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DOCKET SELECTION AND JUDICIAL RESPONSIVENESS: THE USE OF AI IN THE COLOMBIAN CONSTITUTIONAL COURT

Pablo Rueda Saiz*

INTRODUCTION

Legal institutions in Latin America have been criticized for their unresponsiveness to the most pressing social and political issues in the region. The excessive formalism and lack of autonomy of courts, their inefficiency, and lack of access for most of its population are but some of the most frequent criticisms.¹ After the region's democratic transitions, most people expected the consolidation of the rule of law and human rights. Many of these countries embarked on constitutional reforms that adopted a relatively standard package of large-scale reforms of their judiciaries, including the adoption or expansion of judicial review.² Most of these countries also adopted mechanisms that provide injunctive relief for the protection of fundamental rights, like the *amparo*.³ This form of injunction was originally adopted in Mexico during the nineteenth century, and spread in the late twentieth century to Argentina, Bolivia, Brazil, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Panama, Paraguay, Peru, along with similar injunctions for the protection of fundamental rights, like the *recurso de protección* in Chile, or the *tutela* in Colombia.⁴

Recently, the formalism of Latin American courts has begun to recede, as legal systems promote greater access to justice to their population.⁵ To be sure, there have been significant setbacks in the protection of human rights, as illustrated by the situation in Brazil, Colombia, Mexico, Nicaragua, and Venezuela, among others.⁶

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¹ Jorge Correa Sutil, *Judicial Reforms in Latin America: Good News for the Underprivileged?*, in (UN)RULE OF LAW AND THE UNDERPRIVILEGED IN LATIN AMERICA, 258 (Univ. Notre Dame Press, 1999).

² See generally RULE OF LAW IN LATIN AMERICA: THE INTERNATIONAL PROMOTION OF JUDICIAL REFORM (Domingo Pilar & Rachel Sieder eds., 2001).

³ See generally *id.*

⁴ See generally JUDICIAL POLITICS IN MEXICO: THE SUPREME COURT AND THE TRANSITION TO DEMOCRACY 6 (Andrea Castagnola & Saul Lopez Noriega eds., 2016).

⁵ Alexandra Huneus et al., *Cultures of Legality: Judicialization and Political Activism in Contemporary Latin America*, in THE JUDICIALIZATION OF POLITICS IN LATIN AMERICA 1–2 (Rachel Sieder et al. eds., 2005).

⁶ *Critics Under Attack*, HUM. RTS. WATCH (2021), <https://www.hrw.org/report/2021/06/22/critics-under-attack/harassment-and-detention-opponents-rights-defenders-and> (last visited Dec. 13, 2021).

However, courts throughout the region have become increasingly important political players and legal culture has been significantly transformed.⁷ One important leader in promoting this change in the region is the Colombian Constitutional Court,⁸ which has played an important role in controlling that country's historically hypertrophied presidential power and extending the protection of fundamental rights to traditionally marginalized segments of society.⁹

However, extending the protection of fundamental rights in Colombia promoted a substantial rise in litigation, and the analysis and selection of lower courts' decisions for review became a daunting task for the Court. From 1998 to 2018 the number of cases filed increased from 10,872 to 607,313; this is an increase of 5,587% in twenty years.¹⁰

To cope with this increase in litigation, the Colombian Constitutional Court recently adopted an artificial intelligence (AI) mechanism, called PretorIA, to gradually replace the current system for selecting its docket in *tutela*, which relies on law clerks reviewing all lower court decisions and writing case file summaries.¹¹ Although there are discrepancies regarding the precise AI technology that PretorIA currently uses,¹² the use of any form of AI to help judges preselect the docket of a court at the apex of a judicial system raises questions both with respect to the nature of docket selection and the effects of using AI for this task. How is the selection of the docket of a high court related to law, and is it related to human experience?

This Article addresses some of the limitations of AI as a tool to preselect a long or shortlist of cases for a court at the apex of the judicial system to review. It focuses on the Colombian Constitutional Court, as an example of a court at the apex of the judicial system that has been historically responsive to claims for fundamental rights. Docket selection is an example of a classification problem using supervised learning, in which a machine groups data according to preestablished characteristics.

This Article draws from two different bodies of literature to analyze the consequences of using AI to preselect the docket of Colombia's Constitutional Court. It draws from political science models of the functions of courts and the structure of

⁷ See generally CULTURES OF LEGALITY: JUDICIALIZATION AND POLITICAL ACTIVISM IN LATIN AMERICA (Javier Couso et al. eds., Cambridge Univ. Press, 2013).

⁸ MANUEL JOSÉ CEPEDA ESPINOSA & DAVID LANDAU, COLOMBIAN CONSTITUTIONAL LAW: LEADING CASES 1 (Oxford Univ. Press, 2017).

⁹ See *id.*

¹⁰ See *Tutelas radicadas en la Corte Constitucional*, CORTE CONSTITUCIONAL DE COLOMBIA: ESTADÍSTICAS DE LA CORTE CONSTITUCIONAL, <https://www.corteconstitucional.gov.co/la-corte/estadisticas.php> [<https://perma.cc/3KT3-FZ2E>] (last visited Dec. 13, 2021).

¹¹ See Constitutional Court of Colombia, Agreement 02 of 2015, arts. 53(a), 54(c)–(d), 55, which reform the court's internal rules of procedure.

¹² *Conoce nuestra Investigación sobre PretorIA, la tecnología que incorpora la Inteligencia Artificial a la Corte Constitucional*, DEJUSTICIA (2021), <https://www.dejusticia.org/conoce-nuestra-investigacion-sobre-pretoria-la-tecnologia-que-incorpora-la-inteligencia-artificial-a-la-corte-constitucional/> [<https://perma.cc/PV32-WGCR>] (last visited Dec. 13, 2021).

the judiciary to show the importance of docket selection to provide high courts with complete information about existing conflict in a society.¹³ Secondly, it draws from critiques of AI made by philosophers of the mind¹⁴ and cognitive scientists to illustrate the importance of human experience in docket selection.¹⁵ These critiques focus on the ways human experience and our interaction with the world shape our cognitive abilities and processes, to illustrate the differences between human intelligence and AI.¹⁶ The Article uses that literature to show that AI can help in identifying and preselecting cases based on well-defined legal categories. The use of AI, however, can also bring more significant problems. On the one hand, AI classification can sometimes include cases that do not deserve to be selected, producing which are known as false positives. However, the use of AI may produce more difficult problems because a machine cannot help the Court identify emerging patterns of social conflict, or naturalized patterns of social interaction that have recently been perceived as problematic. In other words, it also fails to preselect cases that are worth selecting, which are known as false negatives. Moreover, during times of social and political change, courts can become unresponsive or reactionary, and the costs associated with false negatives tend to be much greater.

This Article is divided into five parts. The first part briefly surveys the relevant AI technologies and elaborates on the criticisms made by philosophers and cognitive scientists. The second part introduces a model that describes the functions of courts, highlighting that such functions vary depending on the position of a court within the structure of the judiciary and showing the importance of information flows within the judiciary for the operation of a well-functioning legal system. The third part describes the role played by the Colombian Constitutional Court and how its responsiveness promoted an increase in fundamental rights litigation. The fourth part describes the current docket selection mechanism and how AI is starting to be used by the Court. The fourth part analyzes the consequences of using AI in preselecting the docket. Finally, the conclusion highlights some of the theoretical implications and makes recommendations for more sensitive ways in which AI can be used to promote greater efficiency and legal certainty.

I. AI AND THE WAY MACHINES LEARN

Lawyers, law firms, judges, and governmental agencies currently use AI for various purposes. Lawyers have been using AI to identify all the relevant precedents that

¹³ See generally MARTIN SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* (1986); MARTIN SHAPIRO & ALEC STONE-SWEET, *ON LAW, POLITICS, AND JUDICIALIZATION* 102–11 (2002).

¹⁴ John R. Searle, *Minds, Brains, and Programs*, 3 *BEHAV. BRAIN SCI.* 417–24 (1980).

¹⁵ See generally GEORGE LAKOFF & MARK JOHNSON, *PHILOSOPHY IN THE FLESH: THE EMBODIED MIND & ITS CHALLENGE TO WESTERN THOUGHT* (1999).

¹⁶ Benjamin Alarie et al., *How Artificial Intelligence Will Affect the Practice of Law*, 68 *UNIV. TOR. L.J. (SUPP. 1)* 106–10 (2018).

may improve the chances of success of their clients.¹⁷ Firms also use it to predict the outcomes of cases,¹⁸ evaluate the probabilities of success and advise their clients.¹⁹ Moreover, lawyers have also used AI to predict the way in which specific judges are going to vote on certain issues.²⁰ Governmental institutions have also started to use it to find relevant precedents and determine their probabilities of success in pursuing certain courses of action against citizens and companies, for example, in matters related to taxation.²¹ Furthermore, these institutions use AI not only to assist them by providing, filtering, and analyzing information, but to replace officials in some of their tasks. For example, prosecutors specialized in taxation matters in the province of Buenos Aires use AI to draft certain decisions in these legal procedures.²² Finally, companies like eBay and others have gone even further, using AI to settle the disputes between providers and recipients of the goods and services exchanged in their platform.²³

Proponents of expanding the use of AI in law assure that AI can promote greater legal certainty, because it mitigates human errors, biases, and corruption in the application of legal standards.²⁴ They also claim using AI makes the legal system more efficient and less expensive, because AI can analyze large quantities of data in only a fraction of the time and resources used by humans.²⁵ On the other hand, AI detractors claim that the conflicts that reach the legal system are usually not those where there is a clear rule applicable to a well-known set of facts.²⁶ These skeptics argue that the opposite is true. Cases that reach the legal system are those in which there are no clearly applicable rules, and where facts are disputed. Moreover, other AI skeptics also highlight that at the current state of AI development machines are incapable of analogical reasoning, which is the type of reasoning used in law.²⁷

¹⁷ *Id.*

¹⁸ Frank Pasquale & Glyn Cashwell, *Prediction, Persuasion, and the Jurisprudence of Behaviourism*, 68 UNIV. TOR. L.J. (SUPP. 1) 63–81 (2018).

¹⁹ Harry Surden, *Machine Learning and Law*, 89 WASH. L. REV. 101–02 (2014).

²⁰ *Id.* at 103.

²¹ See DEJUSTICIA, *supra* note 12.

²² *Id.*

²³ Jeremy Barnett & Philip Treleaven, *Algorithmic Dispute Resolution—The Automation of Professional Dispute Resolution Using AI and Blockchain Technologies*, 61 COMPUT. J. 399–408 (2018).

²⁴ Arthur Rizer & Caleb Watney, *Artificial Intelligence Can Make Our Jail System More Efficient, Equitable, and Just*, 23 TEX. REV. LAW POLIT. 199–202 (2018).

²⁵ See generally Daniel L. Chen, *Judicial Analytics and the Great Transformation of American Law*, 27 ARTIF. INTELL. L. 15–42 (2019) (highlighting the data that AI can consider).

²⁶ GIOVANNI SARTOR & L. KARL BRANTING, *JUDICIAL APPLICATIONS OF ARTIFICIAL INTELLIGENCE* 105 (1998).

