CHAPTER FIVE

# LEGAL EMBEDDING

> *The Constitutional Court wanted to ensure that the Constitution permeated the entire judicial arena. In other words, all the judges of the country, the civil judges, the labor and criminal judges, the Supreme Court, all apply the Constitution.*[1]
>
> Justice Eduardo Cifuentes

This chapter turns to the Colombian legal community and examines how the 1991 Constitution influences judicial decision-making in Colombia. Legal embedding refers to the process by which particular understandings of new constitutional rights or other legal provisions come to inform the actions of judges and lawyers. Thus, legal embedding conceptually fits within constructivist approaches to judicial behavior, which understand judicial decisions to be "influenced by the institutionalization of 'sticky' ideas about the law and appropriate professional conduct in courts' routine practices," as described by Ezequiel González-Ocantos (2014: 482). He further explains that judges' social and professional contexts can influence their "cognitive frameworks mak[ing] certain patterns of action unthinkable, certain legal solutions unknown, certain jurisprudential innovations too risky, and certain practices part of unquestioned routines" (2014: 482) Lisa Hilbink (2007: 34, emphasis in original) similarly highlights the importance of both "institutional *structure*, [or] the formal rules that determine

[1] Elite interview 1 (July 26, 2016). "La Corte Constitucional quiere que busca que la Constitución permeé en toda la habita judicial. O sea que todos los jueces del país, los jueces civiles, los jueces laborales, penales, la Corte Suprema, todos aplican la Constitución."

the relationship of judges to each other and to the other branches of the state, and thereby offer incentives and disincentives for different kinds of behavior," and "institutional *ideology*, [or] the understanding of the social role of the institution into which judges are socialized, the content of which is maintained through formal sanctions and informal norms within the institution," for explaining judicial behavior. These factors condition whatever ideological preferences judges might have or strategic pressures they might face. Importantly, legal embedding occurs in these cognitive frameworks, institutional structures, and institutional ideologies.

What does legal embedding look like in Colombia? Following the introduction of the 1991 Constitution, the new Constitutional Court and the justices that comprised it set out a new vision of constitutional law; one that was informed, but not determined, by the drafters of the constitution. These justices also reacted to citizens' claims and the problems they came across time and time again both within the legal system and outside of it. Like with social embedding, we see a key role of legal mobilization in legal embedding. As citizens continued to bring claims to a wide variety of constitutional rights (including newly enshrined rights) using the tutela procedure, justice and clerks at the Constitutional Court began to think about the tutela and the possibilities of constitutional law in more expansive ways. They were inundated with new social rights claims and some of these social rights problems came to be visible to justices in their lived experience outside the courtroom as well as legible to them as *legal* in nature. Justices came to see these problems as properly legal, as ones that fall within the scope of the new constitutional vision. They then became more open to developing new legal approaches to the issue. In other words, this process made everyday problems "real" to the law.

The rise and persistence of claims related to a specific grievance (in this case, the right to health and other social rights) cumulatively informed judges about these issues, making them more comfortable with the scope of social rights and more aware of the salience of social rights. Ultimately, they even began to identify with claimants.[2] A confluence of exposure to social rights challenges in daily life (i.e., life outside of courthouses) and exposure within the legal system played

[2] For other arguments that focus on how judges' awareness of and responsiveness to an issue may shift over time, see Feeley and Rubin (1998), Hilbink (2014), Petrova (2018), Ríos-Figueroa (2016), and Kim et al. (2021).

an important role in the development of judicial receptivity, inspiring judges to connect an issue that they have perhaps seen on television or in their everyday lives with the format, scope, and tools of law. Justices then allowed new kinds of claims to be made, viewing new grievances as issues that should be resolved in the formal legal sphere – specifically those related to social rights. Over time, this view came to be one that was held not just by individual justices or the Constitutional Court, but one that had spread throughout the judiciary. Citizens continued to make legal claims to these new social rights using the tutela, especially as the social embedding of the 1991 Constitution deepened. As will become evident, this legal mobilization helped to generate judicial receptivity and shape the legal embedding of the Constitution.

The rest of this chapter proceeds as follows. I first set out evidence that legal embedding of the 1991 Constitution has, in fact, taken place in Colombia. After that, I draw on semi-structured interviews with "legal elites" (including lawyers, judges, and law professors) and a close reading of tutela decisions to show how legal mobilization has served as a mechanism of legal embedding through an examination of early tutela decisions (especially those regarding social rights) and changes in tutela jurisprudence over time. The tutela and social rights have become core to Colombian constitutional law, not simply because of their inclusion in the 1991 Constitution, but through the repeated interactions of judges and claimants, through the social construction of legal grievances (the subject of Chapter 4) and the development of judicial receptivity to particular kinds of claims (described in this chapter). Together, these processes – specifically as they related to the tutela procedure and social rights – ensured the legal embedding of the constitution. In Section 5.3, I discuss why judges became especially accepting of health rights claims, creating an area of unevenness in constitutional embedding. Finally, I detail how legal embedding has occurred beyond the Constitutional Court and throughout the judicial system.

## 5.1 SIGNS OF LEGAL EMBEDDING

How might we know that legal embedding has occurred? In contrast to social embedding, which hinges on societal-level trends, legal embedding involves the acceptance of this legal vision and tools in the formal legal sphere – meaning that we need to look to judicial institutions and actors for evidence of this kind of embedding. In the case of a

new constitution and a new constitutional vision, we might first consider the extent to which institutions, mechanisms, and actors that previously had not been part of the legal infrastructure have come to make their presence known in the daily work of law. If there is a new Constitutional Court or a new constitutional chamber in an existing high court, does it hear cases? More importantly, does it hear politically relevant cases? Has it come to assert itself over "ordinary" courts? If there is a new legal mechanism, a tool with which to make legal claims, are citizens able to use it? If new actors have been empowered to oversee the constitution, do they take this role seriously? Do they work to propagate and defend the new constitutional order, or do they defer to traditional views on law? The presence of these institutions, mechanisms, and actors is not enough to ensure that legal embedding will occur, but without their emergence, legal embedding is unlikely.

Second, by examining judicial actors more closely, we can observe further signs of legal embedding. When judges establish, alter, and expand precedent related to this new constitutional vision, they are taking steps to ensure that this vision will continue to impact the way things are done, the way that cases are decided, even after their tenure is over. For instance, when judges adopt tests, standards, and doctrines by which to decide cases related to new constitutional rights, those rights become more robustly integrated into legal thinking and legal practice than they were when they were simply rights provisions listed in the constitution. These tests, standards, and doctrines help to shape not only judges' perceptions of rights, but also those of litigators and claimants. As time passes and new cohorts of judges rise through the ranks of the judiciary, a new set of judicial actors will come to have the most leverage on the development of constitutional law. However, when legal embedding has occurred, judges who previously held ideological views inconsistent with the new constitutional vision have come to adopt positions closer to the Constitutional Court's (or Constitutional Chamber's) upon being appointed to higher-level courts. They come to see their role as one conditioned by this vision and the routines of their court, as detailed by González-Ocantos (2014) and Hilbink (2007) earlier.

