

THE POLITICAL AND LEGAL STRUGGLE FOR THE DETERMINATION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS: THE COLOMBIAN AND INTERNATIONAL CONTEXTS

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El presente trabajo está escrito en inglés en razón a que fue realizado entre enero y marzo de 2003 durante un curso corto en Derechos Humanos realizado en la Universidad de Nottingham (Inglaterra) gracias a una beca otorgada por el Consejo Británico. El trabajo hubiera sido imposible de no haber contado con la generosa colaboración del profesor ROBERT MCCORQUODALE de la Universidad de Nottingham quien lo revisó y pacientemente me aportó sus sugerencias. Sobra advertir que cualquier imprecisión encontrada es de exclusiva responsabilidad del autor. El trabajo igualmente está dedicado a mi buen amigo RAFAEL ANAYA ZAMBRANO quien murió trágicamente como consecuencia del carro bomba del 7 de febrero de 2003 en Bogotá. Algunas veces no hay suficiente tiempo para decir gracias...

RESUMEN

Existe un fuerte debate en Colombia en torno a la reforma de la acción de tutela, la cual se ha consolidado como un procedimiento constitucional para la protección de los derechos fundamentales. La lucha o debate tiene que ver especialmente con el significado de lo que se ha denominado como “derechos constitucionales fundamentales”. Algunos sostienen que estos derechos son exclusivamente los civiles y políticos que se han establecido en la Constitución colombiana. Otros dicen que la protección de los derechos fundamentales incluye a los llamados económicos, sociales y culturales. Resulta interesante notar que la posición actual del gobierno la cual es la primera mencionada mientras que la Corte Constitucional se acerca más a la segunda de estas interpretaciones.

El debate se ha venido dando con argumentos jurídicos y políticos. Esta lucha no es algo exclusivo del contexto colombiano ya que una rápida mirada al panorama internacional en el área de los debates en torno a los derechos humanos, nos muestra que la lucha dada en el contexto internacional se dirige a la unificación del concepto derechos humanos. La razón para la existencia de esta división entre derechos civiles y políticos de un lado y económicos, sociales y culturales del otro, aparece como un factor eminentemente político y no tanto legal. No obstante, en ambos contextos la lucha es peleada con argumentos jurídicos y políticos mostrando que resulta inconveniente argumentar sólo desde uno de los dos campos.

Palabras clave: acción de tutela, reforma a la tutela, Corte Constitucional, derechos fundamentales, derechos económicos sociales y culturales, derechos humanos, argumentos políticos y jurídicos, pacto internacional de derechos civiles y políticos, pacto internacional de derechos económicos, sociales y culturales, Declaración universal de los derechos humanos, teoría de los derechos.

SUMMARY

There is a strong debate that takes place in Colombia in order to reform the acción de tutela, which is a constitutional procedure for the protection of fundamental rights. The struggle has to do especially with the meaning of the cluster "fundamental constitutional rights". Some argue that these rights are exclusively the civil and political ones that are established in the Colombian Constitution. Others argue that the protection of fundamental rights include the so-called economic, social and cultural ones. It is very interesting to see that the position of the actual government is the former, whilst the Constitutional Court appears to be in favour of the second argument. In the Colombian panorama the struggle appears to be fought with legal and political arguments. The struggle is not an exclusive problem in Colombia. A quick look to the international panorama in the area of Human Rights' debates, shows us that the struggle fought in the international arena tends to unify the concept of Human Rights. The reason for the split between civil and political rights and social, economic, and cultural ones appears as a merely political factor rather than a legal one. Nevertheless, in both of the contexts the struggle is fought with political and legal arguments showing the inconvenience in arguing only in one of the two fields.

Key words: *Acción de tutela, Reform to the Tutela, Constitutional Court, fundamental rights, economic, social, and cultural rights, human rights, politics, law, International Covenant of Civil and Political Rights, International Covenant of Economic, Social, and Cultural Rights, Universal Declaration of Human Rights, theory of rights.*

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INTRODUCTION

In Colombia, the term *acción de tutela*¹ creates an extreme reaction of almost any lawyer or social actor: either it is literally loved or profoundly hated. This innovation in the 1991 Colombian Constitution has changed the legal and judicial panorama in Colombia and has expanded the study and rhetoric necessary to build a more or less strong system of the protection of the “fundamental rights” under the Constitution. More than the procedure of *acción de tutela* itself, the problems have arisen when it comes to determine the interpretation that has been given to the content of the term “fundamental rights”.

What is of a particular interest is the collision between the Executive Branch and the Constitutional Court in Colombia. The latter has tried to defend a perspective that *acción de tutela* is a mechanism for the protection of a wide variety of rights

¹ I am not going to translate this term since I think it should be treated as a proper name. However, one close translation of the term to English shall be “guardianship writ”.

that are considered to be fundamental, and the former has had the intention, lately, to restrict the possibility of the wide exercise of tutela in order to, apparently, ameliorate the problem of the congestion in Justice Administration. The actors involved have used some 'legal weapons' such as administrative decrees, case rulings, and projects of legislative acts which have played a very strategic role in the determination of this issue of the fundamental rights. One argument is that it is necessary to limit *acción de tutela* in order to develop a more efficient Judiciary System, since the excessive exercise of this procedure by the people is the main cause of a non-efficient judiciary system.

