reviewed in each phase
Prior governmental phase	The validity of the representation of the Colombian State in the negotiation, conclusion and signing of the treaty.
	Whether the approval of this instrument was subject to prior consultation and, if so, whether it was carried out. This applies for the cases involving ethnic communities.
	Whether the treaty was approved by the president of the Republic and was submitted to Congress for its consideration.
Process in the Congress of the Republic	The presentation of the bill to the Senate of the Republic by the Government.
	The official publication of the approving bill.
	The beginning of the legislative process in the respective permanent constitutional commission of the Senate of the Republic.
	The publication of the report for debate in the commissions and in the plenary sessions.
	The prior announcement of the votes.
	The vote and the quorum and majority requirements.
	The lapse between debates.
	That the bill has not been considered in more than two legislatures.

Presidential sanction and remission to the Constitutional Court	The president of the Republic has sanctioned the bill
	The president of the Republic has submitted the bill for PJR in the six following days to its sanction.

The material review requires the confrontation of the content of the treaty and the approbatory bill with "the totality of the provisions of the Constitution, to determine whether or not it conforms to the Political Charter"[37]. This implies the same standard used for the statutory laws and decrees, that is, confronting the content of the treaty with all the principles, values, rights and rules of the Constitution.

The characteristics of *automatic, jurisdictional* and *definitive* for this type of dispositions are the same as for the statutory bills. The only changes are regarding the article of the Constitution that provides this qualification. Specifically, it is *automatic* because article 241.10 of the Constitution states that "the Government shall submit treaties to the Court within six days of their approval by law"[38] and it is *definitive* due to article 241.10 of the Political Charter, which establishes that the Court shall "definitively decide on the execution of international treaties and laws approving them"[39].

2.4 Presidential veto or objections on grounds of unconstitutionality

Up to this section, only prior and automatic or *ex officio* judicial review processes have been described. Congress always sends the laws approving treaties or statutory bills. And the president must send the statutory decrees. It has even been stated that the omission in the automatic or *ex officio* sending is an insurmountable vice or problem of unconstitutionality. If this obligation is omitted, the norm will be declared invalid for not having sent it *ex officio* to the Constitutional Court.

However, there is a case in which the judicial review is prior, but the referral is not completely automatic or *ex officio*. This occurs when the Congress approves an (ordinary) law and sends it for the signature of the president of the Republic. This is a normal step in the process of approval of the law. However, the president may refuse to sign the law. This means that the law does not exist in the legal system. The

[37] Judgment C-252 of 2019, section 40.

[38] Vid. Political Constitution of Colombia (article 241.10).

[39] Vid. Political Constitution of Colombia (article 241.10).

president's veto may occur for reasons of inconvenience or for reasons of unconstitutionality. In this case, the second type of veto is of interest. When the president vetoes a law for reasons of unconstitutionality and the Congress insists that the law must be approved, the bill is sent to the Constitutional Court[40].

The procedure for these objections is the following[41]: once a bill is approved by Congress it is sent to the president. If he or she presents objections, the bill must be sent back to the chamber of Congress in which it had its origin[42]. Once the objections have been received and published, the president of each chamber conforms an accidental commission to study and elaborate a report that will be presented to the plenary of each chamber. Then, the vote takes place, and three possible outcomes may occur. This happens depending on if the chambers (i) insist in the bill, in which case the PJR takes place; (ii) take different votes, which implies that the bill is archived or the objected part is retired or (iii) find founded the objections, what means that the bill is archived or modified in the parts that were subject to objections.

In the first case, the review carried out by the Constitutional Court is prior because the law does not exist in the legal system. However, unlike in other cases, the Court does not perform a comprehensive control. The Court does not contrast the entire law with the entire Constitution. In these cases, the Court only analyzes the argument that was presented by the president against the bill. The arguments of the president's veto are the framework within which the control performed by the Constitutional Court moves.

If the Court considers that the veto is not justified, the president must sign the law for it to be put into effect. If the Court considers that the veto is justified, the Congress may modify it, or it may be put into effect without the dispositions vetoed.

As it has been stated, this type of norm has important nuances regarding the five characteristics of the PJR.

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[40] Roa Roa, Jorge Ernesto. "El modelo de constitucionalismo débil y la legitimidad de la justicia constitucional En Colombia". En: Correa Henao, Magdalena y Robledo Silva, Paula. *Diseño institucional del Estado democrático en América Latina*. Universidad Externado de Colombia, Bogotá, 2018, pp. 113-136.

[41] For a detailed description of this process, see Celis Corzo, Diego Alejandro. *Objeciones gubernamentales en el ordenamiento jurídico colombiano*. In: Revista Derecho del Estado, núm.. 48, 2021, pp. 51-84.

