

# Study analysis

## of the jurisprudential evolution of the State Council of the protection action against Judicial sentences in Colombia<sup>1</sup>

### Abstract

The State Council is the head of the administrative justice in Colombia. For this, they have the same hierarchical level as the Constitutional Court (Article 116 of the National Constitution). The Constitutional Court and the State Council in Colombia are autonomous and independent public institutions of the judicial power. However, The Constitutional Court has known about the protection action against judicial sentences dictated by the State Council. Consequently, this has brought up a judicial competence conflict between the two public institutions. Nowadays, The State Council, in their last sentences, has said that it is viable to interpose the protection action against their sentences when these are trespassing fundamental rights.

**Keywords:** State Council, Constitutional Court, protection action, sentences, fundamental rights.

### Resumen

El Consejo de Estado, como órgano de cierre de la jurisdicción contencioso administrativa, tiene el mismo nivel jerárquico que la Corte Constitucional, según lo dispuesto en el artículo 116 de la Constitución Política de Colombia. La Corte Constitucional y el Consejo de Estado son órganos de la rama judicial autónomos e independientes. No obstante, la Corte ha conocido acerca de las acciones de tutela contra los fallos proferidos por el Consejo de Estado. Lo anterior ha ocasionado un conflicto de jurisdicciones entre estos dos cuerpos colegiados. Actualmente, en sus últimos fallos, el Consejo de Estado ha expresado que es procedente interponer esta acción contra una de sus providencias cuando estas vulneren derechos fundamentales.

**Palabras clave:** Consejo de Estado, Corte Constitucional, acción de tutela, providencias, derechos fundamentales.

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## INTRODUCTION

The Colombian legal system must respect the constitutional and government principles of the rule of law state, where all different public bodies are organized hierarchically according to their functions. Through the constitutional principle of check and balances and the autonomous and independent organs of central power, the constituent of 1991 designed a new model of a modern state, wider administratively for a better offer of public services to individuals, where there was defined a diffuse function system for the different authorities, avoiding the principle of separation of powers.

For instance, the organs of the judicial branch are organized at a National level, such as the Constitutional Court, the Supreme Court of Justice, the State Council, the Supreme Council of the Judiciary and the General Prosecutor of the Nation stated in the Article 116 N.C. While each branch has their primary constitutional function, the constitution gives other subsidiary functions such as the judicial review function that for the Constitutional Court is their main function, and for the Council of State is subsidiary.

The State Council, in their early jurisprudences, with respect to judicial reviews of their decisions or protection actions against judges' providences, they stated that the jurisdictional exercise of judges was not to be reviewed by all means under any protection action, considering that it threatened the ac-

tivity of the same administration of justice and its guiding principles, such as their hierarchy powers and legal certainty. However, the Constitutional Court acquires the responsibility of the integrity of the National Constitution by its own law, defining them as the higher judiciary constitutional court.

This caused a jurisdictional conflict between these two collegiate bodies in their precedents. The State Council in its statements has said that the protection action against their decisions cannot to be reviewed because they are the higher judiciary of the Public Administration. On the other hand, the Constitutional Court defended its supremacy over the protection of fundamental rights of the individuals in any court whenever there is a proven violation of the due process of law during the trial.

### **Jurisprudence of the state council about the protection action against judicial decisions**

There are several providences issued by the State Council, which have defined the procedures for the protection action against judicial decisions.

The State Council (1992) stated that the protection action must be used as an instrument of subsidiary and residual nature. That is that it only proceeds in the absence of other suitable defense mechanisms, to provide immediate protection of fundamental constitutional rights when they are violated or

threatened by the action or omission of a public authority”<sup>2</sup>.

Consequently, the State Council rejects the procedure of the protection action against judicial decisions, concluding that 2591 Decree of 1991, which established the protection action against providences, opposes Article 86 of the National Constitution of Colombia because it gives an additional and subsequent way to the ordinary judicial decision. For that reason, there would be a third instance in the judicial procedure, which is not permitted in the judiciary power in Colombia.

In this instance, in the lawful system of Colombia, the theory of the closure of the administrative jurisdiction is directed to constitutional rule designed by the framers of the Constitution of 1991, where there were defined as constitutional right, the rights developed in Article 85 of our Politic Constitution: They are immediately applicable rights under articles 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 23, 24, 26, 27, 28, 29, 30, 31, 33, 34, 37 and 40.

Here, the interpretation made by various judicial collegial corporations in Colombia, and by the constitutional judge himself, was exegetical to the extent that merely stated the protection of fundamental rights described in some items of the National Constitution, excluding other rights, which nowadays are considered fundamental, and they were not

described literally within the options listed in Article 85.