²⁷ Cass R. Sunstein, *Of Artificial Intelligence and Legal Reasoning* (Chi. Pub. L. & Legal Theory Working Paper No. 18, 2001), <https://papers.ssrn.com/abstract=289789> [<https://perma.cc/4KM7-6VPP>] (last visited Dec. 13, 2021).

To gain a better understanding of the reach that AI can have in the legal system, one should gain a clearer understanding of what AI is and what it is not. Therefore, this section will briefly describe some of the technologies used in artificial intelligence that are relevant to establish its possibilities and limitations as a tool in the legal system. After this, the section will address some of the early criticisms made to AI by philosophers of the mind and cognitive scientists.

The basic building blocks of AI are algorithms. Algorithms are well-defined instructions followed by calculations or other problem-solving operations, which are capable of systematic application and provide conclusions.²⁸ In turn, AI is a difficult term to define, but it commonly refers to a field of computer science that uses algorithms with a level of sophistication such as to resemble certain aspects of human intelligence.²⁹ Human intelligence, in turn, is considered the ability to reason, solve problems, and to learn. Of course, this is a rather vague definition, which both reflects and seeks to encompass different approaches to the term.³⁰

However, any serious analysis of the applications of AI should be aware of the vagueness of such definitions. In both common language and technical parlance, terms such as “intelligence” tend to conflate multiple abilities and processes which are very different in nature. Further adding to these definitional complexities, extrapolations of the concept of intelligence outside of its more traditional, i.e., human, domain tend to obscure the more specific set of abilities and processes that it denotes. Early philosophical analyses of AI noticed these problems and questioned whether intelligence in humans meant the same kind of abilities and processes that computers could execute.³¹ In other words, they called into question whether computers could in fact reason or learn in the same ways human beings can.³²

Perhaps one of the earliest and most influential philosophical analyses of the differences between human intelligence and AI was done by Hubert Dreyfus.³³ Following his lead, decades later cognitive scientists Philip Johnson and George Lakoff

²⁸ *The Definitive Glossary of Higher Math Jargon*, MATH VAULT, <https://mathvault.ca/math-glossary/> [<https://perma.cc/D9ZR-MHYQ>] (last visited Dec. 13, 2021); *Comparison of Algorithms and Heuristics*, BIOINFORMATICS ORG., https://www.bioinformatics.org/wiki/Comparison_of_algorithms_and_heuristics [<https://perma.cc/3GDQ-KN83>] (last visited Dec. 13, 2021).

²⁹ DAVID POOLE ET AL., *COMPUTATIONAL INTELLIGENCE: A LOGICAL APPROACH* 1–2 (1998).

³⁰ *See generally* STUART RUSSELL & PETER NORVIG, *ARTIFICIAL INTELLIGENCE: A MODERN APPROACH* (2020).

³¹ *See generally id.*

³² From a phenomenological perspective, see HUBERT L. DREYFUS, *WHAT COMPUTERS CAN'T DO: THE LIMITS OF ARTIFICIAL INTELLIGENCE* (1979) [hereinafter DREYFUS, *WHAT COMPUTERS CAN'T DO*]; HUBERT DREYFUS, *MIND OVER MACHINE* (1988). From an analytical perspective that stresses the significance of consciousness and intentionality, see Searle, *supra* note 14.

³³ DREYFUS, *WHAT COMPUTERS CAN'T DO*, *supra* note 32.

also questioned the possibility of “disembodied cognition.”³⁴ Both analyses questioned a series of assumptions underlying the idea of AI. The first assumption is that we can make a rigid distinction between mind and body, and that human intelligence is an internal attribute of the mind, which is independent from its physical context. Some have called this assumption the disembodied conception of the mind.³⁵ The second assumption is that the mind operates by systematically following internal rules that can be modelled mathematically.³⁶ These critics claimed that these assumptions were unfounded. From different disciplines, they converged on their view that human cognition is not an internal attribute, but an interdependent, or relational phenomenon, deeply embedded within its physical (i.e., biological, social, political, and cultural) context.³⁷ Secondly, they claimed that human intelligence does not operate according to preestablished rules and processes that are systematically applied by the mind to represent the world and resolve problems.³⁸ Thus, human intelligence cannot be described, much less replicated, using mathematical models.

Dreyfus’ initial critique was directed toward early models of AI that relied on a single, initial input of large quantities of information.³⁹ In the early models this initial input allowed machines to understand the world and develop cognition without any ulterior adaptation or adjustment based on the interaction of the computer with its context.⁴⁰ As we will see, later generations of AI, like machine learning, addressed this issue and incorporated certain forms of contextual interaction for cognition and problem-solving. However, even now AI maintains two of the features criticized by Dreyfus, Lakoff, and Johnson: it still relies on the possibility of a disembodied cognizant entity, and a mathematical modelling of intelligence.⁴¹ Then, in what ways can a computer be said to be intelligent?

One way of understanding this is by looking at machine learning (ML). Machine learning is the ability of certain computers to infer operational rules, based on their interaction with new information, without having been specifically programmed to follow such rules.⁴² Rather, the programmer trains the computer with an initial information set, and as the computer interacts with new information, it identifies patterns that allow it to arrive at certain conclusions and create new operational rules to execute its task better.⁴³ A favorite example used by the literature to explain how

³⁴ LAKOFF & JOHNSON, *supra* note 15, at 4.

³⁵ HUBERT L. DREYFUS, WHAT COMPUTERS *STILL* CAN’T DO: A CRITIQUE OF ARTIFICIAL REASON 235–37 (1992) [hereinafter DREYFUS, WHAT COMPUTERS *STILL* CAN’T DO].

³⁶ *Id.* at 1–4.

³⁷ *Id.*; see also LAKOFF & JOHNSON, *supra* note 15, at 3.

³⁸ DREYFUS, WHAT COMPUTERS *STILL* CAN’T DO, *supra* note 35, at 256.

³⁹ *Id.* at 260–61.

⁴⁰ *Id.* at 1–2.

⁴¹ *Id.* at 67.

⁴² *Id.* at 1.

⁴³ *Id.*

ML works to resolve classification problems is the identification of spam,⁴⁴ although as we will see, comparing spam to a court's docket selection might induce some confusion. Programmers of algorithms used by your email service commonly introduce certain rules that help the system identify spam and exclude it from inboxes. One such spam identification rule might order the computer to classify as spam those emails containing a specific text in their subject. In doing so, the computer finds a new pattern that shows a strong correlation between messages containing the identified text in their subject, and those coming from senders in certain parts of the world, or emails which include certain images in their content. Based on those correlations, an ML system may develop a new rule classifying as spam those emails sent from the parts of the world that correlate to the subject's text, or those containing related images.⁴⁵

However, one should note that this technology does not create rules deductively, based on a general, abstract concept of spam and then recognizing examples of it in specific emails. Instead, ML uses an inductive and probabilistic approach.⁴⁶ Thus, contrary to human intelligence, which reasons both inductively and deductively, ML only works inductively, approaching the concept of spam by identifying patterns that allow tentative generalizations with regards to potentially undesirable emails.

The inductive nature of this process helps the system adapt to change, but it also limits the ability to reason using more abstract concepts or categories, which is an important feature of human cognition.⁴⁷ This approach can lead to both overinclusion, or false positives, and under inclusion, or false negatives, which can lead to biases in the analysis and processing of information.⁴⁸ As we have all experienced, sometimes important emails go to the spam folder and sometimes spam emails are not identified and go directly to our inbox. For example, one might receive an email from a colleague living in a country that the machine associates with spam. Then, the machine might send it to the spam folder, and one may never read it. This would

⁴⁴ Surden, *supra* note 19, at 106.

⁴⁵ *Id.* at 90–93.

⁴⁶ *Id.* at 93–95.

⁴⁷ See generally LAKOFF & JOHNSON, *supra* note 15 (using the concept of metaphors and metaphorical reasoning to refer to this capacity of abstraction.). This form of reasoning is analogous to the notion of family resemblances used by Ludwig Wittgenstein to refer to a mode of classification and comparison that is not based on the presence of specific attributes to define abstract categories, but on more holistic, or integrated perceptual analyses. LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* (Joachim Schulte ed., P. M. S. Hacker tran., 2009).

⁴⁸ See Sunstein, *supra* note 27, at 7–8 (Sunstein considers that machines cannot engage in analogical reasoning because they cannot determine the relative importance of criteria used to determine the precedent that governs a case, either to liken or to distinguish them. The problem, however, might be more related to their inability for metaphorical and “family resemblance” reasoning that Lakoff, Johnson, and Wittgenstein referred to). See generally LAKOFF & JOHNSON, *supra* note 15; WITTGENSTEIN, *supra* note 47.

be a problem of overinclusion, or a false positive, because the machine classifies the colleague's email as spam. In that same vein, spam senders might use a sophisticated VPN system to disguise the country of origin, switch the subjects of the emails, or the images they use, and we might end up receiving spam in our inboxes. More importantly, the design of the algorithm and the selection of the initial training set from which the computer will develop its initial rules can also lead to systematic bias, which leads to the necessity of transparency in the design of the algorithm and the selection of the training set.⁴⁹

However, one must bear in mind that when a machine erroneously classifies a colleague's email as spam (a false positive), it excludes it so you won't have access to it. In contrast, when the machine erroneously classifies a case file as worthy of selection (also a false positive), the result is that the Court will have access to it. As we can observe, the algorithm produces different results in these two cases of false positives. However, this Article is not concerned with the problem of false positives in docket selection. Instead, it focuses on the consequences of false negatives in docket selection, especially during times of social and political change.

To enable AI systems to manage and use more abstract categories and minimize random and systematic errors without a prohibitively expensive human intervention, computer scientists developed "deep learning." Deep learning is a technique that uses multiple levels or layers of analysis to process more complex data sets.⁵⁰ Each layer analyzes the previous layer's output, gradually transforming raw data, turning it into an increasingly complex representation so that as the layers progress, they execute more comprehensive tasks.⁵¹ Deep learning is commonly used in visual and speech recognition of different sorts, including the recognition of texts. In the first layers, the machine usually focuses on the level of pixels, and in successive layers it focuses on recognizing the complete letter, word, or symbol, regardless of the irrelevant differences in the ways they are represented. The advantage of this technology is that it allows the machine to transform unstructured data into structured data that can be used directly.⁵²

Perhaps the area of AI that can be of greater help for processing case files and preselecting the dockets of high courts is Natural Language Processing (NLP). NLP is a subfield of computer science that focuses on the interactions between computers and natural language. It focuses on the ability of computers to analyze large volumes of natural language data.⁵³ Some of the most important features of NLP are its abilities to use probability to identify syntactic structure, and identify a specific term's semantic field. The computer's ability to identify parts of speech enable it to analyze more

⁴⁹ See Surden, *supra* note 19.

⁵⁰ See JOHN D. KELLEHER, *DEEP LEARNING* 1–2 (MIT Press, 2019).

⁵¹ See *id.* at 13–15.

⁵² See Yann LeCun et al., *Deep Learning*, 521 *NATURE* 436–44 (2015).

