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Addressing Economic Inequality in Constitutional Design: the Colombian Drafting Experience in 1991

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Abstract: Colombia's Constitutional Assembly enacted a constitution in 1991 whose text and application are regarded around the world as among the best examples of socioeconomic constitutionalism in the last three decades. Despite rising interest in the structural causes of economic inequality at both global and domestic levels, Colombian constitutional scholarship has not yet offered an account of the role of the original constitutional design in addressing economic inequality. In this article, I show that the drafters of the Constitution of 1991 were deeply concerned with economic inequality and considered the problem from several angles. However, they did not agree on a structural plan with coherent tools to address it and prevent forces in the executive and legislative branches from undermining that purpose. Therefore, the Colombian constitution-making process has been overestimated because, after thirty years, the Assembly's economic egalitarian aspirations are far from being achieved, and Colombia is still among the most unequal countries on earth. Thus, the Colombian constitution-making experience provides a warning about how unclear and weak agreements in constitutional design can become an additional obstacle to overcoming economic inequality.
Keywords: Constitutional Design, Economic Inequality, Socialrights, Social and Ecological Function of Property, Land Reform, Taxation.

Resumen: La Asamblea Constituyente de Colombia promulgó una constitución en 1991, cuyo texto y aplicación son considerados en todo el mundo como uno de los mejores ejemplos de constitucionalismo socioeconómico de las últimas tres décadas. A pesar del creciente interés en las causas estructurales de la desigualdad económica a nivel tanto global como interno, los estudios constitucionales colombianos aún no han ofrecido una explicación sobre el papel del diseño constitucional original para abordar la desigualdad económica. En este artículo, muestro que los redactores de la Constitución de 1991 estaban profundamente preocupados por la desigualdad económica y consideraron el problema desde varios ángulos. Sin embargo, no acor-

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daron un plan estructural con herramientas coherentes para abordarlo y evitar que fuerzas de los poderes ejecutivo y legislativo socavaran ese propósito. Por lo tanto, el proceso constitucional colombiano ha sido sobreestimado porque, después de treinta años, las aspiraciones económicas igualitarias de la Asamblea están lejos de lograrse y Colombia sigue estando entre los países más desiguales del planeta. Por lo tanto, la experiencia constitucional colombiana proporciona una advertencia sobre cómo los acuerdos poco claros y débiles en el diseño constitucional se convierten en un obstáculo adicional para superar la desigualdad económica.
Palabras clave: diseño constitucional, desigualdad económica, derechos sociales, función social y ecológica de la propiedad, reforma agraria, impuesto.

I. Introduction

At the end of the twentieth century, Latin America experienced a wave of new constitutions to overcome authoritarianism through more participatory forms of democracy, to strengthen the rule of law so that constitutions could limit power, and guarantee human rights.[1] The Colombian Constituent Process in 1991 was one of the first examples of a regional movement known firstly as neo-constitutionalism,[2] later as new constitutionalism,[3] and reinterpreted today as *Ius constitutionale commune latinoamericanum*.[4] In thirty years, the Constitution of

[1] *See*, *e.g.*, Rodrigo Uprimny, *The Recent Transformation of Constitutional Law in Latin America: Trends and Challenges*, 89 Texas Law Review, 1587 (2011).

[2] These terms are relevant to understand the background of the Colombian constituent process and its place in the region hereinafter. The "neo-constitutionalism" is a term born in Genova (Italy) to name the new European constitutions after the World War II characterized by "constitutionalizing the law", that is, the normative force and supremacy of the constitution, and the prevalent role of the judge over other branches of power in interpreting and adjudicating the constitution, especially its principles and rights; the Colombian constitution is an example of this first characterization; *see* Jorge Benavides, *Neoconstitucionalismo, Nuevo Constitucionalismo Latinoamericano y Procesos Constituyentes en la Región Andina*, 5 Ius Humani. Revista de Derecho, 173 (2016).

[3] The term "new constitutionalism" was born in Valencia (Spain) and refers to a wave of new constitutions that aimed —mainly— to give the documents more democratic legitimacy by requiring popular approval to be promulgated, for example, the constitutions of Venezuela (1999), Ecuador (2008), and Bolivia (2009); *see id.*

[4] The expression "Ius Constitutionale Commune" was born in Germany to group the common features that characterize Latin American constitutions and the discourses about them, which are the combination of national and international law (particularly, the Inter-American Convention); the centrality of constitutional principles and human rights to overcome exclusion (*e.g.*, inequality); and the contribution of the judiciary (*e.g.*, Constitutional Courts or the Inter-American Court) in the transformative role of constitutional law; *see*, Armin von Bogdandy, *Ius Constitutionale Commune en América Latina: Una Mirada a un Constitucionalismo Transformador"*, 34 *Revista Derecho del Estado*, 3 (2015).

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1991 and its application by the Constitutional Court have been depicted many times as strengthening the rule of law, democracy, and human rights—especially socioeconomic rights—in the country.[5] However, despite some betterments such as the possibility to claim some social rights before a court, where the success of those claims is not always guaranteed, economic inequality is still a pressing issue.[6]

In the last decade, interest in studying the causes of economic inequality has grown, mainly due to the work of the French economist Thomas Piketty.[7] For him, the concentration of wealth is inherent to capitalism and should be fought through a Welfare State with strong public services such as social security and health, financed through mechanisms like taxes on wealth, among other tools, even at a global level.[8] Although Piketty carried out this research in economics principally with data from Western Europe and the United States, this hypothesis has invited legal scholars to think about the role of constitutional design in the fight against economic inequality, even more in countries with high levels of inequality such as Colombia.[9] However, no study by a Colombian legal scholar investigates the relationship between constitutional design and economic inequality in the Constitution of 1991.[10] There are at least two trends in the national literature. The first one analizes the structure of social rights, with some optimistic appraisals of the results obtained through its application,[11] and others that are not so optimistic.[12] The second tendency asserts that issues linked to economic inequality, such as material inequality or poverty were not discussed

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[5] *See, e.g.,* Daniel Bonilla, Constitutionalism of the Global South. The Activist Tribunals of India, South Africa, and Colombia (2013).

[6] By economic inequality, I refer both to the fact that a small percentage of the population accounts for a disproportionately large portion of the country's total income, and that most of the capital or wealth that a country owns (for example, arable land or savings banking) are in the hands of a few. That is, economic inequality, as I understand and use throughout the paper, is an umbrella term that combines the distribution of income and wealth.

[7] Thomas Piketty, El Capital en el Siglo XXI (2014).

[8] *See, e.g., id*. at 528-531.

[9] Although poverty has diminished, the country has big disparities in income, regional allocation of resources, gender inequalities, access to social rights, etc.; OCDE, *Estudios Económicos de la OCDE. Colombia* (Oct., 2019) available at: https://www.oecd.org/economy/surveys/Colombia-2019-OECD-economic-survey-overview-spanish.pdf [https://perma.cc/WQ9M-NW36]. Also, the GINI coefficient was 51.5 in 1992 and 50.4 in 2018, which means that after 26 years since the Constitution of 1991, the aspiration of economic inequality is still far from being achieved; The World Bank, *Gini index (World Bank estimate) – Colombia*. Available at: https://data.worldbank.org/indicator/SI.POV.GINI?locations=CO (last visited Nov. 1, 2023) [https://perma.cc/A632-23BX].

[10] In contrast, there are more studies on economic inequality in economics by Colombian scholars, *see, e.g.,* Luis Garay & Jorge Espitia, Dinámica de las Desigualdades en Colombia. En torno a la Economía Política en los Ámbitos Socio-Económico, Tributario y Territorial (2019).

[11] *See, e.g.*, Luis Pérez et al., Los Derechos Sociales en Serio: Hacia un Diálogo Entre Derechos y Políticas Públicas (2007).

[12] *See, e.g.,* David Landau, *The Reality of Social Rights Enforcement*, 53 Harv. Int'l L.J., no. 1 190, 203-229 (2012); Landau asserts the enforcement of social rights benefiting mainly middle and upper-class groups.

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in depth during the process of drawing up the Constitution.[13] Hence, my research aims to refocus the attention from the analysis of economic inequality in constitutional design solely in terms of social rights and to provide an articulated and comprehensive understanding of the debates on this issue in the Constituent Assembly.

The Constituent Assembly of 1991 met mainly to strengthen the State's capacity to deal with the negative effects of an armed civil conflict over the legitimacy of institutions.[14] Nevertheless, the members were also interested in economic inequality. After reading the minutes of the debates available in the Constitutional Gazette, one can realize that the discussions on how to tackle economic inequality clustered around five "pillars" or groups of policies that make up the design of the current constitution. In the first pillar, the Assembly supported a robust catalog of rights to include more social, economic, and cultural rights that guarantee welfare to the people; in the second pillar, they agreed on the necessity of State intervention in the economy to prevent wealth concentration;[15] the third pillar was the establishment of a social and ecological function of property, that would limit the right to property before the common good, and the land reform;[16] fourthly, drafters agreed on prioritizing the distribution of State expenses to satisfy basic needs, especially in poor territories;[17] and, finally, the Assembly agreed on a taxation system oriented towards equity, efficiency, and progressivity.[18] In sum, the Assembly intended through policies organized around these pillars, to enable the new constitution to address economic inequality.

Notwithstanding, my analysis of the records of proceedings reveals that those five pillars have a fundamental problem that might contribute to the persistence of economic inequality. Most of the pillars did not prescribe concrete policies to overcome economic inequality, others were not coherent with that objective, sometimes they contradicted each other, and others were insufficient to address the problem. I hypothesize that the Colombian Constituent Assembly did not agree on a well-structured constitutional plan to address economic inequality. Therefore, I argue that, to make significant progress in overcoming inequality, it is essential to have a more precise, coherent, and comprehensive plan as possible that includes constitutional mechanisms to prevent internal

[13] *See, e.g.*, Julieta Lemaitre, La paz en Cuestión: La Guerra y la Paz en la Asamblea Constituyente de 1991 37 (2011).

[14] The Constitutional Camber of the Supreme Court of Justice —in a landmark decision that followed a "Hans Kelsen's rationale"— stated that the Constitution of 1886 had no validity because it was not effective in dealing with the country's instability; Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala Plena, Sentencia 138, octubre 9, 1990, M.P.: Hernando Gómez & Fabio Morón, Expediente 2214 (351-E) (Colom.).

[15] Constitución Política de Colombia [C.P] arts. 332-338, especially art. 334.

[16] *Id.* at arts. 58, 60, 64.

[17] *Id.* at arts. 356-362.

[18] *Id.* at art. 363.

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forces like the executive and legislative branches and even external ones from eluding that goal.[19]

Concerning the methodology, this article analizes the proposals and debates of the Colombian Constituent Assembly published between February 5 and December 31 in 1991 by the newspaper *Gaceta Constitucional*.[20] The 144 issues of the Gazette contain the 131 proposals presented and discussed in the meetings (some of them are entire constitution drafts, whereas others consist of new articles or amendments), the publication of the Constitution and its errata, and the minutes of the discussions in the commissions and the plenary of the Assembly. The importance of the Gazette is that this source can show us the disagreements and consensus reached by the Assembly on how to tackle economic inequality and the related concepts that were debated. Although the complete transcripts of the debates are also available online, I generally excluded this source to avoid double work and focused mostly on the print copies of the Gazette. The issues of the Gazette provide a sufficient, comprehensive, and substantive summary of the discussions, that is, the minutes of the meetings, and a transcript of all the proposals and their motivations as expressed by the drafters, which were enough for the purposes and scope of this research.[21] However, in a few cases, I resorted to the transcripts when I considered that they could provide additional interesting information. The paper also draws on secondary sources such as books, newspaper articles, and statistics, to contextualize the Assembly's ideological struggles.

The article proceeds in four chapters. Chapter one explains the background, composition, and organization of the Constituent Assembly in 1991. Chapter two delves into the debates on economic inequality in the Assembly. After a brief historical description to set the context in each section, it shows that the issue of economic inequality was discussed in terms of five broad topics and analyzes the debates for what they reveal about areas of agreement and dissent. Chapter three shows that the agreements incorporated into the Constitution to overcome inequality were inadequate to permit the genesis of a structurally coherent approach to reducing economic inequality. Based on that experience, chapter four reflects on the need for a more precise, coherent, comprehensive,

[19] There is a debate among scholars about the neoliberal nature of the Constitution of 1991. Although there is an agreement about the presence of neoliberal and interventionist approaches, the discussion up to date is whether the constitution has enough tools to prevent that a neoliberal interpretation of the text overrides it; *see, e.g.*, Jairo Estrada, *Las Reformas Estructurales y la Construcción del Orden Neoliberal en Colombia*, in Los Desafíos de las Emancipaciones en un Contexto Militarizado 247, 247-284 (Ana Ceceña ed., 2006).

[20] The data was consulted online at: Biblioteca del Banco de la República de Colombia, *Gaceta Constitucional* (1991) available at: https://babel.banrepcultural.org/digital/collection/p17054coll26/id/3702 [https://perma.cc/ZLW2-C7M2].

[21] Among the available sources from the Assembly meetings in the library Biblioteca Luis Ángel Arango in Bogotá, there are video and audio cassettes, and people's and drafters' proposals.

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and creative constitutional design as possible to better contribute to overcoming economic inequality. Finally, I present a brief conclusion.

II. The Colombian Constituent Assembly of 1991

In 1990, the Colombian people seemed to be at war with themselves. On the one hand, they carried out an armed conflict of almost 35 years between insurgent groups of the extreme left trying to seize power and a political elite that divided power among themselves. On the other hand, the drug cartels had declared war on the State and anyone who dared to question their nascent economic power and political influence. In this scenario, there were Colombians who assassinated compatriots to the highest bidder, hired by the State, or people with the sufficient economic capacity to do so and who considered their interests threatened. Also, the executive branch oppressed the population through a permanent state of exception with the justification of having greater maneuverability to combat both illegal armed groups and citizens considered sympathizers. And, of course, civil society, passively or actively, participated in this bloodbath, either as a victim or as a perpetrator, directly or indirectly.[22] It is in this context that the Colombian Constituent Assembly was born.

The opening context of this chapter presents the birth of the Constituent Assembly as an instrument to re-legitimize the State before the armed actors and to pacify the country. Back then, Colombia was a country with great economic inequality that a constituent assembly could not ignore. According to the World Bank, between the late 1970s and 1980s, Colombia's income inequality according to the GINI index was between 0.53 and 0.54.[23] For the Bank, although inequality was extreme on the international scene, these figures were moderate according to the Latin American regional context. On the other hand, most of the literature agrees that one of the structural causes of violence is inequality in access to land.[24] Thus, for example, according to some estimates,

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[22] *See, e.g.,* David Bushnell, Colombia. Una Nación a pesar de sí Misma 353-388 (19th ed. 2014) [Bushnell, Colombia].

[23] 1 World Bank, Colombia Poverty Report 14 (2002) available at: http://documents1.worldbank.org/curated/en/532871468770949746/pdf/multi0page.pdf [https://perma.cc/X4X8-92YB].

[24] In fact, that was the first point of the Agreement between the Colombian State and the FARC guerrilla in 2016; *see* Gobierno Nacional de Colombia & Fuerzas Armadas Revolucionarias de Colombia – Ejército del Pueblo, *Acuerdo Final Para la terminación del Conflicto y la Construcción de una Paz Estable y Duradera* 9-31 (2016) available at: https://www.jep.gov.co/Documents/Acuerdo%20Final/Acuerdo%20Final%20Firmado.pdf [https://perma.cc/NUQ9-DDS2]; Centro Nacional de Memoria Histórica, *¿De Quién es la Tierra en Colombia?* (2018) available at: http://www.centrodememoriahistorica.gov.co/micrositios/balances-jep/tierras.html [https://perma.cc/SE7T-4458]; Catherine LeGrand, Colonización y Protesta Campesina en Colombia (1850-1950) (2nd ed. 2016).

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in 1984, 0.5% of the proprietors owned 32.7% of the owned surface area in the country, while 65.7% of the owners only held 5% of such area.[25]

Income and wealth inequality were observed not only at the population level but also at the territorial level. The Constitution of 1886 abolished the federated states and enshrined a centralized presidential regime.[26] During the twentieth century, decentralization did not begin until the constitutional reform of 1968,[27] which, among other aspects, created the figure of the *situado fiscal* for departments and the *juntas de acción comunal* in the municipalities,[28] and continued with the constitutional reform of 1986 that allowed the popular election of mayors and governors.[29] Besides these timid attempts by the central State to improve the redistribution of resources and provide territorial entities with greater autonomy, it cannot be denied that Colombia had regions where the State was not present through basic services such as healthcare or education, which the illegal armed actors used as a justification for their struggle but also to victimize the civilian population. This feedback loop between violence and inequality that continues today is what best defines the crossroads at which the Constituent Assembly stood in 1991. As can be seen, several factors fall within this turbulent relationship between violence and inequality. However, before evaluating what was said about inequality and how the problem was addressed in the constituent process, it is necessary to describe the genesis of the Constituent Assembly, its composition and organization, and the means of dissemination of its work, especially the Constitutional Gazette.

1. A Call for Drafting

In the late 1980s, President Virgilio Barco, an MIT-trained engineer and member of the *Partido Liberal Colombiano – PL*, (Colombian Liberal Party, the traditional center left-wing party), came to power and, in 1988, laid the foundations for the Constituent Assembly that would materialize three years later. Barco's proposal included the desires of various political sectors that demanded an opening of the State for greater democracy and institutional solidity. For example, in 1977, President Alfonzo López Michelsen, son of former President Alfonso López Pumarejo who had led the first social constitutional reform in

[25] 1 Darío Fajardo Montaña, Cuadernos Tierra y Justicia. Tierra, Poder Político y Reformas Agraria y Rural 5 (2002) available at: http://www.ilsa.org.co/biblioteca/Cuadernos_Tierra_y_Justicia/Cuadernostierrayjusticia_1/Tierra_poder_politico_y_reformas_agraria_y_rural.pdf [https://perma.cc/NC7X-WXPV].

[26] Constitución Política de Colombia de 1886.

[27] Acto Legislativo 1 de 1968, diciembre 11, 1968, Diario Oficial [D.O.] 32673 (Colom.).

[28] The "*situado fiscal*" was a portion of the State current revenues given to the departments (the former States) to spend in healthcare and education. The "*juntas de acción comunal*" are community action councils managed and integrated by people in neighborhoods to deal with community problems.

[29] Acto Legislativo 1 de 1986, enero 9, 1986, Diario Oficial [D.O.] 37304 (Colom.).

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1936, presented to Congress a proposal for a constitutional reform that would allow the convening of a small "constituent assembly" to reform the justice system; although the Supreme Court of Justice declared it unconstitutional due to the lack of competence of Congress to delegate its functions to an assembly.[30] On the other hand, a few years later, in 1985, in the framework of the peace talks between the government of President Belisario Betancourt and the communist guerrilla *Fuerzas Alternativas Revolucionarias de Colombia — FARC*, the *Unión Patriótica — UP* (Patriotic Union) political party, born out of these talks, proposed a Constituent Assembly. The aim was to draft a new, more participatory constitution, where the exceptional powers of the president were limited, human rights were guaranteed, and the State intervened in the economy and private property to combat the effects of "transnational capital".[31] Thus, Barco sought to meet these reform demands.