Third, although high court judges will be more able to impact precedent than lower-court judges, the beliefs and behaviors of lower-court judges and members of the broader legal profession are also informative. To the extent that lower-level judges (particularly those who do not specialize in constitutional law) do not challenge or disregard, but

instead follow interpretations of the issues that fall within the scope of the new legal vision (e.g., the justiciability of social rights), we may conclude that legal embedding has occurred. The same is true of litigators. In other words, when the broader legal profession acts as if it is constrained by the new constitutional order, we see evidence of legal embedding.[3] This remains true even if, at the individual level, there is variation in beliefs about the most viable and appropriate interpretation of constitutional law. We might also look to shifts in law school curricula, namely the inclusion of constitutional law coursework, and in the number firms and lawyers working on constitutional law for evidence of legal embedding. I turn now to legal embedding in the Colombian case.

## 5.2 LEGAL EMBEDDING: JUDICIAL RECEPTIVITY TO TUTELA CLAIMS

Before considering early Colombian Constitutional Court decisions regarding the tutela and how these decisions contributed to the embedding of the 1991 Constitution, it is important to note the structure of the Court and the actors who exactly comprised the early Court. In 1992, seven justices served on what became known as the "Transitional Court." Of these seven, four had previously served on other Colombian high courts: José Gregorio Hernández, Fabio Morón, and Jaime Sanín on the Supreme Court, and Simón Rodríguez on the Council of State. The other three had been academics: Ciro Angarita, Eduardo Cifuentes, and Alejandro Martínez. The three academic justices had also been associated with a commitment to human rights and an expansive view on the role of the judiciary.[4] Of these justices on the Transitional Court, Justices Cifuentes, Hernández, Martínez, and Morón were selected to continue on for a full eight-year term.

Early on, progressively minded justices – particularly those with academic backgrounds – at the Constitutional Court gained attention for creating opportunities for legal mobilization by changing understandings about and uses of particular preexisting judicial institutions, including the tutela (Nunes 2010a; Landau 2014; Taylor 2020a). In an

[3] Of course, this is what is "supposed" to occur when a new constitution or a new legal provision is enacted. Empirically, though, we see that this does not always happen. See, for example, the discussion of "sterilization by judicial interpretation" of the 1936 reforms in Chapter 3.

[4] For more detail on these early justices, see Nunes (2010a).

interview with David Landau (2014: 133), Eduardo Cifuentes explained the approach of these progressive justices: "We knew we had one year, because we did not know whether we would be reappointed. We wanted to change as much as we could in one year … We were not a majority on the Court, but we had influence because we acted together." Ultimately, this came to pass. The progressive orientation of the early Constitutional Court became so ingrained that even conservative judges appear to have put up relatively little resistance upon assuming their positions as Constitutional Court justices. As Néstor Osuna, a former justice in the Superior Council of the Judiciary[5] and alternate Constitutional Court justice explained, "there is a tradition in the [Constitutional] Court of progressivism from day one. Judges of the conservative tradition who came to the Court became moderates at least."[6] This progressivism was manifest in rights-protective stances, particularly in stances that allowed for the justiciability of social rights through the tutela procedure and generated a larger role for the Constitutional Court in the broader judicial system than previously envisioned.[7]

Yet, according to the 1991 Constitution, tutelas could not be used to make claims about social rights violations. Instead, the tutela was meant to serve as a mechanism through which citizens could make claims about civil and political (or "fundamental") rights violations. Article 86 of the Constitution reads:

> Every individual may claim legal protection before the judge, at any time or place, through a preferential and summary proceeding, for himself/herself or by whoever acts in his/her name, the immediate protection of his/her *fundamental constitutional rights* when the individual fears the latter may be jeopardized or threatened by the action or omission of any public authority.

Chapter 1 of the section of the Constitution on "Rights, Guarantees and Duties" outlines these "Fundamental Rights" (including, for

[5] The Supreme Judicial Council oversees the administration of the judiciary.

[6] Elite interview 5 (August 8, 2016). "Hay una tradición de la Corte de ser progresista desde el primer día. Jueces de tradición conservadora al llegar a la Corte se vuelven moderados al menos." A former auxiliary justice in the Sala de Seguimiento de Salud of the Constitutional Court confirmed this view (interview 9, August 18, 2016).

[7] Interestingly, the Colombian Constitutional Court was not formally the head of the judiciary at the time this new constitution was written. The Colombian system featured four high courts, but the *tutela contra sentencias* meant that the Constitutional Court could review the decisions of the other high courts.

instance, the right to life, due process, and freedom of religion), while chapter 2 of that section lists "Social, Economic, and Cultural Rights" (which include the right to health and the right to live in dignity/the right to shelter, among others).

Those involved in the drafting of the Constitution expected that the tutela would be used by Colombians to make rights claims, though not with nearly as much scope or frequency. As Néstor Osuna suggested, "no person at that time had the ability to predict the dimensions that it would have. What we wanted was to have a cheap and simple tool for citizens for simple problems. We did not think that new rights were going to be created. We were [just] looking for a simple tool available to citizens."[8] Juan Carlos Esguerra, the member of the constituent assembly who actually proposed to call this mechanism the "tutela," agreed: "It was not meant to grow that much."[9] Despite this limited set of expectations on the part of the Constitutional Assembly members, those serving on the Constitutional Court in its early years saw an opportunity in the tutela. Justice Eduardo Cifuentes explained that "the idea [was] that it is not enough to consecrate a bill of rights, but that these rights must be surrounded by guarantees through instruments that would make them effective [or claimable]."[10]

The use of the tutela expanded quickly throughout the 1990s and into the 2000s.[11] Decisions on several tutelas that were filed in 1992 set the stage for the development of the justiciability of social rights in Colombia. Early that year, Pastora Emilia Upegui Noreña filed a tutela (T-002/92), claiming a violation of the right to education.[12] Both the lower courts and the Constitutional Court rejected this tutela claim. However, in rejecting

[8] Elite interview 5 (August 8, 2016). "Ninguna persona en ese momento tenía la capacidad de ofrecer las dimensiones que iba a tener. Lo que se quería era tener una herramienta barata y sencilla de los ciudadanos para problemas también sencillos, no pensaba que se iban crear nuevos derechos, se buscaba una herramienta sencilla al alcance de los ciudadanos."

[9] Elite interview 35 (September 23, 2016). Many other interviewees confirmed these points.