Only after twelve years, the issue about the protection action against judicial decisions of the State Council is reviewed again by this same organism, affirming that it is inadmissible because the Constitutional Court has no jurisdiction to reverse the decisions of the control body responsible for the loss of investiture of members of the congress. In this regard, the Council expressly indicated that there must be a regulation about the unlawful attempt of Board of review of the Constitutional Court to annul the rulings on loss of investiture of a member of the congress because it is the Council of State, by constitutional mandate, the sole and exclusive judge who can decree to decide on the particular application which is raised in accordance with Article 184 of the National Constitution.

Subsequently, the above thesis is reiterated, adding that the idea of justice suggests a definite point of which the decision cannot be changed, even by incurring way of fact, which it considers an irregular and inadequate shortcut, holding the following:

The idea of justice itself suggests a final point from which the judicial decisions cannot be modified. Once reached that final point, with all the procedural stages finished, instances of legal verification of the proceedings completed, whether they were on time, extraordinary actions provided by law, there may not be new options that review the process again,

<sup>2</sup> Look up: State Council of Colombia. Expediente No. A009 de Enero 29 de 1992. Consejero Ponente: Dolly Pedraza de Arenas.

as the possibility that this step would commit the principle of prevalence of general interest (Article 1 CN), represented in the necessary certainty of judicial decisions<sup>3</sup>.

Which means that then, since that time, it was the beginning of developing a legal position that did not allowed the constitutional action in parallel to the binding power of the decisions of the closing of the administrative jurisdiction and its legal effects, since these could only be those described in the law, that is, that after the judicial decisions uttered the parties may file only the resources that may be required to ensure the constitutional principles of *res judicata* and legal certainty.

Years later, the case of a protection action against final judicial decisions is presented. In that case, the plaintiff filed protection action before the state council, second section, so that their fundamental rights to education, work and related rights were violated by the judgments of 12th July 2007. After, in the 10th of June 2010, the decision proffered by the Administrative Tribunal of Cundinamarca and the State Council, first section, in the popular action conducted by the People's Defense of Bogotá, against the company Aqueduct and Sewer of Bogotá, the Institute of Urban Development (IDU) and the Local Municipality of Engativa. The plaintiff claimed that in this case the judicial decisions pronounced were sus-

pended until the district secretariat mobility and IDU determine the feasibility of vehicular access routes to replace the current one.

The State Council, the first section, said that the actor intended protection action is the rescission of a decision already executed. So the constitutional action is inadmissible because it cannot be brought against judicial decisions to end a process or action.

It also considered that it is not being excluded the rights referred by the actor, while the rehabilitation of the sector is ordered by what the law prescribes on the field of wetlands.

The second section of the State Council explains that the judgments of the Administrative Tribunal of Cundinamarca and the State Council, Second Section, conducted a weighting of collective rights in conflict and the rights of community members who were passing, so the fundamental rights of the actor are not excluded whatsoever, but on the contrary, it is creating a protection to life and physical integrity of the inhabitants of the area of influence of the wetlands.

Therefore, in this case, the protection action did not advance because the issue discussed lacked constitutional relevance and there was no evidence of the assumptions alleged as a direct offense of the state responsibility.

Thus the origin of the protection action against judicial decisions was a forbidden topic for the state council, which did not accept the review

<sup>3</sup> Look up: State Council Of Colombia. Expediente IJ-2004-0270, Consejero Ponente Rafael Ostau de Lafont Pianeta. 9 de noviembre de 2004.

of their judicial decisions because since these were constitutional by the mere fact of this body holds the residual constitutional function. Subsequently, by judgment of July 31, 2012 with a presentation of Maria Elizabeth García González, this body considered necessary to admit that there should be addressed the study of the background of the protection action when it is in the presence of judicial decisions regardless of the instance and the organ that issues the act that is in violation of fundamental rights, provided that the requirements and grounds of procedural established by the law are met and that in the future will be determined by law and judicial doctrine itself.