Bearing in mind these explanations, what I intend to do with this article is to show that the struggle that has been taking place in Colombia in relation with the *acción de tutela* has been fought in the legal and political fields. A reform in the procedure is almost imminent and the arguments that can defend or attack this reform will be shown. However, if a reform that limits the scope of the *acción de tutela* is carried out, another alternative of rights fulfilment must be established in order to attend humane issues that a population of a country need to deal with. The absence of this alternative can bring violent consequences in a society that is already marked with this horrendous characteristic.

Since the rights protected are not only a concern in Colombian society, it is necessary to link this problem with the struggle fought in the international arena towards the determination of Human Rights, especially in relation to economic, social, and cultural rights and their relationship with civil and political rights. The struggle given in the international panorama can show us that the problem that takes place in Colombia is not distant from an International Law concern.

This article will be divided into four main parts. Firstly, I will outline the main characteristics of the *acción de tutela* and how it has been working since 1991. In the second part I will try to show that the arguments that attack this institution are principally policy, not legally based. Thirdly I will be dealing with the struggles that in the legal world have been taking place to enforce and to recognise economic, social, and cultural rights and will try to show how particular domestic situations like the ones in Colombia, can affect the possibility of enforceability of these rights. Finally some conclusions will be set as to where to move in the legal panorama of International Human Rights.

1. ACCIÓN DE TUTELA AS A JUDICIAL PROCEDURE

One of the main innovations of the 1991 Colombian Constitution is the establishment of a vast catalogue of rights and some judicial procedures in order

to accomplish real protection of them before Courts. The acción de tutela, was created in order to achieve the protection of 'fundamental rights'. Article 86 of the Colombian Constitution states the following:

'Every individual will have "acción de tutela" in order to demand before courts, in any moment and place, by a preferential and short procedure, acting on his behalf or represented by anybody, the immediate protection of his or her fundamental constitutional rights, whenever these are breached or threatened by action or omission of any public authority.

In order to protect the rights in each case, the Court will order the authority to act in a certain way or to omit an action. The sentence, which has to be observed immediately, can be appealed before the competent judge and, in any case, the latter *will send it to the Constitutional Court for its eventual revision.*

This procedure [acción de tutela] will only proceed when the victim does not have any other judicial procedure for the protection of his or her rights, unless it is used to avoid an irremediable damage.

The maximum term between the request of "tutela" and the decision, would be ten days. The law will establish the cases in which this procedure can be directed against private individuals that provide public services or in cases where their behaviour gravely and directly affects the collective interests, or also when the petitioners are in state of subordination or defencelessness in respect to private individuals'. (Author's own emphasis)

Under Article 86 of the Constitution there are three main characteristics of the tutela²: First of all it is a judicial procedure which allows *any individual*, to take a case to court. Secondly it has been established for the protection of "*fundamental constitutional rights*", a highly polemic term that has been the nucleus of the discussion because these are not clearly set out in the Constitution, as different interpretations have shown. Finally, any eventual review of tutela cases will be done by the Constitutional Court³, which is also a very important and innovative figure of the 1991 Constitution. There are many other special features that characterise this procedure but since it is not the purpose of this article to analyse

2 From now on I will use the term tutela and acción de tutela meaning the same; the latter would be a more technical term and the former a more 'popular' one. As a matter of fact it is very interesting that in Spanish, even though the word *tutela* has a meaning of its own, when used in the Colombian context, it would be, most of the times, referring to this Constitutional procedure. Thus, the use of the word tutela from now on is referring, as in the Colombian context, to the procedure.

3 This is also confirmed by Article 241 of the Colombian Constitution, which describes the duties of the Constitutional Court. This article has to do principally with some procedural issues that confirm that this Court is a separate body which has, among other, the duty to eventually review the tutela decisions issued by lower courts, acting as the superior judicial body in Constitutional matters in the following terms:

all of them, we will deal only with the ones outlined in the introduction. Particularly those that influence the way that the protection of constitutional rights is perceived in the Colombian legal context

It should also be noted that the struggle that has been taking place in Colombia with the *tutela* interacts with demands at the international level, which point towards the implementation and enforceability of economic, social and cultural rights. I will deal first with the possibility for individuals to start the procedure and will continue with the role played by the Constitutional Court, in order to finally address the issue of the determination of fundamental constitutional rights.

1.1. Acción de tutela a procedure for individuals

I still can recall my Civil Procedure Professor in the University saying that having a right and being unable to make it enforceable is the same as not having it. According to this view, it is very logical to think that the way to make rights effective is by going to court and this is achieved by contracting a lawyer who would be able to translate the factual claims of a certain client, into a legal language in order to make a claim able to be won in a Court of Law. In summary, the vision that a lawyer is necessary to deal with legal matters is almost a self-evident truth that is very popular in the Colombian legal background⁴.

From this perspective it is rather evident that the implementation of the *tutela* in the Colombian legal context was revolutionary in a certain way, in the sense that it tried to close the gap that exists between the ordinary people and legal instruments. We can even push this argument further and say that the *tutela* not only is closing a gap but it also showed ordinary people a path to walk in order to find themselves head to head with their own rights.

Since people are now head to head with their rights and can make them enforceable by themselves before a Court of Law, it is possible to say that people

Article 241. ‘The observance of the supremacy and integrity of the Constitution is in charge of the Constitutional Court, which will carry on with its duty strictly according to what is said in this article. Thus, it will carry on the following duties: (...)’