[10] Elite interview 1 (July 26, 2016). "La idea de que no es suficiente consagrar una carta de derechos, sino que estas deben estar rodeada de garantías de instrumentos para hacerlos efectivos."

[11] The next five paragraphs, analyzing early tutela decisions, draw directly from Taylor (forthcoming).

[12] Briefly, after the claimant had failed mathematics three times, the Universidad Tecnológica de Pereira refused to allow her to re-enroll in the industrial engineering program.

the claim, the Court asserted that the categorization of rights in the Constitution should be a supplementary rather than determining factor in the decision about whether or not to hear tutela cases.[13] It also suggested that education could, in other concrete cases, be considered a fundamental right. A few months later, in deciding a tutela regarding health, the Court noted, "today, with the new constitution, rights are what judges say they are through tutela decisions."[14] Together, these decisions helped to stake out a larger role for judges in determining the status of constitutional rights. Esguerra suggests that these decisions should be interpreted as an attempt by the Constitutional Court justices make social rights "real" or meaningful in everyday life.[15] Cifuentes similarly notes:

> [This use of the tutela] is not an innovation of the 1991 Colombian Constituent Assembly. Rather, it is a strong and intense seizure of the Constitution by the Colombian Constitutional Court. Everything is [up to] the discretion of the judge … It would be the Constitution [that] obviously introduces the figure and gives possibilities for the constitutional judge to expand it, but the expansion of the tutela, the guidelines of the tutela were not drawn by the Constitution but in my opinion developed [by judges].[16]

[13] "El hecho de limitar los derechos fundamentales a aquellos que se encuentran en la Constitución Política bajo el título de los derechos fundamentales y excluir cualquier otro que ocupe un lugar distinto, no debe ser considerado como criterio determinante sino auxiliar, pues él desvirtúa el sentido garantizador que a los mecanismos de protección y aplicación de los derechos humanos otorgó el constituyente de 1991." See the full decision here: www.corteconstitucional.gov.co/relatoria/1992/T-002-92.htm. Further, the decision noted that judges ought to examine constitutional rights with respect to one another rather than in isolation.

[14] The complete paragraph is worth quoting here: "Existe una nueva estrategia para el logro de la efectividad de los derechos fundamentales. La coherencia y la sabiduría de la interpretación y, sobre todo, la eficacia de los derechos fundamentales en la Constitución de 1991, están asegurados por la Corte Constitucional. Esta nueva relación entre derechos fundamentales y jueces significa un cambio fundamental en relación con la Constitución anterior; dicho cambio puede ser definido como una nueva estrategia encaminada al logro de la eficacia de los derechos, que consiste en otorgarle de manera prioritaria al juez, y no ya a la administración o al legislador, la responsabilidad de la eficacia de los derechos fundamentales. En el sistema anterior la eficacia de los derechos fundamentales terminaba reduciéndose a su fuerza simbólica. Hoy, con la nueva Constitución, los derechos son aquello que los jueces dicen a través de las sentencias de tutela." See the full decision here: www.corteconstitucional.gov.co/relatoria/1992/T-406-92.htm.

[15] Elite interview 35 (September 23, 2016).

[16] Elite interview 1 (July 26, 2016). "No se trata de una innovación de constituyente Colombia de 1991. Sino más bien una, una fuerte, un fuerte e intenso apoderamiento

Here, as Cifuentes sees it, judges determined not only that the tutela procedure would expand, but also how it would expand. Strikingly, the justices who wrote these decisions were two of the three academics appointed to the Court, Justices Martínez (T-002/92) and Angarita (T-406/92).

This expansion of the tutela procedure continued, as the Constitutional Court justices began to establish principles for analyzing concrete cases. First, the Court declared that the fundamental status of rights would be evaluated on a case-by-case basis in response to the unique facts presented by an individual tutela, per decision T-406/92.[17] In this case, a resident of the Campestre neighborhood of Cartagena filed a claim asserting that an ongoing public works project violated his rights to sanitation, health, and a healthy environment. The court of first instance rejected the claim on the grounds that these rights were not fundamental rights recognized by the Constitution. The Constitutional Court revoked this decision, granted the tutela, and noted that all future cases with similar fact patterns should be decided in the same manner. The Court sustained this approach in its decision on a case filed by SAS Televisión Ltda, a cable television provider (T-451/92).[18] The company claimed that the denial of a final operating license (it had been granted a provisional license) violated the right to work, to private property, and to culture. The Third Superior Court of Ibagué rejected the claim, and the Constitutional Court upheld that decision.

Within this case-by-case analysis, judges developed two doctrines: the *conexidad* (connection) doctrine and the *mínimo vital* (vital minimum) doctrine. Both allowed for the expansion of progressive rights

a la constitución por parte de la Corte Constitucional colombiano. Todo es la discreción del juez … Sería la constitución obviamente a introducir la figura y da posibilidades para que el juez constitucional pueda ampliarla. Pero la expansión de la tutela, las líneas maestras de la tutela no fueron trazadas por la constituyente sino en mi opinión desarrollada."

[17] "Es importante tener en cuenta que la eficacia de las normas constitucionales no se puede determinar en abstracto; ella varía según las circunstancias propias de los hechos." See the full decision here: www.corteconstitucional.gov.co/relatoria/1992/T-406-92.htm.

[18] Referring back to T-406, the decision holds, "el carácter fundamental de un derecho no se puede determinar sino en cada caso concreto, atendiendo tanto la voluntad expresa del constituyente como la conexidad o relación que en dicho caso tenga el derecho eventualmente vulnerado con otros derechos indubitablemente fundamentales y/o con los principios y valores que informan toda la Constitución." See the full decision here: www.corteconstitucional.gov.co/relatoria/1992/T-451-92.htm.

protections. The connection doctrine refers to the possibility of understanding a nonfundamental right as fundamental, and therefore justiciable, insofar as its violation also results in the violation of a fundamental right. The doctrine derives from decisions made in 1992, starting with T-406/92, which indicated that the right to health could be understood, in certain circumstances, as being essentially connected to the right to life. Later that year, Víctor Narváez Paredes filed a tutela (T-506/92) and claimed the confiscation of his car by the national police not only went beyond the appropriate function of the police, but that it also violated his right to property. The Court denied the tutela, citing doubts about who was the true owner of the car and noting that the authorities appeared to have acted appropriately. Even in denying this property rights claim, the Court nevertheless affirmed the case-by-case approach and the possibility of connecting fundamental rights with nonfundamental ones. The Court – or more accurately, the three academic justices, Ciro Angarita, Eduardo Cifuentes, and Alejandro Martínez, who wrote these decisions – recognized the ability to make tutela claims related to social or cultural rights in some instances.[19] Over time, the connection doctrine was even used to allow tutela claims to unenumerated individual rights, like the right to water (Sutorius and Rodríguez 2015; Páez and Vallejo Piedrahíta 2021).[20]

The second doctrine of justiciability, called *mínimo vital*, emerged in decision T-426/92 (written by Cifuentes), which notes that although the Constitution does not include a right to subsistence, such a right is implied or can be deduced from the existence of other, included rights.[21]

[19] "La posibilidad de considerar el derecho a la propiedad como derecho fundamental depende de las circunstancias específicas de su ejercicio. De aquí se concluye que tal carácter no puede ser definido en abstracto, sino en cada caso concreto. Sólo en el evento en que ocurra una violación del derecho a la propiedad que conlleve para su titular un desconocimiento evidente de los principios y valores constitucionales que consagran el derecho a la vida a la dignidad y a la igualdad, la propiedad adquiere naturaleza de derecho fundamental y, en consecuencia, procede la acción de tutela." See the full decision here: www.corteconstitucional.gov.co/relatoria/1992/T-506-92.htm.