However, the 1980s were a period of violence that made a change in the State structure more necessary.[32] By then, the attempts at a peace agreement by former president Belisario Betancur and the communist guerrillas were weakening; in 1987, the first UP presidential candidate, Jaime Pardo Leal, was assassinated; and Pablo Escobar started to force the national government to avoid extradition of drug traffickers to the United States. In a "country of many lawyers", a new constitution or, at least, a profound structural reform seemed to help combat the weakness of the State and restore its legitimacy.

To achieve that, Barco proposed calling the people to a plebiscite on the elimination of Article 13 of the Plebiscite of 1957, which only granted Congress the possibility of modifying the Constitution.[33] His objective was that once this impediment was removed, the people would vote for a Constituent Assembly. To give greater political strength to this project, Barco agreed with former president Misael Pastrana, leader of the antagonist conservative party, the so-called *Acuerdo de la Casa de Nariño* (Agreement of the House of Nariño) of February 20, 1988, after Pastrana had refused to support it because the initially scheduled date would coincide with an election of mayors and governors.[34] In this agreement, it was planned to hold a referendum on October 9, 1988, in

[30] Acto Legislativo 2 de 1977, diciembre 19, 1977, Diario Oficial [D.O.] 34935 (Colom.); Luis Carlos Pinzón, *El Colegio del Rosario y la Constituyente para la Justicia*, 3 Revista Nova et Vetera, no. 32 (2017) available at: https://www.urosario.edu.co/Revista-Nova-Et-Vetera/Vol-3-Ed-32/Omnia/El-Colegio-del-Rosario-y-la-Constituyente/ [https://perma.cc/4EHU-TGDG].

[31] Roberto Romero Ospina, Unión Patriótica. Expedientes Contra el Olvido 420 (2nd ed. 2012) available at: http://centromemoria.gov.co/wp-content/uploads/2020/05/UP-Expedientes-contra-el-olvido.pdf [https://perma.cc/L24T-RWFV] [Ospina, Unión Patriótica].

[32] A popular documentary on contemporary Colombian history named the period between 1984 and 1989 as *El Terrror* (The Terror), *see* Mauricio Gómez & Julio Sánchez, *¡Colombia Vive! 25 años de Resistencia* (2008) available at: https://www.youtube.com/watch?v=yZ79B4f5WFI [https://perma.cc/9KY2-DT42].

[33] Decreto 247 de 1957, octubre 4, 1957, Diario Oficial [D.O.] 29517.

[34] *See* Maite Fonnegra González, *El Plebiscito de 1988*, Revista Facultad de Derecho y Ciencias Políticas, no. 82 173 (1988).

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which the people would eliminate the aforementioned Article 13. However, the Council of State decided the provisional suspension of the pact because it could generate an unconstitutional act as, according to the Plebiscite integrated into the Constitution, only Congress could reform the Constitution.[35]

As an alternative, on July 27, 1988, Barco decided to present a constitutional reform draft to Congress so that it could be approved by the people through a referendum.[36] The project included an agenda very similar to the one studied three years later by the 1991 Assembly. The project was a formal reform, but it introduced structural changes such as the establishment of the Social State of Law (Article 1), a chapter on fundamental rights (Articles 7 to 14), and the limitation of the state of siege (Article 49), among others.[37] Between 1988 and 1989, Colombia experienced one of the most violent periods in its recent history with events such as the assassination of another presidential candidate, the liberal Luis Carlos Galán, and Pablo Escobar's terrorist attempts to prevent the extradition of drug traffickers. However, on December 5, 1989, the House of Representatives approved without debate the inclusion of an article where the people were asked to approve or reject the non-extradition of nationals. For this reason, Barco retired the support for the entire constitutional reform proposal and requested the Senate to postpone it (which practically meant to withdraw it), arguing that, just for that article, the drug traffickers would pressure the people, through terrorism, to vote affirmatively.[38]

In 1990, various political and social sectors demanded the realization of constitutional changes necessary to stop the country's instability. In January 1990, in the Office of the Dean of the Faculty of Jurisprudence of the Universidad del Rosario in the historic center of Bogotá, the dean, and some young professors and students met to discuss the proposal of Fernando Carillo, a Harvard-trained young law professor. Carrillo stated that the Colombian people, being the primary constituent, could speak out to convene a Constituent Assembly without any constituted body being able to prevent it.[39] The mechanism that he devised consisted of the students inviting the Colombian people to intro-

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[35] Consejo de Estado [C.E.] [Council of State], Sala de lo Contencioso Administrativo – Sección Primera – Sala de Decisión, mayo 12, 1988, C.P.: Samuel Buitrago, Expediente 862 (Colom.).

[36] *See* Decreto 510 de 1989, marzo 13, 1989, Diario Oficial [D.O.] 29517. This decree published the draft of the reform "Acto Legislativo número 11 de 1988 Senado, 240 de 1988 Cámara".

[37] *Id.*

[38] *See Entierro de Tercera a la Reforma*, El Tiempo (Dec. 16, 1989), https://news.google.com/newspapers?id=bpwbAAAAIBAJ&sjid=PVMEAAAAIBAJ&pg=3996%2C2378 [https://perma.cc/2VPR-ZR36].

[39] Fernando Carrillo, *La Séptima Papeleta o el Origen de la Constitución de 1991, in* La Séptima Papeleta: Historia Contada por Algunos de sus Protagonistas. Con Ocasión de los 20 años del Movimiento Estudiantil de la Séptima Papeleta 33-34 (María Lucía Torres ed., 2010) available at: http://editorial.urosario.edu.co/pageflip/acceso-abierto/la-septima-papeleta-historia-contada.pdf [https://perma.cc/J3PX-DHJA].

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duce an additional card in the ballot box of the public corporation elections that would be held on March 11, 1990. Although the text of the ballot changed later, its essential message was an affirmative vote to convene a National Constituent Assembly to represent the Colombian people and reform the Constitution of 1886.[40] This card was known as *séptima papeleta* (seventh ballot), because it would be additional to the other official six cards to elect the following public offices: senate, chamber of representatives, departmental assemblies, municipal councils, mayors, and a sixth one of an internal consultation of the *Partido Liberal Colombiano* to choose its presidential candidate. Although the National Registrar's Office as the electoral authority did not count the ballots, it is estimated that around two million were deposited on March 11, 1990.[41] This youth movement, which would be known as *La Séptima Papeleta* (The Seventh Ballot), is the first citizen movement in Colombia's modern history that generated a historical transformation.[42]

This event gave visibility to popular claims for constitutional reform before public opinion, which was welcomed by President Barco through Decree 921 of May 3, 1990.[43] This decree was issued under Decree 1038 of 1984, where he established a state of siege for disturbance of public order. Thus, Decree 921 intended to dictate a measure to restore public order: it ordered the National Registry to issue a card where Colombians could vote if they supported a "Constitutional Assembly" (notice that it is different from a Constituent Assembly) in the presidential elections of May 27, 1990. Decree 921 was automatically submitted to judicial review by the Plenary Chamber of the Supreme Court of Justice as it was an act issued after the use of the state of siege, and the Court declared it constitutional three days before the election was held.[44] In summary, the Court declared that there was a connection between the measures adopted by the decree and the country's troubled situation. For the Court, the decree was of electoral content, it was not a constitutional reform referendum or plebiscite; it was up to the president to be the promoter of the initiative to register the pronouncement of the people. Furthermore, the popular clamor represented in demonstrations such as *La Séptima Papeleta* could not be ignored, nor could the public expressions of political parties calling for an institutional change to confront state instability.

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[40] *Id.* at 35, 36.

[41] *See id.* at 40; Registraduría Nacional del Estado Civil, El Camino Hacia una Nueva Constitución Nacional de Colombia, (2011) available at: https://webcache.googleusercontent.com/search?q=cache:0ww6Sq48y8gJ:https://www.registraduria.gov.co/Edicion-No-53-Ano-V-julio-de-2011.html+&cd=1&hl=es-419&ct=clnk&gl=co [https://perma.cc/356R-28N6] [Registraduría, *El Camino*]; *comp.* Óscar Alarcón, La Cara Oculta de la Constitución del 91 23-25 (2011) [Alarcón, La Cara Oculta].

[42] *See* Registraduría, *El Camino*, *supra* note 41.

[43] Decreto 927 de 1990, mayo 3, 1990, Diario Oficial (D.O.] 39335.

[44] Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala Plena, Sentencia 59, mayo 24, Expediente 2149 (334-E) (Colom.).

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During the 1990 electoral campaign, two presidential candidates were assassinated. The first of them was the ex-guerrillero from the new *Alianza Democrática M-19* or *AD M-19* (Democratic Alliance M-19) party, Carlos Pizarro.[45] The guerrilla of nationalist and social-democratic inspiration M-19 was founded in 1973 by the left-wing of the *Alianza Nacional Popular — ANAPO* (Popular National Alliance) party, founded by the former dictator Gustavo Rojas Pinilla who transformed himself into a popular caudillo, summoning people from various political sectors. The reason for its foundation was the alleged electoral fraud in the presidential elections of 1970 that declared conservative Misael Pastrana Borrero, candidate of the *Frente Nacional* (National Front), the winner, the political pact of the late 1950s through which only the two traditional parties would alternate power between 1958 and 1974. For this reason, the M-19's main demand was the opening of the democratic regime.[46] The second assassinated politician was the communist leader Bernardo Jaramillo who assumed the representation of the Patriotic Union after the murder of Jaime Pardo Leal.[47] Nevertheless, on March 27, 1990, César Gaviria, the candidate of the *Partido Liberal Colombiano — PL* and former government minister, as well as the political heir of the assassinated liberal leader Luis Carlos Galán, was elected president.[48] In the same election, the call for a Constitutional Assembly proposal obtained 4,991,887 affirmative votes and 226,451 negative votes out of a total of 5,218,338 votes; that is, 95% of those who spoke about the Assembly, demanded its convocation.[49] Therefore, once the people expressed their approval, President Gaviria agreed on the date and agenda for the convocation of the Assembly with the leaders of the three main parties defeated in the presidential campaign. They were Antonio Navarro Wolf (a former leftist guerrillero) from the political movement *Alianza Democrática M-19 — AD M-19* (Democratic Alliance M-19, a pluralistic party constituted after the demobilized leftist guerrilla M-19); Álvaro Villegas Moreno from the *Partido Social Conservador — PC* (Conservative Party; the traditional right-wing and Catholic party); and Álvaro Gómez (son of the former conservative president Laureano Gómez) from the *Movimiento de Salvación Nacional — MSN* (National Salvation Movement, a dissident of the Conservative Party).[50] Thus, the President issued the Decree 1926 of August 24, 1990, which summoned the people to elect their constituents to the National Constitutional Assembly on December 9 of that year.[51] The political consensus reached by the government with the parties was to elect 70 drafters according to a national constituency that, in turn, guaranteed the

45 Bushnell, Colombia, *supra* note 22, at 374-375.

46 *Id.* at 346.

47 *Id.* at 374.

48 *Id.* at 375.

49 Registraduría, *El Camino, supra* note 41.

50 Alarcón, La Cara Oculta, *supra* note 41, at 29.

51 Decreto Legislativo 1926 de 1990, agosto 24, 1990, Diario Oficial [D.O.] 39512.

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participation of minority groups. However, the President reserved the right to appoint drafters from the armed groups that lay down their arms and wanted to join the constituent process. The formula agreed upon for the positive voting card was: "Yes, I call a Constitutional Assembly that will meet between February 5 and July 4, 1991, which will be regulated by the provisions of the Political Agreement on the Constituent Assembly incorporated into the Decree 1926 of August 24, 1990. Its jurisdiction will be limited to the provisions of said Agreement. I vote for the following list of candidates to integrate the Constitutional Assembly[...]".[52] In other words, the decree limited the constitutional reform to a political agreement that imposed guidelines for reform: Congress, the justiciary, the public prosecutor office, the public administration, the political parties, the opposition, the territorial regime, the participation mechanisms, the regulation of the state of siege, the economic regime, and fiscal control.

Although that did not please public opinion, the Supreme Court of Justice declared the unconstitutionality of those sentences that limited the competence of the Constitutional Assembly one month before the election.[53] The main argument of the Court was that such an assembly was the primary constituent power, that is, the direct representation of the people and, therefore, superior to any constituted body. In this way, the Assembly, despite being called "constitutional" even on the electoral card, would be a "constituent assembly" with all the powers to reform the State.

In summary, the call for a constituent assembly did not arise suddenly. Nor was it an act devised solely by a student movement, as many may mistakenly believe three decades later. This call reflects the need for institutional change identified by a sector of Colombian society made up of some members of traditional parties and civil society. Although the demands for change were requested by sectors of different political currents, the idea of a constituent assembly materialized thanks to the support of the political elite (traditional political parties) and intellectuals of the country (professors and students from universities, most of them private and elite institutions).[54] Furthermore, it is interesting to notice that there were coincidences between these sectors on the general aspects to be reformed; the political agreements that preceded each attempt at constitutional reform demonstrate this. It helps us to foresee that perhaps the Constituent Assembly of 1991 was not so innovative in its proposals. But also, returning to the issue of economic inequality, that could explain why the Assembly did not introduce more radical economic changes such as those proposed, for example, by the Patriotic Union, a party that was outside the elite, and the initial political agreements that originated the convention, as this article

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[52] *Id.*

[53] Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala Plena, Sentencia 138, octubre 9, 1990, M.P.: Hernando Gómez & Fabio Morón, Expediente 2214 (351-E) (Colom.).

[54] *See, e.g., Los Yuppies Constituyentes*, Semana (Nov. 11, 1990) available at: https://www.semana.com/nacion/articulo/los-yuppies-constituyentes/14123-3/ [https://perma.cc/CME8-DNH6].

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will show. Then, who were the ones coming to the Assembly in 1991? I analyze them in the following section.

2. The Chosen

The constitutional assembly congregated people from diverse backgrounds who had never had the chance to meet to design the structure of the State. In the elections of December 9, 1990, the people elected 70 drafters, including indigenous people, protestants, guerrilla and paramilitary members, leftists, rightists, elite politicians, and only four women. However, because of the election mechanism agreed upon by the government and the main political parties, the territories did not have direct representation, so most of the elected constituents were recognized as political figures nationwide. In the following paragraphs, I describe the political sectors that composed the new Assembly.

The majoritarian group with 25 drafters was the liberals, of which 17 were elected through the official list of the *Partido Liberal Colombiano — PL*, one of the two traditional parties in the country and the ruling party at the time.[55] Liberals did not have a homogeneous tendency and many liberals got elected through independent movements such as *La Séptima Papeleta* or *Nueva Colombia*. In the economic realm, for example, despite internal differences, the party supported the economic opening of the country (the end of the import substitution industrialization policy) and the confidence in economic growth through the market economy as the right way for the development of the country. Some constituents, such as Guillermo Perry, an MIT-trained economist and former minister of Virgilio Barco, promoted a balance in State intervention in the economy,[56] while others like Carlos Lemos Simmonds, also a former minister of Barco, favored less State intervention in the economy.[57] Furthermore, this group favored policies that prioritized social spending and overcoming inequalities both on social and economic levels. Although not formally integrated, former colleagues of the assassinated presidential pre-candidate Luis Carlos Galán made up this group, such as Iván Marulanda, founder of the movement *Nueva Colombia,* but also members of *La Séptima Papeleta* movement like young law professor Fernando Carrillo.

The second party was the AD M-19 with 19 drafters.[58] Its leaders applied a strategy to call all sectors of society so that the party represented a national dialogue among diverse political trends. Thus, the party was composed not only of ex-guerrilleros and their sympathizers but also of people from several origins,

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55 Banco de la República, *Miembros de la Asamblea Nacional Constituyente de 1991*, Enciclopedia. Available at: https://enciclopedia.banrepcultural.org/index.php?title=Miembros_de_la_Asamblea_Nacional_Constituyente_de_1991 [https://perma.cc/DM6M-N8FG] [Banco de la República, *Miembros de la Asamblea*].

56 Asamblea Nacional Constituyente, Gaceta Constitucional, no. 48, Ap. 12, 1991, at 12.

57 Asamblea Nacional Constituyente, Gaceta Constitucional, no. 49, Ap. 13, 1991, at 10.

58 Banco de la República, *Miembros de la Asamblea*, *supra* note 55.

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some rich and some poor, rightists or leftists, and even one physician elected with the direct collaboration of paramilitary groups named Augusto Ramírez. The AD M-19 wanted him to be the link with paramilitary groups because it hoped to convince them of the benefits of political participation and peace. Even so, Ramírez did not have an outstanding performance in the Assembly.[59] Therefore, it is difficult to characterize the political trend of the whole party; however, its leaders had left-wing and socio-democratic nationalist inspirations and had managed to enter the political arena thanks to a weapons demobilization agreement reached with Barco's government. The fact of becoming the second political force in the Constituent Assembly shows the enthusiasm of the people for strategies that fostered inclusion to reconcile the country. Furthermore, the success of AD M-19 could also be explained by the popularity of the former guerrilla in the 1980s because of its claims against the political elite and restricted democracy.

The third party was the *Movimiento de Salvación Nacional —MSN*, founded by the conservative leader Álvaro Gómez. The party was created in 1990 to support his presidential campaign because his political party, the *Partido Social Conservador— PC*, preferred another politician, Rodrigo Lloreda. Álvaro was Laureano Gómez's son, a former president who, in the 1950s, promoted a constitutional reform with elements of Francisco Franco's corporativism in Colombia, and whose government precipitated the unique official dictatorship in Colombia in the twentieth century by Gustavo Rojas Pinilla.[60] Perhaps his heritage affected his political image and deprived him twice of being president.[61] This right-wing party obtained 11 delegates.[62] Among other proposals, this coalition supported the opening of the national economy to the international market, the reduction of State intervention in the economy, and even some drafters, like Raimundo Emiliani proposed the elimination of the social function of property, one of the main features of social constitutionalism in Colombia since 1936.[63] In summary, the MSN promoted a conservative agenda in the Assembly.

The fourth party was the *Partido Social Conservador – PC* with nine members.[64] This is the second traditional party in Colombia, and, in the Assembly, it con-

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[59] *See* Pilar Lozano, *Escándalo en Colombia por un vídeo que muestra al abogado de Escobar sobornando a un diputado*, El País (Aug. 17, 1991), https://elpais.com/diario/1991/08/18/internacional/682466405_850215.html [https://perma.cc/254S-4KZ6]; *¿Acuerdo entre 'paras' y el M-19 en la constituyente del 91?*, Verdad Abierta (Mar. 7, 2012) available at https://verdadabierta.com/paramilitares-colombia-constituyente-91-ernesto-baez-m19/ [https://perma.cc/6K7Z-HRZP] [*¿Acuerdo entre 'paras' y el M-19 en la constituyente del 91?*, Verdad Abierta].

[60] Bushnell, Colombia, *supra* note 22 at 302-304.

