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# The 1991 Constituent Process of as an Example of Deliberative Democracy

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## ABSTRACT

The 1991 constituent process incorporates various elements from the social context of the time, both institutional and non-institutional. These include the “Séptima papeleta” movement, which played a decisive role when the Supreme Court of Justice and other authorities adopted the proposals from this and other movements. These proposals aimed to achieve institutional changes through constitutional reform, which was not feasible under the existing mechanisms of the 1886 National Constitution. To promote this objective, social actors employed constitutional theory concepts, such as the primary constituent, and utilized participation mechanisms to facilitate interaction between state and non-state actors. These rules of argumentation were not limited to the exercise of the citizen vote, which, while essential, was insufficient on its own to ensure full participation from all members of the debate. The principle of one person, one vote was inadequate to change the existing order. The construction of dialogue spaces outside of legislative authority became necessary for the actors to achieve institutional change

through the formation of a National Constituent Assembly. This assembly applied deliberative democracy principles, which are reflected in the 1991 Political Constitution.

**KEYWORDS:** Primary constituent power, deliberative democracy, Bill of Rights, human dignity, social contract.

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## **El proceso constituyente de 1991 como un ejemplo de democracia deliberativa**

### **RESUMEN**

El proceso constituyente de 1991 se caracteriza por haber incorporado elementos disímiles dentro los lineamientos sociales de aquel momento como aquellos de naturaleza institucional consagrados en el ordenamiento jurídico, y no institucionales como el movimiento “Séptima papeleta”. Este último llegó a jugar un papel determinante, pues la Corte Suprema de Justicia y otras autoridades toman las propuestas que este y otros movimientos llegaron a realizar para obtener cambios institucionales a través de una reforma constitucional no realizable con los mecanismos existentes en la Constitución Nacional de 1886. Por esta razón, los actores sociales que promueven este objetivo tienen que emplear argumentos de la teoría constitucional como el concepto de constituyente primario, y emplear mecanismos de participación que garantizarán la interacción entre actores estatales y no estatales. Estas reglas de exposición argumentativa no estaban limitadas al ejercicio del voto ciudadano. Este elemento era importante, pero insuficiente, pues este no garantiza la participación a todos integrantes del debate. El concepto de un hombre un voto no permitía era insuficiente para cambiar el orden existente, y la construcción de espacios de dialogo diferentes de la autoridad legislativa resulta ser una necesidad para los actores que logran el cambio institucional con la conformación de una Asamblea Nacional Constituyente, corporación que aplica criterios de democracia deliberativa que están reflejados en la Constitución Política de 1991.

**PALABRAS CLAVE:** poder constituyente primario, democracia deliberativa, Derechos fundamentales, dignidad humana, contrato social.

## Introduction

The constitutional history of Colombia is marked by the instability of its institutional system. Between 1811 and 1886 multiple constitutions were created -an approach that continued until the late 20th century. This trend of using political constitutions to resolve political and social conflicts was the norm. Thus, the constituent process leading to the 1991 Political Constitution was not unprecedented in itself. However, the events that prompted the creation of the 1991 Constitution differ significantly from those of earlier Colombian constitutions. This assertion is based on two key premises: the disregard for established constitutional reform procedures and the inclusive, derivative nature of the process that shaped the current Constitution.

First, the process bypassed the constitutional reform rules established in 1957, which mandated that any constitutional changes occur through legislative acts processed by the Congress of the Republic. In contrast, the social movement that led to the creation of the National Constituent Assembly in 1990 directly opposed existing legal norms. For this reason, the notion of primary constituent power had to be invoked to legitimize the process that culminated in the Political Constitution of 1991.

Second, the 1990-1991 constituent process stood out for its deliberative and pluralistic character. Most political forces of the time engaged in electoral processes, thereby validating the governmental and judicial decisions that preceded the adoption of the current Constitution.

Despite the prevailing violence of the early 1990s, the constituent process benefited the participation of diverse ideological perspectives, as seen in the delegates of the *Asamblea Nacional Constituyente* —the assembly's original institutional name—. Consequently, the events that led to the creation of the 1991 Political Constitution differ from other constitutional reform processes. However, the underlying goal remained consistent with the previous processes: addressing complex social issues through constitutional changes.

Nevertheless, the 1991 constituent process was more than a mere social movement. It represented the construction of a new social contract obligating the State to ensure citizen security, provide public services, and establish a just and equitable social order—crucial aspects for building peaceful coexistence, and a stable and lasting peace.

Although the anticipated social peace was not entirely achieved, the process did establish principles (legal and political), values, rules, and constitutional actions that have, over these 30 years, guided the fulfillment of the essential purposes of the rule of law. The constitutional document also includes fundamental agreements outlining rights and obligations designed to limit public power and prevent abuses.

The social and institutional order established by the 1991 Political Constitution defined the state's purposes, ensuring respect for the agreed-upon guarantees and fundamental rights within the new constitutional framework (Elster, 2002, p. 67).

