

Transcript: Social and Economic Rights and the Colombian Constitutional Court[†]

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Thanks for the invitation to discuss these very fascinating topics. It is difficult for me, having been a justice of the Constitutional Court of Colombia, responsible for the decisions that have been mentioned by the panel, to give specific comments on what was said about Colombia or to discuss the other very interesting papers.

I prefer to share with you some basic topics, about the way to classify decisions and to relate these decisions to the impact they produce, because the three papers address this relationship in different ways. This relationship is important, but before going into it, one should take into account two aspects of context that would explain the differences between countries. The first is the institutional context and the second is the political context.

Let us start with the institutional context in which a court exercises its functions. I think that one of the specific features of the Colombian situation is the degree of independence of the constitutional court in the political system. We have a very strong tradition of judicial independence, and the court has built on this independence.

The other crucial institutional difference is that the constitutional court in Colombia has a very broad jurisdiction that permanently involves the court in structural problems because the court not only decides on concrete cases but has to face judicial review in the abstract of all kind of statutes approved by congress. When the court looks at these statutes, it looks at them from a structural perspective. Abstract judicial review calls for a structural perspective to address the challenges raised against a statute beyond a concrete individual case. In addition, the jurisdiction of the court is open to all *tutela* cases decided in the country since all judicial *tutela* decisions must be sent automatically to the court. Thus, the court has had a lot of opportunities to intervene in the enforcement of social rights. Colombia is a smaller country than Brazil but, per year—in 2008 when the court intervened—there were at least 80,000 *tutelas* that had reached the court concerning health.¹ This happens every year. So, the justices are sensibilized to the issues and also, as

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1. EDGARDO JOSÉ MAYA VILLAZÓN, INSPECTOR GEN. OF COLOM., SISTEMA DE SALUD EN COLOMBIA [HEALTH SYSTEM IN COLOMBIA] (2010).

new cases arrive frequently, they can adjust their judicial interventions to the problems they see are causing the violation of the right to health.

A third very important institutional aspect is *tutela* itself. *Tutela* is of course a cousin of *amparo*, but it has very specific characteristics that are relevant for this discussion. *Tutela* is flexible. It may be surprising to note that the two structural cases that were mentioned, the IDP case² and the health case,³ the so-called two structural cases, were not litigated on a collective approach. Neither of the litigators asked for structural remedies, they were instead litigated as individual cases. However, since *tutela* is flexible, the court was able to accumulate all the individual cases, wait until the cases showed several dimensions of the problem causing the violation of rights, then require evidence from the government and transform governmental agencies that were not parties to the cases in the beginning into parties to the case. So the court, in a certain way, can build the case. In this sense, it is a very powerful court.

Another example of flexibility is what César Rodríguez-Garavito called monitoring. Monitoring is not specifically provided by *tutela* regulations, but the court can interpret some aspects of *tutela* regulations in order to retain its jurisdiction over the enforcement of its decisions. After issuing the final decision, the court can say: this is not really the final decision; I will retain my jurisdiction and continue issuing decisions to implement my initial orders. This is a very specific institutional aspect, I believe, of the Colombian situation.

The second element of context is political, of course. One should look at the relative legitimacy of the relevant actors. And in the Colombian context, the court enjoys a great deal of legitimacy, and judicial activism is considered legitimate in the political process. Why? This is a very tough question, but I just would say that our *Marbury v. Madison*, our first case in this matter, dates from 1887.⁴ It was rendered by the supreme court, who was the constitutional judge at the time. And since this date, more than 100 years of uninterrupted judicial review has been taking place in Colombia—very strong decisions were rendered in the 1930s, in the 1960s, in the 1980s, and these decisions were complied with. Thus, Colombia had a century old tradition of active uninterrupted judicial review at the moment the constitutional court was created in 1991.

2. IDP refers internally displaced persons by Colombia's armed conflict. See César Rodríguez-Garavito, *Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America*, 89 TEXAS L. REV. 1669, 1669–70 (2011). The IDP case refers to Judgment T-025 of 2004, Corte Constitucional [C.C.] [Constitutional Court], enero 22, 2004, Sentencia T-025/04 (slip op.), available at <http://www.corteconstitucional.gov.co/relatoria/2004/T-025-04.htm>.

3. The health case refers to Judgment T-760 of 2008, C.C., julio 31, 2008, Sentencia T-760/08 (slip op.), available at <http://www.corteconstitucional.gov.co/relatoria/2008/T-760-08.htm>.

4. MANUEL JOSÉ CEPEDA-ESPINOSA, POLÉMICAS CONSTITUCIONALES [CONSTITUTIONAL CONTROVERSY] 6 (2007)

The other key aspect of the political context that one should take into account is the relative power between the economic techno-bureaucracy and the lawyers. We are in a permanent debate with economists in Colombia because economists design public policies, even public policies that concern social rights. This debate has evolved in different phases, and one should fit the IDPs decision and the health decision as part of this debate in the Colombian context.