⁵³ See DANIEL JURAFSKY & JAMES MARTIN, *SPEECH AND LANGUAGE PROCESSING* (2nd ed. 2008).

complex grammatical structures, approach a document's content in a more refined way and understand the relevance of specific terms in a document, as well as across documents.⁵⁴ In turn, the machine's ability to identify semantic fields enables it to identify patterns without having to rely on the presence of specific search terms in the data being analyzed, which is useful when people—or courts—use different terms interchangeably. For example, an ML algorithm can establish patterns that enable it to learn and operationalize the relation between the terms “right,” “freedom,” and “entitlement,” and include these analogous terms within their tasks.⁵⁵

The ability of a machine to process information in texts and find patterns does not mean that it can understand or learn language the way humans do. It can only process information, assign different values to it, and adjust its operation according to its subsequent interactions with datasets. Initial formulations of a machine's ability to “understand” language were articulated by mathematician Alan Turing, who created a heuristic called *The Imitation Game*.⁵⁶ He claimed that if such machines were able to imitate the external behavior of someone who understands language, and a third party was unable to know the difference between human and machine behavior, one could conclude that the machine was capable of understanding.⁵⁷

However, this “externalist approach” was later refuted by philosopher John Searle, who criticized the conflation of external appearance, or the outcome of thought, and its internal process.⁵⁸ Searle then designed his own heuristic to rebut Turing's, which he called *The Chinese Room*, to determine whether a machine could understand Chinese language.⁵⁹ In this heuristic, a human who does not understand Chinese is placed inside a room and provided with a question in Chinese characters. This person then carries out exactly the same computational operations that a machine would in order to answer the question, also using Chinese characters. The question that Searle asks is whether the execution of the same operations as a computer would enable the person inside the room to learn any Chinese.⁶⁰ The answer is obviously not, because the execution of the computational operations does not require or permit understanding Chinese.⁶¹ The person inside the Chinese room simply executes a (very long) series of mathematical operations to answer the question, but once this person goes out of the room, their knowledge of the Chinese language will be the same as before.⁶² In other words, executing the same mathematical

⁵⁴ See *id.*

⁵⁵ See HOBSON LANE ET AL., NATURAL LANGUAGE PROCESSING IN ACTION: UNDERSTANDING, ANALYZING, AND GENERATING TEXT WITH PYTHON (2019).

⁵⁶ A.M. Turing, *Computing Machine and Intelligence*, 59 MIND 433, 446 (1950).

⁵⁷ See ANDREW HODGES ET AL., PARSING THE TURING TEST. PHILOSOPHICAL AND METHODOLOGICAL ISSUES IN THE QUEST FOR THE THINKING COMPUTER (2009).

⁵⁸ See Searle, *supra* note 14.

⁵⁹ See *id.*

⁶⁰ See *id.*

⁶¹ See *id.*

⁶² See *id.*

operations as a computer able to answer a question in Chinese characters does not help a person to learn Chinese.

II. THE SOCIAL FUNCTIONS OF COURTS AND THEIR ROLES WITHIN WEBERIAN HIERARCHIES

This section describes the basic functions of courts, their relation to the hierarchical structure of the judiciary, and the ways in which information flows about existing social conflict affect the responsiveness of the legal system. As we will see later in this Article, docket selection is important because it provides information about existing social conflict to high-level courts. Using AI to preselect the docket filters out emerging conflicts and legally accepted forms of social interaction that later become problematic as our understanding of them changes.

Following legal anthropologists, forty years ago Martin Shapiro challenged the traditional formalist model of courts. According to the formalist model, courts are institutions that resolve conflicts according to pre-existing rules, through adversarial procedures which result in zero-sum solutions in which one party is legally right, and the other is legally wrong.⁶³ Shapiro suggested instead that courts perform three basic functions: they resolve conflicts by acting as mediators, splitting wins and losses between the parties to disputes; they engage in social control that tends to centralize power; and they make legal rules, both within the margins left by the other branches of power or by redefining the law altogether.⁶⁴ However, higher and lower courts engage in mediation, social control, and lawmaking to a different extent. Higher courts engage in lawmaking more frequently and openly than lower courts, whereas the lower courts engage in more mediation and social control than lawmaking.⁶⁵

These differences in the extent to which different courts perform these three functions lead to a descriptive model of the way the judiciary operates. To carry out these three functions, courts operate as functionally differentiated organs within the larger judicial system, which can be conceptualized as a Weberian bureaucratic hierarchy. In this type of hierarchy, the organs at the bottom—the lower courts—gather information about existing social conflict and noncompliance, filtering and channeling it upward to the highest courts through the appeals process and review mechanisms.⁶⁶ In turn, the highest courts send messages signaling the applicable law to lower courts.⁶⁷

A. Information Redundancies and Legal Change

As in any Weberian hierarchy, some information is necessarily lost, or filtered, in the communication between higher and lower courts. To minimize information

⁶³ See SHAPIRO, *supra* note 13, at 1.

⁶⁴ *Id.* at 63.

⁶⁵ *See id.* at 39–41.

⁶⁶ *See id.* at 49–51.

⁶⁷ *See id.* at 54–55.

loss, the judicial system relies on redundancies. Multiple lower courts are providing higher courts with information about similar social conflicts through the appeals system, whereas higher courts are retransmitting their rules downward, over and over, by reiterating precedent.⁶⁸ In theory, because the information is provided by a variety of lower courts, the possibility that higher courts receive skewed information about existing social conflict is lower. In turn, the continuous reiteration of rules issued by higher courts increases the probability that lower courts will follow their precedents. According to this operational model of the judiciary, information redundancy contributes to guarantee that high courts are well informed about existing conflict in society and lower courts are well informed about the applicable law.⁶⁹ Therefore, a judiciary operating according to this model provides greater stability to the legal system and adjustments are adopted piecemeal, producing only incremental changes in the law in order to correct minor errors.

This model presupposes certain types of social conflict will be channeled bottom-up through the court system. Channeling social conflicts up through the judicial system usually would require that lower courts identify such social conflicts as justiciable claims; for example, when the conflicts they resolve can be understood as violations of fundamental rights. However, in a system that adheres to the principle of vertical stare decisis, lower courts receive signals from higher courts indicating when a certain type of social conflict is a justiciable claim. In lieu of such signals, lower courts usually discard the claim as nonjusticiable.

Most social conflicts are never even taken to court, either people either to normalize injurious experiences as part of the status quo⁷⁰ or because they lack the resources to change it.⁷¹ Individuals face numerous obstacles to perceive their experiences as injurious and frame them as claims that could eventually be channeled through the legal system. Therefore, most injurious experiences are never channeled through the legal system or negotiated under the shadow of law.⁷² As Felstiner, Abel, and Sarat have convincingly argued, the legal system poses significant obstacles for individuals to give a name to their injurious experiences, to attribute their occurrence to someone (blaming), and then to be able to claim some form of redress, either directly or through the courts.⁷³

Furthermore, perceptions of what constitutes an injurious experience, and what should or should not be a justiciable claim change over time. These changes often

⁶⁸ See *id.* at 54.

⁶⁹ See *id.* at 56.

⁷⁰ See William L. F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 L. SOC. REV. 631–54 (1980).

⁷¹ See KITTY CALAVITA & VALERIE JENNESS, *APPEALING TO JUSTICE: PRISONER GRIEVANCES, RIGHTS, AND CARCERAL LOGIC* (2014); see also Marc Galanter, *Why the Haves Come out Ahead: Speculations on the Limits of Legal Change*, 9 L. SOC. REV. 95–160 (1974).

⁷² See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce Dispute Resolution*, 88 YALE L.J. 950–97 (1978).

⁷³ See Felstiner et al., *supra* note 70.

occur in a piecemeal fashion in cases where lower courts sporadically nibble on existing legal doctrines to gradually change the ideas about the justiciability of social conflicts. For this reason, the judiciary adopts most legal changes incrementally. When these changes occur gradually, the judiciary operates according to the Weberian hierarchy model described above.

However, historical institutionalists have shown that long periods of relative stability, characterized only by incremental social, political, and institutional change, are usually followed by more drastic changes according to the model of punctuated equilibrium.⁷⁴ In these circumstances, the courts can adopt incremental changes lagging behind the rapidly changing social norms or respond by promptly adopting drastic legal changes.

One of the most drastic changes in recent times with regards to fundamental rights corresponds to what has been known as the new constitutionalism. The new constitutionalism refers to a rather inchoate phenomenon occurring in different parts of the world from roughly the 1970s to the late 1990s, where countries throughout the globe embarked on significant constitutional reforms or otherwise underwent constitutional transformations led by the judiciary.⁷⁵ To a large extent, the new constitutionalism was an institutional response to political and economic transformations. Changes in political regime—like democratization—or in the mode of production and economic exchange—like market liberalization or economic integration—or a combination of both, were usually accompanied by constitutional reforms.⁷⁶

A key aspect of the new constitutionalism was to create new constitutional courts, increase their power for judicial review, or in any case, grant courts a greater role in governance, especially through the protection of individual rights.⁷⁷ These changes were of significant magnitude and abruptness, and for that reason they have been sometimes called “rights revolutions.” One such example is France, where the Constitutional Council created a Bill of Rights, the “constitutional bloc,” by incorporating the Universal Declaration of the Rights of Man, the European Convention, and other documents to the otherwise rights-sparse Constitution of the Fifth Republic.⁷⁸ Perhaps even more impressively, in the *United Mizrahi Bank v. Cooperative Village* decisions, the Israeli Constitutional Court declared the unconstitutionality of statutes

⁷⁴ See generally FRANK R. BAUMGARTNER & BRYAN D. JONES, *AGENDAS AND INSTABILITY IN AMERICAN POLITICS* (2nd ed. 2009). (The notion of punctuated equilibrium was originally used in evolutionary biology to denote the way changes occurred in evolution. Then, it was adapted by social scientists to refer to the way drastic changes in institutions occurred after long periods of stability.); STEPHEN JAY GOULD, *PUNCTUATED EQUILIBRIUM* (Belknap Press 2007).

⁷⁵ See RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* 4–5 (Harvard Univ. Press 2007).

⁷⁶ See ALEC STONE-SWEET, *GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE* (Oxford Univ. Press 2000).

⁷⁷ See HIRSCHL, *supra* note 75, at 1–2.

⁷⁸ See *id.* at 7.

for violating fundamental rights despite the fact Israel lacks a written constitution.⁷⁹ However, although these are especially significant cases of rights revolutions, there have been many others.⁸⁰ Some have even successfully occurred in authoritarian regimes like Egypt.⁸¹ However, not all have been successful. Some rights revolutions have rapidly failed like in Russia⁸² or were only able to maintain rights protection for a limited time until a backlash occurred, like in Hungary and Poland.⁸³

How do these sudden and sweeping changes usually known as rights revolutions come to occur? Establishing the cause for these sudden changes is complex because contrary to the other branches of government, courts are passive actors, in that they cannot actively seek cases to promote such transformations. They require individuals to file claims to be able to promote legal change. This means that rights revolutions require that a critical mass of citizens can overcome the obstacles imposed by the legal system. For this reason, Charles Epp has claimed that rights revolutions occur not only because of judicial activism, but due to the enhancement of citizen access to the judicial system.⁸⁴ Rights revolutions, then, are the result of providing citizens with the necessary resources to organize collectively and promote legal change through litigation.