[42] Vid. Political Constitution of Colombia (article 115).

Prior. The judicial review is prior because it is carried out before the sanction of the bill. The Court has indicated that "if, as a result of the processing of governmental objections, the bill is modified, added to or deleted, including the total or partial archive of the bill, it must be submitted to [PJR]"[43].

Not integral. Article 241.8 of the Constitution states that it is one of the functions of the Court to decide on the constitutionality of the bills with governmental objections "both on account of their substantive content and for procedural errors in their formation"[44]. The Court has also considered that the PJR "is applied both for its material content and for procedural flaws in its formation"[45]. Nonetheless, as it was just stated, the Court does not carry out a comprehensive review in which it both identifies the constitutional tensions of the law and confronts it with the totality of the Constitution. The Court only analyzes the argument that was presented by the president against the law.

Semi-automatic. The president of the Congress must submit the bill to the Court if it is insisted by the chambers or if it had any modification during the process of the objections or if it was partially or completely archived. This remission must be carried out (i) when the process of objections has concluded or (ii) the time limit for deciding on the matter has expired, whichever comes first[46]. The Court stated that the review is automatic because it must be carried out "as of the culmination of the legislative procedure and without the filing of a lawsuit being required for its activation, even if the bill has not been sent to the Court by the respective Chamber"[47].

Jurisdictional. Article 167 of the Constitution provides that the PJR is enabled by the presentation of objections relative to the constitutionality of the bill. The objections that consider the bill to be inconvenient do not have judicial review and, in these cases, it returns to the Congress for a second debate and the president "shall sign a bill without being able to present objections if it is approved upon reconsideration by an absolute majority of both houses"[48]. In this sense, the Court

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[43] Decision A-123 of 2019, section III.

[44] Vid. Political Constitution of Colombia (article 241.8).

[45] Decision A-123 of 2019, section III.

[46] In the decision A-123 of 2019 the Court stated that "the president of Congress, at the conclusion of the processing of the objections formulated by the president of the Republic or the term to decide on the matter, whichever occurs first, shall send to this Corporation the bill resulting from said procedure, even in the event that the same is totally or partially archived", section III.

[47] Ibidem.

[48] Vid. Political Constitution of Colombia (article 167).

can only exercise the judicial review upon constitutionality objections, thus making the process jurisdictional.

Not definitive. Even though the Court has stated that the PJR is also definitive because "a new [review] is not applicable after its enactment"[49], this affirmation requires some precision. Specifically, the review is not integral and it is only focused on the argument that was presented by the president against the law. This implies that the constitutionality of the provision can be challenged after the control has been carried out, especially regarding the dispositions that were not subject to presidential objections. Also, the Court has considered that a new review may proceed if aspects that were not reviewed or a change in the control parameter arise[50].

2.5 A more detailed description of the definitive judicial review

The PJR is definitive for the statutory laws and decrees and for the laws approving international treaties. In the Judgment C-153 of 2022 the Court established that the PJR "is definitive given the scope of the aforementioned control, thus materializing the principle of absolute constitutional *res judicata*"[51]. The doctrine of the *res judicata* is an established phenomenon in the Constitutional Court's jurisprudence. It originates from article 243 of the Constitution, which provides that "Constitutional Court rulings in exercise of jurisdictional oversight bar double jeopardy (or *res judicata*)"[52].

The Court has considered that this figure is founded in four reasons[53]. First, the principle of legal certainty which imposes stability and reliability on the rules. Secondly, the safeguard of good faith, which requires ensuring the consistency of the Court's decisions. Thirdly, the guarantee of judicial autonomy, by preventing a matter that has already been judged by the competent judge from being examined again. Finally, the constitutional supremacy (provision established by article 4 of the Political Charter) since the decisions of the Court that put an end to the constitutional debate are intended to ensure the integrity and supremacy of the Charter.

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[49] Decision A-123 of 2019, section III.

[50] Ibidem.

[51] Judgment C-153 of 2022, section 59.

[52] Vid. Political Constitution of Colombia (article 243).

[53] Judgment C-009 of 2023, section 18.

The Court has considered that the *res judicata* requires three concurring circumstances[54]. First, the contested norm must have the same normative content of the legal provision that was subject to review in the previous decision. Secondly, "the charges of unconstitutionality raised in the new complaint must be materially similar to those proposed and studied previously by the Court"[55]. Thirdly, the parameter of control must be the same that was applicable in the previous decision.