I give two aspects of the decisions to show that. First the IDP decision, T-025⁵ of the year 2004. In this decision, the court, moved forward in the debate with economists concerning budgetary restrictions. It decided not to order to spend a penny. The court did not order the government to spend a specific amount of money. The court instead ordered the government to make an estimate of how much money the government would have to spend to protect IDPs' rights. If this amount turned out to be excessive, the court said, the Government could publicly say that it would regress in the protection of rights. That is why in the beginning, IDPs were angry with the decision. IDPs now support the decision, but at the beginning IDPs were angry with the decision because they said, "everything is wonderful, but you authorized the government to regress." So IDPs waited one year after the deadline given by the court ended to see what the government would say. And the government said: "okay, I made my estimate, it's a lot of money, I will spend it, I will not regress." And only then, IDPs supported the decision and agreed to engage in promoting its enforcement. I remember a phone call from a leader of the IDPs, who I happened to meet in an academic encounter. He called me and said that after some days of deliberation the main organizations dedicated to advocate in favor of IDPs had decided to support the decision rendered by the court and would work to implement it. Why did the court take this approach to public spending needed to protect IDPs rights? To address the very difficult problem of economic costs in the protection of rights and conciliate budgetary restrictions and constitutional restrictions.

In the second decision, T-760⁶ of 2008, the health structural decision the court moved forward in this debate. In this decision, the court issued several complex orders, but there is one that I want to underline. The court ordered that whatever reform was adopted for the health care system to comply with the decision rendered by the court, it should be financially sustainable. Thus, the court was very concerned with the financial sustainability of the health system. I do not want to imply that these economic concerns are not important; of course they are important! And the system, at least in the Colombian context, was failing. The court intervened, of course to protect the right to health, ordered equality in health, ordered the adoption of all kind

5. C.C., enero 22, 2004, Sentencia T-025/04 (slip op.), available at <http://www.corteconstitucional.gov.co/relatoria/2004/T-025-04.htm>.

6. C.C., julio 31, 2008, Sentencia T-760/08 (slip op.), available at <http://www.corteconstitucional.gov.co/relatoria/2008/T-760-08.htm>.

of deep measures by the competent regulatory agency, but the court also ordered the reforms adopted by the competent authorities to be financially sustainable. I think these elements of the context are important.

The second basic idea that I want to share, are criteria to classify the decisions that protect socio-economic rights after these tensions are taken into account. I think that we should try to avoid placing the decisions in fixed categories or boxes. The decisions are best seen as in a continuum, where there are degrees of intervention and kinds of intervention, I will only highlight the basic criteria for this classification. First, the object of the decision rendered by the court. I think that individual and structural dichotomies are useful, but T-025 and T-760, the IDPs decision and the health decision, are more than structural, they are systemic. In the T-760 decision, the court had to address the whole health system, for example. It did not focus on one aspect which reflected a structural problem of the system; it looked at the whole health system and how it works. I would label this decision as a “systemic sectorial decision.” The IDPs decision is different. The IDPs decision is trans-sectorial. All state agencies had to do something with IDPs, but they were not acting. And thus, it is a very complex decision in which the court could not give orders to a single ministry or a single state agency, but had to involve the whole state in the protection of IDPs. So the object of the decision rendered by the court is a very important criterion for classification: what is the object of the decision, how structural it is, and whether it even reaches the level of a systemic decision.

The second criterion concerns how rights are protected. In both decisions, the court did not protect one right. Even the health case is not a decision only concerning health; it is also a decision concerning equality. In this decision the court ordered that the health plan that protected the middle classes should be equalized to the health plan that protected the poor. Because the poor, as the Brazilian and Colombian experiences have demonstrated, do not access justice easily. The court ordered an equalization of the plans so that the poor receive health without the need to access the courts, because the health plan protects them automatically. So this decision was also sensitive to the perverse effects of focused and individualized judicial intervention, when systemic issues are not addressed by the judges. But the systemic approach was accompanied in decision T-760 by individual orders which protected each plaintiff, in addition to the systemic orders.

I would thus suggest two categories to analyze the kinds of protection of rights given by the court in structural or even in systemic cases. The first, I will call “simple procedural gradualism.” It consists in a gradual protection, which is *procedural* in the sense that it invites dialogue, and is *simple* in the sense that it recognizes that the problem is too tough and it needs time.

The Colombian decisions go beyond simple procedural gradualism. The protection offered by the court, I will call “biting substantive progressiveness.” It is progressiveness in the sense that the court recognizes that rights are not absolute, and that one should develop and expand the pro-

tection of the right within certain limitations. Second, there should always be an advancement, but an advancement accompanied by proof of progress. And third, it is progressiveness towards an outcome, and thus outcomes are defined in terms of the effective enjoyment of rights. So it is not any kind of gradualism. Rather, it is a progression directed towards a clearly defined aim, which is in turn defined in terms of effective enjoyment of rights.