[20] The only explicit reference to water in the constitution comes in Article 366, which reads: "The general welfare and improvement of the population quality of life are social purposes of the state. A basic objective of the state's activity will be to address unsatisfied public health, educational, environmental, and potable water needs."

[21] "Aunque la Constitución no consagra un derecho a la subsistencia éste puede deducirse de los derechos a la vida, a la salud, al trabajo y a la asistencia o a la seguridad social." See the full decision here: www.corteconstitucional.gov.co/relatoria/1992/T-426-92.htm.

Subsequent decisions, such as T-005/95 (again written by Cifuentes), which focused on the rights to health and social security, more fully articulated what was to become the vital minimum doctrine, noting that although health was not a fundamental right, access to medical services were necessary to a life with dignity in the particular case.[22] The standard implied by this doctrine requires that "the petitioner show both that the failure to receive treatment was severe enough to threaten his rights to life, dignity, or personal integrity, and that the petitioner lacked the resources to pay for this treatment or to attain it under some other plan" (Landau 2012: 421). In this conception, otherwise progressively realizable rights (those that are regarded as not immediately applicable) become justiciable, as they are necessary for a minimal standard of living. Ultimately, judges decided to recognize the vital minimum as a right in itself.

Throughout this period, certain Constitutional Court justices actively expanded rights protections, often through the purview of the tutela procedure,[23] viewing the constitutional parameters as artificial limitations on the legal tool that resulted not from societal preferences but political maneuvers and compromises. Cifuentes recalls:

> The challenge was to change the judicial culture … to demonstrate that the Constitution was a performative constitution … The Constitution had to be binding on all public powers and private powers, so that constitutional guarantees could effectively address general conditions of citizenship and equality … That the constitution had to produce a change and a transformation and that this was not simply semantic. That was the idea that I think was shared by colleagues in the Court. The Constitutional Court wanted to ensure that the Constitution permeated the entire judicial arena. In other words, all the judges of the country, the civil judges, the labor and criminal judges, the Supreme Court, all apply the Constitution … The second challenge of the Court was for rights to mean more power for the weakest … and for that reason the extension

[22] "El derecho a la salud no es en principio un derecho fundamental de aplicación inmediata. Sin embargo, la Corte ha estimado que este puede ser protegido por medio de la acción de tutela en casos especiales en los cuales se presente conexidad palmaria con un derecho fundamental … En estas circunstancias, la efectividad de su derecho al servicio médico se encuentra en conexidad evidente con su derecho al mínimo vital indispensable para la subsistencia en condiciones dignas." See the full decision here: www.corteconstitucional.gov.co/relatoria/1995/T-005-95.htm.

[23] Interestingly, many of these extensions were suggested in tutela decisions that actually rejected the original applicant's claims.

> of borders of economic, social and cultural and fundamental rights was guided by the Court directly.[24]

Judges were able to suggest and implement alternate understandings of the proper scope of the tutela procedure and the nature of rights, in part due to their independence and in part due to the continued (and expanding) filing of tutelas by aggrieved citizens. Decisions made by judges in the years immediately following the creation of the new constitution allowed citizens to file tutelas that made claims to a wide variety of social rights. In other words, these expansions did not apply singularly to any one right.[25]

Because all revision decisions are posted on the Constitutional Court's website, I was able to scrape a random sample of these revision decisions, and code and analyze them.[26] The Constitutional Court accepted 62 percent of all tutela claims in my sample (1992–2016) and 68 percent of social rights claims. The Transitional Court

[24] Elite interview 1 (July 26, 2016). "El reto era cambiar la cultura judicial … El reto era demonstrar … que la constitución tenía, la constitución era una constitución performativa … Y la constitución tenía que ser vinculante para todos los poderes públicos y para los poderes privados, que las garantías constitucionales efectivamente buscaban general condiciones real de ciudadanía y de igualdad. Que la constitución había producido un cambio y una transformación y que este era no simplemente semántico. Esa fue digamos con la idea que yo creo que compartía los colegas de la Corte, la Corte Constitucional … La Corte Constitucional quiere que busca que la Constitución permeé en toda la habita judicial. O sea que todos los jueces del país, los jueces civiles, los jueces laborales, penales, la Corte Suprema, todos aplican la Constitución … El segundo desafío de la Corte de decía es el de que los derechos significaban más poder para los más débiles … y por eso la atenuación, la extensión de fronteras de derechos económicos, sociales y culturales y fundamentales fue aprometía de la Corte directamente."

[25] These early developments should not be taken to mean that all tutelas filed result in positive outcomes, however. Some claims are – rightly or wrongly – denied, and some problems are challenging to name or articulate. Further, a successful decision will not necessarily result in compliance or the delivery of a remedy. An in-depth study of tutela decisions across issue areas found a noncompliance rate of 28 percent, a rate that 71.5 percent of surveyed Colombians deemed unacceptably low (Carlin et al. 2022). Beyond questions of compliance, some claimants may be dissatisfied with the remedy offered by the judge. Among legal professionals there does not appear to be a consensus about whether or not Constitutional Court orders are, in fact, complied with (Juan Carlos Henao, a former Constitutional Court justice, elite interview 62, November 8, 2016; Hernán Olano, a former *oficial mayor* of the Constitutional Court, elite interview 30, September 20, 2016; Pablo Rueda, former auxiliary justice, elite interview 61, November 4, 2016).

[26] This analysis was only possible because of the help of Josh Meyer-Gutbrod.

accepted just over half of the social rights claims made, and each subsequent set of justices accepted a higher percentage of these claims. At the same time, the percentage of lower-court decisions that were overturned increased with each court (at a slightly greater rate than the overturned decisions on nonsocial rights claims), as the Constitutional Court worked to solidify lines of jurisprudence. In this way, a vision of the 1991 Constitution that centered the tutela and newly codified rights came to be legally embedded at the highest court in the country.