Therefore, the primary objective of this document is to analyze the issuance of the 1991 Political Constitution as a deliberative democratic process, examining the political foundations that justified invoking the concept of primary constituent power, as well as the factors that contributed to enshrining a bill of rights within the constitutional framework. Specifically, it will explore the characteristics of constituent processes in deliberative democracies, the events leading up to the convening of the Asamblea Nacional Constituyente to modify and eventually repeal the National Constitution of 1886, and the purpose of the primary constituent assembly in 1991, which established a new bill of rights. This document aims to demonstrate that these elements reflect a democratic process and provide evidence of the deliberative democratic approach. Additionally, it examines how the resulting concepts and provisions incorporated by the Asamblea Nacional Constituyente within the Political Constitution are essential for the Corte Constitucional jurisprudence.

## **I. Constituent processes in deliberative democracies**

Some perspectives prioritize the formal aspects of democracy, such as the exercise of free elections, freedom of expression, and accountability by public authorities, over substantial elements. This is evident in the views of some legal philosophers who conceive democracy as a set of rules and procedures to submit individual decisions to the majority. However, this approach is insufficient because democracy is more than just a form of government; it is a political experience. Most citizens find the conceptual frameworks of legal formality and economics to be foreign to them. Therefore, concepts have been developed to actualize the principles and values enshrined in bills of rights since the second decade of the 20th century to realize political agreements arising from democratic processes. Legal guarantees (*garantismo jurídico* in Spanish) offer two perspectives on democracy: a formal one—related to procedures—and a substantial one—concerning the fundamental rights the state must guarantee— (Ferrajoli, 2011, p. 90).

Similarly, some contemporary constitutionalists seek to restore the foundation of bills of rights through formalistic models that legitimize the rule of law. Another approach, which is different, but not contradictory, suggests that the deliberative process requires an understanding of democracy as active and not merely formal, thereby creating modern democracies with reflective citizens who are aware of their rights and constitutional guarantees (Ferrajoli, 1995, p. 861).

In this context, democratic deliberation should not exclude any topic or form of understanding social welfare, nor should it deny spaces for interaction between

actors. This is the only way to give effect to democratic values and establish legitimacy parameters for demanding state protection of fundamental rights enshrined in constitutional provisions and international human rights rules. Therefore, spaces for exercising these deliberative processes are essential and can be categorized as either institutional or non-institutional paths. The former occur within the framework of a legally established and regulated decision-making process that leads to legal decisions in a broad sense. The latter occur broadly, diffusely, and informally in various spaces and contexts of the public sphere, which are not legally established and do not lead to legal decisions (Martí, 2006, p.80).

Thus, the 1991 constituent process cannot be considered contrary to deliberative democracy, even if it did not conform to the institutional parameters of the 1886 Constitution (Uprimny and Sánchez, 2012, p. 34). The rulings of the Colombian Corte Suprema de Justicia upheld the election of delegates to the National Constituent Assembly based on an interpretation of constitutional principles. This court applied the primary fundamental concept to justify that people's authority is not subject to the established institutional restrictions, as long as it respects democratic principles, human dignity, and the principle of checks and balances (Leiva, 2015, p. 21). The Corte Suprema de Justicia made decisions that were extra-constitutional but not unconstitutional. Below, the original constituent power concept as a reflection of a deliberative process will be analyzed further.

## **II. Original constituent power as a deliberative process**

Deliberative democracy serves as a mechanism through which citizens actively engage in promoting the public good. Martí (2006, p. 298) considers this as a pillar of modern democracies, based on deliberative processes that involve citizens who are aware of their rights and constitutional guarantees (Leiva, 2021).

Consequently, democratic deliberation becomes both a right of citizens and an obligation of the State. It evolves into a fundamental normative principle, embodying a positive mandate that the state must guarantee as a social or material right (Ferrajoli, 1995, p. 354<sup>1</sup>; Alexy, 2017, p. 483). In this way, the right to

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<sup>1</sup> "Alongside traditional rights to freedom, the constitutions of this century have recognized other essential or fundamental rights: the rights to subsistence, food, work, health, education, housing, information, and similar rights. Unlike the rights to freedom, which are rights (or powers of own behavior) that correspond to prohibitions (or public duties not to act), these rights, which can be called "social" or "material," are rights to (or expectations of others' behaviors) that correspond to obligations (or public duties to act). Consequently, the liberal notion of the 'rule of law' must be expanded to include not only the state bound by obligations but also prohibitions. Thus, when a constitutional order incorporates only prohibitions to provide negative protections for ensuring rights to freedom, it is considered a liberal state of law; when, instead, it also incorporates obligations to provide protections for guaranteeing social rights, it is characterized as a state of social law." The original text in Spanish was elaborated by Ferrajoli (1995, p. 861). Finally, Ferrajoli suggests that a derivative of the right to life is the right to survival, which involves the exercise of various social rights such as the right to education. "Living requires not only the prohibition of killing but also demands taking the necessary measures to guarantee survival by providing vital minimums." The original text in Spanish was elaborated by Ferrajoli (2011, p. 18).

deliberate acquires takes on a political character, enabling citizens to exercise their constitutional guarantees and contribute to “a living constitution” or a “living tree” (Waluchow, 2009, p. 376).