(...) 9. Review, according to the law, the judicial decisions related with *acción de tutela* of constitutional rights. (...)

4 Before *acción de tutela* it is difficult to think of a judicial procedure that could be carried on without the intervention of a lawyer even though there is a right and a guarantee of the free access to the Justice Administration. Generally, thinking about the ordinary traditional procedures—administrative, civil, criminal, and labour law, it is impossible to state that there is the possibility to get to court directly without a lawyer in these particular cases.

can see more clearly which are the goods to which they are entitled to (SEN, 2002: 18). One step is erased now from the stairway that an ordinary individual had to go through before going to Court, saving not only money, but also finding themselves directly involved in a process where the judge is going to determine whether, according to an alleged right, it is possible for an individual to demand a certain behaviour from a public authority. The possibility for each individual to know which good is possible to have according to their rights is going to be defined without any mediation. For instance, if A's right to a fair trial is breached (let us assume that he has no possibility of legal assistance because of his bad economic situation), he can go by himself to a Court, since he knows that he is entitled to this right that must be respected, perceiving that the possibility to acquire the 'good' of the Justice Administration, is due to the fact of being a person that owns rights, and not a privilege established for the ones that can pay for a lawyer in a certain case.

In summary, we can say that since the individual can go to a Court of Law demanding the protection of some rights, the individual can see that his or her rights are expressed in law, with the individual being an active part of the procedure. The possibility of being involved directly as a part in this procedure is a right itself which entitles each individual to an "order of things" in which some sorts of rights (the ones which the *tutela* protects) must be observed. The determination of the rights that can be protected by the acción de tutela is a key point in the domestic level, since the struggle against the tutela has a lot to do with this determination of fundamental rights that are not so clearly stated in the Constitution as some try to ensure⁵.

1.2. Fundamental Constitutional Rights

The second problem we have identified in Article 86, is about the determination of which are the "Fundamental Constitutional Rights", that must be protected by the tutela. The problem arises because the 1991 Colombian Constitution is divided in titles, chapters, and articles, and articles 11-40, are located in Chapter 1 of Title 2 that is called "Fundamental Rights". So the question that started to 'fill the environment' of Constitutional Law in Colombia, was whether the fundamental rights protected by the *tutela* were only those established in these articles of the

5 Some of my personal conversations with RAMON ZÚÑIGA, a very respected lawyer in Colombia who was a judge in the Supreme Court of Justice since the late 80s and part of the 90s, showed me that he was convinced that tutela was established only for fundamental rights' protection. This perception shows that he, among many others, can determine exactly which are these rights.

Constitution or, if it was possible to obtain the protection of different rights also established in the Constitution but under other names⁶.

To solve this problem it is necessary, to review the jurisprudence of the Constitutional Court since 1992 as the major judicial authority in constitutional matters. One of the very first rulings of the Court had to do with the matter of how these labels given to some chapters and titles of the body of the Constitution should be interpreted. The case known as T-002/92⁷ in the Colombian context is a famous one and is seen as a first attempt of the Court to determine the scope of protection set by the *acción de tutela*.

In case T-002/92 the Court referred to a problem that had to do with the right to education, which is not under the label of “Fundamental Rights” in the Constitution. The Court tried to interpret which were the Fundamental Rights that could be protected with the *acción de tutela* and ended up establishing some criteria that the Constitutional judges should follow in order to determine if a right shall be considered as a fundamental one. The Court, among other considerations, established that if a right was established in chapter 1 of Title 2 named “Fundamental Rights”, this was only a guide that could help the interpreter but it could never be taken as the most important pattern to follow when it comes to determine whether a right is of a fundamental kind. The Court, analysing the procedure followed to approve the Constitutional text, stated that the names of chapters and titles were not approved by the Constituent Assembly as a whole. Thus, the labels or names of the chapters and titles cannot to be taken as a principal criteria in order to determine, in this case, that “fundamental rights” are only those established in Chapter 1 of Title 2. In the words of the Court, the labels of the different chapters and titles of the Constitution limited the intention to protect rights in the following terms:

“It must be concluded, that the fact of limiting the fundamental rights to those established in the Constitution under the title ‘Fundamental Rights’ and exclude any others that are placed under other title, must not be considered as a determinant criterion, rather than an auxiliary one, since it will nullify the final aim that the 1991 Constituent granted to the protection mechanisms and the application of Human Rights guarantees (...)

(...) The judge is in front of what the doctrine will denominate an ‘undetermined legal concept’: The fundamental constitutional rights, which can be or not at the same time or

6 Concretely the rights catalogue of the Colombian Constitution is completed with the ones established also in Title 2 in chapters 2 and 3. The former are named as Economic, Social, and Cultural Rights and the latter are the ones labelled as Collective and Environmental Rights.

7 In T-002/92, T stands for *tutela*, 002 is the chronological number of the case, and 92 is the year in which it was issued (1992).

simultaneously in anyway, but always its sense will be defined according to time, manner, and place characteristics”.

From the part of the judgement that has just been quoted it is possible to see that from the early times of the Constitutional Court that was created in 1991, this tribunal was not willing to accept a narrow interpretation of the way that fundamental rights were conceived. The Court was categorical from the very beginning in affirming that the fact that a right was placed under a specific title or label under the Constitution, was not a principal criterion in order to determine what kind of right was before a judge in a certain case.