[61] *Laureano Gómez 1889-1955. El Rugido del León*, El Tiempo (Mar. 7, 1999) available at: https://www.eltiempo.com/archivo/documento/MAM-858343 [https://perma.cc/B3K3-GXJW].

[62] Banco de la República, *Miembros de la Asamblea*, *supra* note 55.

[63] Asamblea Nacional Constituyente, Gaceta Constitucional, no. 6, Feb. 18, 1991, at 4-6.

[64] Banco de la República, *Miembros de la Asamblea*, *supra* note 55.

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gregated people of right-wing ideology with traditional and social Catholic doctrines. Ideologically, both this party and MSN were conservatives, despite some members who were elected through an independent list like Rodrigo Lloreda's movement, *Movimiento Unidos por Colombia*. Conservative drafters favored a balance between State intervention in the economy and the role of the private sector in promoting social welfare. For example, Rodrigo Lloreda, the politician who replaced former president Misael Pastrana as a constituent, stated that the State was neither the best nor the only actor to distribute income.[65] Also, they supported the priority of social expenditure and its allocation according to territorial necessities, such as Mariano Ospina Hernández (an MIT engineer and Mariano Ospina's son, the former President at the beginning of *La Violencia* in the 1950s).[66] They tended to support the social agenda proposed by the government, such as the establishment of Colombia as a Social Rule of Law, and the consecution of social justice to overcome poverty, a position that seems to be grounded in the Christian discourse of the social doctrine of the Catholic Church.

The Assembly also reunited drafters from the *Movimiento Unión Cristiana — UC* (Christian Union Movement), the *Unión Patriótica — UP* (Patriotic Union), and the Indigenous Movements *Organización Nacional Indígena de Colombia — ONIC* (National Indigenous Organization of Colombia) and *Autoridades Indígenas de Colombia — AICO* (Indigenous Authorities of Colombia). The first group consisted of two Protestant pastors known in national politics at the time: Jaime Ortiz and Arturo Mejia.[67] Their presence in the Constituent Assembly was remarkable because, in a traditionally Catholic country, it was the first time that members of another religion could participate in designing the constitution.[68] Their main objective in the Assembly was to achieve greater recognition of religious diversity, but they also advocated for an economy guided by the Christian doctrine of social justice.[69]

The second group, with two members, was the UP, the party that was born in the framework of the peace talks between President Belisario Betancourt and the communist guerrilla *Fuerzas Alternativas Revolucionarias de Colombia — FARC* in 1985.[70] The UP drafters in the Assembly were Aida Avella, a psychologist, communist, and union leader, who served later as its president; and Alfredo Vásquez, a conservative politician and former foreign affairs minister in the

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[65] Asamblea Nacional Constituyente, Gaceta Constitucional, no. 50a, Ap. 19, 1991, at 4 [Asamblea, no. 50a].

[66] Asamblea Nacional Constituyente, Gaceta Constitucional, no. 103, June 20, 1991, at 12.

[67] Banco de la República, *Miembros de la Asamblea*, *supra* note 55.

[68] *Una Sorpresa: Los Candidatos de Dios*, El Tiempo (Dec. 11, 1990) available at: https://www.eltiempo.com/archivo/documento/MAM-34564 [https://perma.cc/EK9C-ERMP].

[69] *See, e.g.*, Asamblea Nacional Constituyente, Gaceta Constitucional, no. 9, Feb. 19, 1991, at 21 [Asamblea, no. 9].

[70] Banco de la República, *Miembros de la Asamblea*, *supra* note 55.

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government of Misael Pastrana. The UP leaders called Avella to integrate the list as the second option after Vásquez because she was a woman, a unionist, and a leftist leader, and they believed that the Assembly would need more people with this profile.[71] On the other hand, it is curious to find the participation of Vásquez in a leftist party; he was one of the main scholars and politicians that defended human rights and denounced the concentration of power in the presidency, two things that characterized the domestic left political discourse in the period and that might explain why he accepted the nomination but not the reasons for his nomination by the party.[72] In any case, the UP favored economic measures like direct taxation, social investment, and land reform.

The third group was made up of two indigenous leaders who introduced claims by indigenous peoples and by Afro-Colombians and other ethnic groups for greater recognition of their rights.[73] Among these leaders were Francisco Rojas Birry and Lorenzo Muelas. Birry, a young lawyer and indigenous leader from Chocó, the country's poorest department, marked by the dense presence of Afro-Colombians and indigenous communities within its jungles. Muelas, born into a modest family in Cauca, one of Colombia's persistently impoverished, violent, and unequal regions, actively championed land rights in his community as a leader.[74] In general, these two drafters advocated for a greater commitment by the State to pursue development in harmony with the environment and with communal ownership of "ancestral" lands.

In addition to the seventy popularly elected members, the Assembly included the participation of four additional drafters. Two constituents, Jaime Fajardo and Darío Mejía, represented the recently demobilized Marxist guerrilla group *Ejército Popular de Liberación — EPL* (Popular Liberation Army). This group was later renamed *Esperanza, Paz y Libertad*, which translates to Hope, Peace, and Liberty, after the peace talks with the national government.[75] Their left-wing ideology helped them to reach the Assembly with ideas on overcoming the economic inequalities that caused the war, but also with proposals on amnesty and reintegration plans to make peace with all guerrillas.[76] There was also a

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[71] Laura Ospina, *Aída Avella, una defensora de los derechos fundamentales en la Constitución de 1991*, El Espectador (Mar. 20, 2021), https://www.elespectador.com/noticias/politica/aida-avella-una-defensora-de-los-derechos-fundamentales-en-la-constitucion-de-1991/ [https://perma.cc/F5Y3-BQB8].

[72] *Alfredo Vásquez Carrizosa, un conservador diferente*, El Espectador (Feb. 19, 2021), https://www.elespectador.com/noticias/politica/alfredo-vasquez-carrizosa-un-conservador-diferente/ [https://perma.cc/V3JD-K2WF]. On the relationship between the leftists and the human rights discourse between 1970 and 1980, *see* Jorge González, Revolución, democracia y paz Trayectorias de los Derechos Humanos en Colombia (1973-1985) (2019).

[73] Banco de la República, *Miembros de la Asamblea*, *supra* note 55.

[74] Juan S. Lombo, *Lorenzo Muelas, la voz de los indígenas en Asamblea Constituyente*, El Espectador (Mar. 20, 2021), https://www.elespectador.com/noticias/politica/lorenzo-muelas-la-voz-de-los-indigenas-en-asamblea-constituyente/ [https://perma.cc/7XKW-C9NA].

[75] Banco de la República, *Miembros de la Asamblea*, *supra* note 55.

[76] *See, e.g.,* Asamblea Nacional Constituyente, Gaceta Constitucional, no. 52, Ap. 17, 1991, at 24.

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constituent named José Matías Ortíz, a drafter from the Marxist guerrilla *Partido Revolucionario de los Trabajadores — PRT* (Revolutionary Workers' Party), who supported the limitation of presidential powers and the armed forces;[77] but also, a drafter from the *Movimiento Armado Quintín Lame — MAQL* (Quintín Lame Armed Movement), an indigenous guerrilla that emerged in the 80s and whose drafter in the Assembly, Alfonso Peña (an indigenous leader from Cauca), favored land distribution and even expropriation to achieve that purpose.[78] All four drafters had the right to speak in the Assembly, but only the two ELP delegates could vote. Eventually, the Colombian people in all regions had the opportunity to intervene in the Assembly by sending proposals and suggestions to be debated in the meetings.

There were relevant but missing actors in the Assembly. The first ones were the Afro-descendant communities. Carlos Rosero, who was born in Valle del Cauca (a department with a high concentration of African descendants) and was profiled as a candidate for black communities, did not obtain enough votes.[79] That is why the Assembly did not get direct drafters from Afro-descendant communities and, instead, these communities had to lobby with drafters of parties such as the AD M-19. The second ones were the FARC delegates. Although the UP originated to support the FARC's transition to peace, the party did not introduce itself as the political branch of the FARC (remember the nomination of conservative Alfredo Vásquez). The hopes that the FARC integrated the Assembly died when the government bombed Casa Verde, the main FARC's camp, on December 9, 1991, the same day of the polls for the Assembly.[80] Nevertheless, some of their historical claims, such as land reform, were eventually incorporated in the Constitution through the Peace Agreement of 2016.[81] Although one can speculate about the outcome of such a consensus, for instance, in the shortening of the armed conflict, the real issue at stake is the surviving lack of consensus of all Colombian sectors in the drafting of the Constitution. Furthermore, there were no drafters from the *Ejército de Liberación Nacional – ELN* (National Liberation Army), a communist guerrilla created in 1964 and supported by Cuba that included people from student movements, the Communist Party of Colombia, and a dissident wing of the *Partido Liberal Colombiano*.

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77 Asamblea Nacional Constituyente, Gaceta Constitucional, no. 29, Mar. 30, 1991, at 20.

78 Asamblea Nacional Constituyente, Gaceta Constitucional, no. 60, Ap. 26, 1991, at 15.

79 Mónica Morales, *Movimiento afrodescendiente colombiano en la Asamblea Nacional Constituyente de 1991: de la política de influencia a la política del poder*, 2 Estado & Comunes, Revista de Políticas y Problemas Públicos, no. 11 37 (2020).

80 Colombia en Transición, *Casa Verde: 30 años del bombardeo que cambió la guerra con las Farc*, El Espectador (Dec. 8, 2020), https://www.elespectador.com/colombia2020/justicia/verdad/casa-verde-30-anos-del-bombardeo-que-cambio-la-guerra-con-las-farc/ [https://perma.cc/8GAN-ADNQ].

81 Acuerdo Final, *supra* note 24.

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Finally, it is worth asking whether the drug dealers and the paramilitary groups should have been allowed to attend the Assembly as independent groups. As discussed before, one can argue that they attended indirectly through at least one AM-19 drafter, but this was not the same as having official drafters who could commit their groups to agree to the constitution and the implicit peace agreement. A notable difficulty was that these groups did not have a clear political ideology and proposals to present before the Assembly.[82]

3. The Organization of the Constituent Assembly

The Assembly was made up of a board of directors, five commissions, a coding commission, and a plenary. The organization was structured in accordance with various topics, including human rights and territorial organization, among others. In this section, I describe how the Assembly split up to discuss the reforms.

Firstly, the board of directors was integrated by the leaders of the three main movements in the Assembly. Thus, a sort of triumvirate held the presidency, the drafters were the former M-19 guerrillero Antonio Navarro, the conservative leader Álvaro Gómez, and the liberal former minister Horacio Serpa, who obtained the highest number of votes among liberals.[83] Also, each drafter submitted their proposals; for example, Gómez favored environmental protection, Navarro proposed a stronger catalog of rights, and Serpa emphasized labor rights and social planning, among many more topics. Moreover, each commission had a president and a vice president chosen from the minority parties to assure a democratic allocation of high positions within the Assembly.

The rest of the drafters made up the following commissions:

- Comisión Primera. The First Commission debated the principles, rights, and duties, as well as the mechanisms of democratic participation, and the constitutional amendment procedure. It had 16 elected drafters and one appointed drafter from the EPL. This commission was presided over by Jaime Ortiz (Cristian Union) and Francisco Rojas Birry (indigenous peoples) and had drafters such as Aída Avella, Horacio Serpa, and Darío Mejía.[84]
- Comisión Segunda. The Second Commission studied the territorial distribution of the State and regional autonomy. With 14 members, it included 13 elected drafters and 1 appointed from Movimiento Armado Quintín Lame. Juan Gómez (Conservative Party) and Lorenzo Muelas (indigenous peoples) held the presidency and vice presidency, respectively, and some of the visible

[82] *¿Acuerdo entre 'paras' y el M-19 en la constituyente del 91?*, Verdad Abierta, *supra* note 59.

[83] Banco de la República, *Asamblea Nacional Constituyente*, Enciclopedia, https://enciclopedia.banrepcultural.org/index.php/Asamblea_Nacional_Constituyente [https://perma.cc/SMX6-RRBG] [Banco de la República, *Asamblea*].

[84] Alarcón, La Cara Oculta, *supra* note 41, at 207.

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drafters were sociologist Orlando Fals Borda, former liberal minister Carlos Holmes Trujillo, and Alfonso Peña.[85]

- Comisión Tercera. The Third Commission discussed the structure of the executive and legislative branches, the states of exception, and international relations. Presided by Alfredo Vásquez (Patriotic Union) and José Ortiz (Revolutionary Workers Party), it was integrated by 16 members like Antonio Navarro and the evangelical pastor and lawyer Arturo Mejía.[86]
- Comisión Cuarta. The Fourth Commission debated the administration of justice. Fernando Carillo (liberal and leader of *La Séptima Papeleta* movement) and Jaime Fajardo (EPL) held the presidency and vice presidency. The commission had 9 members, including co-president Álvaro Gómez.[87]
- Comisión Quinta. 18 drafters discussed socio-economic, ecological, and public finance aspects of the constitution in the Fifth Commission. The president and vice president were partisans of the two traditional parties in Colombia, conservative and former presidential candidate Rodrigo Lloreda, and liberal Jaime Benítez, elected through the movement Por Un Nuevo País. However, this commission included union leaders like Angelino Garzón, former senator and economist Ivan Marulanda, Guillermo Perry, and Carlos Lemos Simmonds, among others.[88]

Ultimately, the Assembly had two other bodies: the plenary and the coding commission. 74 drafters composed the plenary, it discussed and approved in the first debate the proposals presented by the commissions. Then, in a second round, it approved the final text of the constitution, except for the two drafters who had no right to vote.[89] The Coding Commission, with nine members had to consolidate the draft after each plenary debate and proposed changes.[90] It was presided over by MSN constituent Carlos Lleras de la Fuente and had the assistance of several scholars such as Ciro Angarita, a Yale graduate who later became a justice of the Constitutional Court and wrote the landmark judgment that defined the new Colombian Social Rule of Law in 1992.[91]

4. Discussions and Voting in the Assembly

The Assembly was installed on February 5, 1991, to promulgate a new Constitution five months later, on July 4, 1991, to coincide with the American Declaration of Independence.[92] Five months were not enough to discuss at length

85 *Id.* at 208.
86 *Id.*
87 *Id.* at 208-209.
88 *Id.* at 209.
89 Banco de la República, *Asamblea*, *supra* note 83.
90 *Id.*
91 Alarcón, La Cara Oculta, *supra* note 41, at 176.
92 *Id.* at 203-204.

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more than 100 proposals by the drafters, institutions, and organizations, and approximately 100,00 people's initiatives throughout the country. In some cases, constituents received proposals to vote for with little time to analyze them. Also, there were some incidents during these months. For instance, before the second plenary session, the Coding Commission lost the files of the articles approved in the first plenary. Consequently, the Coding Commission could not finish on time the final draft of the Constitution, and, on July 4, the co-presidents and the President of the Republic (although he was not a drafter) ended up signing a blank sheet.[93] Thus, the Constitution was published on July 7, 1991, and was corrected later due to several mistakes made during an atypical codification.

In summary, despite the heterogeneous composition of the Assembly and the unfortunate events mentioned before that made it difficult to hold orderly discussions, the drafters agreed broadly on substantive aspects, such as the Social Rule of Law and State intervention in the economy. The organization of the Assembly in those commissions and the enactment of rules to conduct the debates were the best way for the drafters to discuss all the kinds of topics that the people expected to decide on. In the next chapter, I focus on the agreements and disagreements regarding economic inequality.

III. Debating and Drafting on Economic Inequality in the Assembly

Even though tackling economic inequality was not among the main reasons for calling a constituent assembly, a closer study of the debates shows a concern about using the new constitution to overcome economic inequality. This chapter analyzes the ideas about economic inequality proposed and debated in the Assembly, with a focus on five policies or pillars. Firstly, it explains the methodology used to find the economic inequality debates in the Assembly. Then, it classifies them into five topics and identifies the proposals and proponents, the discussions, and the outcomes. Finally, it recapitulates the consensus and dissents.

1. Discussions on Economic Inequality

This chapter analyzes the proposals and debates of the Colombian Constituent Assembly, published between February 5 and December 31 in 1991 by the newspaper *Gaceta Constitucional*.[94] I extracted from the Gazette the consensus and disagreements in the Assembly on how to tackle economic inequality. Al-

[93] *Id.* at 194-199.

[94] Banco de la República, *Diario de la Asamblea Nacional Constituyente*, Colecciones Digitales (1991) available at: https://babel.banrepcultural.org/digital/collection/p17054coll26/id/3850/ [https://perma.cc/WZ24-27ER] [Banco de la República, *Diario*].

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though the complete transcripts of the tapped debates are also available online, I generally excluded this source because the issues contain the relevant substantive summary of the proposals, debates, and agreements. Exceptionally, I included transcript references when I considered it would be interesting to add more details about the drafting process.[95] The Assembly published 144 issues on the proposals presented in the Assembly, the debates around them, and the results. Even though there is an archive with verbatim transcripts of the taped debates, I chose the Gazette as the primary source of this research because it contains all the projects presented before the Assembly and the minutes containing the discussions of each session both in the committees and in the plenary sessions. For this reason, it is the most orderly, complete, and easy-access online source, to approach the deliberations in the Constituent Assembly. The Gazette was presided over by Edgardo Camayo and Jacobo Pérez Escobar as general secretary, and published "64 minutes of the plenary sessions, 152 proposals, 152 project presentations, 112 commission minutes, [...] 76 discourses, 3 codifications of the constitution, the convention regulations [...]".[96] In most editions, the Constitutional Gazette classified proposals and debates according to the topic. However, there is no issue dedicated to economic inequality.

An in-depth reading of the issues shows the concern about economic inequality when the drafters discussed five broad topics: rights, property, State and economy, territorial funding, and taxation. A reading of the debates makes it clear that the drafters recurrently mentioned "economic inequality" and the two components of this general concept ("income inequality" and "wealth distribution") when they presented proposals or debated those five topics. Then, the essay classifies the discourses and proposals presented in the Assembly according to (1) the mention of the expression "economic inequality" and its components ("income inequality" and "wealth distribution") and their respective antonyms (that is, "economic equality," "income equality," and "wealth concentration"), (2) the drafter that pronounced the expression, (3) their political affiliation, (4) the content of their intervention or proposal, (5) the broader topic in which the invocation of the expression was made (that is, rights, economy, etc.), and (5) the approval or denial of the proposal. This chapter articulated all those data points.

Thus, the chapter focused on those mentions and their links to the five topics identified to reconstruct the debate about the conflicting notions of economic inequality in the Assembly. It also identified what entered the constitutional text (that is, the agreements, pillars, or set of policies to tackle economic inequality) and what remained outside (the disagreements). Nevertheless, neither the

[95] Banco de la República, *Asamblea Nacional Constituyente – 1991*, Colecciones Digitales (1991) available at: https://babel.banrepcultural.org/digital/collection/p17054coll28/search/searchterm/Informe/field/type/mode/all/conn/and/order/title/ad/asc [https://perma.cc/FH45-KYKW].

[96] Banco de la República, *Diario*, *supra* note 94.

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gazette nor the transcripts identified each drafter's preferences in most of the polls. Although that prevents having a more exact map of each political force choice, the paper tries to compensate for this gap by describing the popular and the unpopular proposals to offer a contrasted view of the discussions.