However, citizen empowerment seems to be a necessary yet insufficient condition to promote rights revolutions. Legal mobilization also depends on the perception of opportunities for success vis-à-vis other strategies.⁸⁵ Social organizations and individual plaintiffs are more likely to sue if they perceive that their claims might be heard and decided favorably by the courts.⁸⁶ However, it is unlikely that individuals or organizations will perceive they have a chance of success if their claims are unlikely to reach the high courts. The likelihood of reaching a high court depends on the messages that high courts send to both lower courts and to the citizenry. Therefore, rights revolutions also require information flows between high courts and citizens that promote litigation as a means of achieving legal change.⁸⁷

⁷⁹ See generally CivA 6821/93 United Mizrahi Bank Ltd. v. Migdal Cooperative Village, 49(4) PD 221 (1995) (Isr.).

⁸⁰ See CHARLES R. EPP, *THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE* (1998).

⁸¹ See Tamir Moustafa, *Law Versus the State: The Judicialization of Politics in Egypt*, 28 L. & SOC. INQUIRY 883, 883–84 (2003). See also TOM GINSBURG & TAMIR MOUSTAFA, *RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES* 138–39 (2008).

⁸² See Lee Epstein et al., *The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government*, 35 L. SOC. REV. 117–64 (2001).

⁸³ See generally Laurent Pech & Kim Lane Scheppele, *Illiberalism Within: Rule of Law Backsliding in the EU*, 19 C.A.M.B. Y.B. EUR. LEG. STUD. 3–47 (2017).

⁸⁴ EPP, *supra* note 80, at 3.

⁸⁵ KEVIN J. O'BRIEN & LIANJIANG LI, *RIGHTFUL RESISTANCE IN RURAL CHINA* 38 (Cambridge Univ. Press 2006).

⁸⁶ AUSTIN SARAT & STUART SCHEINGOLD, *CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES* (Oxford Univ. Press 1998).

⁸⁷ EPP, *supra* note 80, at 8.

In this sense, higher courts play a somewhat different role from that of lower courts. In addition to the social functions of all courts, courts at the apex of the judicial pyramid also perform a cultural role that may seem somewhat paradoxical: they help to promote conflicts. Or, to put it less provocatively, they contribute to transforming societal perceptions with regards to situations previously considered to be natural and unproblematic. It is in this last cultural function of identifying emergent social problems and denaturalizing them, I believe reliance on AI for case selection can pose a significant risk. As we will see, artificial intelligence, especially machine learning, is based on the algorithm's ability to learn by identifying pre-existing legal concepts and patterns of past decisions. So even if AI can process more information about social conflicts that have previously been defined as justiciable claims, it cannot help to identify when and why patterns of emergent social conflicts or naturalized social interaction should be regarded as problematic. AI can help courts identify and select cases that fall into well-known patterns of justiciable claims, which is key to reiterate top-down signals with respect to the applicable law, but it is not helpful to promote the kinds of information exchanges about existing social conflict between high courts and the citizens that lead to rights revolutions.

III. THE ROLE OF THE COLOMBIAN CONSTITUTIONAL COURT IN THE PROTECTION OF FUNDAMENTAL RIGHTS AND THE INCREASE IN LITIGATION

This section describes the expansion of fundamental rights protection in Colombia and the role that the Constitutional Court played in the process. The Court's responsiveness to rights claims led to a substantial increase in fundamental rights litigation,⁸⁸ thus promoting what can be called the Colombian rights revolution.

The Colombian Constitutional Court was established in 1992 after a constituent assembly created a new constitution in 1991. The Court performs two basic tasks.⁸⁹ The first is deciding abstract judicial review cases against congressional statutes and regulations issued by the national executive which have the same legal force as statutes.⁹⁰ The second task is reviewing lower courts' decisions concerning the protection of fundamental constitutional rights via a right of action called *tutela*.⁹¹ Since its beginnings, the Court broke with the traditional formalist approach to judicial decision making prevalent in Colombia, quickly becoming a central player in the country's constitutional governance. The Court systematically curtailed the abuse of presidential exceptional powers as a model of governance, successfully transforming the country's hyper-presidentialism into a more poised system of checks and balances.⁹²

⁸⁸ See *infra* note 111.

⁸⁹ CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 241.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² See Corte Constitucional [C.C.] [Constitutional Court], Sala Plena, 1995, Decision C-1040, Constitutional Revision of Re-election Act (Colom.).

Moreover, the Court even declared the unconstitutionality of a constitutional amendment that allowed indefinite presidential reelections based on its violation of a basic pillar of the Colombian constitution.⁹³

However, the protection of fundamental rights has been perhaps even more important in fostering social and political change. *Tutela*, is, the right of action created to provide injunctive relief for protecting fundamental constitutional rights. It was established with the explicit intent of expanding access to justice for marginalized segments of society who lack an efficient mechanism to resolve their conflicts with the state and powerful private actors.⁹⁴ Thus, individuals and legal persons can file *tutela* claims to protect their fundamental rights whenever they are violated or threatened by a state entity or a private actor that exerts some type of authority or power over them, as long as they do not have other effective means of judicial protection of their rights.⁹⁵ The procedure is informal, it can be filed upon any court, and does not require legal representation. Moreover, *tutela* claims can even be filed orally whenever the claimant cannot do so in writing.⁹⁶ Finally, *tutela* is also an expeditious procedure: courts have ten days to decide the claim in first instance, twenty days on appeal, and judges have ample *ex officio* powers to gather evidence and provide claimants with temporary protection orders.⁹⁷

The rights protected by *tutela* have increased widely, and they include not only civil and political rights, but social, environmental, and cultural rights.⁹⁸ The inclusion of social, environmental, and cultural rights as fundamental rights has been a contentious issue. With few exceptions, the Colombian constitution does not identify which rights are fundamental.⁹⁹ However, initially, the Court only considered civil and political rights as fundamental and excluded social, environmental, and cultural rights. In 1997, the Court started protecting social rights in cases when denying a specific service or good included in the content of a social right threatened a right commonly considered fundamental (i.e., a civil or political right).¹⁰⁰ This was generally known as the connectivity doctrine and can be illustrated with the right to health. Although initially the Court did not recognize the right to health as fundamental, it started regarding health rights as fundamental whenever denying a person access to a given medication or medical treatment posed a risk to their

⁹³ *Id.*

⁹⁴ *Id.* at 553, 554, 559.

⁹⁵ See L. 2591, noviembre 19, 1991, DIARIO OFICIAL [D.O.] (Colom.).

⁹⁶ *Id.* art. 14.

⁹⁷ *Id.* art. 29.

⁹⁸ The first decision in which the full court recognized the fundamental character of social rights was: Corte Constitucional [C.C.] [Constitutional Court], marzo 6, 1997, Sentencia SU-111/97 (Colom.).

⁹⁹ For example, article 44 establishes that the rights of children are fundamental and prevail over all others. CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 44.

¹⁰⁰ See Corte Constitucional [C.C.] [Constitutional Court], marzo 6, 1997, Sentencia SU-111/97 (Colom.).

life.¹⁰¹ During the late 1990s, Colombia, as the rest of Latin America, suffered a harsh economic crisis that seriously affected people's social and economic rights. The crisis promoted a wave of *tutela* litigation seeking to protect the social and economic rights of the affected lower and middle classes.¹⁰² Providing evidence of a causal connection between the lack of a social or economic right and the threat to civil or political rights became too cumbersome for both claimants and judges. Moreover, the court also started protecting social rights by connecting them to increasingly abstract and normative concepts like human dignity where showing evidence of empirical threats was less relevant.¹⁰³ Thus, in the mid-2000s, the Court abandoned the connectivity criterion and started protecting social rights directly as fundamental rights in and of themselves.¹⁰⁴

Furthermore, during the late 1990s and 2000s, the catalogue of fundamental rights expanded beyond rights explicitly included in the constitution. The Colombian court borrowed the doctrine of the "constitutional bloc" created by the French constitutional council¹⁰⁵ to enhance the bill of rights and protect international human rights recognized in treaties as fundamental constitutional rights. The argument for this expansion lies in a constitutional clause that establishes the prevalence of human rights in the domestic legal system.¹⁰⁶ In that way, the Court started protecting social, economic, environmental, and cultural rights as fundamental. The protection of such rights has meant that the types of subjects being protected has also changed. The Court started protecting not just individuals, but collective actors such as labor unions, neighborhood residents, indigenous groups and afro-Colombian organizations, and even non-traditional legal subjects, such as rivers¹⁰⁷ and forests.¹⁰⁸ Thus, for example, based on the International Labor Organization's 169 Convention on the Rights of Indigenous and Tribal Peoples,¹⁰⁹ the Court started protecting via *tutela*, the rights of ethnic communities to a prior and informed consultation whenever the government

¹⁰¹ See Pablo Rueda Saiz, *Legal Language and Social Change During Colombia's Economic Crisis*, in CULTURES OF LEGALITY: JUDICIALIZATION AND POLITICAL ACTIVISM IN LATIN AMERICA (Javier Couso et al. eds., 2013).

¹⁰² *Id.* at 26.

¹⁰³ *Id.* at 31.

¹⁰⁴ *Id.* at 39.

¹⁰⁵ The French decision of 1971 (71-44DC) included the Declaration of the Rights of Man and of the Citizen of 1789, the Preamble of the Constitution of 1946 which includes a series of social rights. Later, the Council also included the Charter for the Environment of 2004, thus extending the protection to civil, social, and environmental rights. Corte Constitucional [C.C.] [Constitutional Court], mayo 18, 1995, Sentencia C-225/95 (Colom.).

¹⁰⁶ See CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 93.

¹⁰⁷ See generally Corte Constitucional [C.C.] [Constitutional Court] noviembre 10, 2016, Sentencia T-622/16 (Colom.).

¹⁰⁸ See generally Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala. Civ. abril 5, 2018, L.A.T. Villabona, STC 4360-2018 (Colom.).

¹⁰⁹ 108 Convention Concerning Indigenous and Tribal People in Independent Countries (No. 169), June 27, 1989, 1650 U.N.T.S. 383.

sought to extract resources from their land or planned to issue a statute or administrative act that affected them directly.

The expansion of the catalogue of fundamental constitutional rights was not the result of incremental changes also adopted top-down by the Court. Rather, the expansion resulted from a rapid creation of legal categories in response to a growing panoply of claimants increasingly gaining access to the judiciary and making novel claims.¹¹⁰ *Tutela* increased access to the legal system to many social groups that formerly lacked it. Enhanced access to the legal system was a necessary condition that allowed these groups to resolve their conflicts with the state and with powerful private actors against which they otherwise had no recourse. However, enhanced access to justice was not a sufficient condition for the expansion of fundamental rights. The Court's responsiveness to the claims made by marginalized social groups provided them with the normative toolkit to rapidly enhance the scope and nature of their claims. In the words of a former justice of the Court, referring to the use of *tutela* by indigenous peoples, "[i]t provided such groups with a language; this is, a vocabulary, and a grammar, that allowed them to pursue their claims."¹¹¹

This process by which courts come to dominate the normative structure of a community by resolving conflicts in different areas of social life has been referred to as the "judicialization of society."¹¹² In its first stage, social actors interact among themselves and with the state, and resolve the conflicts emerging from such interactions directly, either negotiating their social exchanges or simply "lumping" their losses.¹¹³ When provided access and the appropriate incentives, these actors resort to third parties, such as courts, to resolve their conflicts. In the process of resolving their conflicts judges change and/or reaffirm the normative structure used to resolve them.¹¹⁴ The changes in norms have two basic consequences: (1) they will impact the direct interactions between social actors and (2) create an incentive for litigation by social groups. However, the expansion of litigation depends on whether these actors perceive they will benefit from the new rules created by the courts. In turn, these new rules will also help forge new relationships between courts and different segments of society.