## 5.3 EXPLAINING DIFFERENCES IN JUDICIAL RECEPTIVITY

Legal mobilization provided the opportunity and groundwork for legal embedding, but mobilization alone does not explain the precise contours of the embedding process. We must also look to the development of judicial receptivity to particular kinds of claims to understand why we see variation in claim-making pathways. Notably, although the early Constitutional Court decisions could have applied to all social rights, different rights evolved along different trajectories. Specifically, health tutelas increased more dramatically through the 1990s and early 2000s than tutelas invoking all other social rights combined, though the overall trend lines for all social rights claim-making increase over time (see Figure 5.1).

Differences in social rights claim-making are most apparent when comparing health rights claims to housing rights claims. The official data on tutela claims nationwide compiled by the Defensoría del Pueblo did not initially include disaggregated information on claims to the right to housing, instead including housing in the "other socioeconomic rights" category. That the Defensoría del Pueblo did not separately tabulate housing rights claims until 2016 is evidence of their relative infrequency. In 2016, there were 4,891 housing claims; 3,080 in 2017; 3,536 in 2018; and 3,618 in 2019. Further, my random sample of tutela revision decisions scraped from the Constitutional Court's website indicates that between 1992 and 2016, only 3.4 percent of all reviewed tutelas claimed the right to housing, of which the Court accepted 60.5 percent. Most of these tutelas were accepted on the basis of a right other than housing (each tutela claim can involve multiple rights). In contrast, 25.1 percent claimed to the right to health, and the Court accepted 72.8 percent.

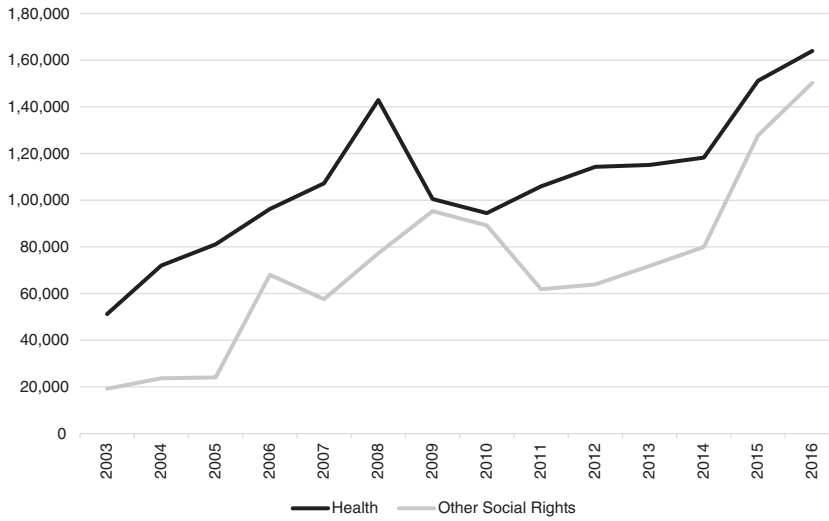


Figure 5.1 Social rights tutela claims.
Source: Author's elaboration using data from the Defensoría del Pueblo.

This disparity in claim-making can be explained, though only in part, by a rise in grievances related to the new healthcare system. Still, it is not immediately clear why other kinds of social rights claims – for instance, housing claims – did not follow a path similar to that of health claims. According to UN-Habitat (2013: 148–9), in 1990, 31.2 percent of urban-dwelling Colombians lived in "slum areas," a percentage that dropped to 14.3 percent by 2009. Thus, there existed a population that *could have made claims* on the basis of housing inadequacy and could have connected those claims about housing to dignity. Whether or not judges would accept these arguments is another story, but it is striking that these kinds of claims have been largely absent in the Colombian context.[27] So, despite the existence of potential grievances in both health and housing, we see substantially more mobilization with respect to the right to health.

Instead, I hold that judicial receptivity, as conditioned by exposure to problems within and outside of the legal system simultaneously, accounts for this difference. The persistence and/or increase of particular kinds of claims can inform judges about an issue, encouraging them

[27] There is evidence, however, that citizens *occasionally* filed tutela claims to this effect (Holland 2017).

to become (more) comfortable with the scope of the problem and to identify with claimants. Over time, this continued exposure to claims triggers a consideration or reconsideration of the correct legal response to the underlying issue, particularly when judges view the issue as comporting with contemporary sociolegal values: in the case analyzed here, when they interpret the issue as central to a dignified life.

Judicial decision-making on health rights followed the path described earlier, with judges first rejecting claims outright, before accepting claims on the basis of the *conexidad* doctrine or the *mínimo vital* doctrine. Eventually, the Constitutional Court declared the right to health to be fundamental in itself (and therefore directly claimable with the tutela). In this case (T-760/08), the Court decided twenty-two separate tutelas together and in the process mandated significant changes to the overarching healthcare policy structure.[28] In 2015, the legislature passed Law 1751, which solidified this understanding of health as a fundamental constitutional right.[29]

An analysis of housing rights claims demonstrates that the expansion of rights claims present in the realm of health was not inevitable. The first of these housing rights tutelas, T-423/92, dealt with "*invasores*," or squatters, who remained on rented property even after their lease had ended. Despite acknowledging the country's housing deficit, the three-judge panel rejected the claim, arguing that the right to housing had to be sought though legal means, that the right to housing was not a fundamental right (therefore falling outside the competence of the tutela), and that "the termination of a lease cannot be considered as a violation of the right to housing."[30] The Court also rejected the only other housing rights tutela it reviewed in 1992 (T-598/92), again pointing to the nonfundamental status of the right to housing.[31]

The most well-known set of legal claims related to the right to housing involved the system of home financing (Unidad de Poder Adquisitivo Constante, or UPAC). Interviewees, including those currently working at the Constitutional Court, consistently referred to the

[28] See full decision here: www.corteconstitucional.gov.co/relatoria/2008/t-760-08.htm.
[29] www.secretariasenado.gov.co/senado/basedoc/ley_1751_2015.html.
[30] See full decision here: www.corteconstitucional.gov.co/relatoria/1992/t-423-92.htm. There was a similarly decided constitutionality case (one not involving a tutela claim): C-157/97. See that decision here: www.corteconstitucional.gov.co/relatoria/1997/c-157-97.htm.
[31] See full decision here: www.corteconstitucional.gov.co/relatoria/1992/t-598-92.htm.