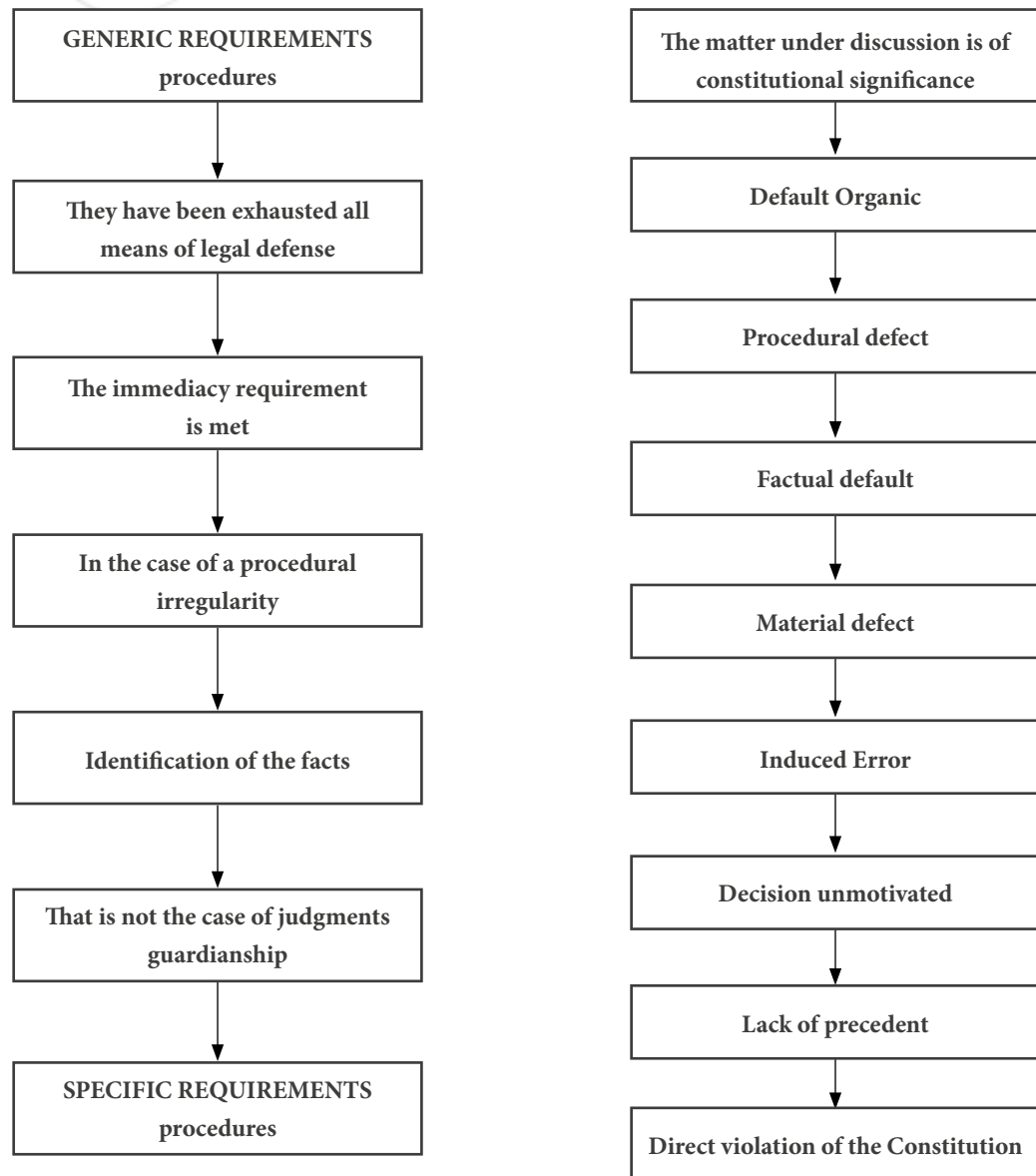
Given the above we can show that in the latter judgment the State Council adopts the criterion of being able to bring an action for protection against one of their judicial decisions when the violation of fundamental rights occurs and when you are in the presence of any of the procedural requirements.

It is important to remember that the Constitutional Court has established two re-

quirements to bring an action for protection against of judicial decisions: generic and specific requirements.

About general requirements, the Constitutional Court has indicated that these elements are essential and vital to enable the filing of the action, that is, that through them, they must determine the possibility of considering the case as subject to review. Besides, this Court says that these particular causes are used to verify the origin of the protection action. Once verified the validity of its filing, these requirements will focus on the study of the judicial decision attacked and its deficiencies that they must have to prosper the action materially.

Finally, the State Council adheres to precedent developed by the Constitutional Court in its Judgment C-590 of 2005, a landmark judgment, which defines the framework for generic and specific procedural grounds for the protection action against judicial decisions.



**Figure 1.** The generic and specific requirements of the protection action against judicial decision

As for the generic causal dealing with the constitutional significance of the fact that the matter to be to inform the judge of guardianship is discussed, must necessarily have affected fundamental rights of any party. Otherwise, it will not proceed the study of the particular case. This cause has become the filter

to be performed by the guardianship judge, notwithstanding incurring a new process before the constitutional court, which would be in breach of the procedural safeguards described in our political charter. In this regard, the Court has held that the protection action should not become a new instance of the pro-

cess or the end of the ordinary or extraordinary actions replacing the same actions.