An example of this process of judicialization can be observed clearly in the rise of cases in *tutela* in Colombia. As Chart 1 shows below, the amount of *tutelas* filed in Colombia has increased significantly since its creation. In 1992, lower courts decided 12,809 claims, whereas in 2019, that number increased to 620,242 cases.¹¹⁵

¹¹⁰ See Rueda Saiz, *supra* note 101.

¹¹¹ Interview by Pablo Rueda-Saiz with Eduardo Cifuentes, former Justice of the Court, in Bogotá, Colom. (April 2010) (on file with the author).

¹¹² STONE-SWEET, *supra* note 76, at 13.

¹¹³ See *id.* at 14.

¹¹⁴ See *id.* at 15.

¹¹⁵ *Tutelas radicadas en la Corte Constitucional*, *supra* note 10 (data configured by author).

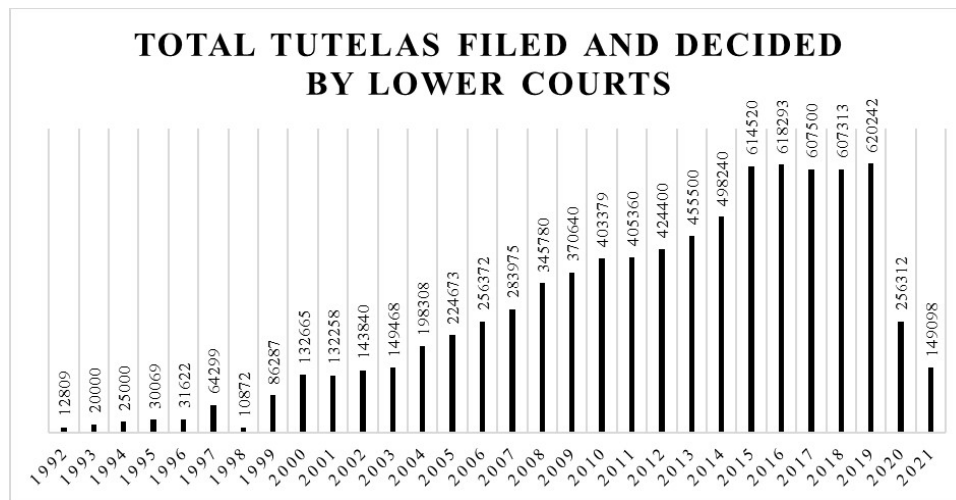


Image 1: Data configured by the author showing total *tutela* filings by year. The years 2020 and 2021 present a significant decrease in the number of cases because courts were temporarily closed due to COVID-19.

Moreover, the types of rights protected have also changed drastically because of the Court's jurisprudence. Until 1997, the Court did not consider social rights fundamental. As mentioned before, that year, the Court stated that social rights could be regarded as fundamental if they were connected to other civil and political rights that were generally considered fundamental.¹¹⁶ Later, the Court discarded the connectivity requirement and started protecting certain social rights, like health, pensions, salaries, and social security benefits as inherently fundamental.¹¹⁷ Moreover, it also started protecting cultural rights as fundamental rights even though some are not explicitly recognized in the constitution. The Court's expansive social rights jurisprudence created an incentive for litigation in that area. In the last three years, at least 50.30% of *tutela* claims filed in the country requested the protection of social rights, mostly health rights, pensions, humanitarian assistance and labor rights.¹¹⁸

¹¹⁶ See Rueda Saiz, *supra* note 101.

¹¹⁷ See *id.*

¹¹⁸ *Derechos demandados*, CORTE CONSTITUCIONAL REPUBLICA DE COLOMBIA: ESTADÍSTICAS DE LA CORTE CONSTITUCIONAL, <https://www.corteconstitucional.gov.co/lacorte/estadisticas.php> [<https://perma.cc/WHK7-5949>] (last visited Dec, 13, 2021) (data compiled by author).

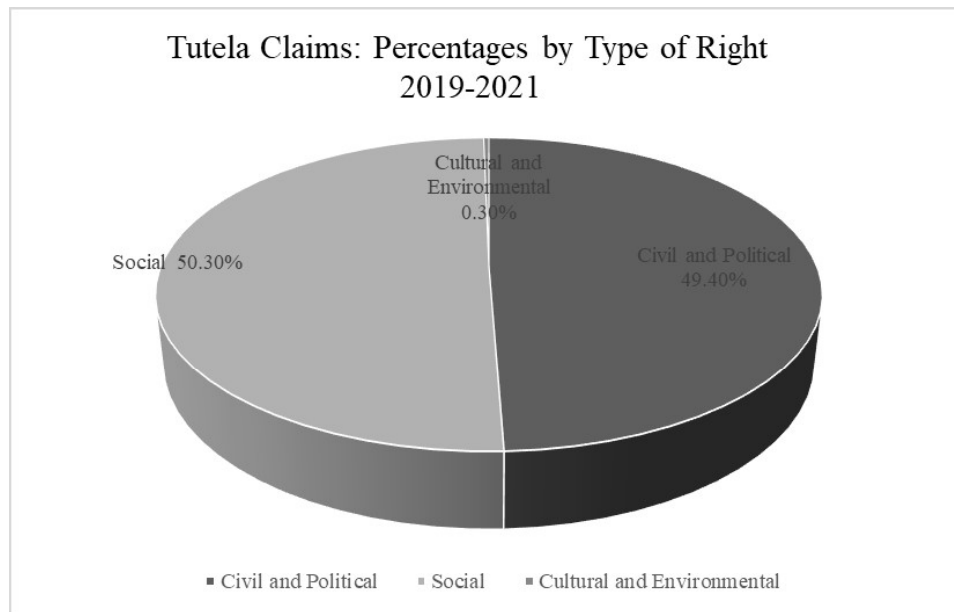


Image 2: Data configured by the author showing a breakdown of rights sought in 2019–2021 *tutela* filings.

As the increase in the number of social rights claims suggests, the Court plays a key role in shaping not just the increase in litigation, but the specific areas and issues on which individuals and groups file claims. The role of the Court's decisions in shaping the types of rights claimed in the litigation that followed suggests that docket selection is one of the most sensitive aspects of the Court's role. The types of claims where there has been greater expansion were initially regarded by the Court as nonjusticiable. Despite its initial position, the Court was responsive to a growing need to address issues of social, economic, and ethnic disparities that plague Colombia. Eventually, the Court changed its precedents, and in doing so it opened the door of a "rights revolution" in areas like health rights, pensions, and housing, and levelled the playing field between indigenous and companies seeking to extract resources from their territories.¹¹⁹

The following section describes the current process of docket selection in the Colombian Constitutional Court. It highlights the ways in which the Court obtains information about social conflict through the analyses of the summaries of the lower courts' case files written by law clerks and the staff attorneys of the Court's judges. Although there are several mechanisms that ultimately help filter cases that do not merit selection for review, a critical mass of the judges' staff are well informed about the cases.

¹¹⁹ David Evan Landau, *Beyond Judicial Independence: The Construction of Judicial Power in Colombia* (Oct. 2014) (Ph.D. dissertation, Harvard University, Graduate School of Arts & Sciences).

IV. DESCRIPTION OF THE SELECTION MECHANISM

Various organs and officials of the Court participate in the selection process, but perhaps the most important ones are: The Selection Panels, the Unit of Analysis and Follow-Up to the Selection Process, and the Law Clerks. Additionally, attorneys within the staff of each judge support the whole selection process, even though they have different tasks depending on the way each judge organizes the team's work. In what follows, this Article will describe the selection process, identifying their roles and interactions to show how the information regarding the case files flows from lower courts to the Constitutional Court.

As previously mentioned, individuals and legal persons can file *tutela* claims upon any court. Once a *tutela* decision is final, the case file goes to the Constitutional Court to determine whether the Court will select it for review.¹²⁰ After arriving at the Court, the law clerks (law students in their final year who work for one of the judges)¹²¹ read the case files and summarize them. Each judge works with approximately six or seven clerks, in addition to a staff of sixteen attorneys with different levels of seniority that comprise each judge's team.

A member of the staff of each judge is appointed to the Unit of Analysis and Follow-Up of the Selection Process, who usually dedicates most, if not all, of her time to this task. The role of the unit is to implement the selection criteria, create the templates for the case files' summaries that the law clerks write, supervise their work, discuss with them any cases that may award being selected, and elaborate a long list of "preselected" cases. This unit meets at least once a week to discuss current issues, cases and trends, establish the best way to implement selection criteria and discuss any problems that the selection process may have. Clerks are instructed by the unit member in their judge's team with regard to case selection and criteria discuss candidate for review.¹²²

Reading the files, analyzing the relevant case law, and discussing them is a time-consuming task. Unit members are usually attorneys with several years of court experience and are dedicated full-time to their task. If the unit member agrees the case could be preselected for review, she will usually take it to one or more senior attorneys in the judge's team for further discussion. Thus, when a clerk identifies a potential candidate case for review, usually at least three people in the judge's team are familiar with the case and its merits. Unit members then approve the preselection of the case and indicate this in the case's summary. Case summaries of preselected,

¹²⁰ See Rueda Saiz, *supra* note 101, at 32.

¹²¹ In Colombia, law school is an undergraduate degree that typically lasts five years. Throughout the fifth year, all students are legally required to work for a clinic or as law clerks. See L. 1862, agosto 18, 1989, DIARIO OFICIAL [D.O.] (Colom.).

¹²² See Corte Constitucional [C.C.] [Constitutional Court], noviembre 10, 2016, Acuerdo 02 de 2015 (Colom.).

as well as non-preselected, cases are transferred to the staffs of the two justices whose turn it is that month to be part of the Selection Panel.¹²³

Selection panels are comprised of two judges, who meet roughly once a week to select the cases for review and distribute them among the judges.¹²⁴ Before each meeting, the staff members of each judge read the summaries, analyze them, and elaborate a format of written arguments justifying their position. These cases are then discussed by each judge and their staff to define their position with respect to each case. Once the judge's position has been defined, the staff attorneys meet and elaborate a short list of cases. These preliminary meetings reduce both the number of cases and their disagreements. Then, the judges in turn for the panel and their teams hold a formal meeting with the secretary of the court to decide what cases will be selected for review. The judges that comprise the selection panel change every month to avoid overburdening their teams.¹²⁵

Despite being labor intensive, the selection process is not foolproof. Even though case files are revised exhaustively and there are intentional redundancies geared toward double-checking the selection process, some unworthy cases get selected (false positives). More importantly, critical cases are sometimes overlooked (false negatives). To correct the problem of false negatives in this classification process, the Court's judges who did not participate in the selection process but may nevertheless be aware of the importance of a case before the Court can insist that the panel select a case. Besides these judges, the country's human rights ombudsperson, the *Procurador General*, and the government can insist on the need to select a specific case.¹²⁶ In these circumstances, the selection panel considers the request and once again decides whether there is any merit to select the case. However, the panel still has complete autonomy in deciding whether there is merit to select the case.¹²⁷ Moreover, the claimants or any individual with a legitimate interest can write an informal request to the Court asking it to select a case.¹²⁸ When one of the public officials mentioned above insists on the selection of a case or a person requests it, the staff attorneys analyze the case file and write a summary expressing their position with respect to the selection of that case.¹²⁹

As the former description shows, the selection process is a time-consuming enterprise with significant redundancies. The same case files are read and summarized exhaustively, and their merits for review are analyzed by multiple participants at different times. These redundancies have a specific purpose, which is to guarantee that the Court's judges and their staffs are well-informed about existing patterns of

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ L. 2067, septiembre 4, 1991, DIARIO OFICIAL [D.O.] (Colom.).