Thus, the principles of deliberative democracy can foster citizens who are cognizant of their political destiny, leading to the establishment of spaces to exercise their rights (Uprimny and Sánchez, 2012, p. 35). According to Martí, a deliberative society must “take measures to educate and train citizens in such public virtues and design mechanisms for political participation that contemplate the possibility of participants being virtuous and encouraging the virtue of citizenship” (2006, p. 297).

Therefore, constitutional deliberation facilitates the communication of democratic principles in a politically engaged society. Habermas (1987, p. 161) asserts that “everything valid must be publicly justified.” Deliberative democracy considers democratic determination—both private and public aspects of communal life—as an issue that can only be resolved through deliberation and public discussion among all members of a democratic society (Leiva, 2015).

A democratic public discussion or deliberation should not exclude any topic or interpretation of the social good. As such, applying democratic principles and values becomes an obligation for the social state governed by the rule of law, since it does not provide citizens with the knowledge necessary for their participation in building a deliberative democracy. Ignorance of constitutional principles lead to debates lacking substantiated arguments, which is detrimental to a democratic society (Leiva, 2023, p. 12). Therefore, democratic states must bolster spaces for deliberation, both institutional (formally outlined in constitutional texts) and non-institutional (Guastini, 1999, p. 174), as these enable citizens to gather essential arguments to demand state protection of fundamental rights (Alexy, 2017, p. 471).

On the other hand, deliberative democracy allows citizens to contribute to the realization of democratic principles and values through both institutional and non-institutional means (Mejía, 1998, p. 81). Institutional paths operate within normatively established decision-making processes, resulting in legal decision in a broad sense. In contrast, non-institutional spaces of democratic deliberation occur widely, diffusely, and informally across multiple spaces and contexts of the public sphere. These processes are not legally established and do not result in legal decisions (García, 2012). According to Martí:

*Institutional deliberative processes are regulated by rights and obligations established by other legal norms and are also linked to the State powers. Non-institutional deliberative processes, on the other hand, are diffuse and complex, and are not directly regulated by a legal norm. They take place in civil society across various*

*established structures, with different intensities and importances, such as publishing opinion articles, letters to the editor in the press, television debates, and informal conversations in coffee shops. In these cases, it is not possible to establish who should deliberate institutionally; thus, the participants in deliberation can potentially be all human beings (2006, p. 80)<sup>2</sup>.*

Deliberative democracies benefit from non-institutional spaces as they strengthen public debate. These forums have expanded since the end of the 20th century (Mejía, 1998). Sauquillo considers that the political transformations experienced by Western societies stem from the rapid dissemination of information, which travels with greater ease and fewer restrictions. These shift has allowed a transition from representative democracy to a new paradigm of direct democracy (Sauquillo, 2002, p. 285).

The Colombian constituent process exemplifies deliberative democracy due to democratic that emerged at the end of the 20th century. These contexts highlighted the limitations of representative democracy in achieving the principles of nascent global constitutionalism (Mejía, 1998, p. 77), particularly in the context of the global south (Leiva, 2023, p. 11).

The primary constituent power was exercised in non-institutional spaces and acknowledged by the existing authorities within the constitutional norm being reformed (García, 2012). The Constitutional Court recognized the 1991 constituent process and the subsequent constitution as legitimate due to its reflection of deliberative democracy.

An examination of popular sovereignty leads to reflections on the theory of constituent power, as it represents its manifestation. Constitutional doctrine and jurisprudence consider democracy in Colombia as being expressed in two ways: directly<sup>3</sup> or by representation<sup>4</sup> (Leiva, 2022). Regarding constitutional theory, the first is the foundation of the concept of constituent power in its strict sense, also known as primary or original constituent power. The second forms the basis of

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<sup>2</sup> Free translation by the author.

<sup>3</sup> Examples of this type of political activity in Colombian history include the 1957 plebiscite or the commissioning by the people of a Constituent Assembly. In 1863 and 1886, the Assembly resulted from the decision of the victors of a civil war. In contrast, in 1991, the assembly was the product of universal, equal, and secret suffrage as a democratic procedure. In these instances, the only constraints were those established by the people.

<sup>4</sup> *“A review of Colombian constitutional and political history illustrates these assertions. In the nascent and unstable political forms of Colombian society in the 19th century, the original constituent power was entirely absent from the constitutions of Cúcuta, Ocaña, Rionegro, and even in that of Núñez and Caro, which remained in effect during throughout most the 20th century. Although the adoption of the latter went through a council of delegates that acted as a constituent body, its origin did not extend beyond the will of the Regenerator.*

*Similar considerations can be made regarding the only instance of popular intervention in constitutional matters in the previous century. The circumstances surrounding the plebiscite of December 1957 are well known to all; the event was far removed from what could be considered a genuinely free, spontaneous, and sovereign demonstration of most majority of the people”.* The original text in Spanish was elaborated by Moncayo (2004, p. 81).

the power of reform or derived or secondary constituent power (Guastini, 1999). The first is rooted in politically organized people who retain the ability. This original constituent power is not subject to the normative ruling order's legal to establish a constitution. This original constitution power is not bound by legal limits because of the existing normative order, as it entails a full exercise of the associates' political power.