2. The Five Pillars of Economic Inequality

Based on an interpretation of that data, there were five issues that the drafters related to the goal of overcoming economic inequality through the new constitutional order. I will describe each one next.

A. Rights

The need to create a more robust catalog of rights, including social rights, was one of the main points of agreement among the drafters. Although Colombia ratified international treaties such as the International Covenant on Social, Economic, and Cultural Rights in 1968, during the presidency of liberal Carlos Lleras Restrepo,[97] and the Inter-American Convention on Human Rights in 1973, during the presidency of conservative Misael Pastrana, the Constitution of 1886 did not enshrine social rights.[98] Even first-generation rights (civil and political) were enshrined in the Civil Code to have "legal force," since the Constitution was not an enforceable norm.[99] In this context, during the twentieth century, Congress and, above all, the executive branch through decrees of the state of exception granted some social guarantees, such as the right to work. However, other constitutional provisions, such as the so-called "public assistance," which the Constitution of 1991 recognizes as the right to social security, never had a practical application.[100]

One of the initial speeches in the Assembly was that of President César Gaviria, who articulated what he thought should be the nature of social rights under the new constitution. He ended up summarizing the general meaning of what these types of rights were for most of the Assembly. Gaviria stated that "[in] a Social State, [...] a law that ignores [social rights] could be declared unconstitutional. [The] obligation [of the State] is to act to protect these rights and guide its economic and social policy to promote sufficient conditions for their realization. These socioeconomic and collective rights cannot be directly demanded by an individual before a judge."[101]

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97 Ley 74 de 1968, diciembre 26, 1968, Diario Oficial [D.O.] 32682.

98 Ley 16 de 1972, diciembre 30, 1972, Diario Oficial [D.O.] 33780.

99 Ley 153 de 1887, agosto 24, 1887, Diario Oficial [D.O.] 7151, art. 7.

100 *See, e.g.*, Corte Constitucional [C.C.] [Constitutional Court], septiembre 23, 1992, Sentencia T-533/92, M.P. Eduardo Cifuentes (Colom.).

101 Asamblea Nacional Constituyente, Gaceta Constitucional, no. 1, Feb. 5, 1991, at 3.

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The Assembly agreed on various socio-economic rights with the understanding that they would not be directly enforceable before a judge but would depend on the State to materialize them progressively. Therefore, the Assembly excluded the *acción de tutela* (the main judicial action invented by the new Constitution) from guaranteeing social rights because the action was aimed to protecting only the so-called "fundamental rights" (that is, civil and political rights). Thus, for example, drafters from different political wings such as Angelino Garzón (PL), Tulio Cuevas (MSN), Carlos Ossa (AD M-19), and Rodrigo Lloreda (PC), all from the Fifth Commission, proposed a right to social security to be developed progressively by the State, according to the principle of solidarity that supports the Social State, to pay off a social debt that caused unfairness.[102] Thus, healthcare ceased to be an "act of charity" and became a "right," guaranteed as a public service by the State, although people could not claim its protection before a judge because it was not a fundamental right.

Another example of a new social right as an instrument to fight inequality under this non-justiciability logic is the right to work. Although the government project had already proposed the idea of fair and sufficient remuneration for the subsistence of the worker,[103] in the debates of the Fifth Commission on social and economic issues, the right to work emerged as a mechanism for overcoming economic inequality in the debates. Thus, Angelino Garzón (AD M-19), Guillermo Guerrero (PL), Tulio Cuevas (MSN), Guillermo Perry (PL), Iván Marulanda (PL — Nueva Colombia), and Jaime Benítez (PL — Por un Nuevo País), proposed the constitutional establishment of the rights to work, to strike, to unionize, and to negotiation; hence, they supported "private property, freedom of business, and the market economy, but [they also defended that] democracy has to be expressed economically and that its foundation is the redistribution of wealth […] linked to the humanistic and Christian principle of social justice."[104] Those rights were eventually approved by the Assembly as they are all enshrined in the Constitution;[105] in this way, the Assembly promoted a conciliatory approach between the social guarantees of the new State and the market economy, the two antagonistic trends among the drafters. The meeting point between the two axes was the promotion of workers' participation in the management and even ownership of the companies, that is, the so-called "solidarity economy." Examples of this type of economic policy are cooperatives, unions, and any other kind of workers' intervention in management and profits. Hence, the Assembly understood the right to work not only as a warrant to the fair remuneration of people but also as a form to ensure a change in the traditional relationship between employers and workers, which, eventu-

[102] Asamblea Nacional Constituyente, Gaceta Constitucional, no. 78, May 21, 1991, at 2.

[103] Asamblea Nacional Constituyente, Gaceta Constitucional, no. 5, Feb. 15, 1991, at 2 [Asamblea, no. 5].

[104] Asamblea Nacional Constituyente, Gaceta Constitucional, no. 45, Ap. 13, 1991, at 3.

[105] Constitución Política de Colombia [C.P.] arts. 25, 39, 55, 56.

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ally, would foster a better redistribution of wealth and social welfare. However, labor rights also followed the rationale of the right to social security because, although the rights to work and to unionize were established as fundamental rights, the most redistributive aspects, such as a vital, minimum, and proportional salary or the guidelines for workers to participate in companies' management, were not justiciable through the Constitution.

The right to education is another social right that illustrates the search for economic equality despite the absence of constitutional mechanisms. The Constitution of 1886 established that public education would be free, not compulsory, and managed by the postulates of Catholicism. However, that was modified in 1936 to guarantee the freedom of education and the compulsory nature of primary education.[106] Then, in 1991, the Assembly established education as a right and a public service. Although the final wording of the text approved by the Assembly does not contain an explicit reference to economic inequality,[107] some drafters did clearly express this relationship during the debates and used it as a justification for its establishment as a right. Thus, for example, the AD M-19 drafter Abel Rodríguez was one of those who proposed that, to "advance towards the achievement of social justice and equality in life",[108] the Constitution should begin by establishing the age and grade for education to be compulsory, as it was indeed approved. Also, the right in the Constitution took shape thanks to interventions such as that of the liberal drafter Antonio Yepes, who highlighted the importance of education as a commonplace in which the entire population should participate to form a democratic culture that would overcome inequality as a "natural order" in Colombia.[109] Also, the indigenous drafter Francisco Rojas was one of the defenders of the idea that the skills granted by higher education could not continue to be a privilege because the inequality generated would end up affecting the ability of the economy to fulfill its function of social integration, which is why the State had to guarantee access to universities as part of the right to education.[110] Nevertheless, even though the Assembly agreed on free-of-charge public education, it was only in 2011 that the government implemented this State obligation, and it was just for elementary and secondary school, not for public higher education,[111] which means that the Assembly did not approve any mechanism to ensure that the State provided free public education shortly after the enactment of the Constitution.

In this pillar, many voices in the Assembly supported the ideas that rights, especially social rights, are instruments of the State to redistribute wealth, guarantee equality of income, and improve the living conditions of the population;

106 Acto Legislativo 1 de 1936, agosto 5, 1936, Diario Oficial [D.O.] 23263, art. 14.

107 Constitución Política de Colombia de 1991, art. 67.

108 Asamblea Nacional Constituyente, Gaceta Constitucional, no. 18, Mar. 8, 1991, at 19.

109 Asamblea Nacional Constituyente, Gaceta Constitucional, no. 26, Mar. 21, 1991, at 15.

110 Asamblea Nacional Constituyente, Gaceta Constitucional, no. 29, Mar. 30, 1991, at 20.

111 Decreto 4807 de 2011, diciembre 20, 2011, Diario Oficial [D.O.] 48289.

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however, the mechanisms to achieve the latter objectives seem to be missing. One of the rights widely discussed in the Assembly was the right to property, as described next.

B. Property

The debate on the right to private property in the Constituent Assembly had several edges. The reason is that private property is not a right linked to a single article, but rather, like other aspects such as State intervention in the economy, it is linked to other institutions. This article focuses on four issues related to land ownership that I consider relevant because several drafters linked them to their speeches on economic inequality. These four issues are the social and ecological function of property, land reform (basically, the distribution of rural land), distribution of land to indigenous and Afro-descendant communities, and expropriation. Before presenting the fundamental aspects of these discussions in the Assembly on issues, I will present the situation in Colombia before 1991.

a. Property under the Constitution of 1886

The Constitution of 1886 was amended by Legislative Act 1 of 1936. It established the social function of property and two types of expropriation: with and without compensation.[112] This reform took place within the framework of the first social and interventionist reform of the State in the economy, presented by the liberal president Alfonso López, and it was called *Revolución en Marcha* (Revolution on the Move). Alfonso López belonged to the commercial and industrial upper class of the country and, even though the terminology seemed socialist, and the Conservative Party and the Catholic Church criticized it harshly, the reform was liberal because it sought to break the almost feudal model of land concentration in large haciendas, like in the colonial period, that, moreover, were not productive.[113] This explains the introduction of the concept of "social function of property," an expression coined by the French jurist León Duguit in the 1910s, and disseminated in Latin America and, in conferences in Colombia, by himself and by authors like the Colombian constitutionalist Tulio Tascón. Duguit was influenced by sociologist Emile Durkheim and positivist Auguste Comte.[114] He criticized the individualism and sacredness of property established by the French Revolution and Napoleon's Civil Code. The reason was that property is not a subjective right, that is, a natural right inherent to humans. Instead, it is an objective right that society grants to the owner, who

[112] Acto Legislativo 1 de 1936, agosto 5, 1936, Diario Oficial [D.O.] 23263, art. 10.

[113] On the debates transcripts and struggles to approve the constitutional reform in 1936, *see* Álvaro Tirado Mejía & Magdala Velásquez, La Reforma Constitucional de 1936 (1982).

[114] Ana Carolina Mercado Gazabón, La Influencia de León Duguit en la Reforma Social de 1936 en Colombia: El Sistema Jurídico, la Función Social de la Propiedad y la Teoría de los Servicios Públicos 9-20 (2013) (LL.M. thesis, Universidad del Rosario).

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is dependent on society to enjoy her right and, therefore, must contribute to it by using her property for the common good. Otherwise, the State could impose its positive obligation by force, for example, through expropriation, so that the property fulfills its function of generating wealth for all.[115] Also, to create a mechanism for this purpose to be fulfilled, Congress enshrined not only judicial expropriation with compensation, which was already enshrined in Article 31 of the Constitution of 1886. It gave itself the power to determine in which cases there was no place for compensation. Expropriation without compensation required the positive vote of the absolute majority of both houses of Congress.

Since then, various norms have been issued to materialize the social function of property and expropiation but with little success. Law 200 of 1936 regulated the constitutional reform and was the basis of what would be known as Agrarian Reform throughout the twentieth century in Colombia.[116] In essence, this Law established the land titling to the possessors (mostly tenant farmers or those who had invaded private or national lands) if they worked on them. However, in practice, the Law did not have a redistributive effect, but rather concentrated property more because its execution was bogged down by political pressure from various landowners and businessmen, who formed the *Acción Patriótica Económica Nacional — APEN* (National Economic Patriotic Action), integrated by both liberals and conservatives.[117] In the 1960s, in a context in which the National Front tried to give stability to the country after the bipartisan conflict known as *La Violencia*, the Cuban Revolution had triumphed, and the United States promoted the Alliance for Progress with measures such as —among others— an agrarian reform that would avoid the outbreaks of communism.[118] Then, Congress issued Law 135 of 1961, which had two axes: the redistribution of land and technical assistance to achieve it, which was delegated to the *Instituto Colombiano de Reforma Rural – INCORA* (Colombian Institute for Rural Reform).[119] In addition, this Law defined the *Unidad Agrícola Familiar — UAF* (Family Agricultural Unit), which is the minimum amount of land that a peasant family should have for its exploitation to be productive.[120] Nevertheless, that Law was not applied during the government of the conservative Guillermo León Valencia. In contrast, the Law received a new impulse from liberal president Carlos Lleras Restrepo; during his government, peasants constituted the

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115 *Id.*

116 Ley 200 de 1936, diciembre 30, 1936, Diario Oficial [D.O.] 23388.

117 *See, e.g.*, Inés Trujillo, *Reformas Agrarias en Colombia: Experiencias Desalentadoras y una Nueva Iniciativa en el Marco de los Acuerdos de Paz en la Habana*, Ensayos de Economía, no. 35, 38 (2014) [Trujillo, *Reformas*].

118 Darío Fajardo Montaña, *Colombia: dos décadas en los movimientos agrarios*, 71 Cahiers des Amériques Latines [en ligne] par. 37 (2012), http://journals.openedition.org/cal/2690 [https://perma.cc/GFL5-HY8G].

119 Ley 135 de 1961, 15 de diciembre de 1961, 30691; *see* also, Trujillo, *Reformas, supra* note 117, at 39.

120 *Id.*

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Asociación Nacional de Usuarios Campesinos — ANUC (National Association of Peasant Users), which allowed them to be an institutional actor within the reform promoted by the State.[121] Also, Congress passed Law 1 of 1968, which accelerated the processes to distribute the land through, for example, the establishment of administrative action to extinguish ownership of improperly exploited lands and the compensation of properties according to their non-commercial value.[122] However, bureaucratization, the opposition of the landowners, the emergence of paramilitary groups that confronted the peasants, the radicalization to the left of some peasants and other sectors, and the appearance of illicit crops within large new estates, resulted in the Law having few redistributive effects.[123]

In this context, there was a rise in indigenous and Afro-Colombian movements for land. On the one hand, the guerrilla group *Movimiento Armado Quintín Lame — MAQL*, the first indigenous guerrilla in Latin America, was inspired by the indigenous leader, Manuel Quintín Lame Chantre, born in Cauca in 1880.[124] This indigenous leader fought against the landowners who accumulated ownership of the land and the benefits of its exploitation by indigenous peoples. Among the landowners who fought him, the conservative poet Guillermo Valencia, father of President Guillermo León Valencia, stands out, both from Cauca.[125] Likewise, the MAQL sought to appropriate land for the indigenous people by force of arms, for which it had the support of the M-19 guerrilla on several occasions. However, almost at the same time in the 80s, many indigenous people organized the *Organización Nacional Indígena de Colombia – ONIC* (National Indigenous Organization of Colombia), which also carried out land seizures from farms without being a guerrilla movement.[126] On the other hand, the Afro-descendant communities that, for the most part, had lived since the abolition of slavery in 1851 on communal lands on the Pacific coast and in valleys near the former haciendas, did not obtain full recognition of community property.[127] Instead, the State allowed companies and landowners to appropriate the most productive lands (for example, to produce sugar in Valle

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121 Montaña, *Colombia, supra* note 118, at par. 15.

122 Ley 1 de 1968, enero 26, 1968, Diario Oficial [D.O.] 32428.

123 *See* Angélica Franco & Ignacio De los Ríos, *Reforma agraria en Colombia: evolución histórica del concepto. Hacia un enfoque integral actual*, 8 Cuad. Desarro. Rural, no. 67, 93, 104 (2011) [Franco, *Reforma*]; on the ANUC leftist radicalization, *see* Absalón Machado, La Reforma Rural. Una Deuda Social y Política 156 (2009) [Machado, La Reforma].

124 Daniel Peñaranda, Guerra propia, guerra ajena: conflictos armados y reconstrucción identitaria en los Andes colombianos: El Movimiento Armado Quintín Lame (2015).

125 *El Quintín Lame tomó y dejó las armas por su comunidad*, Verdad Abierta (Mar. 27, 2015) available at https://verdadabierta.com/el-quintin-lame-tomo-y-dejo-las-armas-por-su-comunidad/ [https://perma.cc/83E2-6XTJ].

126 *ONIC: 40 años de resistencia, autodeterminación y derechos de la naturaleza*, Dejusticia (Mar. 2, 2020) available at https://www.dejusticia.org/column/onic-40-anos-de-resistencia-autodeterminacion-y-derechos-de-la-naturaleza/ [https://perma.cc/2CGY-NQKZ].

127 *Los afros del Cauca quieren su tierra*, Verdad Abierta (Feb. 27, 2014) available at https://verdadabierta.com/los-afros-del-cauca-quieren-su-tierra/ [https://perma.cc/E3US-QYPL].

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del Cauca).[128] Contrary to the MAQL and the indigenous peoples, the Afro-descendant movement in 1970 was not violent nor was it able to organize itself to bring a drafter to the Constituent Assembly in 1991.

During the 1970s, under the conservative president Misael Pastrana, the scope of the laws passed in the previous period narrowed. He was a staunch opponent of property seizures by force and, in a meeting with landowners and traditional parties (except the followers of Lleras Restrepo), Pastrana signed the *Pacto de Chicoral* (Chicoral Agreement).[129] With this agreement, later materialized in Law 4 of 1973, Law 5 of 1974, and Law 6 of 1975,[130] the government sought to reduce the institutional participation of the ANUC that demanded the implementation of the agrarian reform. The stigmatization and persecutions worsened during the presidency of the liberal Julio César Turbay (1978-1982) through its Security Statute, a decree with the force of law that persecuted peasant leaders as if they were leftist guerrillas and militarily prevented land taking.[131] Instead of the redistribution of large estates, President Pastrana sought land allocation in uncultivated regions under the pretext of increasing the agricultural frontier; yet, the State did not help in this process. In the end, he supported the inclusion of additional requirements to hinder the expropriation and extinction of property rights, such as the existence of a sharecropping contract (which is an almost feudal version of the employment contract). As of this period, in a context of increased violence and pressure from armed groups and drug trafficking to the State, and in addition to the gradual elimination of the import substitution system, the State restructured the purposes of the agrarian reform and focused on overcoming the poverty of the peasants and promoting production through plans such as the *Desarrollo Rural Integrado — DRI* (Integrated Rural Development). Notwithstanding, Law 30 of 1988 was the one that definitively weakened the idea of an agrarian reform based on the expropriation and adjudication of vacant land of the nation, since it privileged the purchase of land by INCORA, the entity in charge of distributing to the peasants.[132] However, this phenomenon generated at least two consequences. On the one hand, it generated more wealth for the landowners and, on the other, even though in this period INCORA bought more properties to distribute, this only benefited approximately 3.8% of the families without land or with enough land

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128 *Id.*

129 Machado, La Reforma, *supra* note 123, at 158-159.

130 Ley 4 de 1973, marzo 29, 1973, Diario Oficial [D.O.] 33828; Ley 5 de 1974, septiembre 30, 1974, Diario Oficial [D.O.] 34185; Ley 6 de 1975, enero 10, 1975, Diario Oficial [D.O.] 34244.

131 *El precio que pagó la Anuc por querer la tierra que trabajaban*, Verdad Abierta (Sept. 2, 2010) available at https://verdadabierta.com/el-precio-que-pago-la-anuc-por-querer-la-tierra-que-trabajaban/ [https://perma.cc/2986-8Z2B].

132 Ley 30 de 1988, marzo 18, 1988, Diario oficial [D.O.] 38264; Franco, *Reforma*, *supra* note 123, at 107.

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for a production that would guarantee survival (that is, an UAF).[133] All this happened to the detriment of a State power such as expropriation, whose basis was that the State imposed itself against the owner and not the other way around.