¹²⁸ *Id.*

¹²⁹ *Id.*

fundamental rights violations within Colombian society and minimize false negatives in the selection process. In terms of the Weberian hierarchies described above,¹³⁰ redundancies guarantee that the information with respect to patterns of conflict in society flows upward to the apex of the hierarchy. This information is important because it enables the Court to adequately perform its functions of conflict resolution, social control, and lawmaking. Without adequate information about existing social conflicts would increase significantly, courts would not regard them as justiciable and aggrieved individuals and groups would resort to other means to resolve them.

The possibility that individuals and social groups resort to other means to resolve their conflicts, including illegal means, is a very real one, especially in a country with a history of inequality, internal armed conflict, and violence, like Colombia. The capacity of the judicial system to channel and resolve conflicts between parties with significant power asymmetries can contribute to preventing individuals from taking justice into their own hands and instead strengthen the legitimacy of the state. The capacity of the judiciary to channel social conflict depends, among others, on the availability of information that the Constitutional Court has about existing social conflict.¹³¹ The availability of such information can enable the Court not only to intervene directly to resolve such conflicts, but to create rules through which lower courts can resolve them. Moreover, those same rules are likely to guide the interactions of social actors and governmental officials.¹³² Thus, redundancy in the docket selection process is important because it guarantees that the Court has the information that will allow it to reduce social conflict.

During the first years of the existence of the Court, this type of redundancy in the selection of its docket was feasible. However, as image 1 above shows, the number of *tutela* case files the Court must analyze went from roughly 12,000 in 1992 to 620,000 in 2019. In other words, the number of case files that the Court needs to analyze to select its docket has increased 5,100% in twenty-seven years.¹³³ To provide a more temporally grounded idea of the order of magnitude, in any given week of 2019, the Court received approximately the same number of case files that it received during the whole year in 1992. The resources necessary for processing that number of case files are exorbitant. Monitoring the elaboration of case file summaries, analyzing their merits, and discussing them, is simply out of the Court's capacity. Therefore, a more efficient mechanism to select the Court's docket is necessary. It is for this reason that the Court has adopted a mechanism to simplify and expedite the docket selection process. In what follows, this Article will describe the way in which AI will be used to contribute to these two purposes.

¹³⁰ SHAPIRO & STONE-SWEET, *supra* note 13.

¹³¹ *Id.*

¹³² STONE-SWEET, *supra* note 76.

¹³³ *Tutelas radicadas en la Corte Constitucional*, *supra* note 10.

A. How Is AI Being Used for Case Selection in Colombia?

Understanding the function and precise extent to which AI is currently being used for docket selection in Colombia's Constitutional Court is difficult for various reasons. For starters, the whole program has changed from its initial design, called Prometea, to its current one, called PretorIA.¹³⁴ The initial design, Prometea,¹³⁵ was based on the design used by the office of the Attorney of the Province of Buenos Aires, Argentina, to assist its role by predicting the possible outcomes of the cases in which it represents the interests of Buenos Aires and help it draft resolutions accordingly. The Argentine version of the program uses machine learning and natural language processing to read tax case files, predict possible outcomes, and generate official documents based on the machine's analysis.¹³⁶ According to the Constitutional Court, the current program used to assist the Court in the selection of its docket, PretorIA, is much more modest and does not use machine learning.¹³⁷

Another difficulty in establishing the specific technology of AI being in Colombia's Constitutional Court lies in that there are significant discrepancies between the way PretorIA is described by the Constitutional Court and by the entity in charge of its implementation, the Artificial Intelligence Laboratory (IALAB) of the University of Buenos Aires, Argentina.¹³⁸ According to members of the IT office of the Constitutional Court, the selection criteria at this stage are introduced manually, using specific terms defined by the Unit of Analysis. At this stage, then, even if the program can be considered artificial intelligence, it does not use machine learning. Much less does it use deep learning, neural networks, or natural language processing. In fact, according to the way it is described by the Court's IT team, PretorIA is not much more than a sophisticated search engine that additionally performs some statistical functions. Moreover, at this stage the program remains a pilot, and it is only being used to select cases related to the right to health.¹³⁹

In contrast, according to IALAB's website, PretorIA uses supervised machine learning to read thousands of case files and predict the presence of selection

¹³⁴ The name of the Argentine program, Prometea, alludes to the Greek Titan that stole fire from the gods to give it to humans. See CARL KERENYI, PROMETHEUS (Princeton Univ. Press 1991). In turn, the name of the Colombian program alludes to both the Roman praetor, who acted as a magistrate and to the acronym of artificial intelligence in Spanish: IA.

¹³⁵ See *Informe de gestión 2018–2019*, CORTE CONSTITUCIONAL, <https://www.corteconstitucional.gov.co/transparencia/Informe%20GestionPresidencia2018-2019.pdf> [<https://perma.cc/3HM5-HYYC>] (last visited Dec. 13, 2021).

¹³⁶ See *PROMETEA: Transformando la administración de justicia con herramientas de inteligencia artificial*, INTERAMERICAN DEV. BANK, <https://publications.iadb.org/publications/spanish/document/PROMETEA-Transformando-la-administracion-de-justicia-con-herramientas-de-inteligencia-artificial.pdf> [<https://perma.cc/24VC-JDM6>] (last visited Dec. 13, 2021).

¹³⁷ DEJUSTICIA, *supra* note 12.

¹³⁸ See *PretorIA*, IALAB, <https://ialab.com.ar/pretoria/> (last visited Dec. 13, 2021).

¹³⁹ See *id.*

criteria.¹⁴⁰ According to this account, the program would not just identify specific terms being used in the case files and bring them forward, it would also predict when the selection criteria are present in any given case.¹⁴¹ This kind of prediction would require machine learning and the use of natural language processing in order to identify the relevant case files, even when the specific search terms introduced by the programmers. Moreover, this kind of prediction would also entail the capacity to establish when a term is just mentioned in passing, when it is immaterial, or in any case does not indicate the presence of a criteria for selection.

Regardless of the actual stage of development of PretorIA, whether the cases are preselected with the assistance of a search engine which uses specific terms as criteria, or the presence of such criteria are predicted using machine learning and natural language processing, the Court will use pre-existing categories to preselect its docket.¹⁴² Using the terminology of Weberian hierarchies, the preestablished normative, top-down categories will be used, not only to send signals to lower courts, but to select the docket.¹⁴³ In other words, normative categories will be used to filter the signals that an apex court will receive from lower courts with respect to existing social conflicts. Preselecting the Court's docket based on pre-existing normative categories will skew the process in favor of reiterating the Court's pre-existing case law. In other words, the Court will look at the same types of claims which it has previously analyzed. As we will see, this will be problematic for the function of conflict resolution, as there will be a significant segment of social conflict that will be excluded from the outset. Moreover, it will also be problematic from the standpoint of law-making; particularly as it prevents the Court from responding to emergent social problems and problematizing naturalized forms of social interaction.

V. ANALYSIS OF AI MECHANISMS USED TO SELECT THE COURT'S DOCKET: THE IDENTIFICATION OF OLD AND EMERGENT CONFLICTS

This section analyzes the benefits and drawbacks of using AI to assist the Constitutional Court preselect its docket of *tutela* cases. This section will analyze two potential benefits: (1) AI can help the Court centralize and process large amounts of information, and (2) it can do so more efficiently. Efficient processing of information helps high courts identify when lower courts are not abiding by their precedents, thus aiding them in their function of social control. In turn, the ability to centralize and process greater amounts of information can help courts identify any structural causes that underlie patterns of violation of fundamental rights. By identifying structural causes of these violations, courts can devise new solutions to well-known, unresolved problems, facilitating their conflict resolution function.

¹⁴⁰ *See id.*

¹⁴¹ *See id.*

¹⁴² *See supra* note 122 and accompanying text.

¹⁴³ *See id.*

Nonetheless, using AI to preselect the docket of an apex court also has drawbacks with respect to judicial lawmaking and conflict resolution. Depending on the type of AI used, the algorithm uses either key legal terms, or precedent—that is, past patterns of decision-making—to help the Court preselect its docket.¹⁴⁴ Therefore, whether through predefined legal concepts or patterns of decision making, the machine can only learn from a bounded *legal* context. It cannot consider an unbounded social context, integrating and balancing its moral, political, economic and technological components to identify when a case should be selected by the Court. Regardless of their importance within the dynamic context that constitutes human experience, cases are overlooked if they do not fit within pre-existing legal categories. In contrast, when lower courts' decisions are analyzed by humans, and selection for review is based on discussions between law clerks and staff lawyers, great importance is given to the multiplicity and dynamism of human experience. In this way, docket selection helps law to remain an institution that is dynamic and cognitively open to the complexity of human experience.

Moreover, besides having a strictly legal input to select cases, AI selection is based on information about prior cases or pre-existing legal categories. This means that its way of processing information is exclusively anchored in the past, not based on a vision of the future. Under these circumstances, law can become stifled and fundamental rights can become less responsive to the ever-changing challenges of our social and political life.¹⁴⁵ Even though selecting a high court's docket based on legal categories and past decisions does not necessarily mean that legal change is impossible, it might become mostly marginal; change that only seeks to adjust minor errors without promoting significant transformations. In the terms of the new constitutionalism literature, there will be no rights' revolutions if the courts at the apex of the judiciary select rights' cases based on pre-existing legal concepts and patterns of decision-making.

These circumstances show the importance of distinguishing the kinds of abilities and processes we generally refer to as intelligence and learning when they are carried out by a machine or by human beings to understand the proper place of AI in legal decision making. However, before focusing on the drawbacks of using AI to select the Court's docket, we will analyze some of its possible benefits.

A. The Possible Benefits of Using AI to Preselect the Court's Docket

As mentioned, the Court and the entity in charge of developing PretorIA represent its technology differently. While the Court's IT personnel says PretorIA's current capacity is that of a search engine that uses terms to identify potentially relevant

¹⁴⁴ See DEJUSTICIA, *supra* note 12.

¹⁴⁵ Other commentators have also stressed the stifling effect that AI may have over justice. An important work on this topic is Rebecca Crootof, "Cyborg Justice" and the Risk of Technological-Legal Lock-In, 119 COLUM. L. REV. 233, 233–51 (2019).

case files and executes some statistical functions, ILAB claims the program can “predict” docket selection criteria.¹⁴⁶ Some of the benefits and drawbacks of using AI for the preselection of the Court’s docket depend on the type of program that the Court is using while others are independent of the type of program used by the Court. In the description of benefits and drawbacks that follows I will make the distinctions whenever appropriate. As it will become evident throughout this section, the core argument with respect to the limitations of AI in the identification of emerging or naturalized social conflicts does not depend on the specific technology.¹⁴⁷

In its most basic form, the ability of AI to find key terms in the documents of case files can help the Court classify and select cases using to relevant legal terms. Thus, even if PretorIA does not use machine learning, deep learning, and more sophisticated forms of natural language processing, it can still assist in classifying and selecting cases. According to the Court’s IT division, at this stage PretorIA is being used exclusively as a pilot program to assist in the selection of health rights cases.¹⁴⁸ However, in the future the Court seeks to expand the program to include other rights and use a more sophisticated algorithm.¹⁴⁹ In its current version for health rights, the Court uses key terms to classify the gravity, urgency, or importance of the claims that citizens are making and select those that it deems more urgent for claimants or important for the development of its case law.