Finally, the Tribunal has distinguished between four types of *res judicata*: absolute and relative, on one side, and formal and material, on the other. The first one occurs when "the prior decision of the Court exhausted any debate on the constitutionality of the accused norm, since 'it is understood that the norm is executory or unenforceable in its entirety and in relation to the entire constitutional text'"[56]. This may happen on two occasions: (i) when the Court develops the PJR or (ii) in those cases when the ruling "has not made an express delimitation of its effects in the resolutive part of the decision, it is presumed that the absolute constitutional *res judicata* has operated"[57]. The second one is configured in those events "when the previous decision conducted the study of constitutionality with respect to some charges. For this reason, it is possible to challenge the same provision based on different charges so that the Court may examine it from the perspective of the new accusations"[58].

The formal *res judicata* occurs when "when there is a previous decision of the constitutional judge on the same provision that is brought back for review"[59]. On the other hand, the material *res judicata* takes place when "when the provision under attack is not necessarily the same as the one analyzed in the previous decisions but reflects identical normative content"[60].

Up to this point we have explained the concept and types of *res judicata* but, what does this mean for the PJR? Specifically, what type of *res judicata* implies the PJR? What are the dispositions subject to it? Here the PJR characteristics of integral and definitive interact to answer these questions.

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[54] Ibid. Section 19.

[55] Ibidem.

[56] Ibid. Section 22.

[57] Ibidem.

[58] Ibid. Section 23.

[59] Ibid. Section 24.

[60] Ibid. Section 25.

Given that for the statutory laws and decrees and for the laws approving international treaties the PJR is integral, the provisions have been reviewed taking the entirety of the Constitution as the control parameter. The Court has identified the problems of the disposition and already has exhausted the debate around its constitutionality. This means that the phenomenon that operates is that of the *absolute and formal res judicata*.

For example, in the Judgment C-713 of 2008 the Court carried out the PJR regarding a reform of the Justice Administration Statutory Law. In paragraph 5.23.3 the Court studied the constitutionality of article 23 of the law and declared it constitutional. Years later, in the Judgment C-787 of 2011 a citizen presented a public action against that very same article 23. The Court decided that the phenomenon of the *absolute res judicata* took place because the PJR carried out in 2008 was prior, integral and definitive. In consequence, the decision was to abide by the prior judgement.

There are two precisions to be made. First, the presidential objections do not imply the establishing of an *absolute res judicata* because, as it was previously stated, the review is not integral. It is limited to the provisions that the president challenged and only in relation to its specific arguments. Second, even though the *res judicata* is classified as absolute, this is not truly the case. As we will explore in a following section[61] the Constitutional Court has identified three events in which a new review may be carried out. This implies a necessary flexibilization of the *res judicata* that invites a reconceptualization of the category. This, and other problems, will be the subject of sections 3 and 4 of this article.

2.6 Synthesis of this section

Due to the number of specifications regarding the PJR for each of the provisions subject to this review, the following table aims to synthesize these conclusions.

[61] Infra 3.5.

Type of provision	Characteristics of the PJR
Statutory laws	Prior to the sanction of the bill, integral (material confrontation with the Constitution and legislative procedure), automatic, jurisdictional and definitive.
Statutory decrees	Prior to the enactment of the decree, integral (material confrontation with the Constitution and administrative procedure), automatic, jurisdictional and definitive.
Laws approving an international treaty	Prior to the exchange of notes, integral (material and legislative procedure), automatic, jurisdictional and definitive.
Presidential objections	Prior to the sanction of the bill, not integral (only reviews the presidential objections), semi-automatic (only if the Congress does not modify the law after the objections), jurisdictional and not definitive.

This document has already described the characteristics and procedure of the prior judicial review. It has even distinguished the different nuances of this judicial control according to each norm under review. It is now time to formulate a series of challenges and perspectives on the functioning of the prior judicial review. This may be useful as a laboratory for other jurisdictions in which the same challenges exist or in which it is intended to implement this form of review of laws.

3. Challenges of the prior judicial review

The purpose of this section is to describe some of the challenges of prior judicial review. The aim is to use the Colombian system as a laboratory so that some of these challenges can be overcome with the institutional design adopted in other countries (i.e. Chile or Argentina). Perhaps there are also shared challenges that may be intrinsic to this form of constitutionality control.

3.1 The need to imagine unconstitutionality issues

One of the main challenges for a Constitutional Court is to imagine or think prospectively about the problems of constitutionality of a law. This occurs in all systems in which the judicial review does not require any type of lawsuit, accusation or veto.

As has been indicated, most of the prior judicial review in Colombia is also automatic. The only exception is the president's vetoes against bills. That means that there is no formal demand from a citizen with a series of arguments against the law. The Court must think, imagine or detect the problems of constitutionality that the law might have. The Court itself must think about the questions and the answers.