Derived or secondary constituent power refers to the ability of specific state organs to modify an existing constitution within the channels defined by it. This power includes criteria such as the authority's jurisdiction, the constitutional amendment, process and the Bill of Rights, among others (Uprimny and Sánchez, pp.34 -35). thus, it is a power to reform the constitution itself, but with limitations and subject to controls (Corte Constitucional, sentence C-551 de 2003).

During the validity of a constitution, the people, as the primary constituent, remain in a latent state. They only manifest directly when an institutional crisis arises that challenges the constitution's validity or effectiveness (Guastini, 1999, p. 176). In such circumstances, the people may reclaim their sovereign power, leading to a disruption of the established order and paving the way for a new founding act. Constitutional parameters defined by superior norms guide the exercise of this power, channeling people's powers under normal conditions (Leiva, 2015, p. 22).

The act of the primary constituent power goes beyond the simple verbal or written adoption of a constitution. It incorporates crucial factors such as the structure of state power, relationships between the state and society, state duties and the rights and responsibilities of people, conflict resolution mechanisms, and methods for protecting the adopted scheme. These factors limit the exercise of constituted power, including the ability to amend the constitution, as it exists only from the constituent act and according to the fundamental decisions made by the constituent power. For this reason, derived constituent power cannot destroy the constitution because the constituted authority lacks the constitutional competencies of the original constituent power.

The preceding statement refers to one of the most complex challenges of constitutional theory and practice: what role the people, as the original constituent power and holders of sovereignty, play after the Constitution is issued. An answer is that the constitutional reform mechanisms embedded within the constitutional norm. In effect, the power of constitutional revision or modification is not the work of the original constituent power; instead, it represents an expression of a legally organized jurisdiction aimed at preventing the substitution of constitutional provisions. The power of reform does not become an original constituent power.



Establishing a clear channel for the original constituent power is inherently imperfect due to the nature of constituent power, which is resistant to a complete integration into a system of norms and competencies. Consequently, it does not allow for complete institutionalization. However, limits are present thanks to the inclusion of axiological principles in democratic societies, which help to moderate the exercise of primary constituent power (Corte Constitucional, sentence C-141 de 2010).

Thus, the exercise of original constituent power is guided by to these axiological principles to avoid causing unnecessary institutional disruptions. When a politically organized society adopts a model of constitutional democracy, it consents to the notion that all exercise of power must have limits. Therefore, as a sovereign people, they agree to self-regulate and conform to that democratic model, instituting channels through which to express themselves in any deliberative setting.

However, the Corte Constitucional considers that the 1991 Constitution attempts to resolve the dilemma and tension between popular sovereignty and constitutional supremacy by providing an avenue for the original constituent power through an aggravated reform procedure. Proof of this can be found in ruling C-1040 of 2005, which states that “the people may empower an Asamblea Constituyente with the authority to issue a new Constitution, a possibility explicitly permitted in Article 376.” Only through this mechanism can the current Constitution be replaced with a different one<sup>5</sup>.

In this process, the people determine whether to organize an Assembly and whether to limit its competence or grant extensive powers to alter the existing Constitution, depending on the citizens’ decision (Verdesoto, 2007, p. 121). This approach does not eliminate limits, but rather, the limitations would arise not from the provisions of the replaced Constitution but from the peremptory norms of international law and international human rights conventions.

Thus, the exercise of original power does not constitute a coup d’état or a breach of the rule of law. The primary constituent can issue a new constitution even in opposition to the existing one, and it can establish clauses that ensure the stability of the new order, provided this exercise occurs within a democratic context. Although the Colombian Constitution does not outline unchangeable clauses or principles that prevent its modification, it has limited the constitutional reform to uphold the democratic principles embedded in the new constitutional order to apply the principles of deliberative democracy. Therefore, the following section will present the antecedents that led to the realization of the original constituent will in the Political Constitution of 1991.

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<sup>5</sup> Indeed, Title XIII and Article 374 refer only to “Reform.” The interpretation provided in the ruling is unfortunate because it is logical that the same constitution only provides for its reform, not its replacement, as the latter is an autonomous act of the primary constituent power, which does not need regulation.

### III. The Political Constitution of 1991 as a constituent deliberative process

The 1991 Political Constitution of Colombia was born from a complex social, economic, and political context. Understanding the factors that influenced the creation of this new constitution is essential to understand the reasons behind the social movement of the early 1990s that advocated for a constitutional change to replace the Political Constitution of 1886. This period was marked by transformations and challenges faced by Latin American nations that saw modifications to their constitutional orders in response to globalization, persistent violence, and institutional chaos in Colombian society<sup>6</sup>.