The Court has, however, reiterated, not only regarding the protection actions against judicial decisions but in all areas, the need to access the ordinary and extraordinary means established by law provided there is no irreparable harm that threatens the fundamental rights of the affected. About this ground, the Constitutional Court has indicated that it is an obligation of the applicant to exhaust all legal means the law gives to defend their claims. In contentious administrative matters, once the actions that come against court orders the plaintiff may institute action is resolved. These resources are:

- Appeal action (Article 243 of Law 1437 of 2011)
- Replacement action (Article 242 of Law 1437 of 2011)
- Appeal Complaint action (Article 245 of Law 1437 of 2011)
- Appeal of appeal action (Article 246 of Law 1437 of 2011)
- Appeal extraordinary review action (Article 248 of Law 1437 of 2011)
- Appeal extraordinary unification of jurisprudence action (Article 256 of Law 1437 of 2011)

On the requirement of immediacy, the Constitutional Court has established that if the action is not filed within the terms permitted, will allow the protection action even years after proffered the decision if there is a violation of fundamental principles such as *res judicata* and legal certainty. Otherwise, there would be absolute uncertainty in all-judicial decisions.

The source of this cause is very important in administrative litigation, because a process of direct repair action can last on average seven years, causing legal uncertainty to the parties; therefore the protection action against a court order must be filed in stipulated terms, which are generally 6 months, from the enforceability of the judgment.

Also, when a procedural irregularity has occurred in the administrative litigation procedure, such as the assessment of evidence obtained by unconstitutional means, and the judge gives validity, you can initiate the action of constitutional protection to safeguard the rights and process guarantees.

The last generic causal is that the action is not brought against a judgment of guardianship. However, the Constitutional Court in 2015 unified its jurisprudence, indicating that it is appropriate to bring an action for protection against a judgment of guardianship when it is facing the phenomenon of fraudulent *res judicata*, and the generic procedural requirements are met by the protection action against judicial decisions.

On the other hand, about specific requirements, the Constitutional Court has established the organic mistake also called a lack of competence, which is when the judicial officer who issued the contested ruling is not competent to do so. In administrative litigation, it is frequently observed that there are demands outside the jurisdiction of the competence of the administrative judge, but instead, they are competence of the ordinary courts, this originates the organic mistake.

The Constitutional Court has indicated that the procedural defect occurs when the judge acted completely outside the legal framework of the established procedure, presenting two situations: first, when the functionary follows a procedure completely alien to the relevant one (diverts the course of the process), and second, when the officials omit substantial steps of the procedure established by law.

The Court has also stated on the factual default, the following: “The factual defect occurs when the judge makes a decision, without fully verifying the assumption made that determines, as a result of an omission in the decree or evaluation of evidence; an unreasonable assessment of them; irregular test, or the granting of false evidence”<sup>4</sup>.

In Judgment T -265 of 2013, in its considerations, the Constitutional Court expressly stated that the material or substantive defect occurs when “judicial authority applies

a clearly unworkable standard to the case or fails to apply it, or opt an interpretation that violates the minimum principles of legal fairness.

According to the Court, the induced error or the error in consequence occurs when the judge or court is misled, and then the judge makes the decision based on these misleading facts, affecting the fundamental rights. It has also indicated that the judicial decision unmotivated, arises when the judicial authority utters his decision without properly argue it or the reasons for issuing the judgment are not relevant in the case.

On the requirements of lack of precedent, the Constitutional Court in its Judgment T-762 of 2001 defined this precedent figure as “that precedent of all previous judgments to the case necessary to solve a legal problem, which by itself has relevance to the final resolution at the time of sentencing”.

The last specific causal is a direct violation of the constitution, which is when the ordinary judge makes a decision that omits the Constitution.

In contentious administrative matters, judges, courts, and the State Council have always framed their decisions by of the National Constitution of 1991. Otherwise, they would be exposed to the revocatory action of their judicial decisions for violating the Constitution directly.

4 Look up: Constitutional Court of Colombia. Sentencia T-362 de 2013.



## Conclusion

The protection action against judicial decisions has demarcated an evolution in the Colombian constitutional law, since the Constitutional Court has conferred to itself the power to control the constitutionality of the individual cases in all courts, even in those that occur in the State Council.

At first, the State Council was reluctant to admit the filing of the protection action against one of its judgments, because, at the time, they argued that various constitutional principles were violated such as the *res judicata* and legal security.

However, in its latest decision to unify the judgment, the State Council finally accepted the merits of this action measures, recognizing the general and specific grounds for procedural developed by the Constitutional Court.

This latest ruling closed a cycle of conflict between the Council of State and the Constitutional Court as well, ending this long discussion. The fundamental rights of the people prevail, allegedly violated a court order, against constitutional principles.

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