UPAC cases when asked about the right to housing and often failed to identify any other housing rights cases. Initially, citizens organized, marched, and brought tutela claims in the wake the UPAC crisis (Uprimny 2007). Nevertheless, as Pablo Rueda (2010: 46) notes, these tutelas were not decided in favor of the claimants, with the Constitutional Court finding "that an eventual breach of the right to housing was not enough to award protection through [the] *mínimo vital*" standard. In 1999, the Court decided an abstract review case related to UPAC (C-747/99). The Court declared the UPAC system unconstitutional and held that the central bank, not the market, should determine interest rates. Interestingly, two justices expressed hesitancy about issuing such a decision, arguing that:

> The reluctance or incompetence of the relevant organs of state – which should not be tolerated by the people, who can appeal at all times to the instruments of democratic participation – cannot be offered as an excuse for the Court to intervene in the determination or elimination of a public policy, outside of its original function of the review of constitutionality.[32]

While the other justices did not necessarily share this disinclination, their decisions in tutela claims suggest that they, too, saw the tutela as an inappropriate tool to raise claims related to UPAC specifically and housing more generally. Some commentators have suggested that the UPAC cases had a demobilizing impact on claim-making related to housing rights.[33] Further, not only did judges indicate that they would not respond favorably to tutela claims related to UPAC, but financial organizations did not promote the filing of these claims (in contrast to pharmaceutical and insurance companies in the realm of health).

The exposure mechanism helps to explain the differential expansion of rights protections. One clerk put it this way: "It's a bit like the

[32] Justices Cifuentes and Naranjo make this argument in their dissent (para. 14). "El desgano o impericia de los órganos competentes del Estado – que no pueden ser tolerados por el pueblo, que en todo momento podrá apelar a los instrumentos de participación y control que le entrega la democracia – no pueden ofrecerse como excusa suficiente para que la Corte intervenga de fondo en la determinación o eliminación de una política pública, por fuera de su función originaria de control de constitucionalidad." See full decision here: www.corteconstitucional.gov.co/relatoria/1999/c-747-99.htm.

[33] Interview with a former Constitutional Court clerk who practices and teaches law. Elite interview 61 (November 4, 2016).

citizens were knocking on the door to see what the judges were saying. We were very receptive and we opened the door completely … They knocked on the door with many cases of many issues and we as judges opened it [to health claims]." When pressed as to why the Court would have "opened the door" to health claims more readily than other social rights claims, she referred to the state of crisis of the healthcare system, to the "painfulness" of the situation, and the fact that "we suffer physical pain equally, we suffer the pain of seeing a sick relative equally, and we are also equally victims of the health system."[34] Another clerk summarized this situation, saying that the "tutela for social rights [emerged] out of pure necessity of the people, and [they] found that the Constitutional Court was receptive to the needs of the people."[35] As judges continued to be exposed to health claims, they became more comfortable with them and even identified with claimants, and they became more aware of the extent of the problems with the healthcare system and more convinced that these types of claims could or should be resolved by the Court.

Here again, we see the key role of legal mobilization in spurring embedding – and specifically in determining unevenness in embedding. Judges became convinced that some kinds of claims should be resolved by the Court not simply because of the continued filing of health claims (though my sample of tutelas shows that between 1992 and 2016 roughly 25 percent were health claims), but also because the issue of access to healthcare comported with judges' understanding of contemporary Colombian sociolegal values. In other words, judges viewed access to healthcare as central to a dignified life (as evidenced by their willingness to accept health rights tutela claims with the *mínimo vital* and *conexidad* standards). While my interviewees referred to objective factors, such as having sick relatives, the process of recognizing problems and identifying with claimants is contingent and subjective; these judges could just as easily have referenced not health-related issues but housing-related issues as what tied Colombians together,

[34] Elite interview 17 (August 26, 2016). "En la salud el problema es que la … el tema de la salud nos iguala a todos. Ricos y pobres sufrimos por igual los estragos de salud, sufrimos por igual el dolor físico, sufrimos por igual el dolor de ver a un familiar enfermo, y también somos víctimas igualitarias del sistema de salud porque hay momentos en que los costos son tan elevados que no importa si tú tienes dinero o no."

[35] Elite interview 2 (August 4, 2016). "La tutela en todos los derechos sociales es por pura necesidad de la gente y encontró a la corte constitucional que fue receptiva a las necesidades de las personas."

holding instead that "at a minimum, we all need a roof over our heads." They did not, however, share this interpretation of housing and relatively few housing rights claims came before the Court.[36] The shift from experimental to established claim-making featured the growth and acceptance of health rights claims, as potential claimants came to understand health through the lens of the law and judges came to understand health as an issue that should be handled by the courts. That process did not occur for housing rights claims during the same period, leading to one area of unevenness in the constitutional embedding process.

## 5.4 LEGAL EMBEDDING BEYOND THE CONSTITUTIONAL COURT

Legal embedding at the Constitutional Court level is significant – if we were to see legal embedding anywhere, we would expect to see it there – but everyday Colombians likely never meet Constitutional Court justices. Instead, they file their claims before the lower-court judges who are tasked with the initial tutela decision-making or – less frequently – seek help from lawyers and bureaucrats in government legal offices, like the Personería and Defensoría del Pueblo. I turn now to my interviews with lower-court judges in Medellín and Cali for an additional perspective on the extent to which legal embedding has occurred among lower-court judges outside the Colombian Constitutional Court. I track how judicial receptivity to social rights tutela claims has permeated through the judicial establishment, examining judges' views on the 1991 Constitution, their role, and the tutela, as well as their views on how constrained they are by the Constitutional Court and its jurisprudence. Importantly, these views do not necessarily reflect the modal understanding of lower-court judges, as my interviewees were not randomly selected. However, they offer insights into how some judges who are not part of the immediate Constitutional Court network think about and understand legal culture following the enactment of the country's new social constitution.

These judges uniformly noted that the 1991 Constitution, the rights it enshrined, and the tutela procedure change the nature of their work. Gabriel Roldán, a judge working in the criminal courts in Medellín, explained that "constitutions by themselves do not

[36] Again, only 3.4 percent of reviewed tutelas involved housing rights claims.

transform a society, but they are a starting point." He went on to note that, in this case:[37]

> The 1991 Constitution gave a very important role to the judge in the construction of a social and democratic state of law, precisely through the action of tutela as a constitutional protection mechanism. Judges, I believe that we began to have a greater relevance in society to directly affect the rights of citizens – that seems to me a change of paradigm and perspective compared to the figure of the judge [before].[38]

The judges who I interviewed seemed to appreciate this changed role. For example, when I asked Andrés López, who works in a jurisdiction outside of Cali, about the best part of his job, he pointed to the requirement that he also hear tutela cases, because with the tutela "we are on the other side. In the criminal area, we are [often] putting a poor indigenous person, a poor peasant with few resources [and] without education in jail, and on the other side is the tutela, where people's rights that are violated by health entities are vindicated."[39] Another judge, when I asked about the tutela, explained: "Thanks to our father, creator of the universe, the wise legislator was to bring us in 1991 the tutela, that has been very helpful for many people … In general terms, it has helped defenseless communities a lot."[40] Further, these judges made clear that they did not look down on or dismiss their new constitutional duties (even if they also lamented their workload and other job-related pressures). Cristian Cabezas, a judge working in the criminal courts in Cali,

[37] Elite interview 74 (March 22, 2017). "[L]as constituciones son una carta que por si solas no transforman una sociedad, pero son un punto de partida."