At first, Latin America adopted a new economic model requiring structural changes, including economic liberalization and a shift away from state interventionist. The neoliberal economic framework established in the 1989 Washington Consensus influenced these changes during the liberal governments of the early 1930s. Regarding the Colombian social situation, the 1991 constitution emerged in a crisis with the belief that a new Political Charter could help alleviate the situation. Prior reform efforts, such as legislative acts 2 of 1977 and 1 of 1979 (which proposed convening a constitutional assembly), were unsuccessful as they deemed unenforceable by the Corte Suprema de Justicia in 1978 and 1981, respectively. The rigorous judicial review duties of the court at the time led to the rejection of these initiatives due to procedural and substantive defects.

The constitutional reform during the Barco administration (1986-1990) and the resulting social dissatisfaction sparked the need for a new constitutional order. The “séptima papeleta” (seventh ballot) student movement, designed by Fernando Carrillo<sup>7</sup> (Torres, 2010, p. 68) and involving around 25,000 participants (Herrera, 2010, p. 85) from various universities (Lleras and Tangarife, 1996, p. 13). The “Séptima papeleta”

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<sup>6</sup> “The convocation of a Constituent Assembly is not a new procedure. It has been utilized in various countries during the 19th and 20th centuries. In Peru, the Constituent Assembly was convened to draft its Constitution of 1979. Following the departure of the military regime in Brazil, the call for Constituent Assemblies became widespread in Latin America as the most suitable procedure for restructuring the State through a constituent act with broad popular engagement. In 1987, the ANC convened in Brasília, where the Brazilian Government of the time attempted to limit its powers. However, the social mobilization that ensued, leading to the presentation of sixty-one thousand amendments to the constitutional text, transformed this Assembly into a full sovereign body. The Brazilian Constitution of 1988 stands as the fundamental work of the Constituent Assembly. The constitutional reform in Argentina of 1994, was proposed as an agreement of Congress to convene a reform Convention. Although it did not introduce significant new features, it represented a departure from traditional doctrine, which had previously held that only Congress had the capacity to enact reforms. In Venezuela, after the presidential elections of 1993, there was a discussion about the possibility of the Congress, elected that year, acting as a Constituent Congress, based on the draft of the so-called Bilateral Commission. However, it was with the victory of the then candidate of the Polo Patriótico, Hugo Chávez Frías, whose main political proposal was the convocation of the National Constituent Assembly, that an ANC was convened, resulting in the drafting of the 1999 Constitution.”. The original text in Spanish was elaborated by Colomer (2007, pp. 56 a 58).

<sup>7</sup> Fernando Carrillo, who worked as a professor of Public Finance at the Universidad del Rosario, proposed the idea of inviting citizens to cast an additional ballot on that day. The text on this ballot, “voto por una asamblea nacional constituyente,” would serve to express the will of the nation, in a direct way, thereby creating an irrevocable political fact in the exercise of its constituent power. (Torres, 2010, p. 72).

was deemed valid on February 27, 1990, when the Registrador Nacional del Estado Civil of Colombia confirmed that including this vote in the electoral process would not invalidate other ballots (Sáchica and Vidal, 1991, p. 47). On March 11, 1990, one and a half million Colombians voted for the “Séptima papeleta” (Younes, 2004, p. 155).

Once the national government supported the social movement, the reform became part of the government’s agenda. Consequently, the issuance of Decree 927 of 1990 marked the government’s assumption of responsibility for the popular initiative. Nearly two months after the vote, President Barco issued Legislative Decree 927 of May 3, 1990, “Por el cual se dictan medidas tendientes al restablecimiento del orden público”, recognizing the constituent nature of the electoral decision and providing the first step toward reform. The Decree called on the Registraduría del Estado Civil to count the votes produced from the presidential elections of May 27, 1990, while also outlining the text of the electoral card that would facilitate the decision of the people regarding the convening of a Constitutional Assembly (Valencia, 1997, p. 181).

The Corte Suprema de Justicia declared the Legislative Decree enforceable on May 24, emphasizing the need for judicial review to consider the social reality of the situation. This included political valuation and judgement to uphold the Political Constitution of Colombia, and whoever exercises its guardianship is forced to issue political content decisions (Corte Suprema de Justicia, Sala Plena, 1990). In the elections of May 27, 1990, votes in favor of a National Assembly received strong support, totaling 6’048.076, with 5’236.863 votes in favor and approximately 230,000 against (Henao, 2004, p. 108).