This is even more challenging when the control occurs before the law has entered *into operation*. Before its operation in *real life*. The challenge is to analyze the law impartially and, at the same time, to have the peace of mind that all potential problems have been seen and resolved.

Of course, each process is studied by the nine judges of the Court and their teams and not only by the magistrate acting as rapporteur. But even those nine teams may have various difficulties in anticipating all the abstract and concrete problems of constitutionality of a norm that has not entered *into operation*. It is therefore necessary that the discussion of these rules be qualified. Deliberation can remedy many of the deficits of a judicial review process that begins automatically and in advance.

3.2 Reduced legitimacy due to lack of public citizen action

The second challenge is specific to the context of Colombian institutional design. The citizenry is the protagonist of the judicial review in Colombia. The way laws reach the Court's desk is by means of an unconstitutionality claim. The prior judicial review betrays (so to speak) this central philosophy of the Colombian judicial review system.

Therefore, it can be thought that the prior judicial review lacks the legitimacy of a process initiated by the petition of citizens. However, it is also true that prior review only exists by direct mandate of the Constitution. The Constitution itself has decided which norms must be subject to a prior review of constitutionality.

In this sense, prior judicial review would lack citizen legitimacy but would have a legitimacy derived directly from the mandates of the Constitution. The Court can raise its hand and say: it is true that it would have been better if the law (or the bill) had been sued by the citizens. But it is no less true that the Constitution mandates that these norms be previously controlled due to their importance. Likewise, it is difficult for citizens to demand normative acts that do not exist. Therefore, the absence of

demand in the prior control seems to be a necessary element that corresponds more to the philosophy of a preventive control than to the citizen control of power[62].

3.3 Blind spots for the legislator and the Court

As it was stated before, during the process of PJR the Court must identify by itself the constitutionality problems of the provision under review. This poses a special difficulty: the monologic nature of the PJR may subject the Court to the same blind spots that the legislative process faces. Dixon diagnoses three types of blind spots that may arise in the process of creating provisions. These are the blind spots of (i) application, (ii) perspective and (iii) accommodation. The first ones may occur because "legislatures may fail to recognize that a law could be applied in a way that infringes rights [and] this failure could come about because of time pressures on legislative deliberations or because of other limitations on legislative foresight"[63].

The second type of blind spots take place when the Congress fails to anticipate the impact on rights "because they do not appreciate, adequately, the perspective of rights claimants with very different life experiences and viewpoints"[64]. Finally, the third kind of blind spots may be present because "legislators who are focused on a particular legislative objective, and who have limited legal experience, may be ill-equipped to perceive ways in which a rights-based claim might more fully be accommodated, without undue cost to the relevant legislative objective"[65].

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[62] Roa Roa, Jorge Ernesto. "A cidadania dentro da sala de máquinas do constitucionalismo transformador latino-americano". Revista Direitos Fundamentais & Democracia, vol. 28, núm. 2, 2023, pp. 91–115.

[63] Dixon, Rosalind. *Creating dialogue about socioeconomic rights: Strong-form versus weak-form judicial review revisited*. In: I-CON, Volume 5, Number 3, 2007, pp. 391–418. p. 402

[64] Ibidem.

[65] Ibidem.

Given the presence of blind spots and other problems amongst the legislative procedure[66], a valid question arises: why not have pure strong forms[67] of judicial enforcement? This would mean treating the Court's decisions as "having broad and final effect"[68]. However, the author states that "courts, like legislatures, will be prone to failures of responsiveness in the process of constitutional rights-enforcement"[69].

It is possible to imagine this occurring. For example, a Court could miss the specific unconstitutional effects of a disposition for the situation of certain citizens, implying the need for a posterior unconstitutionality exception in concrete control (application blind spot). Or a Court may fail its duty to adopt a "differential approach"[70] for the incommensurable amount of different life perspectives.

3.4 The inadequacy of citizen *amicus curiae*

It has already been indicated that the prior judicial review process does not begin with a lawsuit. Only the presidential veto provides some argument to detect problems of unconstitutionality of a law that will be previously controlled. It has also been pointed out that the control implies problems for the Court to imagine difficult questions of constitutional incompatibility.