However, the ability of programs that use term searches is limited and still requires a significant amount of human labor to select the cases. Moreover, term searches are fallible because not all lower courts use the exact same legal terms and the case files do not necessarily contain the same relevant information. For those reasons, term searches might produce false negatives, this is, they might fail to include all the relevant cases. On the other hand, this type of technology might also lead to the opposite problem of false positives, because the mere presence of a term in a case file does not necessarily indicate the subject matter of a case. Thus, a simple term search might result in the preselection of cases that are not real candidates, which would entail further depuration of the results.

These problems can be minimized by using a version of AI that employs machine learning and a more sophisticated mechanism of natural language processing—one that can learn to identify not just the precise terms being fed to the machine, but terms within the semantic field of the underlying concept.¹⁵⁰ Such technology can prevent relevant cases from falling through the cracks because courts use terms that are

¹⁴⁶ IALAB claims that PretorIA predicts selection criteria. It remains unclear how such criteria can be predicted. See *supra* note 136 and accompanying text.

¹⁴⁷ In contrast, Cass Sunstein’s argument with respect to AI’s inability to engage in analogical reasoning does depend on the current stage of technological development. See Sunstein, *supra* note 27, at 5.

¹⁴⁸ See *Informe de gestión 2018–2019*, *supra* note 135.

¹⁴⁹ See *id.*

¹⁵⁰ See Alarie et al., *supra* note 16, at 8.

different from the ones fed to the machine.¹⁵¹ More sophisticated versions of natural language processing algorithms can also evaluate the importance that a specific concept has within a case file by measuring its prevalence within the analyzed documents, thus avoiding the problem of overinclusion inherent to search engines that use specific search terms. Finally, natural language processing can also identify syntax, which can actually improve the analysis of the content of documents in the case files.¹⁵² However, these more advanced algorithms that use machine learning to discern patterns, natural language processing, and deep learning, are not a panacea either, and should be carefully monitored. Nonetheless, they do represent an advancement over the kinds of term search programs allegedly used by the Court in the present phase of PretorIA.

Greater efficiency in docket selection improves consistency in the application of case law,¹⁵³ because it helps high courts to identify more accurately when lower courts are not abiding by their precedents. Consistency in the application of the law is an important dimension of social control. Thus, by selecting the docket more efficiently the Constitutional Court is contributing to exercise social control, which as we saw, is one of the three basic functions of courts. However, as the conclusion discusses, docket selection is not the only way to achieve consistency in the application of the law, nor the most efficient way to do so.¹⁵⁴ The highest level courts currently have limited resources that must be used wisely, and correcting the errors of lower courts directly may be overly burdensome. As we saw, the number of claims made in an average week during 2019 correspond to all the *tutela* claims made during the entire year of 1992. By reiterating its own case law every time a lower court makes an error, the Colombian Constitutional Court operates beyond its capacity. Moreover, attempting to assume such a role directly by reviewing every lower court decision increases the probability of further contradiction between the panels of the Colombian Constitutional Court. As a result, lower courts receive contradictory messaging, further aggravating inconsistencies in the application of case law.¹⁵⁵ Therefore, one of the conclusions of this Article is that there might be less risky and more efficient ways to use AI to convey applicable precedent to lower courts. Additionally, there might be some important ways in which the Constitutional Court can use AI to mitigate the structural pattern of fundamental rights violation.

In certain cases, the violation of fundamental rights may be the result of an isolated and discrete event. However, critical legal studies,¹⁵⁶ and critical race

¹⁵¹ *See id.*

¹⁵² *See id.*

¹⁵³ *See generally* Rizer & Watney, *supra* note 24.

¹⁵⁴ *See infra* Conclusion.

¹⁵⁵ Currently, this seems to be the strategy adopted by the Constitutional Court. This is in the selection criteria, the great number of cases is selected for review to reiterate its own case law, and the fact that it has a group of staff attorneys dedicated exclusively to draft decisions that reiterate its case law.

¹⁵⁶ ROBERTO MANGABEIRA UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT: ANOTHER TIME, A GREATER TASK* (2015).

theorists¹⁵⁷ have highlighted that these violations are not isolated events but commonly result from structural factors deeply embedded in society. In many cases, the institutions of the state or the market economy are at the root cause of the most pervasive breaches. A country like Colombia, with a decades-long civil war, large-scale corruption and a deeply seated drug economy is very likely to present these patterns of widespread fundamental rights violations. Some of them, like massacres committed by armed actors are visible, but others are not. Moreover, even evident violations of fundamental rights may not have readily visible causes.

AI can help the Court identify the underlying factors that motivate multiple individual *tutela* claims and act consequently to address such causes. Thus, for example, the identification of a spatial pattern may suggest that there is a local state entity or a private party with regional power affecting such rights. At the very least, centralizing information with respect to similar claims instead of decentralizing the analysis by assigning it to different law clerks can render important information to the Court.

The Constitutional Court understands certain patterns of violations have structural causes that require solutions that require more than simply addressing the specific situation of individual claimants. However, the Court's awareness has been the result of waves of litigation around well-defined areas of social conflict that had already been recognized as fundamental rights violations, like the situation of peasants who were internally displaced by Colombia's civil war,¹⁵⁸ or inmates subject to inhumane prison conditions.¹⁵⁹ To address these kinds of violations effectively, the Court created a legal doctrine, which it named an "unconstitutional state of affairs", which has also been adopted in other Constitutional Courts in Latin America.¹⁶⁰ Declaring an unconstitutional state of affairs allows the Court to select all relevant cases for review, analyze the underlying claims in a comprehensive manner and issue orders to the government that reach beyond the specific situations of individual plaintiffs. Such orders have required the government to design public policies, promote statutory changes in Congress, allocate the necessary funds to develop certain programs, among many others. Moreover, it also allows the appointment of special masters to secure compliance with the Court's orders.

¹⁵⁷ RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* (3rd ed. 2017).

¹⁵⁸ See Corte Constitucional [C.C.] [Constitutional Court], enero 22, 2004, Decisión T-025/04 (Colom.).

¹⁵⁹ See Corte Constitucional [C.C.] [Constitutional Court], Sentencia T-153/98 (Colom.); Corte Constitucional [C.C.] [Constitutional Court], diciembre 16, 2015, Decisión T-762/15 (Colom.).

¹⁶⁰ In Peru, for example, the unconstitutional state of affairs has been used for multiple purposes including the situation of inmates. See *Estado de Cosas Inconstitucional*, TRIBUNAL CONSTITUCIONAL, <https://www.tc.gob.pe/jurisprudencia/estado-de-cosas-inconstitucional/> [<https://perma.cc/AQ6C-B9C2>] (last visited Dec. 13, 2021). Similarly, the Brazilian Federal Supreme Tribunal has declared the unconstitutional state of affairs to reform the prison system in ADPF 347. See *Thiago Luís Santos Sombra, ADPF 347 and the "Unconstitutional State of Affairs" of Brazil's Prison System*, 17 ESPAÇO JURÍD. J.L. 649, 649–56 (2016).

This happened when inmates in various prisons around the country started filing claims due to inhumane prison conditions, including overcrowding, mistreatment, and lack of access to medical services. At first the Court simply ordered prison directors to provide required medical services, or relocate individual inmates, or to initiate investigations on mistreatment of inmates. It was not until the Court started selecting such cases and accumulating them into a single procedure that the magnitude of the problem, its different dimensions and causes became evident. Overcrowding was systemic in national and municipal prisons and relocating inmates did nothing to address the problem. The Court then established that the inhumane conditions claimed in *tutelas* went beyond the situation of claimants. It affected 24,107 inmates of a prison population of approximately 117,000, this is approximately 21% of the total prison population, which represented around 11.67% of the country's prisons.¹⁶¹ However, the Court also realized that building more prisons, or reforming them, would not solve the problem. The Court went beyond prison reform and addressed the problems of the criminal system, identifying causes, adopting concrete measures, requiring the government to promote a large-scale criminal reform, and monitoring its development.¹⁶²

Another declaration of an unconstitutional state of affairs was triggered by the humanitarian crisis of internal displacement caused by Colombia's civil war.¹⁶³ Although internal displacement has been a constant trait in Colombia for almost seventy years, it became critical in 1998, when approximately 308,000 people were displaced, and in 2002, when around 412,553 more people were displaced.¹⁶⁴ The Court had selected cases of internally displaced people, granting them protection and issuing orders to the government to provide the claimants with the necessary humanitarian assistance.

However, it was not until 2004 when the Court decided to tackle with the problem in a different way. It selected for review the *tutela* claims made by thousands of people and issued guidelines of the policies the government needed to create to guarantee the basic rights of internally displaced people, regardless of whether they had filed *tutela* claims. Moreover, it maintained its jurisdiction over the case and created a system to monitor compliance with its decisions and issue new orders on specific issues. The Court could not do much to end the country's civil war, and in this respect, it did not address the root cause of internal displacement. However, it did address most of the institutional hurdles that prevented displaced people from being able to enjoy their basic constitutional rights and regain control of their lives.

¹⁶¹ *Id.*

¹⁶² See Corte Constitucional [C.C.] [Constitutional Court], diciembre 2, 2015, Decisión T-762 de 2015 (Colom.).

¹⁶³ Gabriel Rojas Andrade & Paola Hurtado, *Grupos posdesmovilización y desplazamiento forzado en Colombia: Una aproximación Cuantitativa*, CONSULTORÍA PARA LOS DERECHOS HUMANOS Y EL DESPLAZAMIENTO, http://www.codhes.org/~codhes/iages/Aticlos/GPD_y_desplazamiento_forzado_en_Colombia.pdf (last visited Dec. 13, 2021).

¹⁶⁴ *See id.*

Thus, the Court organized its monitoring task by focusing on the types of institutional problems confronted by different types of claimants, focusing at different times on different social groups, like indigenous peoples, women, children, among others. AI could have helped not only in the selection of these cases, but also in the organization according to the patterns of recurring institutional hurdles saving time and significantly improving the quality of life of victims of forced internal displacement.

Besides centralizing the analysis of these cases, AI can establish when individual claims correspond to larger patterns of litigation and provide valuable information that can help the Court identify structural causes of such violations. In the case of the prison conditions, the Court established that the increasingly inhumane prison conditions were related to an increasing reliance on criminal law to resolve social problems that significantly increased the prison population. However, this was the result of a painstaking analysis of thousands of case files. A sophisticated algorithm can help the Court identify patterns and correlations more efficiently.¹⁶⁵ In this way, more complex algorithms that use machine learning, natural language processing and deep learning can assist the Court in its functions of conflict resolution and lawmaking.