Finally, although there is no single consistent source that determines the GINI index of land concentration before the 1990s, all available sources place the coefficient of rural property concentration above 0.8 from 1960 to 1990.[134] Furthermore, between 1960 and 1984, while large owners (that is, with properties larger than 500 hectares) increased the area of their domains, the number of small owners (with less than 20 hectares) decreased by little, but it did tend to have less surface area than the total property registered in Colombia.[135] This is the setting in which the Constituent Assembly took place.

b. Reimagining property in the Constitution of 1991

In general, most of the drafters' proposals supported the need to maintain the social function of private property and add the expression "ecological function" to it. In this way, the proposals sought to highlight not only the obligation of the owner to produce but also to respect the environment. Thus, for example, from liberals, Antonio Galán (brother of the murdered leader Luis Carlos Galán) proposed the right to land access, and the State's duty to stimulate access to and exploitation of the land. In addition, he was in favor not only of maintaining the two types of expropriation provided in the Constitution of 1886 but also of administrative expropriation to expedite the agrarian and urban reforms without judicial review (only to dispute the amount of the compensation).[136] In the Conservative Party, drafters Juan Gómez and Hernando Yepes proposed to preserve the social function of private property. In addition, they only approved the expropriation with compensation in all cases in which a law or the government used it for reasons of public utility, social interest, or state of exception. Ultimately, Gómez and Yepes proposed community property based on solidarity and the non-seizure and inalienability of the properties of indigenous communities.[137] From the most right-wing dissenters of the Conservative Party, the MSN, drafters Raimundo Emiliani and Cornelio Reyes sought to eliminate the social function of private property. The reason was that, for them, the social function of property made no sense because all rights ultimately have a social function, which is why this is a characteristic that could not be predicated on property alone; in their opinion, that expression was the result of the socialist influence of the time (that is, 1936). Instead, they put

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133 *Id.*

134 Instituto Geográfico Agustín Codazzi (IGAC), Atlas de Distribución de la Propiedad Rural en Colombia (2012).

135 *Id.* at 66.

136 Asamblea Nacional Constituyente, Gaceta Constitucional, no. 31, Ap. 1, 1991, at 22, 28 [Asamblea, no. 31].

137 Asamblea, no. 9, *supra* note 69, at 13, 15, 16.

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forward the figure of abuse of the right when the owner did not fulfill the social function of property.[138] However, Emiliani and Reyes maintained their support for judicial expropriation and prior compensation, and expropriation without compensation has been planned since 1936. Finally, from the UP, drafters Aida Avella and Alfredo Vásquez presented a project that maintained the social function of property and expropriation even without compensation.[139] In addition, they proposed an obligation of the State "to carry out an annual inventory of lands to determine the urban and rural productive properties."[140] Their idea was for the State to apply the extinction of ownership over unproductive properties and also expropriation with compensation over productive properties, if required. At last, Avella and Vásquez proposed that Congress should limit the extension of land that an owner could have; however, indigenous reservations could not be expropriated.[141]

The indigenous constituents also submitted similar projects. Drafter Francisco Rojas presented a project in which he defended the social function of property, community and solidarity property, and an agrarian and housing reform through administrative expropriation (not only judicial as the Constitution of 1886 prescribed) and extinction of ownership for non-compliance with the function of property. To avoid the concentration of land, Rojas even proposed that the State should suppress those private monopolies that did so, and that any property should be subject to expropriation (except ethnic territories). Finally, Rojas's proposal contained two new rights: the right to housing with public services, and the right to access agrarian property in conditions that facilitate productivity. The State should guarantee integrated rural development and redistribution through development plans.[142] As for Alfonso Peña, the drafter representing the indigenous guerrilla MAQL, he introduced a reform project, although he could not vote. He defended the continuity of the social function of the property but reinterpreted it through the need to distribute property in harmony with development plans that also promote different forms of property. In addition, for Peña, the Constitution needed to establish mechanisms to fulfill those ends. For this reason, his project preserved judicial expropriation, not necessarily with compensation, for the State to avoid paying additional expenses such as consequential damages and loss of earnings. Also, his project contemplated administrative expropriation for cases of agrarian reform and housing for the poorest. Ultimately, Peña promoted the extinction of ownership in both cases, as a sanction inherited from Law 200 of 1936, when the social function of the property was not fulfilled.[143]

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138 Asamblea Nacional Constituyente, Gaceta Constitucional, no. 6, Feb. 18, 1991, at 4-6.

139 Asamblea Nacional Constituyente, Gaceta Constitucional, no. 27, Mar. 26, 1991, at 6 [Asamblea, no. 27].

140 *Id.* at 8.

141 *Id.* at 16.

142 Asamblea Nacional Constituyente, Gaceta Constitucional, no. 29, Mar. 30, 1991, at 2.

143 Asamblea Nacional Constituyente, Gaceta Constitucional, no. 60, Ap. 26, 1991, at 15.

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However, the project of a new constitution presented by the AD M-19 movement was characterized by not containing the classic formula of the social function of property. On the contrary, concerning property over land, the project presented only one article in which it proposed the non-seizure and imprescriptibility of the lands of the reservations of ethnic communities (that is, indigenous and Afro-Colombian) and the obligation of the State to promote incentives for them to fulfill their responsibility to protect resources and the environment.[144] However, it does not mean that none of its members supported, for example, the social function of property or agrarian reform. Thus, although it was not consistent with the proposal that he and his party offered, Carlos Ossa stated that the social function of property should be maintained and accompanied by administrative expropriation to give agility to the processes of agrarian and urban reforms, all in the framework of a Constitution that encourages the increase of wealth but the decrease of inequality.[145] In a tone more consistent with the reform project presented by his party, the constituent Abel Rodríguez stated that the objective of his party was for the Assembly to reach agreements so that the citizens themselves could fight to achieve agrarian and urban reform.[146]

The social function of private property, expropriation, territories for ethnic communities, and agrarian reform were debated by the First Commission on rights, the Second Commission on territorial planning, and the Fifth Commission on economic affairs. In other words, those were cross-cutting issues that a single Commission could not study. The pronouncements on these four aspects were numerous within the Commissions and during the Assembly's first plenary session. Thus, for example, in the First Committee, drafters such as Aída Avella (UP) and María Mercedes Carranza (AD M-19) proposed a bill of rights that included the establishment of the social function of property and judicial expropriation with compensation, and administrative expropriation without compensation. The only opponent was Raimundo Emiliani, who maintained his proposal to eliminate the social function of private property. Emiliani presented a draft article that, paradoxically, was more similar to the final wording of the article approved by the Assembly as will be explained later.[147] However, the bill of rights liberal Diego Uribe (PL) presented as the First Committee's proposal to the plenary of the Assembly, did not contain the regulation of property rights, nor did it mention ethnic territories.[148] Another example of the variety of proposals are those of indigenous drafter Francisco Rojas (ONIC) —in the First Commission—, and other by sociologist Orlando Fals Borda (AD M-19)

144 Asamblea Nacional Constituyente, Gaceta Constitucional, no. 8, Feb. 19, 1991, at 3 [Asamblea, no. 8].

145 Asamblea Nacional Constituyente, Gaceta Constitucional, no. 50, Ap. 15, 1991, at 15.

146 *Id.* at 5.

147 Asamblea Nacional Constituyente, Gaceta Constitucional, no. 51, Ap. 16, 1991, at 24.

148 Asamblea Nacional Constituyente, Gaceta Constitucional, no. 82, May 25, 1991, at 10.

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and Lorenzo Muelas (AICO) —in the Second Commission—. They defended the creation of an entire chapter to regulate indigenous and ethnic issues, including communal ownership of territories;[149] still, neither initiative was successful. Meanwhile, in the Fifth Commission, drafters such as Angelino Garzón (AD M-19), Mariano Ospina (PC), and Iván Marulanda (PL) proposed on behalf of the Commission several agrarian rights that were intended to be the guide of the agrarian reform with initiatives like, for instance, the prioritization of the integral development of the productive activities, access to land ownership, and respect for indigenous communities in their territories.[150] Those constituents also proposed transitory articles like the one that required that, within 120 days following the entry into force of the Constitution, the government should implement measures to stimulate integral development or the article that required the State to spend at least 8% of its annual budget for the agricultural sector.[151]

During the first plenary session of the Assembly, the variety of positions on these issues came to the fore. Therefore, an Ad Hoc Commission was formed to reconcile and unify the different proposals presented, integrated by the commissions and the drafters in the first debate. Thus, on the issues of property, expropriation, and agrarian reform, the Accidental Commission was formed with a conservative majority by Carlos Ossa (AD M-19), Raimundo Emiliani (MSN, and who might have influenced the final wording), Rodrigo Lloreda (PC), Guillermo Perry (PL), and Mariano Ospina (PC).[152] Once this process was carried out, the Assembly voted part by part on the general article that defines the property. The proposal had an identical wording to the one that was finally approved; in fact, each of the paragraphs was approved with large majorities and without debate, except for two minor expressions. Eventually, this article as a whole was approved by 59 affirmative votes and 2 denials; there the Assembly established: the social and ecological function of property, judicial expropriation with compensation, administrative expropriation with subsequent judicial control including over the price paid, expropriation without compensation for equity reasons as defined by the legislator, and the indication that the reasons for any expropriation could not be disputed before a judge.[153] In the same terms, the plenary approved the non-seizure, inalienability, and imprescriptibility, among others, of the lands of ethnic groups and the indigenous

[149] Asamblea Nacional Constituyente, Gaceta Constitucional, no. 67, May 4, 1991, at 21; Asamblea Nacional Constituyente, Gaceta Constitucional, no. 40, Ap. 8, 1991, at 7-8.

[150] Asamblea Nacional Constituyente, Gaceta Constitucional, no. 86, May 30, 1991, at 16.

[151] *Id.*

[152] Asamblea Nacional Constituyente, Gaceta Constitucional, no. 134, Oct. 29, 1991, at 14.

[153] The Assembly also enshrined other articles on expropriation in war or extinction of property rights when assets were acquired through illicit enrichment (like asset seizure in the United States); Asamblea Nacional Constituyente, Gaceta Constitucional, no. 136, Nov. 11, 1991, at 3-4 [Asamblea, no. 136].

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reservations.[154] Also, the first plenary session approved the current Articles 64 to 66 with almost no debate, except for Article 64 on whether it should contain the verb "guarantee" or "promote" progressive access to land.[155] Thus, in Article 64, with 55 votes in favor and 3 against, the Assembly agreed on the State's duty to promote progressive access to land ownership with all the guarantees for its production and improvement of the peasant's quality of life.[156] Also, Article 65 approved with 48 votes and no objections the obligation of the State to protect food production and promote the integral development of production, for example, through research and technology.[157] Ultimately, in Article 66, the Assembly approved with 54 votes the possibility of benefits for agricultural credit.[158] The second plenary session of the Assembly confirmed everything as described. In fact, in the final approval of the general article on the property (that is, current Article 58) with 40 affirmative votes, the vote was nominal with three negative votes (drafters Juan Gómez (PC), Mariano Ospina (PC), and Cornelio Reyes (MSN)) and 17 abstentions (among them, Hernando Yepes (PC), and Carlos Rodado (PC)).[159]

Nevertheless, there were two relevant issues without consensus. The Assembly did not reach an agreement on the issue of recognition of the territories traditionally inhabited by Afro-descendant communities because their geographical delimitation was not clear. Thus, the Second Commission proposed the recognition of black communities' land rights along the Pacific coast. However, this geographical delimitation disregarded the fact that there are other black communities rooted in community territories in other parts of the country. Finally, the Assembly approved the current transitory article 55 that obliged Congress to pass a law in two years and after a wider discussion to recognize the right to collective property of those Afro-descendant communities.[160] Secondly, during the first plenary session, drafters Abel Rodríguez (AD M-19) and others promoted a new article according to which, following the social function of property, Congress should set a limit on the extension of land property. Yet, this article was only voted on by 22 drafters, with 10 negative votes, and 7 abstentions; thus, it was denied.[161]

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154 *Id.* at 5.

155 Constitución Política de Colombia [C.P.] arts. 64-66.

156 Asamblea Nacional Constituyente, Gaceta Constitucional, no. 139, Nov. 22, 1991, at 19.

157 *Id.*

158 *Id.* at 20.

159 Asamblea Nacional Constituyente, Gaceta Constitucional, no. 142, Dec. 21, 1991, at 27.

160 Asamblea Nacional Constituyente, Gaceta Constitucional, no. 140, Dec. 17, 1991, at 41 [Asamblea, no. 140], Asamblea Nacional Constituyente, Informe de la Sesión de la Plenaria del Día 21 de Junio de 1991 376-394 (June 21, 1991), https://babel.banrepcultural.org/digital/collection/p17054coll28/id/214 [https://perma.cc/M4ZA-K2HW] [Asamblea, Informe].

161 Asamblea, no. 136, *supra* note 153, at 5.

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In short, the Assembly conceived the right to property with a social and ecological function, promoted the guidelines for land reform, aimed to allocate land to ethnic communities, and accepted the continuation of expropriation as a matter of economic equality. These topics are closely related to the economic structure and the intervention of the State to regulate it as the next subchapter presents.

C. State and Economy

The relationship between the State and the economy was one of the great topics in the Assembly. This relationship was analyzed not only through social rights as economic obligations by the State towards citizens, but also as the need of the State to intervene in the management of the economy to meet all the social goals. In general, this subchapter shows the consensus on State intervention in the economy as a guarantee of freedom (e.g., freedom of business), but also equality on its substantive side, that is, economic equality.

State intervention in the economy was not an invention of the Constitution of 1991. It was enshrined for the first time in 1936 in the framework of the so-called *Revolución en Marcha* (Revolution on the Move) of President Alfonso López Pumarejo, the first social democratic program in Colombia. The reform established the intervention of the State "in the exploitation of industries or public and private companies, to rationalize the production, distribution, and consumption of wealth, or to give the worker the just protection to which he is entitled."[162] However, in 1968, President Carlos Lleras Restrepo led a constitutional reform to provide the State not only with the power to regulate companies to optimize their processes and protect the worker, but also to give the State a role as a planner or director of the economy.

Article 32 of the Constitution of 1886 established the freedom of business and private initiative, and, within that right, it enshrined the general direction of the economy by the State. Moreover, it described the intervention of the State in all economic processes from production to consumption, to "rationalize and plan the economy to achieve integral development."[163] Eventually, the reform established that the State should "give full employment to human and natural resources within a policy of income and salaries, according to which the economic development has as main objective social justice and the harmonic and integrated improvement for the community and the proletarian classes."[164] In this article, we can see the influence of the economic policy designed by the United States for Latin America, the Alliance for Progress.[165] This policy was

[162] Acto Legislativo 1 de 1936, agosto 5, 1936, Diario Oficial [D.O.] 23263, art. 11.

[163] Acto Legislativo 1 de 1968, diciembre 11, 1968, Diario Oficial [D.O.] 32673, art. 6.

[164] *Id.*

[165] *See*, *e.g.*, Diana Marcela Rojas, *La Alianza Para el Progreso en Colombia*, Análisis Político, no. 70, 91 (2010).

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aimed at promoting economic development in the region to lessen the chances of pro-communist uprisings. Development was understood as the growth of a country's internal economy through mechanisms such as industrialization by import substitution or loans to guarantee macroeconomic stability and social investment. The State, and particularly the president, would guarantee growth through strategic interventions in the economy.[166] Thus, the American development agenda for Latin America was enshrined in the Constitution of 1886 and indeed, survived in the Constitution of 1991 with some modifications, despite the change in American economic policy towards Latin America and the world from the 1970s.

During the debates of the Constituent Assembly in 1991, most drafters advocated for State intervention in the economy. Although the essence of Article 32 survived in the new Constitution, many drafters promoted additional features, some of them more radical than others. Thus, trends can be classified into two groups. The first group included those drafters who sought to preserve the article according to its original wording explained above and those who wished to add some adjustments to complement it. The second group proposed a wording text with essentially different characteristics of State intervention, sometimes more radical, sometimes more lax. Next, I will describe each group.

Firstly, most of the projects sent to the Fifth Commission on Economic Affairs contained the same wording as Article 32 on State intervention or added other aspects. In general, the new proposals aimed to modify the style of the article and add intervention policies that would reconcile neoliberalism and a strong role for the State. For example, the reform project presented by the Liberal government changed the expression "income and wage policy" to "policy of economic stability," which is relevant since the first expression sought that the intervention took into account the income of the population as an instrument to guarantee development and well-being, while the latter preferred macroeconomic stability as the policy to achieve such ends, a fundamental idea of neoliberalism.[167] Other liberals, such as Jesús Pérez, proposed adding policies such as the fight against inflation and regional improvement, [168] or Antonio Galán and Ernesto Rojas proposed the management of savings, the exploitation of natural resources, the promotion of full employment, the fulfillment of the development plans, all to achieve an equitable distribution of wealth and income in the regions and at the personal level.[169] Similarly, the liberal Eduardo Espinosa proposed to prevent the concentration of wealth in the hands

[166] *See* Carlos Caballero, La impronta de Carlos Lleras Restrepo en la economía colombiana de los años sesenta del siglo XX, Revista de Estudios Sociales [En línea], no. 33, par. 41 (2009) available at: https://journals.openedition.org/revestudsoc/15832 [https://perma.cc/954A-GNQB].

[167] Asamblea, no. 5, *supra* note 103, at 6.

[168] Asamblea Nacional Constituyente, Gaceta Constitucional, no. 4, Feb. 13, 1991, at 3 [Asamblea, no. 4].

[169] Asamblea, no. 31, *supra* note 136, at 28.

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of one person and correct the inequalities that arise from production to consumption.[170] For him, an economic development model was necessary that would eliminate the unequal concentration of wealth, which could be done, for example, through real competition. Antonio Navarro and the other drafters of the AD M-19 presented a project that maintained the structure of Article 32 but added other policies of State intervention. Those policies were: ensuring minimum conditions of competition, productivity, and efficiency, protecting the rights of workers, consumers, and users, and seeking the development of the regions. In addition, the party's proposal added an article where private monopolies and oligopolies would be prohibited, with due compensation for the existing ones.[171] At last, those constituents who tacitly accepted Article 32 without modifications can also be included here, such as the constituents of the MSN Raimundo Emiliani and Cornelio Reyes who, in their extensive project to reform the Constitution, did not even mention Article 32.[172]

Secondly, a minority of drafters presented projects that, although inspired by Article 32, had different policies from those mentioned above. Like conservative Rodrigo Lloreda, conservatives Juan Gómez and Hernando Londoño expressly proposed a market economy as an economic regime within which freedom of business, freedom of competition, and democracy were guaranteed, with State intervention only when individuals or the situation demanded it. Also, such intervention would serve to guarantee the provision of basic public services and be subject to evaluation by the public so that they could participate in the exercise of the intervention. Additionally, the project foresaw that the intervention by the executive branch would not only cover monetary, credit, and fiscal policy, but also have egalitarian social development, increased productivity, internationalization, and the control of monopolies to prevent the concentration of property. Finally, the project expressly declared that ecological balance prevailed over economic development.[173]

The project presented by the Patriotic Union Party, although it preserved part of Article 32, emphasized three different intervention policies. First, fundamental economic decision-making would be coordinated with unions; second, the State could nationalize any type of company; in the end, the intervention should preserve the environment. It is worth highlighting the coincidence of two policies of this left-wing party with the Conservative Party, but above all the explicit proposal to provide the State with the power to nationalize companies.[174] This proposal was already existing in the initiatives presented by the Patriotic Union in its founding program where, besides, it explained the need

[170] Asamblea Nacional Constituyente, Gaceta Constitucional, no. 26A, Mar. 26, 1991, at 21, 37; Asamblea Nacional Constituyente, Gaceta Constitucional, no. 44, Ap. 12, 1991, at 9.