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[66] Dixon also refers to the burdens of inertia. The author states that: "Legislative processes may also be subject to burdens of inertia in achieving rights-based protection because legislation is a time-consuming process and must operate within the capacity constraints of a given legislative session. In these circumstances, a legislature may fail to address rights-based claims simply because competing legislative priorities appear electorally more pressing or salient (priority-driven burdens of inertia). Alternatively, inertia may come about because an issue divides a political party in such a way that the benefits of pursuing a more responsive legislative outcome are outweighed by the costs involved for party integrity (coalition-driven inertia). Finally, where the realization of a rights-based claim requires sustained and complex forms of administrative action, delay and inertia in the process of legislative oversight may combine with inertia within the executive or administrative branch to produce compound burdens of inertia". Ibid. p. 403

[67] This statement follows the distinction made in Dixon, Rosalind. *Creating dialogue about socioeconomic rights: Strong-form versus weak-form judicial review revisited*. op. cit. p. 408 and Tushnet, Mark. *New Forms of Judicial Review and the Persistence of Rights – and Democracy-Based Worries*. In: Wake Forest Law Review, Volume 38, 2003, pp. 813-838. In this sense, we will understand for strong-forms those models that give to the Courts the final word on constitutionality matter and for weak-forms those that admit dialogic features such as the not-withstanding clause.

[68] Dixon, Rosalind. *Creating dialogue about socioeconomic rights: Strong-form versus weak-form judicial review revisited*. op. cit. p. 407

[69] Ibidem.

[70] The Constitutional Court of Colombia has considered that this approach "must be understood 'as a development of the principle of equality, as it treats unequal subjects differently, seeks to protect people who are in circumstances of vulnerability or manifest weakness, so as to achieve a real and effective equality, with the principles of equity, social participation and inclusion'". Judgments T-412 of 2023, section 26, and T-010 of 2015, section 3.4.

However, the process is participatory[71]. This means that the citizenry can participate in the deliberations with written submissions in which they can defend or attack the law. The fundamental question is whether this participation is sufficient and whether it remedies the fact that the law was not subject to an initial attack of unconstitutionality? Regarding the participatory nature of the prior control of constitutionality, in Judgment C-153 of 2022, the Constitutional Court held:

> "The scheme of prior control before this Corporation evidences the irradiation of the participatory principle in the State, by allowing that through the process of constitutionality the citizenship and the Public Ministry find another space in which their reasons are heard, around the constitutionality of norms that, as it has been argued, have a special category in our legal system and that, for their incorporation into the normative system, do not only require the presumption of validity – which accompanies all laws that are generally subject to subsequent control – but the prior and concrete verification, the certainty, of their concordance with the superior mandates"[72].

One way to remedy this deficit would be to establish the obligation that in all prior controls a public oral hearing must be convened. This should be attended not only by the persons who filed an *amicus* brief but also by all those who wish to intervene orally and by a number of persons summoned directly by the court. Of course, it would be ideal if the authorities who will be in charge of applying the law, those who participated in the negotiation of the international treaty, citizen associations and the legislators themselves would participate. No scenario of deliberation is superfluous in the judicial review of laws, and this is even more true when it comes to the prior judicial review[73].

3.5 The inevitable rupture of the *res judicata*

In most cases, the PJR is integral and definitive. This implies that the disposition is reviewed both in its formal and material aspects and the decision has the

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[71] Roa Roa, Jorge Ernesto. "La jurisdicción constitucional nos representa. La adjudicación estratégica y cooperativa en el constitucionalismo transformador". *Revista Iuris Dictio*, nº 30, mayo-diciembre de 2022, pp. 41-57.

[72] Judgment C-153 of 2022, section 60.

[73] Roa-Roa, Jorge Ernesto. *Control de constitucionalidad deliberativo*. Universidad Externado de Colombia, Bogotá, 2018, pp. 137-173.

effect of an absolute *res judicata*, which means that the Court has "exhausted any debate on the constitutionality of the accused norm, since 'it is understood that the norm is executory or unenforceable in its entirety and in relation to the entire constitutional text'"[74].

Even though there may exist *res judicata* in a certain case, the Court has foreseen three events in which a new ruling may take place: (i) the modification of the constitutional parameter of control; (ii) the change of the material significance of the Constitution or (iii) a variation of the normative context of the disposition under review[75].

The first one takes place when the provisions of the Constitution that were used in the past ruling as parameter the control have been modified or reformed. The second one occurs in those events when "'in light of the economic, social, political, and even ideological and cultural changes of a community' it may not be admissible (...) 'a pronouncement that the Court has made in the past, based on constitutional meanings materially different from those that must now govern the judgment of constitutionality of a given norm'"[76]. The last event presents itself in those cases in which "a previously reviewed provision is subsequently issued and integrated into a different normative context. It may also happen that the provision that has been judged is not modified, but the legal system in which it is included has undergone modifications"[77].

This situation creates difficulties relative to the different types of dispositions subject to PJR. For the statutory laws or decrees it is possible to imagine these events occurring. For example, the political and public debate implies a new comprehension of the political values and fundamental rights. This is the case for equal marriage or the abortion debates. Or maybe a constitutional amendment incorporates new principles or rules to the Constitution, demanding an adjustment of the statutory regime.