The Court surprisingly established some extremely elaborate considerations not only from a legal point of view but also from an argumentative one⁸. However, what was even more surprising was that the Court, in this case, determined that the right to education can be considered as a fundamental one even though it was established under the title named as Economic, Social, and Cultural Rights. In the particular circumstances the petitioner was not successful, but the Court set a method for the determination of fundamental rights.

Nevertheless what must be stressed is that from the beginning of its existence, the Constitutional Court was not willing to accept that the fundamental rights were established only under one specific chapter. This position set out from the beginning was important for the development of the further jurisprudence that led the Court to adopt the theory of “*connexity*” which is a new expression of the tribunal’s unwillingness to accept a narrow interpretation of the scope of protection of the *acción de tutela*. This argument starts to appear at the middle of 1992 in different cases that can be useful to outline the argumentative manoeuvres the Court did in order to protect in some cases economic, social and cultural rights¹⁰ with the *tutela*.

8 It is really impressive to see from the first rulings, the use by the Court of some authors such as DWORKIN and BOBBIO that were perceived as merely theory authors of no interest to practical lawyers. The Court especially in its first years used some kind of argumentative chains not very easy to follow for ordinary people. Very sophisticated judgements were issued. However this does not contradict with what we stated before about the *tutela* closing the gap between people and the law. I believe that the use that the Court gave in the first years with strong legal theory was used strategically to consolidate a position within the Colombian legal panorama.

9 It is kind of an awkward word not only for the English reader but also for Spanish one. The word *conexidad* in Spanish is also rare and it denotes connection to something. That shall be the context of the word use by the Court in this event. It must also be stated that the *connexity* argument is not also found in the fundamental rights context, but also when the Constitutional Court reviews some Decrees that the Executive is allowed to issue under the States of Emergency granted by the Constitution. In these cases *connexity* is used to examine whether the provisions and measures implemented by the Decrees, are directly related to the causes that support the declaration of the State of Emergency.

10 This categorisation is referring to how the rights are classified in the Constitution.

Case T-492/92 issued in the middle of June showed how the Court started to work in the argument of *connexity*¹¹. The case shows that there is an interdependence between the rights in the Constitution and that not only the criteria set in T-002/92 to determine fundamental rights was the only one to study if *tutela* will proceed in a certain case, but also it allowed protection for other kinds of rights if there was a link with fundamental ones. The Court said in this particular case that there was a special kind of rights called the ‘fundamental rights due to *connexity*’ and that these could be protected by *tutela*. In words of the Court,

“The *fundamental rights due to connexity* are those that are not labelled as such in the constitutional text. However this category is communicated to them due to the intimate and inseparable relationship with other fundamental rights, therefore not to protect immediately the former ones would end up in a breach or threat to the latter. That is the case of health, that not being in general terms a fundamental right, it will be such when an ill person is not attended properly since it will be a threat to his life”.

This concept set by the Court in the ruling has been mainly used to protect rights such as health and social security, which are now, in the Colombian legal context, fundamental rights due to *connexity* when their breach threatens a fundamental right. The ruling in this case was confirmed later on by T-499/92, which even though it did not mention explicitly the word *connexity* it used the same argument. This case also referred to a case dealing with the right to health and it was even stricter in the sense that it established that narrow interpretations of the Constitution were unacceptable in the case of fundamental rights.

“A narrow and formalistic interpretation of the Constitution should not occur in regard to the role of fundamental rights as a limit to the actions or omissions of the State. The right to health (Art. 49 of the Constitution), when its breach or threat compromises other fundamental rights such as life, integrity, or work, must be looked upon as a fundamental right and it can be protected by the *acción de tutela*”.

Even though this ruling does not expressly mention the existence of some fundamental rights due to *connexity*, it can be clearly seen that the argument used to decide the case is more or less the same used in T-492/92 when the right to health was also protected by the Constitutional Court.

The argument of *connexity* has been widely used to the present and it can be said that it constitutes a case law in the rulings issued by the Constitutional Court.

11 I would not affirm that this is the very first case of the Court dealing with the argument because for instance T-426/92 showed also the beginning of it. However it’s one of the first rulings in which the argument appeared with the name of ‘*connexity*’.

The argument has been repeatedly stated in order to protect especially the right to health, education, and social security, which appear under the constitutional label of economic, social, and cultural rights. However, the denomination of fundamental rights due to connexity started to be a very ‘popular’ one inside the Court since the end of 1992 when case T-571/92 repeated the exact same words of ruling T-492/92 (see above), affirming in a categorical way that the right to health is a fundamental one in cases when its threat or breach would lead to a breach of a fundamental one.

A very brief look to some of the cases and the rights able to be protected due to this argument can set up a very interest pattern in the Court’s activism. In some of the cases the Court found that there was no breach or violation of the right. Anyway what must be shown is that in several cases the Court applied the connexity test in order to determine whether a right not placed under the label of fundamental rights, was, indeed, “fundamental” for a tutela¹².