The electoral process resulted in the liberal candidate César Gaviria Trujillo becoming president-elect of Colombia. Gaviria Trujillo expressed his support for the convening of a National Constituent Assembly due to his political beliefs. He promoted a political agreement to organize the assembly and establish a framework for reforming the Constitution to strengthen participatory democracy. This agreement, signed by Gaviria Trujillo as president-elect and national director of the Partido Liberal, along with representatives of other political parties, including the Partido Conservador, Movimiento de Salvación Nacional, and Movimiento Alianza Democrática M-19, represented forces that, according to the text of the agreement obtained on May 27, 1996, secured over 96% of the total vote (Henao, 2004, p. 108). As a result, Cesar Gaviria issued Decree 1926 of August 24, 1990, using the po State of Siege powers to organize the electorate for December 9, 1990, to decide whether or not to approve the convening of a Constitutional Assembly:

**ARTICULO 1º** *Mientras subsista turbado el orden público y en Estado de Sitio todo el territorio nacional, la Organización Electoral procederá a adoptar todas las medidas conducentes a contabilizar los votos que se emitan el 9 de diciembre de 1990, para que los ciudadanos tengan la posibilidad de convocar e integrar una Asamblea Constitucional.*

**ARTICULO 2º** *La papeleta que contabilizará la Organización Electoral deberá contener un voto afirmativo o un voto negativo.*

*El texto que deberá contener el voto afirmativo es el siguiente:*

*“Sí convoco una Asamblea Constitucional que sesionará entre el 5 de febrero y el 4 de julio de 1991, la cual estará regulada por lo establecido en el Acuerdo Político sobre la Asamblea Constitucional incorporado al Decreto 1926 de agosto 24 de 1990. Su competencia estará limitada a lo previsto en dicho acuerdo. Voto por la siguiente lista de candidatos para integrar la Asamblea Constitucional...”<sup>8</sup>.*

However, a legal battle still needed to be addressed, having been lost on previous occasions: the constitutional review of the Decree declaring a state of siege by the Corte Suprema de Justicia. Indeed, this institution had to rule on the constitutionality of Decree 1926 of August 1990. Judges Fabio Morón Díaz and Hernando Gómez Otálora prepared a presentation, and a judicial decision issued on October 9, 1990, accepted it. However, the Corte Suprema de Justicia dismissed the procedural objections and declared this legislative Decree constitutional. This legal norm contained an exhaustive list of ten issues regarding the so-called political agreement, which would restrict the full exercise of sovereignty by the original constituent. With this decision, the Assembly opened the possibility of reforming the entire constitutional text to establish a new constitutional order. From this moment on, the Corte Suprema de Justicia began to refer to the Assembly as an “Asamblea Constituyente” (Constituent Assembly) rather than simply constitutional, as it allowed for the creation of a new constitution rather than merely reforming specific points of 1886 one.

However, the text was submitted for approval on December 9, 1990, with a vote of 3.600,000 in favor and 350,000 against. The question posed was: “Con el fin de fortalecer la democracia participativa, ¿vota por la convocatoria a una asamblea nacional constitucional con representación de las fuerzas sociales, políticas y regionales de la nación, integrada democrática y popularmente, para reformar la Constitución de Colombia?”<sup>9</sup> (In order to strengthen participatory democracy, do you vote for the convening of a national constitutional assembly with representation from the nation’s social, political, and regional forces, democratically and popularly integrated, to reform the Constitution of Colombia?).

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<sup>8</sup> *ARTICLE 1 As long as public order and a State of Siege remain throughout the national territory, the Electoral Organization shall take all necessary measures to count the votes cast on December 9, 1990, thereby providing citizens with the opportunity to convene and establish a Constitutional Assembly.*

*ARTICLE 2 The ballots to be tallied by the Electoral Organization must include an option for either an affirmative or negative vote.*

*The text for the affirmative vote shall read as following:*

*“Yes, I call for the convening of a Constitutional Assembly to meet between February 5 and July 4, 1991, in accordance with the provisions of the Political Agreement on the Constitutional Assembly incorporated into Decree 1926 of August 24, 1990. Its authority shall be restricted to the provisions outlined in said agreement. I vote for the following list of candidates to comprise the Constitutional Assembly ...”. (Free translation by the author.)*

<sup>9</sup> *“To enhance participatory democracy, do you support the call for a national constitutional assembly with representation from the nation’s social, political and regional forces, democratically and inclusively integrated, to reform the Constitution of Colombia?”. (Free translation by the author.)*

The electoral quotient system selected seventy members from a list of 119 candidates on the electoral ballot. "The seventy elected constituents or delegations represented the Partido Liberal (24), the Movimiento Alianza Democrática M-19 (19), the Movimiento Salvación Nacional (11), the Partido Social Conservador (7), independent conservatism (5), the Unión Patriótica (2), the Movimiento de Unidad Cristiana (2), and the indigenous organization (2). Subsequently, four representatives of guerrilla groups relinquished their weapons to the government's peace process (Henao, 2004, p. 110). The 74 constituents deliberated for five months from February 1991 to July 4, 1991, divided into five commissions, and these into subcommittees.

it is worth noting that the call was for a Constitutional Assembly, which was to reform the current Constitution. In the early nineties, political society and state institutions considered that a Constituent Assembly would enable the integration its armed or non-armed actors within the country. It was seen as an opportunity to establish the foundations of a valid pact. The economic model, organizational design, bill of rights, and participation mechanisms were subjected to an inclusive debate based on equality and respect for the dignity inherent in all people. However, this would require a new political pact that recognized these principles as the foundation of the new institutional order (Leiva 2021, p. 128). Thus, the National Constituent Assembly issued Constituent Act No. 1 in May 1991, declaring itself with empowered without limit and establishing that its acts would not be subject to any judicial review constitutionality.