This flexibilization took place, for example, for the Statutory Law 971 of 2005. This disposition provided in its articles 14 and 15 certain rights for the family members of victims of enforced disappearance. Through Judgment C-473

[74] Judgment C-009 of 2023, section 22.

[75] Judgment C-007 of 2016.

[76] Ibid. Section 3.4.b).

[77] Ibid. Section 3.4.c).

of 2005 the Court carried out the PJR for the law and declared it constitutional. Years later, in the Judgment C-029 of 2009, the Court studied a public action in which a citizen challenged those same articles claiming that the provisions excluded homosexual couples.

The Court stated that, even though the law was previously studied, the normative context had changed because posterior judgments, such as judgments C-075 and C-811 of 2007 and C-336 of 2008, considered that the exclusion of homosexual couples was understood as a violation of the principle of equality. Because of this, the Court reviewed again the dispositions and declared them constitutional but in the understanding that the provisions included as family the spouses or permanent companions of the same gender.

Regarding the laws that approve an international treaty, the PJR is not a suitable mechanism for reviewing the compatibility of domestic legal norms with the international instrument[78]. It may happen that a treaty in conformity with the Constitution is incompatible with certain legal norms; that after the entry into force of the treaty, the legislature enacts norms contrary to the content of that international instrument; or that without a domestic legislative change, the authentic interpreter of the international treaty expands the content of the obligations in such a way that a national law that was compatible with the initial interpretation of the treaty ceases to be so by virtue of the new hermeneutic formula[79].

The tensions just exposed show that the integral and definitive characteristics of the PJR are not, in fact, integral and definitive. Specifically, the three events that enable a new ruling from the Court seem certain, given the passing of the time and the dynamism of the legal systems. Viewed from this perspective it appears as if the necessary conclusion of the PJR is not the configuration of the absolute *res judicata* but its weakening.

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[78] In favor of the prior and posterior judicial review of international treaties: Mendez, Mario. "Constitutional review of treaties: Lessons for comparative constitutional design and practice". *International Journal of Constitutional Law*, vol. 15, nº 1, 2017, pp. 84-109.

[79] Another type of antinomy may also arise between the domestic legal system and international law: "it may happen that a norm elaborated by a national legislature is initially 'conventional' – as it does not collide with the human rights treaties signed by the country in question, nor with the jurisprudence of the Inter-American Court of Human Rights – but that it later becomes unconstitutional, e.g., if a new jurisprudence of the Inter-American Court of Human Rights collides with that national norm, or if the State ratifies a new treaty opposed to the norm in question, or if it modifies a pre-existing one, with the same results". Sagüés, Néstor Pedro. *La Constitución bajo tensión.* Instituto de Estudios Constitucionales del Estado de Querétaro, México, 2016. p. 409.

These five challenges adequately comprise the evaluative panorama of prior constitutionality control in Colombia. But we must also look constructively to the future. In the following, the paper will describe some elements about the future of prior control of constitutionality in Colombia with a comparative perspective.

4. The future of the prior judicial review

This document also offers a series of perspectives on the future of prior judicial review. Some of these are responses to the challenges that were previously formulated and others some elements for the institutional design to be adopted for this form of judicial review in other countries.

4.1 Public hearings and citizen participation

Given the reduced space for citizen intervention in processes that are carried out through PJR, the Court should resort to different dialogic strategies, such as public hearings. Implementing this mechanism in an obligatory manner for all cases where the judicial review is not activated throughout a public action, could reduce the democratic tensions that were pointed out before.

For the Constitutional Court of Colombia this possibility is contemplated in articles 12 and 13 of the Decree 2067 of 1991. The first provides that any of the justices can propose "that a hearing be convened so that the person who issued the regulation or participated in its elaboration, by himself or through an attorney-in-fact, and the plaintiff, may attend to answer questions to deepen the arguments presented in writing or to clarify facts relevant to the decision". Article 13 of the decree indicates that the justice in charge of the public action "may invite public entities, private organizations and experts in matters related to the subject matter of the process to present in writing, which shall be public, their opinion on relevant points for the elaboration of the draft decision".

Also, article 67 of the Accord 2 of 2015 establishes that the "Plenary Chamber of the Court, at the request of any Magistrate, by a majority of those present and taking into account the background of the background of the act being judged constitutional and the importance and complexity of the importance and complexity of the issues, shall summon to a public hearing those persons who must persons who must intervene therein in accordance with the law, and shall set the date, time and place".