[171] Asamblea, no. 8, *supra* note 144, at 2.

[172] Asamblea Nacional Constituyente, Gaceta Constitucional, no. 25, Mar. 21, 1991, at 9.

[173] Asamblea, no. 9, *supra* note 69, at 4.

[174] Asamblea, no. 27, *supra* note 139, at 8.

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to nationalize extractive companies of natural resources or banks, not only as a matter of sovereignty against foreign capital but also for redistributive purposes of economic benefits.[175] Additionally, in other articles, the Patriotic Union proposed intervention measures such as "economic democracy," according to which, in companies, no one could have more than 30% of the total capital, and also no foreign investor could have more than 49% of any company's shares.[176]

After presenting the proposals, the Fifth Commission, with the participation of two of the few economists in the Assembly, Iván Marulanda (PL – Nueva Colombia) and Guillermo Perry (PL), presented a unified draft article with a similar structure to that of Article 32, a draft that was approved by the plenary of the Assembly with a vast majority. The Commission structured the article in two paragraphs. The first contained new general intervention policies, such as the power to intervene in the exploitation of natural resources and land use, the equitable distribution of opportunities, the benefits of development (which replaced the expressions "integral development" and "social justice" because these were considered outdated), and the preservation of the environment. The second paragraph (which the Codifying Commission divided later) determined the specific objectives of the intervention, such as providing "full" employment to materialize the social right to work, ensuring public services to satisfy basic needs, promoting productivity, and regional development. Policies such as agreements with unions on economic decisions or economic stability were left out, because, in the opinion of the majority in the Codifying Commission, they overloaded the Constitution.[177]

Although the article was approved by all the attendees (61 constituents), drafter Aida Avella (UP) presented only one additional proposal.[178] She insisted on including the power to nationalize companies, whether Colombian or foreign, as one of the distinctive elements of her initial proposal before the Commission.[179] We can interpret Aida Avella's request, even though the article on public services also contemplated that the State could reserve the provision of public services (an article that continues in the Constitution today), as a wish that the State had that specific power not only in public services (an article that continues in the Constitution today) but also in key sectors of the national economy, such as oil companies or banks. The political agenda of the UP listed that policy, wich was also shared by the FARC-EP.[180] In the end, this proposal

[175] Ospina, Unión Patriótica, *supra* note 31, at 421.

[176] Asamblea, no. 27, *supra* note 139, at 8.

[177] Asamblea Nacional Constituyente, Gaceta Constitucional, no. 80, May 23, 1991, at 21.

[178] Asamblea, no. 140, *supra* note 160, at 3.

[179] Asamblea Nacional Constituyente, Informe de la Sesión Plenaria del Día 20 de Junio de 1991 19-21 (June 20, 1991) available at: https://babel.banrepcultural.org/digital/collection/p17054coll28/id/165/rec/1 [https://perma.cc/C2BE-YFLH].

[180] Ospina, Unión Patriótica, *supra* note 31, at 417, 421.

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obtained 20 affirmative votes, 14 negative votes, and 11 abstentions, and, since it did not obtain an absolute majority, it was denied.

This subchapter shows that the Assembly did agree on State intervention in the economy as a tool for fighting economic inequality. One of those policies that the Assembly debated to distribute wealth was territorial social expenditure. Next, I will explain it in depth.

D. Territorial Funding

Inequality in territorial entities' funding was one of the objectives to be fought by the Constituent Assembly. However, the discussion was not new in 1991. Contrary to the liberal Constitution of 1863, wich enshrined the federal regime in Colombia with total sovereignty of the states to capture and administer its funds, the conservative Constitution of 1886 centralized the State and made any local spending depend on the will of the President through their appointees: mayors for the municipalities, governors for the departments (the former states). From 1905, the most unpopulated territories of the departments were transformed into "national territories" called *intendencias* or *comisarías* and subjected to a more direct administration by the president; among them were territories such as Chocó, Amazonas, or Guajira. Nevertheless, at the end of the 1960s, in a context in which international organizations such as the Economic Commission for Latin America and the Caribbean – ECLAC recommended that Latin American countries promote not only planning through State intervention in the economy but also decentralization as an instrument for development, President Carlos Lleras Restrepo promoted the rules that would mark the beginning of the distribution of national income to territorial entities to meet social needs.

After Legislative Act 1 of 1968, wich amended the Constitution, Law 46 of 1971 was issued, which established the so-called *situado fiscal*.[181] The reform assigned a percentage of the State's ordinary income to the departments, *intendencias*, *comisarías*, and the district of Bogotá to fund their services. Ordinary income was that current income (tax and non-tax) not intended for a specific expense. Law 46 of 1971 defined the percentage of ordinary income as *situado fiscal* and stipulated that it should only satisfy public services of primary education and public healthcare in those territorial entities. According to this act, the *situado fiscal* started at 13% in 1973 and increased by 15% in 1974, although it could increase up to 25% after that date. Of the total fiscal budget, 74% would go to primary education and 26% to healthcare, unless the government allocated otherwise in the respective annual budget. In turn, the *situado fiscal* was divided into 30% for all territorial entities and the other 70% according to their population. These norms achieved that the allocation of resources to the de-

[181] Ley 46 de 1971, diciembre 31, 1971, Diario Oficial [D.O.] 33520.

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partments was rationalized, standardized and ensured at least two basic services in their municipalities: primary education and healthcare.

During the following years and until 1990, the income allocated to these two services increased, as did the demand for services. Law 12 of 1986, in addition to extending municipalities' participation in the V.A.T. from 30% in 1985 (according to Law 33 of 1968) up to 50% in 1993, demanded that said V.A.T. share should be used for education in a proportion of 30% or 50%, depending on the number of inhabitants in the municipality.[182] Besides, Law 10 of 1990, the primary legal framework for healthcare, established that, as of 1991, the *situado fiscal* share for healthcare would be equal to 4% of current income (higher than ordinary income) with the possibility of an increase, provided the *situado fiscal* did not exceed the 25% of the ordinary income of the Nation.[183] Thus, by 1991, the territorial entities had already gained a greater share of the Nation's income to finance the two basic services. Notwithstanding, the Assembly concentrated on addressing the problems that this division had not yet solved.

The discussion on the funding distribution to the territorial entities was extensive. As the conservative lawyer and economist Juan Camilo Restrepo, who later became Minister of Finance, described it in 1991, the general framework of the debate on funding distribution in the territories in the Assembly could be summarized as the conflict between two ideas: decentralization and fiscal sovereignty.[184] Thus, the struggle consisted of whether the decentralization of resources that began in the 1970s should be intensified and the territories should be given greater autonomy to collect revenue, or if, on the contrary, the Constitution should support fiscal sovereignty to grant full powers to the territories to collect their taxes. The Assembly opted for the first option. Furthermore, in many proposals and speeches, the drafters showed a consensus that a better distribution of revenue among the territorial entities was essential to overcoming economic inequality.

The most relevant policies discussed here were the *situado fiscal* to departments, the participation of the municipalities, bonuses for natural resources exploitation, and social spending. Thus, for example, from the liberals, the constitutional law professor from Cartagena, Jesús Pérez (PL) presented a reform proposal in which he insisted that the population should not be the criterion for distributing *situado fiscal* and municipalities' shares. [185] The reason was that there were regions that, despite having a higher proportion of their population living in poverty, received less funding as they had fewer inhabitants compared to the national total. Therefore, the drafter proposed to make the distribution according to the number of people with unsatisfied basic needs (U.B.N.) in a territory,

[182] Ley 12 de 1986, enero 16, 1986, Diario Oficial [D.O.] 37310.

[183] Ley 10 de 1990, enero 10, 1990, Diario Oficial [D.O.] 39137.

[184] *Descentralización o Soberanía Fiscal*, El Tiempo (Feb. 28, 1991) available at: https://www.eltiempo.com/archivo/documento/MAM-33249 [https://perma.cc/G75D-KUVC].

[185] Asamblea, no. 8, *supra* note 144, at 81.

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that is, needs for education, healthcare, and sewerage, among others. Similarly, the project of the 19 constituents from the AD M-19 sought a raise in *situado fiscal* from 15% of ordinary income to 25% of the Nation's current income, and the allocation of 20% of that share for the less developed departments. From the conservative party, drafters Juan Gómez and Hernando Londoño proposed a new model based on fiscal capacity, unsatisfied basic needs, flexibility, complementarity, and a fiscal and administrative effort by territories.[186] In other words, their proposal sought a distribution system that would allocate more resources to the territories with less capacity to generate revenues but more poor people. In addition, it did not establish specific percentages because it delegated the transfers' regulation to an act, which should complement what the territories would gain through their efforts and an efficient administration. On the other part, the Patriotic Union presented a project where, although it did not establish specific percentages or items, it did oblige the State to prioritize social expenditures and give territorial entities the power to define their fiscal regime.[187] Also, this initiative proposed that municipalities have more generous participation in the distribution of bonuses from the exploitation of non-renewable natural resources, that is, the so-called *regalías*.

Many voices in the Assembly condemned the conditions of inequality in many regions at that time. In the first report that included all the proposals on public funding presented by the drafters, conservative constituent Carlos Rodado (PC), Jesús Pérez (PL), and the constituent from the AD M-19 Helena Herrán, in the Fifth Commission, summarized the consensus on the need to strengthen territorial entities funding. In their concept, the gap between rich and poor regions was due to an unequal distribution of the productive apparatus and a concentration of wealth in specific regions, among other structural factors.[188] However, they stated that the revenues allocation carried out by the State maintained inequalities because the central level reserved the highest percentage of revenues while assigning more responsibilities in matters of public services to territorial entities. They also justified the distribution according to unsatisfied basic needs as a principle, accompanied by an incentive to the territorial entities that were efficient in managing funds and gaining more through local taxation. For the constituents, that implied it was not necessary to create new taxes and to give territorial entities the power to create more taxes through fiscal sovereignty. Also, that principle encouraged the territorial entities to be diligent and not get used to living on the revenues granted by the central level. Hence, the three constituents proposed to the Fifth Commission concrete tools to redistribute resources, such as a new configuration of the *situado fiscal*, direct

186 Asamblea, no. 9, *supra* note 69, at 13.

187 Asamblea, no. 27, *supra* note 139, at 8, 16.

188 Asamblea Nacional Constituyente, Gaceta Constitucional, no. 53, Ap. 18, 1991, at 13 [Asamblea, no. 53]; on the compilation work, *see* Carlos Noriega & Jesús Pérez, Informe Ponencia para Primer Debate (May 27, 1991) available at: https://babel.banrepcultural.org/digital/collection/p17054coll28/id/309 [https://perma.cc/FN3G-8F6Y].

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transfers from the Nation to the municipalities, the creation of a National Bonuses Fund, and the inclusion of a chapter on public social expenditure in the Annual Budget Act.[189]

Nevertheless, not only the constituents of the Fifth Commission for Economic Affairs debated this issue. For example, in the Second Commission on land use planning, the liberal medical doctor and former vice minister of healthcare, Eduardo Espinosa (PL), justified the creation of regions (union of departments) as an instrument to redistribute income in a more balanced way among departments with a similar history, culture, or geography.[190] Similarly, the liberal and Columbia-trained business administrator, Eduardo Verano (PL), favored regionalization as a mechanism to redistribute the wealth generated in large cities that did not reach peripheral areas.[191] Finally, former M-19 guerrillero Héctor Pineda also defended regionalization as a process to integrate neglected territories into the domestic market which, in his opinion, constituted a form of "compensation" to the formerly sovereign states abolished by the Constitution of 1886, which had limits very similar to the geographic and socioeconomic regions that the Assembly discussed.[192]

The debates in the Fifth Commission changed the first draft initially proposed by drafters Rodado, Pérez, and Herrán. However, the new set of articles maintained its essence and was approved by large majorities in the first plenary session of the Assembly.[193] After a review made by the Codification Commission that was partially objected to by several drafters, the Assembly also approved the articles in the second plenary.

Firstly, with 54 votes, it approved a regulation on *situado fiscal* for departments to fund preschool, primary and secondary education, and healthcare services in their municipalities. Although the norm did not include a specific percentage of current income, it did order that at least 85% of that percentage would be for all departments according to the number of users and services provided, and their fiscal and administrative effort. This distribution could be changed by Congress every five years after evaluating its performance.[194] These policies became Article 356 (amended today).[195] Secondly, the Assembly approved a new article that established the obligation of the State to transfer a minimum percentage of the current income to the municipalities, which would increase

189 Asamblea, no. 53, *supra* note 188, at 14.

190 Asamblea Nacional Constituyente, Gaceta Constitucional, no. 43, Ap. 11, 1991, at 2-4.

191 Asamblea Nacional Constituyente, Gaceta Constitucional, no. 46, Ap. 15, 1991, at 18-19.

192 Asamblea, no. 50a, *supra* note 65, at 8, 9.

193 Asamblea, no. 140, *supra* note 160, at 37.

194 Asamblea Nacional Constituyente, Gaceta Constitucional, no. 144, Dec. 31, 1991, at 9 [Asamblea, no. 144]. This was Article 379 of the project.

195 Constitución Política de Colombia [C.P.] art. 356.

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annually from 14% in 1993 to 22% in 2002.[196] Of that percentage, 60% would be allocated according to the population with U.B.N., a share that Congress could modify after five years; furthermore, the drafters agreed on the possibility that municipalities were eventually assigned new responsibilities for social investment. Thus, with 52 affirmative votes, Article 357 (amended today) was approved.[197] In another rule approved by the Assembly (Article 361 of the current Constitution, amended today), the constituents prescribed the distribution of bonuses to the territorial entities and created the National Bonuses Fund, according to the terms of a law issued by Congress. The proposal was adopted in the first debate and, later, confirmed in the second plenary with 49 affirmative votes.[198] Ultimately, there was a greater consensus in the Assembly to oblige the State to include a chapter on social expenditure in the Annual Budget Act. That expense would have priority over any other allocation, except in cases of war or for reasons of national security (a relevant exception due to the Colombian context).[199] This proposal was enshrined in Article 350 of the Constitution and was adopted without any opposition in the first debate and with 49 affirmative votes in the second debate.[200]

Thus, the subchapter shows that the Assembly was concerned about the revenues allocated to territories to fight economic inequality. However, the State needed the funds to accomplish a fair distribution. The last subchapter presents the consensus and disagreements on taxation in the Assembly.

E. Taxes

The first televised presidential debate in the history of Colombia was on February 11, 1986. The candidates who participated were Álvaro Gómez, from the Conservative Party, and Luis Carlos Galán, from *Nuevo Liberalismo* (New Liberalism), a leftist dissidence of the *Partido Liberal Colombiano*.[201] Taxes were one of the six points discussed that day; specifically, the question for the two candidates was how each one would manage to balance the promises of their electoral programs without raising taxes. On the one hand, Gómez affirmed that the taxes were very high; according to him, they were oriented to punish the saver and maintain a State full of inefficient bureaucracy. He proposed to reduce the size of the State and rationalize expenditures to increase efficiency. In addition, he assured that the reduction of taxes would decrease evasion, since it was easier for everyone to pay low taxes, which would guarantee growth both

196 Asamblea, no. 144, *supra* note 194, at. 10-11. This was Article 381 of the Project.

197 Constitución Política de Colombia [C.P.] art. 357.

198 Asamblea, no. 144, *supra* note 194, at. 10-11. This was Article 384 of the Project.

199 *Id.* at 8. This was Article 373 of the Project.

200 Constitución Política de Colombia [C.P.] art. 350.

201 R.T.I. & Producciones JES, Debate 1: Álvaro Gómez y Luis Carlos Galán 11 de febrero 1986, YouTube (Ap. 10, 2019), https://youtu.be/TbElNsrwIL0?t=2588 [https://perma.cc/X3SP-AA83].

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in the income collected and in private investment. On the other hand, Luis Carlos Galán supported a tax reform that would simplify the collection of taxes and their distribution, but which, at the same time, would guarantee that those with greater wealth would contribute more money to the finances of the State. For him, this model states that the modern State of the last fifty years assumed the responsibility of eliminating the class struggle through the redistribution of wealth, not as a favor from the political elite, but as a State policy. The description of this debate is relevant here because it illustrates two things. Firstly, it shows the general discussion about the tax regime in force before the Constitution of 1991. And, secondly, the debate reveals the two main antagonistic visions that would meet five years later in the Assembly to create a new pact on taxation. I consider each of the two in turn.

a. Taxes in the Constitution of 1886

The Constitution of 1886 mentioned taxes in a few articles. Originally, the Constitution referred to the power of Congress to establish taxes (although it implicitly allowed the president to do so through states of exception) and the date of entry into force of the collection of contributions or indirect taxes, which was six months.[202] During the one hundred years of existence of that regime, a few changes were added. Even so, that did not stop Congress and the executive branch from introducing taxes such as the sales tax (V.A.T.), the income tax, or the wealth tax; the latter was in place for 54 years and is still highly controversial. Below, I present a brief historical review focusing on those three taxes to contextualize the debates in the Assembly in 1991.

At the end of the nineteenth century, almost 80% of the State's revenues came from customs taxes.[203] However, at the beginning of the twentieth century, Congress created the first two modern taxes: Law 26 of 1904 created the tax on the consumption of luxury goods,[204] and Law 56 of 1918 established the income tax,[205] reinforced by Law 64 of 1927.[206] In the 1930s, two events increased the number of taxes: on the one hand, the 1929 world crash reduced foreign trade and, therefore, the customs tax; on the other hand, the arrival of Alfonso López with his social democratic government plan. Thus, Law 81 of 1931 increased the income tax,[207] Law 78 of 1935 created comple-

202 *See, e.g.*, Constitución Política de Colombia de 1886, arts. 204, 206.

203 Departamento Nacional de Planeación - DNP, Las Reformas Tributarias en Colombia Durante el Siglo XX (I) 3 (2002) available at: https://colaboracion.dnp.gov.co/CDT/Estudios%20Econmicos/Las%20reformas%20tributarias%20en%20Colombia%20durante%20el%20siglo%20XX%20(I).pdf [https://perma.cc/P28J-C2P2] [DNP, Las Reformas].