The Constitutional Court, with its own jurisprudence was able to set as a rule the ‘connexity test’ in order to determine whether a right, according to particular circumstances of a case, can be within the category of a fundamental one. The table given (see footnote 13) show that in about 80 cases the Court applied its

12 These are some of the cases in which the Constitutional Court uses the argument of ‘connexity’ in its rulings. I would not assure that here is a list of all of the rulings although it can be seen as a more or less meaningful list :

RIGHTS PROTECTED	CASE REFERENCE
Health	T-571/92, T-200/93, T-005/95, T-157/95, T-271/95, T-409/95, T-556/95, SU-039/9812, T-395/98, T-472/99, T-484/99, T-572/99, T-654/99, T-655/99, T-699/99, T-705/99, T-755/99, T-822/99, T-851/99, T-119/00, T-128/00, T-204/00, T-409/00, T-476/00, T-545/00, T-579/00, T-617/00, T-618/00, T-622/00, T-668/001, T-723/00, T-769/00, T-781/00, T-822/00, T-839/00, T-933/00, T-941/00, T-945/00, T-976/00, T-1130/00, T-101/01, T-230/02, T-329/02
Social Security	T-005/95, T-157/95, T-619/95, SU-039/98, T-484/99, T-569/99, T-654/99, T-701/99, T-705/99, T-792/99, T-794/99, T-822/99, T-827/99, T-120/00, T-130/00, T-578/00, T-618/00, T-691/00, T-704/00, T-781/00, T-945/00, T-003A/01, T-230/02
Adequate Shelter	T-021/95, T-569/95, T-626/00
Collective Rights	T-219/94, T-220/95, T-284/95, T-664/99, T-836A/99, T-944/99

‘connexity test’ to achieve the protection not only of economic, social, and cultural rights but also of collective rights, such as the right to a clean environment.

The ‘connexity test’ gives us important clues in order to build a clearer panorama in the Colombian struggle for the *acción de tutela* reform within a theory of rights. The ‘connexity test’ is the pattern to determine whether a right is or not fundamental in a particular case, according to the rulings of the Constitutional Court. This test permitted the possibility to protect rights that were not under the label of fundamental ones in chapter 1, title 2 of the Constitution. Now, the protection of rights that impose a positive obligation are now within “fundamental rights” as decided by the Constitutional Court. Ordinary people that find themselves in situations where their right to health or social security (among others) is breached can go by themselves to Court in order to obtain a positive action from the State. In a developing country such as Colombia this compromises extremely the Executive since it will show that legality protects the individuals in a sense that their rights are guaranteed when applied, putting some pressure in the public policy design that has to be done by the Executive and Legislative with decrees and laws. The pressure consists in the fact that if people have the right to something that is protected by the law but they cannot actually have it because of resources scarcity, then a disbelief in the government will be critical for anyone who is in charge of a country. The Constitutional Court, as an institution created in 1991 has a lot to do with this extra pressure put upon the Executive that shows how the determination of their public policies are influenced highly by judicial practice. It is important now to set out why this Court has had so much influence within rights adjudication in Colombia since 1992.

1.3. Constitutional Court in defence of rights

As stated above, the Constitutional Court with its case ruling has become a political protagonist of the legal context in Colombia, especially in the protection of rights. However, the possibility of getting involved with the protection of economic, social, and cultural rights was not expressly given by any legal nor constitutional provision but rather due to the creation of its own system of judicial precedent. The constitutional provision about the sources of Law in Colombia was more of the kind of a Civil Law as it can be seen in Article 230:

“Judges, in their rulings, are only submitted to law’s empire. Equity, jurisprudence, general principles of Law and doctrine are auxiliary criteria for the judicial activity”.

Since the only principal source of Law allowed by the Constituent is the act of law issued by the Congress or Parliament, a quick observer would say that the

precedents set by the cases ruled by the Constitutional Court are not actually binding. However, since the Court had among other things, the possibility to review some acts of law issued by the Congress in order to determine its compliance with the Constitution, it was able to interpret some laws that pretended to develop these particular matters. For instance, in case C-037/96¹³ the Court was able to review the constitutionality of Law 270 of 1996 - the so-called Statutory Law of Justice Administration. This law tried to limit the effects of *tutela* cases, stating that the principles that were developed on a *tutela* decision, were auxiliary criteria for the judges but had no binding nature. This was a direct attack to what the Court had been developing since its creation. The Court decided that the provision was to be understood according with the Constitution if interpreted in the following way:

“The constitutional doctrine that defines the content and scope of the constitutional rights set by the Constitutional Court in the *tutela* cases, goes beyond the specific situations that supports them and it turns into a pattern that unifies and directs the Constitution’s interpretation. The principle of judicial independence has to be harmonised with the principle of equality in the application of Law, because, if it is not, there is a risk of making an arbitrary decision. (...) Therefore (...) the constitutionality of article 48 (2) will be declared, understanding that the review of *tutela* cases in which the Constitutional Court determines the content and scope of the constitutional rights, is an auxiliary criterion for the judicial activity. However if a judge decides to rule a case taking a distance from the jurisprudence set by the Constitutional Court, he or she must justify in an adequate and sufficient manner why they are choosing to do so in order to respect the principle of equality”.

The Court reached this conclusion arguing that if a judge or court would not follow previous rulings and it had no just reason to do so, it would be looked upon as a breach to the right of equality. The right of equality, that is another fundamental right, is the basis to affirm that there must be a system of precedents in the Court’s jurisprudence and that this is the only way to ensure the full realisation of rights (equality especially). The implications of this arguments are extremely important; in the case of the demands of social security and health, since persons in the same situation of others from which a positive ruling was obtained by the Court, are entitled to the same remedy in order to realise the right to equality. The creation of this reasoning was entirely judicial by the Court and it opened the door for even more *tutelas*. If a ruling by any court does not follow the patterns set by the Constitutional Court in a specific situation, then it is possible for an individual to use *acción de tutela*, when under similar circumstances the former takes distance from a decision issued by the latter, since there would be a violation of the right to equality.