What kind of hearings must be held by the Court? One type of hearings that might be beneficial follows the Argentinian doctrine of "institutional relevance hearings"[80]. The Supreme Court Justice Ricardo Lorenzetti described this type of hearing as "those that are not only of interest to the parties, but also to third parties that are not part of the process"[81]. They are carried out in "cases of enormous public importance that go beyond the interest of the parties"[82] and "a public hearing is held, the purpose of which is to hear the arguments of the parties and, often, the friends of the court (*amicus curiae*)"[83].

For Justice Lorenzetti the object of a public hearing "is to show a scenario where society interacts, where there are arguments, counter arguments, where there are points in which one says: 'in this there can be common ground, in this there is dissent'. This is a much more appropriate way of thinking for the complexity and diversity in which we live than the one we are used to. I am convinced that this is the most important reason why one should have a public hearing"[84].

Deliberation is never superfluous. This is all the truer the greater the importance of the decision. New forms of deliberation are conceivable when it comes to rules that have not yet entered into force. Controlling these norms requires greater openness to written submissions, public hearings and a proactive role of the Court in fostering deliberation.

4.2 Increasing flexibility in terms of *res judicata*

As it was shown before, the PJR leads to the configuration of the absolute and formal *res judicata*. However, it was previously stated that integral and definitive characteristics of the PJR, in a context where the Constitutional Court has allowed three events of weakening of the *res judicata*, implies the inevitable rupture of the phenomenon.

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[80] Lorenzetti, Ricardo. *Las audiencias públicas y la Corte Suprema*. In: Gargarella. Roberto. *Por una justicia dialógica*. Siglo Veintiuno Editores, Buenos Aires, 2015. p. 348.

[81] Ibid.

[82] Ibid.

[83] Ibid.

[84] Ibid. p. 354.

There are two possible ways of reading this weakening: (i) as an affront to the principle of legal certainty and the predictability of the legal system or (ii) as a strategy of dialogic constitutionalism that advocates the constant updating of the legal system to meet the needs of reality. This last perspective seems much more consistent with the preoccupations expressed throughout this work, that is, that the PJR generates certain tensions with the democratic principle that can be resolved.

Dixon considers that "[f]rom a dialogic perspective, some further internal *weakening* of judicial review will thus almost always be required, over and above the external checks described above, before one can be confident that the process of judicial review will enhance, rather than undermine, overall commitments to democratic responsiveness"[85].

In any case, the first reading of the weakening or flexibilization of the *res judicata* does not imply disregarding the principle of legal certainty. The Constitutional Court has stated that "[i]n view of the extraordinary nature of the events that allow the exception of the formal constitutional *res judicata*, the Court considers that the plaintiff is required to comply with a special and particular argumentative burden"[86]. The tension with the principle of legal certainty is reduced by (i) the setting of an argumentative standard for the plaintiff and (ii) the fact that the review is activated by a public action presented by a citizen.

4.3 Conclusion

Is it better to have a system of prior judicial review or one of subsequent control with an action of unconstitutionality? In general, those who defend the existence of abstract models of prior control of constitutionality argue that the systems of abstract and subsequent control are not advisable because they have an intrinsic tendency to cause delays in the examination of the constitutionality of laws. There is no empirical study on this difference between the two types of control of constitutionality and, of course, neither is there one that distinguishes between the different forms of access to subsequent and abstract control of constitutionality.

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[85] Dixon, Rosalind. *Creating dialogue about socioeconomic rights: Strong-form versus weak-form judicial review revisited*. op. cit. p. 408.

[86] Judgment C-007 of 2016, section 3.5.1.

Waldron considers that prior control constitutes a form of political control carried out by the legislator himself within the legislative procedure. The author also affirms that when the prior control of constitutionality is carried out by a constitutional judge, in reality he does not act as a judge but assumes the functional role of one of the chambers of the legislative body[87].

Some authors consider that only prior review of constitutionality helps to improve the constitutional quality of legislation, while others recognize that subsequent review also helps Parliament to take the Constitution seriously. In this context, the model of direct access to the control of constitutionality provides arguments in favor of ex post control of laws and its potential to dissuade the legislature from adopting rules contrary to the Constitution:

> "*Ex ante* constitutional review may increase the average quality of legislation-patently unconstitutional bills cannot be passed. But *ex post* constitutional review may also have a similar effect. By demonstrating that unconstitutional legislation cannot be effectively implemented, *ex post* review may reduce the incentives to pass such legislation. To the extent that review after promulgation allows more information to be considered, there may be an advantage for *ex post* monitoring"[88].