204 Ley 26 de 1904, noviembre 15, 1904, Diario Oficial [D.O.] 12225.

205 Ley 56 de 1918, noviembre 27, 1918, Diario Oficial [D.O.] 16555.

206 Ley 64 de 1927, noviembre 12, 1927, Diario Oficial [D.O.] 20648.

207 Ley 81 de 1931, junio 20, 1931, Diario Oficial [D.O.] 21731.

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mentary taxes on wealth and excess profits,[208] and Law 63 of 1936 established the tax on occasional gains (inheritances and donations).[209] Faced with the decrease in foreign trade during the Second World War, Congress increased the income tax with Laws 45 of 1942 and 35 of 1944.[210] Nevertheless, it was during the dictatorship of General Gustavo Rojas Pinilla that greater equity was sought through Decrees 2317 and 2615 of 1953,[211] which increased income and wealth taxes and established double taxation of companies and dividends of shareholders. Thus, in 1955, income and wealth taxes constituted 53% of the State's tax revenue.[212]

Another important milestone was Law 81 of 1960.[213] This Law was influenced by a commission of experts from ECLAC and Harvard University, and, in general terms, it reduced direct taxes such as income, wealth, and excess profits. The purpose of this modification was, on the one hand, to eliminate tax burdens on small and median incomes, but, on the other hand, to encourage the productive sector and private investment for the benefit of the country's industrialization. However, this led to a decrease in income that ended up with the issuance of Law 21 of 1963,[214] which gave the conservative president Guillermo León Valencia the power to increase direct taxes and create an indirect tax called "sales tax" through Decree 3288 of 1963, which would later become the value-added tax, V.A.T.[215]

Despite certain stability in tax collection, in the mid-1970s the country suffered high inflation and the liberal president Alfonso López Michelsen issued the Decree of Economic Emergency 1970 of 1974 that served to issue decrees that reformed the tax structure.[216] Thus, López Michelsen reduced most of the incentives of Law 81 of 1960 and implemented the presumptive revenue of wealth, to increase tax collection, reduce evasion, and combat inflation. Notwithstanding, the reforms were unsuccessful, and the system was dismantled in 1977 through the reduction of direct taxes, and the declaration of amnesty for tax evasion, among other measures that reduced the State's income again. Thus, by 1980, income and complementary taxes such as wealth tax reached 30% of the State's tax income compared to 20% of the sales tax.[217]

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208 Ley 78 de 1935, diciembre 23, 1935, Diario Oficial [D.O.] 23075.

209 Ley 63 de 1936, marzo 30, 1936, Diario Oficial [D.O.] 23165.

210 Ley 45 de 1942, diciembre 18, 1942, Diario Oficial [D.O.] 25135; Ley 35 de 1944, diciembre 21, 1944, Diario Oficial [D.O.] 25733.

211 Decreto 2317 de 1953, septiembre 8, 1953, Diario Oficial [D.O.] 28484; Decreto 2615 de 1953, octubre 6, 1953, Diario Oficial [D.O.] 28326.

212 DNP, Las Reformas, *supra* note 203, at 15.

213 Ley 81 de 1960, diciembre 22, 1960, Diario Oficial [D.O.] 30412.

214 Ley 21 de 1963, agosto 20, 1963, Diario oficial [D.O.] 31177.

215 Decreto 3288 de 1963, diciembre 30, 1963, Diario Oficial [D.O.] 31265.

216 Decreto 1970 de 1974, septiembre 17, 1974, Diario Oficial [D.O.] 34170.

217 DNP, Las Reformas, *supra* note 203, at 15.

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The reforms of the 1980s sought to counteract the decline in income. They expanded the sales tax and transformed it into the V.A.T. (Law 9 of 1983 and Decree Law 3541 of 1983, which established its rate at 10%),[218] decreased the percentages of direct taxes through incentives, and ended double taxation. Also, under the protection of Law 14 of 1983,[219] the taxes of the territorial entities were strengthened, such as land taxes. Finally, in 1989, according to Law 84 of 1988, the President issued Decree 1321 of 1989 that eliminated the wealth tax,[220] a tax that, according to some calculations, was around 20% of total income tax on average since 1936 and ended up being 5.45% in 1991.[221] The motivation was the need to "harmonize" the tax burden of taxpayers who already paid, for example, property tax for their real estate before the territorial entities, that is, to eliminate double taxation. That decision was framed in a context in which the governments of Virgilio Barco, first, and César Gaviria, later, promoted the economic opening of the State to a free international market economy.

This historical account suggests at least two things. The first is that, at the time of the presidential debate between Gómez and Galán, the trend of the moment was to reduce taxes that could be considered "anti-private investment burdens"; in other words, the governments endorsed Álvaro Gómez's position. The second issue is that the discussions on economic inequality in the Constituent Assembly took place in a context in which direct policies to reduce inequality, such as the wealth tax, were being dismantled. This context could explain the weak consensus in the Assembly on the constitutional structure of the tax system, as I will show below.

b. A new Tax Structure in 1991

There were several proposals on the tax system in the Assembly. For instance, drafter Jesús Pérez (PL) proposed the prohibition of tax law retroactivity, the progressivity of land tax, and the Congress's power to propose any modification to the laws on personal exemptions to income tax, on its initiative and without the government's intervention, which had the initiative in budgetary matters according to the Constitution of 1886.[222] In this last aspect, the journalist Alberto Zalamea (MSN) agreed.[223] The AD M-19 proposed some principles for the taxation system according to which Congress would be obliged to approve

[218] Ley 9 de 1983, junio 8, 1983, Diario Oficial [D.O.] 36274; Decreto 3541 de 1983, diciembre 29, 1983, Diario Oficial [D.O.] 36452.

[219] Ley 14 de 1983, julio 6, 1983, Diario Oficial [D.O.] 36288.

[220] Ley 84 de 1988, diciembre 29, 1988, Diario Oficial [D.O.] 38635.

[221] Cecilia Rico Torres, *Impuesto al patrimonio en Colombia: 1936-2004*, DIAN 18 (Nov., 2004) available at: https://imgcdn.larepublica.co/cms/2014/09/11020248/Impuesto%20al%20Patrimonio%20DIAN.pdf [https://perma.cc/NZY6-HNE7].

[222] Asamblea, no. 4, *supra* note 168 3-4.

[223] Asamblea Nacional Constituyente, Gaceta Constitucional, no. 12, Feb. 28, 1991, at 6.

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tax laws to promote equity, efficiency in collecting taxes, and development.[224] In the Conservative Party, constituents Juan Gómez and Hernando Londoño proposed that Congress and collegiate bodies of the territorial entities could create taxes, and suggested wealth taxes as a general principle of public finances.[225] Additionally, the leader of *La Séptima Papeleta* movement, Fernando Carrillo, in his constitutional reform project inspired, according to him, by the *Nuevo Liberalismo* movement of Luis Carlos Galán and the discussions within the student movement,[226] proposed the duty of the inhabitants to pay taxes according to their economic capacity. In addition, he proposed distributive justice, equality, and progressiveness should be the principles of the tax system and that public revenues should be allocated and spent according to the principles of equity, economy, and efficiency.[227] Finally, in the draft constitution of the UP party, in Articles 46 (on the guidelines of the national development plan) and 49 (on the annual budget law), Aida Avella and Alfredo Vásquez (UP) sought to tax mainly land, capital gains, and real estate. They also proposed direct and indirect taxes should not exceed 25% of the State's tax revenues, otherwise, the State would be obliged to collect more direct taxes on assets, e.g., land. Furthermore, the UP project proposed the obligation that the annual budget law should privilege social expenditure and direct taxation.[228]

The reports prepared by the constituents Carlos Rodado (PC), Jesús Pérez (PL), and Helena Herrán (PL), within the Fifth Commission, which summarized all the previous projects,[229] depicted the Assembly's general conception as if it believed that it was not necessary to create more taxes but to improve the allocation of those already in force. In other words, according to the reports, the discussion did not criticize enough the increase of indirect taxes in the total share of fiscal revenue during that period and its effects on economic inequality. Moreover, the debates in the Fifth Commission had the joint participation of the Second Commission. The reason is that the discussion on taxes focused on granting greater participation to territorial entities in the collection of the most dynamic taxes, especially V.A.T., to guarantee territories greater fiscal autonomy to collect new taxes under the law (for example, through liquor taxes) and to protect the exclusive ownership of those revenues by territorial entities. However, concerning the general regulation of the tax system, the commission's proposal to the plenary consisted of only one article that declared the non-retroactivity of taxes, which was already implicit in the Constitution of 1886.[230]

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224 Asamblea, no. 8, *supra* note 144, at 4.

225 Asamblea, no. 9, *supra* note 69, at 13.

226 Asamblea, no. 31, *supra* note 136, at 19.

227 *Id.* at 13.

228 Asamblea, no. 27, *supra* note 139, at 8-9.

229 Asamblea, no. 53, *supra* note 188, at 13.

230 Asamblea Nacional Constituyente, Gaceta Constitucional, no. 85, May 29, 1991, at 18. In the project, it was Article 9.

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During the first plenary session, the constituent Fernando Carillo (elected through the La Séptima Papeleta movement) proposed an addition to the article initially presented by the Fifth Commission. His proposal consisted of insisting on the need to determine the three basic principles that should guide tax policy; those were equity, efficiency, and progressivity.[231] These principles reflected his initial proposal presented to the Fifth Commission. Although the Gazette did not address his explanatory memorandum, I can explain the meaning of those principles as follows, according to their context. Equity referred to equality in the collection of taxes, more specifically to the fact that there were no excesses when gathering or exempting; efficiency was related to good management of resources both in their management and in their destination; progressivity was especially linked to the expectation that whoever had more assets would pay more as well.[232] Ultimately, the first plenary adopted this proposal with 60 affirmative votes and without further discussion.[233] Additionally, the Assembly approved with 41 votes in favor and 26 against the current transitory Article 43 that obliged Congress (and, failing that, the President) to issue a tax reform in 18 months so that the State could comply with the new (social) obligations derived from the new Constitution. The most representative protest was that of the conservative constituent Rodrigo Lloreda (PC), who stated that the transitory article broke up the general agreement reached by the Assembly that only Congress could impose taxes and carry out the tax system.[234]

During the second plenary session, barely two days after the Assembly's session period ended, the ex-guerrillero drafter Darío Mejía (EPL), supported by others such as Aida Avella (UP), Francisco Rojas (ONIC), and Iván Marulanda (PL – Nueva Colombia), proposed to modify the article that described the tax system. The constituent requested the inclusion of this text: "The law will gradually increase direct taxation in relation to indirect taxation as a criterion of social justice."[235] The text was not approved, as it only obtained 31 affirmative votes. On the other hand, the version of the article approved by the first plenary session got 56 affirmative votes and no denials or abstention votes; thus, it was approved unanimously and is the current Article 363 of the Constitution. Unfortunately, neither the Gazette nor the transcripts offer data on which people voted for the modification proposed by Mejía. What can be learned from the transcripts is Mejía's motivation only. For him, this proposal had the objective

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231 Asamblea, Informe, *supra* note 160, at 189.

232 In fact, the Constitutional Court has applied that meaning in judgements such as Corte Constitucional [C.C.] [Constitutional Court], febrero 13, 2019, Sentencia C-056/19, M.P.: Gloria Ortiz (Colom.).

233 Asamblea, no. 140, *supra* note 160, at 38.

234 Asamblea, Informe, *supra* note 160, at 255-256.

235 Asamblea, no. 144, *supra* note 194, at. 10; Asamblea Nacional Constituyente, Informe de la Sesión de la Plenaria del Día 2 de Julio de 1991 167 (July 2, 1991) available at: https://babel.banrepcultural.org/digital/collection/p17054coll28/id/57/rec/1 [https://perma.cc/A4YF-326U].

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of forcing the State to progressively increase the portion of direct taxes on the richest, because, for him, the Colombian people were paying too many taxes.[236] The proposal followed what several constituents initially put forward, namely, making explicit the obligation for the State to promote the predominance of direct taxation as an instrument to combat economic inequality.

In summary, many constituents proposed to provide the State with guidelines to develop a tax policy to fight economic inequality, although under different terms. However, even if there was a sector that, until the last minute, intended the Assembly to adopt the express establishment of the priority of direct taxes, the Assembly did not approve it. Thus, the general agreement on the tax system can be found in Article 363 and in the four basic principles that govern it: equity, efficiency, progressivity, and non-retroactivity. Of course, there are other tax principles implicit throughout the constitution (for example, the principle of legality). Nevertheless, the tax pillar agreed upon by the Assembly did not emphasize explicit mechanisms for taxation to overcome economic inequality. This is paradoxical, first, because several constituents from different political backgrounds were aware of the importance of direct taxation as an explicit principle in the constitution, and second, because, despite that, the majority ended up voting for the simplest and most general regulation.

Thus, the next chapter argues that, along with other gaps in the constitution's regulation, the Assembly did not design a well-structured and coherent plan with concrete mechanisms to fight against economic inequality, despite having all the power and proposals to do so.

IV. A Defective Constitutional Design to Address Economic Inequality in Colombia

I presented above the five pillars or set of policies that the Assembly debated and agreed on as the main issues through which the State could overcome economic inequality. However, the agreements and disagreements on specific policies such as social rights, the social function of property, expropriation, land reform, State intervention in the economy, territorial funding, and a tax system supported by progressivity, make evident that there was no structural consensus on a concrete plan to overcome economic inequality, despite some drafters' discourses against it and their desire that the Constitution become an effective instrument to tackle it. There are at least five reasons to support that hypothesis.

Firstly, the data on the drafting of the three social rights presented in the first subsection of the second chapter, perhaps among the most remarkable of all those approved by the Assembly, suggests two things. The first one is that two tendencies in the Assembly influenced how these rights were regulated. The transcripts account for the tension between the global trend in 1990 that

[236] *Id.* at 168-169.

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pushed Colombia towards a free-market economy and the claims of the constituents that the State had to guarantee better living conditions for Colombians. The tension lies in the fact that the global trend proclaimed the reduction of the State's role in guaranteeing these rights to favor the market and not vice versa, that is, the strengthening of the State's role to secure those rights and public services, even if some private companies were the providers. The transcribed speeches show the constituents' intention to reconcile the idea of social rights as tools to fight economic inequality with the pressure of the period to reduce the role of the State in providing those rights before the market economy. The second issue is that the Assembly did not agree on creating specific constitutional actions for citizens to claim those rights before judges; it did not establish any coercive measures (such as setting a deadline for Congress to regulate and materialize those rights),[237] and the drafters did not create any rule to determine the priority of those rights when the ratio of market economy conflicts with them.

The absence of legal actions to claim them seems to have been motivated by two reasons that contradict themselves. Firstly, the well-known "programmatic nature" of these rights, which is evident if one considers that, even in international law, social rights are programmatic, that is, the State is expected to carry them out at some point, due to financial difficulties involved in guaranteeing these social benefits at once. Nevertheless, it is questionable because rights such as social security, education, and work are indispensable within any State that calls itself a "Social Rule of Law", and seeks to guarantee minimum standards of living to overcome inequality. Thus, it seems necessary that any constitutional arrangement with such characteristics should provide the mechanisms to make them possible without delays. This shows that, despite the discourse of the members of the Assembly, the majority did not dare to prioritize social rights to overcome economic inequality; their excurses were costs and progressivity, but they did not realize that even civil and political rights also cost a lot.[238] Secondly, the Assembly did not agree on constitutional actions for second-generation rights, that is, socio-economic rights because it was how these could be reconciled with the postulates of the market economy. That explains why the *acción de tutela*, which must be immediately enforceable, was not established for the protection of social rights, and, also, why the Assembly did establish actions for third-generation rights (e.g., environmental rights, public services, freedom of competition). In fact, contrary to what the Assembly agreed on in 1991, it was the Constitutional Court, since 1992, that has conferred itself the power to

[237] Thus, for instance, some constituents like Rodrigo Lloreda (PC – Movimiento Unidos por Colombia), Carlos Lemos (PL), Carlos Ossa (AD M-19), Rafael Molina (MSN), Antonio Yepes (PL), and Óscar Hoyos (AD M-19) proposed a five-year deadline for Congress and the President to reform and execute the whole new social security system. Nevertheless, the Assembly only approved a transitory article obliging the government to elaborate a draft within the next 180 days after the Constitution's promulgation. Asamblea, no. 53, *supra* note 188, at 2.

[238] For a discussion on the cost of rights, *see*, *e.g.*, Stephen Holmes & Cass Sunstein, The Cost of Rights: Why Liberty Depends on Taxes (2000).

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protect social rights through constitutional actions such as *acción de tutela*, when the non-recognition of social rights directly violated fundamental rights. Thus, it was the intervention of the Constitutional Court in socioeconomic rights that would largely materialize the claims of economic equality through the rights established by the Assembly, although the latter desired the intervention of the State in the economy not exactly by the Constitutional Court, a contradiction that resulted precisely because of the Assembly's lack of commitment to effectively drafting socioeconomic rights.

Secondly, on the property and land issues, the Assembly adopted the social and ecological function of property and was concerned with designing guidelines for land reform to overcome economic inequality. Thus, the drafters agreed on radical measures such as expropriation and normative provisions that included new rights and obligations of the State, which, for the most part, emulated the claims of peasants, indigenous people, and Afro-Colombians, and the previous attempts to achieve an agrarian reform. Articles 58 (today reformed) to 66 of the original constitution regulate almost all the aspects that were enshrined under the Constitution of 1886 on property and land, including its legal developments.[239] However, the Assembly did not agree on other specific measures that some drafters proposed and that would have complemented the regulation, such as, for example, the limitation of the extension of property that anyone could own in Colombia,[240] or the spending of at least 8% of the national budget in the agriculture sector. Consequently, this pillar against economic inequality fell short because even the most radical measures adopted by the Assembly, such as expropriation, were already established in the previous constitution. Thus, the Assembly failed to agree on creative measures to resolve the passivity that the executive and the legislative branches had demonstrated in past decades. For this reason, this pillar is inconsistent with the demands for greater economic equality through land reform that many of the constituents supported in their speeches. Maybe the new measures proposed were too radical to apply or conflicted with other ideas that were more important to most constituents, such as the free market and a lax intervention in the economy, as will be discussed next.

Thirdly, there was a consensus among all political sectors that the State should intervene in the economy. In some proposals, overcoming economic inequality as the objective of State intervention was more explicit than in others. However, the Assembly attempted to address this issue through policies such as full employment, access to basic goods and services, and the sharing of opportunities and benefits of development. In any case, the Assembly sought to balance two models that are traditionally seen as antagonistic, but, in its attempt, it did not envision more direct policies to fight against one of the two fundamen-

[239] Asamblea, no. 136, *supra* note 153, at 3-6.

[240] Asamblea Nacional Constituyente, Gaceta Constitucional, no. 23, Mar. 19, 1991, at 53.

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tal aspects of economic inequality: the concentration of wealth. The Assembly agreed to prohibit non-State monopolies, gave the State the power to prevent abuses such as the dominant position in the market, enshrined an action to guarantee unfair competition, and even opened the possibility that the State assumed the provision of public services, although the Constitution did not call it "nationalization". However, the Assembly failed to make explicit as State policy the obligations to overcome the concentration of wealth (not only capital but also land) and to promote policies that discourage it. Although the Constitution contains tools that some drafters mentioned for that purpose, the Assembly's conciliatory spirit disabled them by not formulating explicit and stronger policies of State intervention in the economy to combat the inequality generated by the concentration of wealth then and in the future.