For this reason, it can be asserted that the Political Constitution of 1991 emerges as a manifestation of the people exercising their sovereign power as the primary constituent, aiming to establish a political agreement different from the one existing at that time, imbued with normative character. The purposes of this social contract are enshrined in the current Fundamental Norm, reflecting the deliberative process undertaken before and during the operation of the Asamblea Nacional Constituyente, objectives evident throughout the constitutional text crafted by this body. Consequently, the Corte Constitucional affirms in one of its first pronouncements on the 1991 constitutional process<sup>10</sup>.

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<sup>10</sup> "La Asamblea Nacional Constituyente que expidió la nueva Constitución Política de Colombia fue un poder comisionado del pueblo soberano. La Constituyente actuó una vez superados los obstáculos que establecía el artículo 13 del plebiscito de 1957 para el pronunciamiento del constituyente primario, y en ese sentido las decisiones populares que permitieron la convocatoria hicieron irreversible el proceso de renovación institucional. La comprensión del proceso colombiano de reforma se encuentra pues en el concepto de anomalía constitucional; y este concepto sólo puede ser definido políticamente, por ser acto fundacional, pues se refiere a un presupuesto del derecho que todavía no es jurídico. Este proceso de expresión del Poder Constituyente primario, en concepto de la Corte, es emanación especial del atributo incuestionable de las comunidades políticas democráticas que, en el Estado contemporáneo, pueden acudir de modo eventual y transitorio al ejercicio de sus potestades originarias para autoconformarse, o para revisar y modificar las decisiones políticas fundamentales y para darle a sus instituciones jurídicas, formas y contenidos nuevos con el fin de reordenar el marco de la regulación básica con una nueva orientación pluralista." (Corte Constitucional, sentence C-544 de 1992). Due to the importance of the content of the court decision, it was not translated.

#### **IV. The bill of rights as an expression of the new social contract signed in 1991**

A bill of rights and its guarantees were the responsibilities entrusted by Colombian society to the Asamblea Nacional Constituyente as the representative body of the primary constituent. Consequently, the Fundamental Norm ceases to be merely a political agreement, becoming a legally binding norm for all social actors and a functional legal framework for public authorities (Uprimny and Sánchez, 2012, p. 41). This transformation was made possible by the contentious democratic activity and the deliberative process established for future democratic expressions, emphasizing respect for human dignity as the foundational axiological principle of a democratic societies and modern constitutionalism (Corte Constitucional, sentence T-702 de 2001).

Indeed, the Political Constitution, along with other normative rules, has established that respect for human dignity is a foundational principle of the modern Rule of Law. This assertion stems from the intrinsic link between human dignity—the foundational value of the Colombian constitutional system—and the guiding principle of international human rights law (Corte Constitucional, sentence T-420 de 1993). The result of the deliberative processes culminated in the creation of the National Constituent Assembly in 1991, which had limited functions. Foremost among these was the elevation of the concept of human dignity to the functional and ontological foundation of the Colombian State, as outlined in Article 1 of the Political Constitution (Corte Constitucional, sentence T-585 de 2008).

The preceding argument allows us to infer that recognizing human dignity determines deliberative processes and state functions, serving as the bedrock of the constituted order and a realization of pluralist democracy as an alternative to political and legal organization (Corte Constitucional, sentence C-879 de 2003; Uprimny & Sánchez, 2012, pp. 34-35). The recognition of human dignity underscores the personalistic nature of the State, wherein the human person is the ultimate goal, utilizing the State and the law as instruments rather than ends in themselves. Pluralist democracy emerges as a consequence derived from human dignity (Corte Constitucional, sentence T-299 de 2003), ensuring the consecration and guarantee of human rights (Ortiz Delgado et al., 2009, pp. 99-100), as well as their adequate interpretation (Corte Constitucional, sentence C-251 de 2002).

Therefore, the relationship between the deliberative process and human rights incorporated in the Constitution is direct. The former facilitates the interaction of arguments necessary for institutionalism, while the latter hold axiological significance for all public powers and participating citizens, realizing the essential purposes of the State (Corte Constitucional, sentence C-657 de 1997).