Indeed, it is to be expected that the potential vulnerability of laws would lead the legislature to choose to take the public values of the Constitution seriously when defining the ends and means of its public policies. The goal of Congress would be to produce a legislative result that tends to be more consistent with the promises of the Constitution so that, despite the accessibility of the judicial control mechanism, citizens are discouraged from filing a lawsuit against a law, have a harder time finding a constitutionality objection, or the Court tends to support an interpretation that allows the validity of the law to be preserved against the arguments of the plaintiff. The debate on the institutional design of the judicial review of laws is still open.

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[87] Waldron, Jeremy. "The Core of the Case against Judicial Review". *Yale Law Journal*, nº 115, 2005, pp. 1358 y 1359 and Roa Roa, Jorge Ernesto. "Justicia constitucional, deliberación y democracia en Colombia: Jeremy Waldron reflexivo en Bogotá". *Revista Derecho del Estado*, Universidad Externado de Colombia. nº 44, septiembre-diciembre de 2019, pp. 57-98.

[88] Ginsburg, Tom. *Judicial Review in New Democracies. Constitutional Courts in Asian Cases.* Cambridge University Press, Cambridge, 2003, p. 39.

References

Celis Corzo, Diego Alejandro. *Objeciones gubernamentales en el ordenamiento jurídico colombiano*. In: Revista Derecho del Estado, num. 48, 2021, Universidad Externado de Colombia, pp. 51-84.

Dixon, Rosalind. *Creating dialogue about socioeconomic rights: Strong-form versus weak-form judicial review revisited*. In: I-CON, Volume 5, Number 3, 2007, pp. 391–418.

Ginsburg, Tom. *Judicial Review in New Democracies. Constitutional Courts in Asian Cases.* Cambridge University Press, Cambridge, 2003.

Lorenzetti, Ricardo. *Las audiencias públicas y la Corte Suprema*. In: Gargarella. Roberto. *Por una justicia dialógica*. Siglo Veintiuno Editores, Buenos Aires, 2015. pp. 345 – 354.

Mendez, Mario. "Constitutional review of treaties: Lessons for comparative constitutional design and practice". *International Journal of Constitutional Law*, vol. 15, nº 1, 2017, pp. 84-109.

Restrepo Piedrahita, Carlos. *Control de Constitucionalidad*. Universidad Externado de Colombia, Bogotá, 2006.

Roa-Roa, Jorge Ernesto. *Control de constitucionalidad deliberativo*. Universidad Externado de Colombia, Bogotá, 2018.

Roa-Roa, Jorge Ernesto. "El diseño institucional de la acción pública de constitucionalidad en Colombia". En: Sierra Porto, Humberto; Robledo Silva, Paula y González, Diego (eds). *Garantías judiciales de la Constitución. Temas de Derecho Procesal Constitucional Colombiano. Tomo II. Acción* Pública de *Inconstitucionalidad, Procedimiento y Sentencia.* Universidad Externado de Colombia, 2023.

Roa-Roa, Jorge Ernesto. *La acción pública de constitucionalidad a debate*. Colección Temas de Derecho Público nº 96. Universidad Externado de Colombia, Bogotá, 2015.

Roa Roa, Jorge Ernesto. "A cidadania dentro da sala de máquinas do constitucionalismo transformador latino-americano". *Revista Direitos Fundamentais & Democracia*, vol. 28, núm. 2, 2023, pp. 91–115.

Roa Roa, Jorge Ernesto. "La jurisdicción constitucional nos representa. La adjudicación estratégica y cooperativa en el constitucionalismo transformador". *Revista Iuris Dictio,* nº 30, mayo-diciembre de 2022, pp. 41-57.

Roa Roa, Jorge Ernesto. "Justicia constitucional, deliberación y democracia en Colombia: Jeremy Waldron reflexivo en Bogotá". *Revista Derecho del Estado*, Universidad Externado de Colombia. nº 44, septiembre-diciembre de 2019, pp. 57-98.

Sagüés, Néstor Pedro. *La Constitución bajo tensión.* Instituto de Estudios Constitucionales del Estado de Querétaro, México, 2016.

Santamaría, Alejandro. "El control constitucional por vía de excepción en el pensamiento constitucional colombiano: 1811-1886". In: Barbosa Delgado, Francisco (ed.). *Historia del Derecho Público en Colombia*. Universidad Externado de Colombia, Bogotá, 2012, pp. 265-320.

Tushnet, Mark. *New Forms of Judicial Review and the Persistence of Rights – and Democracy-Based Worries*. In: Wake Forest Law Review, vol. 38, 2003, pp. 813-838.

Waldron, Jeremy. "The Core of the Case against Judicial Review". *Yale Law Journal*, nº 115, 2005, pp. 1346-1406.