Fourthly, regarding territorial funding, four basic agreements are worth mentioning. In the first place, the concept of Unsatisfied Basic Needs is a guiding principle for revenue allocation, although its definition and calculation are not indisputable. Second, decentralization was an instrument for the redistribution of wealth that the drafters tried to strengthen through a larger revenue share for territorial entities. Third, the understanding that the territorial entities and the Nation were partners and, therefore, transfers' rise should be tied to the increase of the State's current income. And, fourthly, the Assembly prioritized public social expenditure, although it placed it after the "security issue". Nevertheless, the pillar suffers two contradictions in its search for economic equality. The first contradiction is that the Assembly sought decentralization so that the entities would provide more and more services to meet the needs of their population, but that system fostered a dependence of the territories on the funds sent from the central government, which, in addition, assigned the money only for fixed expenses (education and healthcare) because the Constitution ordered it to do so. A second problem with this pillar is that the Assembly forced the central government and territorial entities to spend on social investment, but did not require them to save, that is, the Assembly did not provide mechanisms for the allocation to be sustainable even in times of economic crisis, as indeed happened eight years later in 1999. In addition, the entire transfer system depended mainly on taxes (e.g., V.A.T. and income tax), but, in contrast, the tax system agreed upon by the Assembly was essentially weak, as will be shown below.

On the tax system, there are at least three interpretations. The first one is that the approved principles, and especially the principle of progressivity, contain the desire that taxation has an emphasis on direct taxation. The second is that the majority in the Assembly did not realize the importance of taxation having concrete redistributive elements that would force the State and any government to combat economic inequality. The third is that the majority that defeated the proposal of drafter Darío Mejía and others in the second debate, did not want the Constitution to have a strong redistributive tax system because it affected the economic and political interests they represented. Even though it is not possible to know with certainty the correct answer because the data is not

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descriptive enough, my interpretation is that the inclusion of the expression "progressivity" is not sufficient as a mechanism to overcome economic inequality if we compare it with, for example, an explicit rule that obliges the State to charge more direct taxes on wealth than indirect ones, among other measures such as those proposed by the Patriotic Union. With such a rule, even existing institutions like the Constitutional Court could have the indisputable power to declare unconstitutional a taxation act that violates that rule. Furthermore, the data suggest that, from the beginning, there was an intention in the Assembly to make the tax system as weak as possible, under the pretext that tax matters should be the subject of specific regulation by Congress. Nevertheless, that is not understandable if one considers that the regulation of taxation is important not only for reasons of fighting against the concentration of wealth or redistribution of income but because a structured regulation on taxes is necessary for the maintenance of a State with high social burdens, such as the one that the Assembly was founding. In this scenario, even the transitory Article 43 that obliged Congress and the executive branch to amend taxes in vigor only once 18 days after the promulgation of the Constitution was not enough, as proven by the number of 17 tax reforms in 28 years (from 1992 to 2020).[241]

The brief discussion above shows that, even among the five main topics that I identified as the most relevant for the Assembly to overcome inequality according to drafters' proposals and discussions, the Assembly failed to design a well-structured plan to fight economic inequality. Instead of such a plan, the constituents approved a set of unarticulated policies that had some connections with economic inequality but did not provide the mechanisms to materialize that purpose in a context that demanded concrete measures. This leaves the following conclusions:

1) The Assembly favored a very general wording in aspects that required precision to push for compliance. The Colombian legal tradition tends to worship the written word and "trust" its transformative potential. Despite the criticisms of this legal fetishism, the symbolic power of law does exist and should not be minimized. Thanks to that, for example, the Assembly was successful in creating the *acción de tutela* as a mechanism for the protection of fundamental rights. In the same way, a constitutional agreement against economic inequality depended on the greatest precision, accuracy, and coherence of the language (to the extent possible within a constitutional text) to avoid authorities omitting its materialization by excusing itself in unnecessary gaps and ambiguities.

[241] Carolina Salazar, *En Colombia se han hecho más de 50 reformas tributarias desde 1897*, La República (Ap. 1, 2021) available at: https://www.larepublica.co/especiales/mis-documentos-semana-santa-2021/en-colombia-se-han-hecho-mas-de-50-reformas-al-sistema-tributario-en-mas-de-un-siglo-3147619 [https://perma.cc/A8ZH-68GH].

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2) In a context of economic inequality as the one experienced by the Assembly in 1991, this body failed to foresee that there was a huge risk in letting the executive and the legislature branches act under a deficient, contradictory, and extremely general wording pact. As I described it in the historical context of each pillar, during the Constitution of 1886, many events demonstrated the need for a continuous public policy, that is, one that would survive changes in government. Thus, for example, the agrarian reform plans elaborated in the early 1960s to overcome *La Violencia* did not have continuity, sometimes they were not even implemented. In the same way, the Assembly had the possibility of stopping the advance of State financing through indirect taxes share in the State budget, but the majority rejected the proposed policy in this regard and preferred to leave a general postulate such as "progressivity," much weaker and more manipulable than the sentence proposed. A sample is that, despite the existence of the principle of progressivity, the Colombian State has not yet implemented a serious tax reform that gradually increases direct taxation over indirect taxation. In 2021, one of the largest citizen mobilizations in the recent history of the country took place against a tax law that, instead, aimed to create more direct taxes on the middle class and sought to expand V.A.T. to basic goods.[242] Hence, the Assembly left to the discretion of the branches of the State co-opted by the traditional elites, the fulfillment of a pact that was structurally weak and had no mechanisms to defend itself.
3) The Assembly also failed to create constitutional mechanisms to achieve economic equality. Thus, the Assembly enshrined social rights but did not how to claim them. It also recognized the need to carry out agrarian reform but did not agree on more specific times or guidelines to execute it. In the same way, the Assembly did not approve more specific guidelines to combat the concentration of wealth or make the distribution of resources among the State and territorial entities sustainable. Also, I highlight the lack of other figures that could have strengthened the pillars; for example, the possibility that the Constitutional Court could review the constitutionality of all substantial changes to the Constitution (although the Court conferred itself that power later to do it in exceptional cases that it chose). What is paradoxical is that, as described in the debates, there were several proposals in this regard. In other words, many drafters did foresee the need to create these mechanisms or guarantees so that the agreed pillars promote economic equality. However, most of the constituents rejected those proposals.
4) Nonetheless, the Assembly did approve a few concrete measures consistent with the speeches in favor of economic equality. Two examples are expro-

[242] See, *e.g.*, *Protests in Colombia derail an important tax reform*, The Economist (May 6, 2021) available at: https://www.economist.com/the-americas/2021/05/06/protests-in-colombia-derail-an-important-tax-reform [https://perma.cc/JH8T-Y93W]. Even former constituent Fernando Carrillo is still promoting the idea of a need for a "fiscal pact" thirty years after he proposed the current Article 363 of the Constitution, @fcarrilloflorez, Twitter (Ap. 26, 2021, 12:27 PM) available at: https://twitter.com/fcarrilloflorez/status/1386733609546141698.

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priation and the distribution of revenue among territorial entities. Furthermore, it is important to mention that Congress repealed those regulations almost a decade later. In the first case, Congress repealed expropriation without compensation due to pressures from foreign investors who saw in this article a source of legal uncertainty for their capital in Colombia.[243] Nevertheless, that type of compensation was never used and also contradicted international law agreed by the Colombian State.[244] In the second case, the government of Andrés Pastrana in 1999, following the recommendations of the International Monetary Fund, centralized part of the resources of the territorial entities towards the Nation during the first economic crisis under the new Constitution. These changes raise two questions. First, the Assembly did have the power to adopt concrete and punctual measures to avoid the concentration of wealth and distribute income; the original standards in this pair of examples are evidence of this. Second, despite good intentions, even concrete constitutional mechanisms for carrying out macro-projects such as overcoming economic inequality could be easily replaced.

Thus, the internal problems in the structure of what was supposed to be one of the main motivations to draft a better constitution for Colombia in 1991, made the five pillars not only insufficient but also ineffective to overcome economic inequality. Even those concrete mechanisms that aimed to achieve that goal ended up amended under criteria that tended to benefit a vision aligned with the fashionable doctrine that economic growth does reduce economic inequality. The last chapter does not address the issue of what the remedies for Colombia should be to tackle economic inequality through the Constitution, that is not the objective of this work, although I have implicitly suggested potential alternatives. Instead, it reflects briefly on what I consider the minimum points that any constituent process with similar characteristics to the Colombian experience (e.g., profound inequality, violence, elite cooptation of power) should consider when drafting a constitution that aims to fight economic inequality.

V. Towards Economic Equality Through a New Constitutional Design

At this point, then, it is necessary to specify how the design and drafting of a constitution can contribute to achieving greater economic equality. From an Anglo-Saxon legal perspective, leading constitutionalists Rosalind Dixon and Julie Suk have highlighted several ways countries address the problem of eco-

[243] *See* Acto Legislativo 1 de 1999, julio 30, 1999, Diario Oficial [D.O.] 43654; Laura García-Matamoros, *La expropiación, sin indemnización en el derecho interno y en el derecho internacional*, 1 Revista Estudios Socio-Jurídicos, no. 1, 77 (1999).

[244] *See*, *e.g.*, Article 21-2 of the Inter-American Convention on Human Rights, Ley 16 de 1972, diciembre 30, 1972, Diario Oficial [D.O.] 33780.

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nomic inequality in their constitutions.[245] The responses are structural changes to the political system to provide more representation to poor or middle-class people, bills of socioeconomic rights, or the promotion of equality in relevant aspects such as access to higher education. However, they also recognize the obstacles for these measures to work, such as no clear definition and scope of the policies, unexpected or counterproductive consequences of pro-equality policies that end up corroding democracy, and a dependency on institutions such as a Congress absorbed by groups' interests that prevent materializing those policies. In this scenario, the authors show two alternatives when addressing economic inequality as a constitutional problem: assuming an optimistic view that upcoming economic and political needs will force the creation of new tools to address economic inequality within the liberal constitutional tradition,[246] or adopting a pessimistic perspective that the liberal constitutional tradition itself contains features that prevent those policies from being unfolded effectively. What are the teachings of the Colombian Constitutional Assembly discussions account presented above amidst those two positions?

This article argues that the Colombian Constitutional Assembly agreement on how to address economic inequality lacks clarity, coherence, and, therefore, strength to materialize the existing aspirations. However, there are clues to believe that more concrete and reinforced pillars would have had a greater impact on the application of the Constitution as a tool of economic equality. Of course, a constitution is merely a rule, not a magical tool to improve society. Now, the question is: how to prevent existing or upcoming powers from undermining constitutional economic equality policies? This is a problem that even some policies enshrined originally in the Constitution of 1991 faced. Instead of assuming a pessimistic view on this issue with no remedies on the horizon, and without ignoring that liberal constitutionalism has its limitations, the advancement in constitutional theory, which seems to be stuck in classical discussions nowadays could help to answer that query.

In Latin American legal scholarship, Roberto Gargarella asserts that the new constitutions in the region from 1990 up to date have at least two things in common. The first one is the existence of a wide catalog of rights, such as socioeconomic rights; and the second one is that, despite these extensive and promising catalogs, constitutions still maintain the same organic structure (or "engine room") from the nineteenth century that prevents more democracy. Thus, for Gargarella, until the designing problems that prevent more democracy are resolved in the organic part, it is not possible to achieve the promises of this new Latin American constitutionalism; therefore, the consensus on how to achieve

[245] Rosalind Dixon & Julie Suk, *Liberal Constitutionalism and Economic Inequality*, 48 U. Chi. L. Rev., no. 2, 369 (2018).

[246] For instance, nowadays, Colombia, like many other countries, is discussing the possibility to implement a basic income to palliate the effects of the restrictive measures adopted to fight COVID-19); on the drafts presented in Congress, *see* Renta Básica Ya. Diálogos, Saberes y Propuestas 485-554 (Eric Orgulloso et al. eds., 2020).

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greater economic equality has yet to be agreed upon.[247] However, perhaps providing a better organization of power is not enough for at least two reasons.

Firstly, this article shows the importance of a constituent assembly addressing economic inequality as a structural problem with the same relevance that traditional constituent assemblies devote to issues such as the division of power, the bill of rights, or the amendment mechanisms. An economic equality agenda is a serious issue enough to be addressed only through socio-economic rights or general and disconnected declarations on social justice. Even a political arrangement that brings more democracy is insufficient if there are no clear rules for tackling economic inequality. After all, how could anyone talk about democracy when the most basic economic conditions to act freely are yet to be satisfied? There is a false dilemma about which one must come first, equality or democracy, because they are both necessary for human freedom in the end. That is why constitutional assemblies need to consider both aspects as inseparable in constitutional design. The incoherence, gaps, and contradictions of the five pillars agreed upon by the Colombian Constitutional Assembly in 1991 to combat economic inequality show that wishes, well-intentioned speeches, and disconnected concrete measures are not enough. A well-structured constitutional design focused on economic equality is not a definitive guarantee of total success, but it is an instrument with more symbolic strength to guide an entire society that aims to fight against economic inequality. Therefore, any constituent process that is committed to overcoming economic inequality must recognize the relevance this issue deserves and place it at the same level as topics such as the political system, the division of powers, or judicial review and competencies; the latter, a subject on which a considerable part of constitutional scholarship discussions in Latin America is devoted today. Thus, any constitutional drafting process in contexts of extreme inequality or where there is the will to overcome it should prioritize the design of a well-structured plan that permeates the entire constitution. That forces us to rethink the tasks of a Constituent Assembly and the nature of a constitution as traditionally conceived.

Secondly, the structures of current liberal constitutionalism may not be capable of helping to overcome economic inequality in certain contexts, such as the Colombian one, and, therefore, it would be necessary to look for creative ways to materialize that purpose. A real change needs creativeness and our imagination to invent new ways of organizing the world without being tied to a single scheme of what a constitution means or what a constituent power should adopt.[248] This is a criticism not only of those positions that deny the transformative power of law, but also of legal agents (professors, legislators, lawyers, judges, and administrators) who are obstinate in obstructing or not taking ad-

[247] Roberto Gargarella, Latin American Constitutionalism, 1810-2010: The Engine Room of the Constitution 206-208 (2013).

[248] This suggestion derives from my reflection on Roberto Unger's call for imagination in institutional design, *see* Roberto Unger, The Left Alternative (2009).

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vantage of the transformative potential of law. Furthermore, this is also a criticism of the practice of preformatting how a society must be constitutionally organized and the archetypes that scholars and practitioners assume a constitution should comply with to be considered so. [249] Certainly, constitutional scholars have a big task to create alternatives that go beyond inventing more rights and bodies.

Maybe proposals should focus on the notion itself of a constitution, although that exceeds the scope of this article. For example, what about imagining the constitution neither as an agreement that intends to last forever nor as an easy-amending document but as a planning instrument subjected to evaluations only for certain periods? Or what if the provisions that aim to promote economic equality —for example, the prevalence of direct taxation over the indirect taxation— are immutable or petrified clauses as a kind of "militant social justice"? It is paradoxical that, although the social component of a constitution is said to be "progressive," constitutions do not usually contain instruments to verify that promises are fulfilled. In addition, constitutions do not normally include tools to change policies that did not work in a period without destroying what was achieved. Instead, they should have tools to amend processes in order to increase the chances of accomplishing the initial objectives. Indeed, the Colombian case shows that, in general, each government boycotted what the previous one had done before the Constitution of 1991. And even today, that continues to be the case, especially when national decisions are more conditioned by global capitalism.[250] Thus, an interesting experiment could be to conceive of the constitution itself as a plan subject to evaluation and with a fixed duration.[251] Periodic evaluations of the results are essential to ensuring the implementation of agreed-upon policies. This allows for a thorough study of their effects, providing a solid experiential foundation. Subsequently, adjustments can be made as needed to promote effective change. In any case, popular participation is decisive for the success of this dynamic conception of the constitution. The fact that a constitution has an "expiration date" could serve as a safeguard for citizens, ensuring that governments cannot interfere with the implementation of

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[249] On a classical definition of the five minimum elements that make up a constitution (that is, separation of powers, checks and balances, mechanisms to overcome impasses, amendment procedure, and a bill of rights), *see* Karl Loewenstein, Teoría de la Constitución 153-154 (Alfredo Gallego trans., 2d ed. Universidad de Barcelona 1979) (1957).

[250] *See, e.g.,* David S. Law, *Globalization and the Future of Constitutional Rights*, 102 Northwest. Univ. Law Rev., no. 3, 1277 (2008).

[251] Compare with the debates in American constitutional law scholarship about holding periodical constitutional conventions to revise and update constitutions, *see, e.g.*, Mark Tushnet, *The Politics of Levinson's Constitutional Convention*, Harv. L. & Pol'y Rev., https://harvardlpr.com/online-articles/the-politics-of-levinsons-constitutional-convention/ [https://perma.cc/TF6Q-NLZN]; J. H. Snider, *Does the World Really Belong to the Living: The Decline of the Constitutional Convention in New York and Other US States, 1776-2015*, 6 Am. Pol. Thought 256 (2017); Joel I Colón-Ríos, *The Three Waves of The Constitutionalism-Democracy Debate in The U.S. (And an Invitation to Return to The First)*, 18 Willamette Journal of International Law and Dispute Resolution, no. 1, 1 (2010).

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agreed policies until they yield the desired effects.[252] Moreover, broad popular participation could be a guarantee of a greater consensus for the appropriation of common policies, but also for their control and the process of eventual amendment. This is the type of non-conventional discussion that problems in non-conventional contexts require us to think about. Thus, in the end, creativity in constitutional design beyond rights and institutions is also a necessary asset to address economic inequality.

VI. Conclusion

In summary, while the primary reason for initiating the drafting of a new constitution in Colombia in 1991 was not rooted in the high levels of economic inequality, the struggle against economic inequality emerged as a pivotal motivation during the drafting process, as shown in the debates at the hemicycle. However, despite the five pillars or set of policies agreed upon by the Assembly to achieve that goal, that is, rights, property and land, State intervention in the economy, territorial funding, and taxation, the Assembly did not agree on a well-structured plan to address economic inequality, with specific constitutional mechanisms to guarantee its fulfillment and prevent the action of both the executive and legislative branches from deviating from that objective once the Constitution was promulgated.

Thus, the Colombian drafting experience shows that, in societies where inequality is high and the political and economic contexts play against the achievement of economic equality, the constitutional tools proposed to address economic inequality should be designed as precisely, coherently, and comprehensively as possible to deal with the challenges derived from fighting economic inequality in an unequal world. Drafters need to think outside the box of liberal constitutional law to foster the transformative role of law in overcoming economic inequality. Otherwise, we will be stuck in discussions within the same system where remedies for economic inequality are reformulations of the same: increased or decreased judicial participation or activism to realize social rights, varying degrees of state intervention in the economy, and so on. For this reason, I vindicate the need for greater creativity in constitutional design as a valuable contribution from the law to overcome economic inequality.

[252] On the lifespan of written constitutions, *see* Tom Ginsburg et al., The Endurance of National Constitutions (2009).