It is also *substantive* progressiveness because the court in all these cases also protected the individual. The court did not say: “okay, thank you very much for bringing the case, but, as happened in the very significant South African case mentioned,⁷ I will address the general issue, and, sorry, you will not receive the concrete protection of your socio-economic rights.” In all these cases the court protected the individual plaintiffs and granted the *tutela* to them. But in addition, it is *substantive* too because the court fixed standards that substantially define the content and the scope of the rights. For example, in the health decisions as I mentioned, the court ordered a unification of the health plans not as a fusion of both, but with the redesign of the health plans to build a basic common health plan that did not discriminate against the poor and was financially sustainable. And it’s *biting* because the court imposes costly decisions, prompts regulatory action, orders administrative changes, and resolutions of that kind, of course, bite.

The third criterion is how the judge relates to public policies. In the field of socioeconomic rights, obviously public policies are very important. Of course, a constitutional judge should take into account separation of powers issues as have been mentioned. Nevertheless, beyond the separation of powers issues, there is the question of what should the judge do in the face of evident failures in policy making and policy implementation. The judge cannot replace the competent authority in policy making or implementation. The Colombian constitutional court did not do that. In these decisions, the court orders rationality: it orders the policy maker to define objectives, relate means to objectives, develop policies and regulations, and build institutional capacity to do what the policy maker wants to achieve. In this sense, it requires rationality. But it is not any kind of rationality; it is “transparent rights-based rationality.” The court orders the policy maker to look at the objective of the existing policy and answer this question: did all the policy making and policy implementation really result in the protection of a right or not? So it tries to link public policies to a rights approach. Moreover, it is not only rights based rationality, but it is *transparent* rights-based rationality in the sense that the court requires the relevant agencies to put over the table specific reasons for doing one thing and not another, to justify the decisions on precise concrete information, and to even recognize errors, difficulties, and barriers, and to inform how they will be overcome.

7. See Octavio Luiz Motta Ferraz, *Harming the Poor Through Social Rights Litigation: Lessons from Brazil*, 89 TEXAS L. REV. 1643, 1648 (2011) (discussing *Minister of Health v. Treatment Action Campaign* 2002 (5) SA 721 (CC)).

Fourth, concerning remedies, I think that the key thing is whether the orders are what I call “targeted transformative.” Are the orders targeted with precision towards the regulatory bottlenecks, those issues which give rise to the deadlocks that impinge on the enjoyment of social rights, or are they not? There is a big difference between the IDPs decision and the health decision in this respect. The IDPs decision is very broad, and initially was not targeted to fix key specific aspects in order to achieve transformative effects, because the evidence available to the court was too general. This is why afterwards the court had to do a very concrete and specific follow up and rendered targeted transformative orders after the initial judgment. The health decision also needs careful and sustained follow up, but it is more targeted towards the main problems that were identified with the healthcare system, since the initial judgment.

Fifth, I think that concerning the political process, the democratic process, the reaction of the political agencies and the role of civil society, the key aspect of these decisions is that they try to empower civil society; but they empower civil society and the concrete interest in a very specific way. I call it “empowered decisional participation.” The court does not see, in these cases, judicial intervention as something that should be contrast with the political process. On the contrary, judicial intervention is a way to mobilize the political process, but to mobilize it in a way in which participation is not only linked to the very specific party’s interests in the case or the IDPs organizations or health organizations, but that promote a broader participation in the decision making that will lead to the fulfillment of the orders of the court. So in the decisional aspect, it is decisional participation because the court orders the participation to be focused on the decisions needed to protect the right and thus should be adopted by the competent authorities. And it is empowered decisional participation because the court not only looks at access of the interested organizations to the decisional process, or to the opportunities for these participations so that they are timely and effective, but the court also unleashes a more technical participation. In the IDPs case, for example, the IDPs transformed their claims from asking whatever they thought optimum to whatever they thought feasible based on new technical expertise acquired by the IDPs. The court invited IDPs to organize in one commission with the academics and with other organizations that defended their rights, and invited this commission to elaborate very technical surveys about the effective enjoyment of rights. And in this way, the IDPs were empowered technically to establish a dialogue with the planning department, with the most technical agencies of the government, in an equal footing, not only politically but in terms of knowledge.

And finally, although it may sound as a paradox, I would call this kind of judicial decision making “prudent activism.” Of course there is an activism of the intervention, of the judge, but this activism is an activism that has elements of prudence. The court does not try to fix the problem, it leaves the fixing of the problem to the competent agencies. It does not go into the

details of the remedies. It respects the competence and the processes involved, and it values financial restrictions. And finally, it is aware of the political dynamics derived from the judicial intervention. So there is an element of prudence in this activism.

I wanted to address some considerations concerning impact, but time is up, so thank you very much.