[38] Elite interview 74 (March 22, 2017). "La constitución de 1991 le dio un rol muy importante al juez bajo la construcción de un estado social y democrático de derecho precisamente a través de la acción de tutela como mecanismo de amparo constitucional. Los jueces creo que empezamos a tener una mayor relevancia en la sociedad para incidir de manera directa en los derechos de los ciudadanos, eso me parece un cambio de paradigma y de perspectiva frente a la figura del juez."

[39] Elite interview 83 (April 21, 2017). "[E]stamos en el otro lado. En la parte penal estamos metiendo a un pobre indígena, a un pobre campesino de escasos recursos sin educación a la cárcel, y en el otro está la tutela donde se reivindican los derechos de las personas que son vulnerados por las entidades de salud."

[40] Elite interview 85 (April 25, 2017). "Gracias a nuestro padre creador del universo el legislador sabio fue al traernos en el año 1991 la acción de tutela que ha sido de mucha ayuda para bastantes personas … en términos generales ha ayudado mucho a la comunidad indefensa."

compared his work on criminal matters to his work reviewing tutela claims, telling me that:

> Once the [criminal] hearings are over, around 5 o'clock … I have to go up to the office to look at tutela claims … There are ten-day limits in which to resolve tutelas. Many of them involve matters related to fundamental rights … and these matters cannot wait, in addition to all the criminal matters that cannot wait because they involve people deprived of liberty … We have to protect the rights of people deprived of liberty but also protect the rights of people who claim violations of their fundamental rights, for example, to life, health, human dignity.[41]

Here, Cabezas sets out his traditional judicial work – deciding criminal cases – as equally, not more, important than issuing tutela decisions. He notes that neither criminal matters nor fundamental rights matters can wait; both need to be handled quickly. These quotes provide evidence that the new constitution, with its emphasis on fundamental rights, has become embedded in the minds of lower-court judges.

Another judge went a step further, explaining that sometimes they do work beyond their official duties as judges in order to make real the vision of the 1991 Constitution. For example, they would contact those who have not complied with tutela decisions and say:

> "Hey, why don't you deliver that?" Especially in matters of healthcare. In healthcare I try, sometimes I even go to the healthcare provider here … [There] they say, "oops the judge has arrived," because they are really surprised, right? I ask how they have things and do not deliver them. Here in Colombia, we have a saying, "the face of the saint makes the miracle." The face of the saint makes the miracle. And then they say, "oh, the judge came," [and] sometimes they give [the claimant] the things or the medicines, or the supplies.[42]

[41] Elite interview 80 (April 18, 2017). "Una vez termino las audiencias, más o menos a las 5 … tengo que subir al despacho a mirar todo el aspecto de las tutelas … Las tutelas tenemos unos términos de diez días para resolverlas muchas de ellas tienen asuntos realmente dedicados que comprometen derechos fundamentales. Derechos fundamentales y esos asuntos no dan espera, además de todos los asuntos penales que tampoco dan espera porque tienen personas privadas de la libertad. Tenemos que proteger los derechos de las personas privadas de la libertad, pero también proteger los derechos de personas que reclaman violación de sus derechos fundamentales, por ejemplo: la vida, la salud, dignidad humana."

[42] Elite interview 90 (May 8, 2017). "¿Por qué ustedes no entregan eso? Sobre todo, en materia de tutela de la salud, en las tutelas de salud yo trato, a veces voy incluso yo misma a las EPS aquí. Yo aquí deseé ir allá porque a veces digo: 'Bueno … ' Ellos

They continued, noting that the legal code and expectations regarding judicial work do not require this kind of action. The underlying claim is that the role of judges has expanded beyond their traditional duties of deciding legal claims, as they "all have a social function to fulfill as well. So, we dispense justice, yes, but there are also things that one must do as a member of a society, right?"[43] Traditionally speaking, the judicial role did not involve a close connection with society; yet, a closer connection between citizen and judge was part of the aim of the 1991 constitutional changes.

These interviews also revealed that many lower-court judges kept abreast of Constitutional Court jurisprudence regarding the tutela. Carlos Rodríguez, who hears criminal cases in a town outside of Cali, explained the consequences of lower-court judges following the Constitutional Court's lead: "I believe the mindset about the tutela has changed in that the judges are not so legalistic."[44] He further noted that "little by little, the Constitutional Court has addressed many issues and has given many guidelines on that [the tutela]."[45] Another judge, who also works in a jurisdiction in a small town outside of Cali, explained to me that she needed to pay close attention to the Constitutional Court's tutela jurisprudence, because, for example, "the Constitutional Court has a precedent stating that, in exceptional cases, tutela claims for labor rights can be granted. These very exceptional cases are studied and the precedent is applied, but really there are few opportunities to grant them, even though however there are many tutelas requesting that [labor rights protections]."[46] Johnny Braulio Romero, a judge

cuando llaman y dicen: 'Uy llegó la juez' pues ellos ya se quedan como sorprendidos. Pero yo por lo menos yo digo: 'Pero oiga, ¿Cómo es posible que ustedes tengan las cosas y no las entreguen?' Entonces muchas veces como dicen, acá tenemos un dicho en Colombia que dice: 'La cara del milagro hace al santo.' La cara del santo hace el milagro es que es, al revés. La cara del santo hace el milagro. Y entonces ellos cuando dicen: 'Uy, vino la juez' a veces le entregan las cosas o los medicamentos, o los insumos."

[43] Elite interview 90 (May 8, 2017). "Tenemos una función social que cumplir también. Entonces impartimos justicia sí, pero también hay cosas que uno debe hacer como miembro de una sociedad ¿No?"

[44] Elite interview 87 (April 25, 2017). "Creo que ha cambiado la mentalidad de la tutela en cuanto a que los jueces no sean tan legalistas."

[45] Elite interview 87 (April 25, 2017). "Poco a poco la Corte Constitucional ha abordado muchos temas y ha dado muchas pautas sobre eso."