13 In this case “C” stands for a case in which the Constitutionality of an act of law was reviewed according to Article 241 of the Constitution, which sets the Court’s functions.

In summary the Court here is doing two things: First it is claiming some kind of power and second it is introducing itself as a defender of rights. This last characteristic allows us to understand that in the determination of the fundamental rights in Colombia, the Constitutional Court has played an important role mainly because of two reasons:

1. The possibility to protect rights creating some sort of binding judicial decisions issued by the Constitutional Court, due to the establishment of a constitutional procedure for the protection of fundamental rights that is at the reach of ordinary people.
2. The Court's apparent willingness to protect above all constitutional rights in tutela cases, including the so-called economic, social, and cultural rights.

These two points show us how, the most relevant issues about the acción de tutela have to do basically with rights adjudication and the arguments developed by the Constitutional Court are mainly in this area.

The arguments used by the Court in this case contribute a great deal to the argument that this tribunal appears in the legal context as an institution mainly concerned with the protection of rights.

It could be argued that this case, expressed some concern by the Court to maintain the value that its own jurisprudence had been slowly acquiring in 5 years since its creation (López, 2000). However, when *tutela* is attacked, not all the arguments that are raised are rights-based ones. The discussion that it is ordinarily published in the media is a politicised one, as we shall see in the next section.

2. ATTACKS AGAINST THE ACCIÓN DE TUTELA

Two different languages appear in the field in which the struggle for the tutela is being fought: one of them set by the Constitutional Court, which with its rulings made of this procedure an extremely powerful tool for the protection of constitutional rights in a broad sense. Another one is the one set by most of the critics of this figure, that try to set some arguments in which tutela as it is applied by the Court nowadays is not unlawful but rather inconvenient. It could be said that this arguments rely more upon policy reasons such as DWORKIN points, since the *decision* they are supporting, “protects some collective goal of the community as a whole” (“Hard Cases”, 2003: 148). I would not like to say however, that the protection of rights done by the Court is not a convenient one; what happens is that when the Courts argue, as we have seen they rely upon arguments which are rights-

based and cannot decide relying upon policies, for instance. The Executive does have this special attribution.

One of the constitutional changes proposed by the Executive branch after a new government was elected in Colombia for the period 2002-2006, was a reform in the acción de tutela. The change that has been proposed is not exclusively an attack to the tutela; it is called ‘Justice Reform Project’. One of the issues in which a radical change is suggested is the limiting of the acción de tutela only to ‘fundamental rights’ avoiding that the mechanism is used to protect economic, social, and cultural rights due to the connexity test. In words of the news centre of the Presidency of the Republic of Colombia in a press release of 29 October 2002¹⁴, this change intends to,

“[A]void, according to the travaux preparatoires of the project, rulings of the judges that pretend to replace mayors and compromise the duty of the governors and the competence of the President and the National Government” (‘Government presents project of Reform in Justice Administration’).

Apparently the worries of the Executive do not lie on the protection of rights but in the uneasiness for the Executive caused by judges and courts doing a job that is a duty of the representatives of the Executive branch in a national and provincial level. It appears from this press release that the government does not like the idea of judges determining when an economic, social, and cultural right must or should be protected. The Executive feels the pressure of the judiciary that started to protect economic, social, and cultural rights with its rulings.

Not only official authorities have been worried about the wide scope of the acción de tutela but also ‘independent’ journalists have expressed their concern about the issue. For instance, according to GILBERTO ARANGO, tutela has evolved to be some sort of an illness that can be cured by limiting its scope of protection only to fundamental rights. He also argues that this change is one of the most important government’s initiatives since it will save a huge amount of money to the State budget and will speed up the Justice Administration in Colombia. (“Antibiótico contra la tutelitis”).

In other words, he is saying that when protecting economic, social, and cultural rights, such as social security, with the *tutela*, the government has to provide some amount of extra money that was not expected when the budget was initially planned.

14 See <http://www.presidencia.gov.co/cne/octubre/29/26102002.htm> and complete reference in the Bibliography at the end.

Therefore, the development the judges and especially the Constitutional Court have given to this procedure is not convenient politically and economically speaking.

It is not difficult to see why the arguments that have been set out by the critics of the *tutela* have had to do more with the economic impact that this instrument has had in the first ten years of the 1991 Colombian Constitution. Protecting the right to health and social security has opened the door for a huge amount of *tutelas*. According to ALVIS PINZÓN, up to December 2000, more than 400,000 *tutelas* had been started and 17% of them were related to the right to health, stating that one of the entities to whom a huge amount of *tutelas* are started against, is the Social Security Institute, demanding the protection not only of the right to health but also to social security (“La justicia se acercó a la gente”). The statistic is not surprising at this point if we remember the table shown above which showed the times the connexity argument was used; mostly it was used in events that involved the protection of the right to health.