So, the social actor's pact becomes an obligation for all participants in the deliberative process –*pacta sunt servanda*–. This contract necessitates a document formalizing the contractual clauses to produce legal effects –*ad substantiam actus*–and to demand accountability if the parties fail to comply (Leiva, 2021). These clauses constitute constitutional provisions and must be interpreted according to the principles agreed upon in the democratic process, especially respect for dignity. Therefore, the relationship between the deliberative process (stages preceding the social contract), the Political Constitution (normative text *ad substantiam actus*), and fundamental rights and other constitutional provisions is direct (Leiva, 2021). The ignorance of agreed agreements implies a resignation of the State to its most elementary constitutional functions, constituting a breach of its mission and reason for being (Delgado, 2006, p. 309). This abandonment leaves constitutional rights defenseless and undermines the legal-political order agreed upon and materialized in the Political Constitution (Corte Constitucional, sentence T-958 de 2002).

## V. Conclusions

The Asamblea Nacional Constituyente that promulgated the 1991 Political Constitution was a delegated power that emerged from the deliberations of political actors seeking to forge a new political pact to address the complex violence that Colombian society faced at the end of the 20th century. Its legitimacy was factual, stemming from a foundational-political fact that contradicted the legal regime in force at that time. Therefore, the Colombian reform process falls within the concept of constitutional abnormality, which can only be defined politically as a founding act—a new political pact—since it refers to a legal presupposition that is not yet legal. However, its validity as norm and political agreement is not questioning solely because it neglected the normative procedure of constitutional reform before its creation.

As a consequence, the validity of a legal system rule is analyzed exclusively from its previous formalities. The order's truth is a concept dependent on what precedes it and coexists with it: effectiveness. The fundamental norm devised by Kelsen (1994, p. 130) is nothing other than the efficacy of the ordering or the Rule of Recognition conceived by Hart (2007, p. 125). If another constitution replaces a constitution and proves to be functional, there is no need to speak of continuity checks. Examining the continuity of the moral, axiological, and legal circumstances in this instance is futile because there will be no legal and logical continuity between the abrogated constitutional system and the one substituting it. (Leiva, 2021, p. 130).

Hence, the legitimacy of the constituent deliberative process that led to the promulgation of the 1991 Political Constitution will not be determined in a legal action. It lies in a political fact that acknowledges the uprising against a legal system that did not reflect the interests of the social actors who interact to construct a new

social pact. For this reason, the Political Constitution of 1991 can be considered a manifestation of the primary constituent power to decide on a new legal order, ensuring greater participation in the political decisions of the State, the efficacy and guarantee of fundamental rights, a new organization of the State, and precise constitutional reform processes. However, constituent power theory is necessary, but not sufficient to explain political-legal changes in a reasonable, democratic, and humanistic manner.

Indeed, contemporary constitutional democracies cannot solely be understood through arguments of political fact, force, revolution, and institutional breakdown. Changes must be democratic and guarantee freedom, justice, equality, and other essential values to legitimize them. Axiological limits are object respect by the political actors of the deliberative process (Mejía, 1998). Ignoring these axiological requirements renders the pact an illicit, despite the deliberation, as democratic and humanistic principles are fundamental (Uprimny and Sánchez, 2012). Accepting a constituent deliberative process that ignores legitimacy limits could justify regimes contrary to human dignity (Hesse, 1992, p. XI).

One of the Constitutions' objectives and the reason for maintaining their status as the supreme norm to structure the Rule of Law for the community (Corte Constitucional, sentence C-251 de 2002), ensuring balance and harmony in its co-associates' political, economic, and legal relations, thereby securing a just and autonomous order (Guastini, 1999). For this reason, most constitutional texts establish general parameters for the activity and behavior of state organisms, governors and the governed in peace situations, ensuring their centrality axis in the operation of the State's operation and a lasting effect (Corte Constitucional, sentence C-008 de 2003). For example, the balance between rights and duties is an essential democracy incorporated in the constitutional pact of 1991 for political actors participating in this deliberative process. Thus, the Constitution of 1991 (Leiva, 2010, p. 28) is a juridical and political pact created from deliberative constituent processes (Corte Constitucional, sentence C-657 de 1997).

In this context, the classification of human rights (or fundamental rights as referred to in the Political Constitution) arises from the legitimate exercise that social actors must undertake by initiating a deliberative process aimed at translating these contractual clauses through the leaders who represented them. The Asamblea Nacional Constituyente utilized its sovereign power to establish specific minimum parameters in the new social pact, including peace, justice, work, coexistence, and equality among the State members, as well as democratic principles and values. In this manner, the constituent delegates fulfilled the mandate of the social actors who participated in the deliberative process. Thus, despite the challenges facing Colombian society, the Political Constitution remains a legal-political pact that guarantees and protects the human rights of the inhabitants of Colombian territory. Without a doubt if it did not exist, the social situation would be much more severe.



For instance, mechanisms such as the tutela action demonstrate that the Colombian Political Charter is not merely nominal but normative, as it has enabled dynamism, correct application, and the safeguarding of fundamental rights. That is precisely how the social actors who participated in the constituent deliberative process envisioned it, and the delegates embodied it in the Constitution in compliance with the legitimate mandate of the original or primary constituent.

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