[46] Elite interview 85 (April 25, 2017). "La corte constitucional tiene un precedente señalando que excepcionalmente se conceden esas acciones de tutela para derechos laborales. [Esos] casos muy excepcionales que se estudian y se aplica el precedente, y

working in Medellín, offered an overarching perspective on the dramatic changes in judicial thinking around the tutela from the early 1990s to the present. Specifically, he noted:

> Since 1991, the tutela has been developing, and the changes it has undergone to date have been impressive. That is, things that in 1991, 1992 and 1993 would never have been granted to you at this time a judge grants them without thinking. For example, this tutela that I have here in my hand involves a man who works for a company and has not been paid. That a person requests through the tutela that the company pay him his wages … it would be unthinkable in 1993, 1994. And even in 1996, 1998, it was unthinkable, right? Today there is already a lot of jurisprudence of the Constitutional Court saying that, for example, despite the fact that it is an economic right, yes it can be protected by way of the tutela.[47]

Cristian Cabezas similarly described this expansion of the tutela procedure, saying, "we have, through a tool called *conexidad*, the possibility of treating the violation of a social right as a fundamental rights violation … That has been expanded [over time] and today we speak of 'fundamental social rights.'"[48] Clearly, these judges take Constitutional Court decision-making regarding the tutela seriously.

Overall, then, we see that the lower-court judges I interviewed have largely accepted the tutela, the use of the tutela to make social and economic rights claims, and the Constitutional Court's position at the apex of the judiciary. These judges did point out limitations and

pues realmente se presentan pocas oportunidades en que se conceden, no obstante, son muchas las tutelas pidiendo ese."

[47] Elite interview 71 (March 10, 2017). "Desde 1991, la tutela se está desarrollando y los cambios que ha tenido desde que entró a la fecha han sido impresionantes. O sea, cosas que para 1991, 1992 y 1993 jamás te las habrían concedido en este momento ya uno las concede sin pensar. Por ejemplo, esta tutela que tengo aquí en la mano es un señor que trabaja para una empresa como obrero y no le han pagado. Que una persona solicite a través de la tutela que la empresa le pague los salarios que le ha dejado de pagar … sería impensable en 1993, 1994. E inclusive en 1996, 1998, era impensable ¿verdad? Hoy en día ya hay muchísima jurisprudencia de la Corte Constitucional diciendo que, por ejemplo, esto a pesar que es un derecho económico si se pueda amparar por vía de tutela."

[48] Elite interview 80 (April 18, 2017). "Nosotros tenemos a través de una herramienta que se denomina la conexidad, la posibilidad de tratar un derecho fundamental a través de acción de tutela siempre que la violación de un derecho social acarre también la de un derecho fundamental, aunque se ha abierto más ese aspecto y hoy hablamos de derecho sociales fundamentales."

inefficiencies in the new system. Some leveled critiques at the tutela, though, notably, no one advocated for the elimination of the tutela or the reversion back to the previous constitutional order. Importantly, even if these judges are simply paying lip-service to the new Constitution and new constitutional order, that lip-service would still be evidence of legal embedding, demonstrating how even judges who otherwise do not share the ideological or normative vision of the Constitution still feel constrained by it. The evidence presented in this section suggests that legal embedding has occurred throughout the Colombian judiciary, not simply within the Constitutional Court.[49]

What about the wider legal sphere, beyond judges? The institutional design of the tutela allows citizens to file constitutional rights claims without needing to formally engage lawyers, but some claimants still turn to private lawyers or state agencies when drafting their tutelas. In 2019, 504,742 tutelas were filed by individuals (81.3 percent), 23,129 by legal representatives (3.7 percent), and a further 53,010 by unofficial agents (8.5 percent); 34,579 were filed by private lawyers (5.6 percent), and 4,782 by state agencies like the Defensoría del Pueblo and Personería (0.8 percent).

The extent to which these state agencies provide citizens with information and/or more formal help filing claims varies substantially. The Personería in Medellín, for example, created the first website through which Colombians could present tutela claims.[50] In 2017, the website allowed only health rights claims, though it has expanded since then to include all fundamental rights. The access tool is not available throughout the country: funding depends on mayoral priorities and resources. Antioquia, the department in which Medellín is located, had the highest number of tutelas filed through the Defensoría and the Personería: about twelve times as many as in Bogotá, though the total number of tutelas filed in both locales in 2019 was around 117,000. Thus, we see evidence of legal embedding in the Personería of Medellín especially. From this wider angle, legal embedding appears to vary significantly across time and space.

[49] Importantly, though, this does not mean that every judge in the country decides every case in a way that is consistent with this social vision of constitutional law. There may be isolated exceptions, but it does appear that legal embedding has permeated the judicial system.

[50] Elite interview 78 (March 29, 2017).

## 5.5 CONCLUSION

Legal embedding refers to the process by which the legal establishment comes to adopt a particular vision of constitutional law and act as if they are bound by it. In order to determine the contours of legal embedding, we must assess how the institutions, mechanisms, and actors created and empowered by the constitution impact the daily work of law. Further, judicial decision-making that is consistent with this constitutional vision provides additional evidence of legal embedding. Finally, an examination of the broader legal profession – including those actors who were not empowered by the new constitution – can reveal the depth of legal embedding.

Unlike the fate of earlier efforts to infuse Colombian law with a social focus, the 1991 Constitution became legally embedded in Colombia, impacting judicial behavior across different levels of the judiciary. Instead of undermining the new social constitutionalist features through subsequent judicial decision-making (what Manuel José Cepeda has called "sterilization by judicial interpretation"[51]), judges bolstered them. Starting with the justices of the Constitutional Court, judges accepted tutela claims in such a way that they expanded the tutela's purview and incentivized continued claim-making. Importantly, lower-court judges followed the Constitutional Court's lead. In this way, the 1991 Constitution became embedded legally – it became part of what is considered normal, ordinary, or everyday in the practice of judicial decision-making.

This process of embedding did not unfold evenly across issue areas, however. There is variation within legal embedding in terms of the kinds of rights claims to which judges are receptive. In this case, judges were most receptive to health rights claims (a new right recognized in the 1991 Constitution) compared to all other social rights claims. The way that judges were (or were not) exposed to problems within and outside of the legal system simultaneously helps to account for this variation. Judges were exposed to health-related problems consistently and their understanding of those problems conflicted with sociolegal values (i.e., their sense of what it means to have a dignified life). Judicial receptivity followed. This receptivity catalyzed additional claim-making through the tutela, creating a positive feedback loop and furthering both legal and social embedding. Because this process

[51] Elite interview 68 (February 23, 2017).

occurred with respect to the right to health, but not the right to housing, there is some unevenness in constitutional embedding.

Neither legal nor social embedding is inevitable or necessarily permanent. The next three chapters examine challenges to constitutional embedding in Colombia, as well as the extent to which the constitutional order endured. Chapter 6 turns to the limits of legal legibility, or what and whose problems are (and are not) addressed by constitutional rights provisions. Chapter 7 looks to efforts by political actors to limit social constitutionalism and unravel rights protections. Chapter 8 explores the labor of law, or the changes and additions to judges' daily work created by the new constitutional order.