To conclude this point we must said that the protection of economic, social, and cultural rights causes some sort of uneasiness to the critics of *tutela* and especially to the government. The critics try to argue that limiting the scope of *tutela* will also help to speed up Justice Administration in Colombia but the intentions of the government is different. The latter is trying to ‘*get the house in order*’ and decide that the convenience or not of policies dealing with economic, social, and cultural rights, itself and not by judges. The collective goal that the government is protecting with its arguments deals more with an efficient justice administration system than with the possibility of guaranteeing social and economic rights. Why does the rights’ language do not appear in these arguments? For the Executive it is not a matter of rights. Why did the politics arguments did not appear in the past section? For the judiciary it is a matter of rights. Rights or politics: this division sends us out to the international arena in which these kinds of struggles have been taking place. Anyway, is this debate able to be transformed exclusively into a rights language or is it more convenient to argue in a political way? In Colombia the debate is at this stage and some experience of the international arena can be useful. I also believe some of the Colombian struggles have to be in the mind of Human Rights lawyers, whom are trying to develop the enforceability of economic, social, and cultural rights at the international level.

3. THE STRUGGLE IN THE INTERNATIONAL ARENA

One can affirm that the struggle that has been fought in the international arena has to do with the dichotomy between the protection system of civil and political rights in one hand, and the one established to protect economic, social, and cultural rights

in the other. It is convenient to explore then the two different instruments that were created in order to achieve this protection and to establish from their origin, purpose, and drafting, where the struggle has been principally fought. That is, to determine whether the language in which the struggle has been fought, relies more in politics or Law.

We must start the analysis looking at the International Human Rights system that gained force especially after 1948 with the Universal Declaration of Human Rights. One of the issues that is more than useful for our purpose, is the separation or division between two sets of rights guaranteed by two different conventions developed by the international system. Civil and political rights are guaranteed by a different convention (International Convention of Civil and Political Rights - ICCPR) than the one that guarantees economic, social, and cultural ones (International Convention of Economic Social and Cultural Rights - ICESCR). However, the Universal Declaration does not distinguish between these two sets of rights precisely because the difference was created when the two covenants were drafted.

“The Universal Declaration of Human Rights recognizes two sets of human rights: the ‘traditional’ civil and political rights, as well as economic, social, and cultural rights. In transforming the Declaration’s provisions into legally binding obligations, the United Nations adopted two separate International Covenants which, taken together, constitute the bedrock of the international regime for human rights”. (STEINER and ALSTON, 2000: 237).

According to this statement it is forceful to conclude that the reasons for the separation of Human Rights in two different international instruments have a particular background since in the origins of the system the unification of a regime of rights was evident. The arguments that gave birth to a differentiation were not present in the initial declaration of the United Nations. Following this hypothesis, that is, that the division of the rights appeared once they were put into a legally binding document, one could infer that the parties involved in the drafting of the covenants had some special interest in setting two different kinds of rights. Therefore, one might ask if the difference between rights established in the different covenants is due to the different essence the rights have, or if the difference established was due to political matters. Most commentators state that the reasons for approving two different sets of conventions had nothing to do with the rights’ nature, rather:

“What happened in practice was that the covenants were separated. This was not because the rights themselves were significantly distinctive but because it was believed at that time that some governments would only sign the civil and political rights covenant.” (HILL, 1995: 6)

Therefore it would appear that the reasons that led the international community to adopt two different conventions were not arguments based in the nature of rights.

Also, if we take a look to the preamble of the ICCPR and the ICESCR both of them are drafted with the same words, with no substantial difference. Even though in general terms the preambles do not contain matters that can be actually enforced, it is clear that they are used to state the principal motivations that led the parties to adopt a particular treaty (covenant in this particular case). What is striking of the preambles of both covenants is the fact that the arguments or motivations expressed there are principally rights-based and no difference between the preambles of the two covenants is established. For instance one can find some words expressing that the rights established in both of the covenants are derived “from the inherent dignity of the human person”. Thus, it is not quite possible to argue exclusively in the international arena that the protection of the civil and political rights are linked in a deeper way to the individual, since the basis established in the protective system of the covenants expressly recognise the same origin for both sets of rights. We must conclude that the starting point of the human dignity, to which any human being is entitled, is a common origin that leads us to think that in the international arena the struggle has been fought within a language of politics principally.

In the other hand, if we look at the purposes or goals that the covenants have in order to protect rights, we may also see that the preambles state that the realisation of civil and political rights, as well as economic, social, and cultural rights have the same purpose. The preambles of both covenants state with a slight different drafting that the creating of the appropriate conditions for the enjoyment of “freedom from fear and want”, are achieved by the realisation of both sets of rights. Again, it is clear to see that the difference does not appear in the purposes or motivations that the covenants have; so, if the origins and purposes of the covenants that guarantee two different sets of rights are exactly the same, then the differentiation of systems do not rely in the covenants themselves but rather in some external factors that determined this result. Thus, we probably could say that the theory for differentiation of the sets of rights appeared in 1966 when the covenants were drafted and that the struggles fought since then, follow more practical reasons than substantial ones.

However what is more interesting is that, if we look to the theoretical developments of the provisions of the ICESCR, we might see that a theory of rights was built up in order to sustain the differentiation of the two protective systems. It appears that in this particular case the reality came before any theory, and that the latter was built afterwards in order to legitimate the existence of two different sets of rights. And we must say that the builders and workers that contributed to the development of this thesis were quite successful since 40 years after the different

covenants were drafted, we still are developing arguments to integrate both sets of rights into one kind of Universal Human Rights. Even though the struggles at the first stage appeared to be played in a political language, further development of the covenants can be discussed in a legal rights-based field.