However, the cases of the inhumane prison conditions and internally displaced people were in the Court's radar because they had already been considered fundamental rights violations by the legal system. Individual claims had been granted before, and only later did the Court come to address their structural components. The situation is very different when the Court has not previously considered a pattern of social conflict as justiciable. In such cases, the use of AI as a tool to help preselect the Court's docket can render these cases invisible.

As mentioned previously, in a working judiciary there is always a division of labor between lower courts and those at the apex of the judicial system. High-level courts, like the Colombian Constitutional Court, are more focused on lawmaking than on social control or conflict resolution. Lower courts, in turn, are more focused on conflict resolution and social control than on lawmaking. In these hierarchical structures, information with respect to the applicable law flows downward, because it is courts at the apex that establish the precedents which should govern certain social interactions. In turn, information with respect to existing social conflict flows upward through appeals and reviews performed by higher courts.

Docket selection is fundamental to guarantee the adequate flow of information throughout the judiciary, not just to control lower courts' deviance from precedent, but because it keeps high courts informed about the existing conflicts in a society. Therefore, even though courts at the apex of the hierarchy need to be informed about cases of deviance from its precedent, bottom-up information cannot be limited to such cases. Bottom-up flows of information must also include the whole universe of cases about existing social conflict. If a court at the apex of the hierarchy only receives information about types of social conflicts that are already considered justiciable,

¹⁶⁵ In a similar vein, *see* Surden, *supra* note 19.

this will prevent them from being able to address new types of conflicts. On the other hand, having information with respect to a more representative universe of the conflicts in Colombian society allows them to intervene and create a new body of case law that helps to provide solutions for emerging conflicts, or otherwise injurious experiences that have become naturalized.

An example that illustrates the importance of docket selection in providing information about social conflict is how social rights became fundamental in Colombia. As mentioned, during its initial years the Court did not regard social rights as fundamental. However, at some point the Court decided to select one such case and created a legal doctrine that allowed it to categorize social rights as fundamental.¹⁶⁶ Initially, social rights cases were selected because they were dramatic life and death circumstances. These cases were crucial, as they opened the door to other, less dramatic ones, until ultimately, social rights became regularly protected as fundamental. However, the Court could not have changed its case law on social rights if it did not have information about these initial cases. And it would lack such information if it was not included as one of the terms processed by the algorithm or the search engine (depending on the current state of Pretoria) to select cases. The problem with using key legal terms to select the Court's docket is that it skews the sample of cases available to the Court in favor of reiterating its own case law.

The first, rather dramatic social rights cases in the Court were not selected because they conformed to the Court's notion of a fundamental right.¹⁶⁷ After all, at that time the Court had expressly rejected the notion that these rights were fundamental.¹⁶⁸ This does not mean that the people who selected these cases were somehow doing it without regard to law or acting fraudulently. Instead, they selected these cases because their own experiences showed them that rights are intricately connected to each other, and sometimes, fundamental rights like the right to life depends on a person's access to medication, a medical treatment, food, housing, clean water, and many other social rights. Understanding how a specific good or service can be fundamental under certain circumstances requires the ability to understand the complexity of human experience, this is, the physical, social, cultural, and political context in which human beings live.

The relation between human experience and docket selection helps to conceptualize this task, or more precisely, to understand its relation to law. It shows that an apex court's decision to select a case ought not be based only on what the law is at any given point in time, but on what the law should be. Given that courts at the apex of the judicial pyramid focus more on lawmaking than on social control or conflict resolution, docket selection is a step that precedes the creation of case law. Thus, it is not exactly a legal role, but a moral or political one.

¹⁶⁶ See Corte Constitucional [C.C.] [Constitutional Court], marzo 6, 1997, Sentencia SU-111/97 (Colom.).

¹⁶⁷ See *id.*

¹⁶⁸ See *id.*

One way to understand the relation between law and docket selection is by considering how sociology of law describes the interaction between law and other areas of social life. In this respect, the work of Niklas Luhmann, is particularly useful.¹⁶⁹ Luhmann described law as a social subsystem that is operationally closed, but cognitively open.¹⁷⁰ This means that law is open to changes in other areas of social life, but it maintains its own system of internal rules and procedures to determine its content and distinguish it from other areas of social life like moral norms or politics.¹⁷¹ And one of the gateways through which law maintains its cognitive openness is precisely through the process of selecting the docket of courts at the apex of the judiciary.

To maintain law's cognitive openness, docket selection needs to analyze a wide universe of cases considering emerging moral norms, changing political perspectives, new technologies, comparative legal experiences, and so many other different contexts. But this kind of analysis, which is open to different areas of social life, is not the same as the type of rule-driven, pattern-finding type of contextual analysis that AI executes.¹⁷² The type of analysis required for docket selection is informed, not just by empathy, but by the ability of drawing analogies and knowledge from multiple contexts, integrating is according to parameters defined by human experience. Moreover, it is a kind of analysis that focuses on the past to assist in the process of decision-making, but it also requires a forward-looking legal imagination. Rights revolutions, like the "invention" of a constitution, or the construction of a bill of rights, or the adoption of structural decisions due to an unconstitutional state of affairs would never have occurred if a court was never confronted with the need to create them to decide novel cases.

However, the limitations of AI for docket selection come from the machine's inability to experience the human condition and is thus independent from technological advancement. In its most basic form PretorIA uses key terms to classify and preselect cases for the Court's docket.¹⁷³ More advanced versions of AI that use machine learning, natural language processing and deep learning can use patterns of the Court's decisions to identify when lower courts have deviated from precedent. Whether PretorIA uses legal terms or previous decisions to preselect cases, it tends to exclude novel types of cases, where claims were not based on pre-existing legal concepts or cannot be decided using previous case law.

Even if PretorIA uses natural language processing and deep learning, which allow it to identify the semantic fields of legal concepts, and enable higher levels of abstraction, it would still be unable to identify emerging patterns of social conflict or to problematize naturalized patterns of injurious social interaction. This is in part

¹⁶⁹ See generally NIKLAS LUHMANN, LAW AS A SOCIAL SYSTEM (Fatima Kastner et al. eds., Klaus A. Ziegert tran., 2004).

¹⁷⁰ See *id.* at 182.

¹⁷¹ See *id.* at 197.

¹⁷² See *id.* at 188.

¹⁷³ See *supra* notes 137–39 and accompanying text.

because the patterns it is taught to recognize, and those it will identify on its own, are defined through pre-existing legal categories and established patterns of decision making. However, the main function of courts at the apex of the pyramid is not to guarantee that the law is applied consistently, but to create law. For this reason, docket selection is not exactly a legal function of a court. Rather, the decision to select a case, although guided by the possibilities of *what law can become*, is ultimately a moral, social, or political decision.

A machine like PretorIA can only “learn” from bounded contexts, which in this case is the input of legal decisions that the algorithm is programmed to include.¹⁷⁴ In contrast, humans can use knowledge acquired from one field in another. For example, humans can use their knowledge of economics, ethics, biology, or sociology, and apply it to different areas of law and vice versa. More importantly, humans can discern when and why a certain body of knowledge is more relevant than the other. A machine cannot expand the context in the same way. Even if in theory a machine can consider its knowledge of the larger social, moral, political and economic context to identify such cases, it is not clear that it can discern what is relevant and why.

The problems of using AI to assist a high court in the selection of its docket shows precisely what the early critics of AI had in mind when they asserted that there is no such thing as disembodied intelligence, and that the kinds of processes carried out by a machine, as helpful as they may be, are very different from human intelligence. Experiencing the complex web of circumstances that constitute the human experience shapes our ability to create the categories that help us understand the world and to draw analogies from different contexts. Part of our inherently human ability is that we are able to draw from our experience in one area of social life and apply the knowledge we gain to another area. This is, of course, true of law. Our knowledge of technology, sociology, morality, and other areas of social life, nurture our legal categories and modes of reasoning. However, this does not change the nature of law.

CONCLUSION

The analysis of the role of AI in the preselection of cases for review by the Colombian Constitutional Court illustrates the nature of docket selection and its importance for judicial responsiveness. Docket selection is a key mechanism that serves to maintain courts at the apex of the judiciary informed about existing conflicts in a society, enabling them to intervene in certain areas of social life. AI, however, uses pre-existing legal categories and patterns of decision making to filter that information. In doing so, AI processes larger amounts of information more efficiently, identifying when lower courts deviate from precedent. Additionally, complex types of machine learning can also help to identify structural causes of certain patterns of

¹⁷⁴ See *supra* notes 144–45 and accompanying text.

fundamental rights violations. Moreover, machine learning can adapt to context. However, this context is very limited, anchored in pre-existing legal concepts and decisions. For this reason, using AI for docket selection also excludes novel or emerging social conflicts, as well as naturalized forms of social interaction that become problematic because of changing cultural perceptions.

Docket selection, as an example of a classification problem, illustrates the tradeoff between the need to reduce false positives, which tends to reduce the Court's workload making it more "efficient," and the need to reduce the false negatives, which tends to increase the Court's workload, but it secures greater judicial responsiveness to social conflict. There is no a priori optimal solution to this tradeoff. However, as this Article suggests, the costs of false negatives in the docket selection tend to increase significantly during times of rapid social and political change. In such conditions, false negatives tend to diminish the ability of the legal system to translate rapid social, technological and cultural transformations into legal categories, which might ultimately lead to an unresponsive legal system.

The shortcomings of AI as a tool in the selection of the docket of a high court depend, not on the specific technology being used, but on the fact that machines cannot experience the complexity of the human condition. It is our unique experience as human beings that allows us to draw information from multiple areas of our lives, integrate them, discern which area is relevant in a specific context, and justify our choices in ways that are legitimate to others because they resonate with their human experience. This ability is especially important if law is to remain a "cognitively open," or to put it differently, a socially responsive institution.

Nevertheless, two different adaptations can tend to mitigate the problems that PretorIA can create in the protection of fundamental rights by the Colombian Constitutional Court. The first adaptation would be to create certain override mechanisms that lead to a totally human selection process when the algorithm identifies certain conditions. An example of one such override could refer to certain categories of protected claimants, like racial, ethnic or gender minorities. In these circumstances, whenever the algorithm identifies that the claimant belongs to one of such especially protected categories, the selection process becomes completely performed by humans according to the pre-existing system. This override selectively mitigates the impact that an AI led docket selection mechanism might have over certain claimants. Moreover, these categories do not need to be static. Instead, they might be introduced at different times through supervised learning to reflect existing social conflicts. Introducing a dynamic override mechanism that reflects changing patterns of social conflict might improve the classification problems. However, introducing these mechanisms might also bring its own challenges, like maintaining transparency.

Moreover, PretorIA can be used differently to serve the same purpose for which it was created. If its purpose is to create a more efficient system of review of lower court decisions in *tutela* and promote greater legal certainty by preserving the principle of *stare decisis*, perhaps the best way to do so is not to identify lower courts'

deviations from precedent so the Court can correct them. This may overburden the Court, as it would have to select a great number of cases to reiterate its case law. Moreover, as already mentioned, it may also be counterproductive, as it increases the probability of different panels of the Court establishing contradictory precedents. Instead, PretorIA can be used to help lower courts identify the governing precedents for the *tutela* cases they need to resolve. As mentioned in the first section of this Article, law firms are already using AI to help their clients identify useful precedents for their claims. This same technology can be used to provide lower courts with the relevant decisions. In this way, the Constitutional Court would not have to select so many cases just to reiterate its case law.