The two major differences between the ICCPR and the ICESCR are stated in Article 2 (1) of the latter. This article states that

“Each State Party to the present Covenant undertake to take steps, individually and through international assistance and co-operation, especially economic and technical, to the *maximum of its available resources*, with a view to *achieving progressively*, the full realization of the rights recognized in the present Covenant by all appropriate means, particularly the adoption of legislative measures” (author’s own emphasis).

Some commentators have focused their attention in this particular provision contained in the ICESCR and have principally stressed the highlighted matters in the last quote. They have particularly called the attention about the meaning of the subject of availability of resources and the obligation that must be achieved in a progressive way (STEINER and ALSTON 2000: 246).

No such provision exists in the ICCPR establishing then the possibility for some to understand that there actually is a difference in the accomplishment of the rights stated in one covenant or the other. It is quite different to condition the accomplishment of some objectives to the availability of resources, since that is principally modifying States’ obligations making it very different to control these obligations because of their nature (STEINER and ALSTON, 2000: 246). The compliance test is different since in the ICESCR one cannot only compare between a certain state behaviour and the legal provision in order to determine if there has been a breach of the Covenant, but also one has to bear in mind if the state behaviour is enough to fulfil the obligation according to the state’s availability of resources.

Therefore, a change in the content or fulfilment of the obligations will logically derive in a change in the content of the right, which may be interpreted as if the rights established in the ICESCR are submitted to some conditions that the ones in the ICCPR are not. It is now a matter of the development of rights theory to attack and defend the fact that there is a different kind of rights in the ICESCR since its accomplishment is conditioned to the availability of resources.

What is important to outline at this stage, is that the adoption of a provision such as the one in Article 2(1) of the ICESCR can lead us to think that there was an interest in the drafting of the covenant in not making states’ duties of an unconditional nature as they can be understood in the ICCPR. And not only this

special provision can make us think the fact that the rights established in the ICESCR are of a different nature than the ones established in the ICCPR, but also a look at the drafting of the articles of one and the other. While the ICCPR sets out some clear obligations for the state parties that must be complied between articles 6-27 in the sense that states “shall” act in certain ways and observe some behaviour, the ICESCR appears more as a recognition declaration than a treaty imposing obligations. The provisions of the ICESCR, especially the ones stated between the articles 2-15, are not quite demanding nor drafted in the way that the State is the subject from which some clear obligations can be demanded. In general terms according to these provisions States “recognise” some rights, but the content of this recognition is submitted to the limitations of Article 2 (1). Rights as the right to education, work, health, food, shelter, and social security which are recognised in the ICESCR among others, appear to be in a different (lower) status, than rights such as security, liberty, freedom, life, or equality, although, paradoxically and according to the preambles of both of the covenants, all of them they are necessary for human dignity.

Hypothetically, states can argue that they are complying with the ICESCR since the rights established in this covenant involve resources which might be scarce in a certain context and therefore, but they are taking steps to fulfil them, as it is stated in Article 2 (1). Thus, people will not be entitled to these rights or to the state of things derived from their fulfilment, but they will be entitled to demand the State to take steps towards the realisation of the rights. In the international case, the theory built upon the protection or not of the economic, social, and cultural rights, appeared after the position of some states that this kind of regulation would interfere in the domestic economic affairs (STEINER and ALSTON, 2000: 243). The arguments in favour of the difference are built because and in the context of this political aim or position, in which we can find legal theories that support political positions. The attacks given to the thesis of the separation of the two kinds of rights appear to have in mind only the rights’ theory and maybe their failure is the impossibility to accomplish their theory within concrete essential political constructs.

This would be a strict interpretation based on the text of the provisions but some demand a broader interpretation of the provisions in the following terms:

“The interdependence of rights, and the pressing problem of their realisation in a world of massive disparities of basic provisions, calls for a very broad interpretation of law and legal instruments. It is not sufficient to see justiciability in terms of Courts and legal process.” (HILL 1995: 11)

The argument of the interdependence of the rights is accepted in the basis that this principle is the one that states that the rights established in the different

covenants cannot be separated since civil and political rights in some cases can be the step to guarantee economic, social, and cultural rights (STEINER and ALSTON 2000: 247). We can see that this argument of interdependence of rights is very similar to the one that led the Colombian Constitutional Court to affirm that tutela could be invoked for the protection of economic, social, and cultural rights when their breach or threat could lead to a breach or threat to the so-called “fundamental rights”¹⁵. Rights and politics appear not to be fighting against each other but rather helping each other to achieve some goals.

However, the argument of the interdependence of rights can implicitly maintain the differentiation between civil and political rights in one hand and economic, social, and cultural rights in the other if the interdependence is understood as a link between two different categories of rights. Interdependence is referred to the relationship of all rights and not only between civil and social for instance. Interdependence can also be used to describe the relationship between rights, which must be in the same level of protection. The fact of protecting the right to work just because it can breach the right to life in the Colombian Constitutional Court context, is implicitly recognising the theoretical difference of two sets of rights. Generally the argument of the interdependence of rights is used to link rights from the different covenants (or categories) but it is not so frequently used to link, for instance, rights from the same category. Thus, the theory of interdependence of rights can be looked as if it has been created as an argument to be applied under one requirement: that we are in a case in which two different category of rights must be linked. The connexity used by the Colombian Constitutional Court and the interdependence used in the international context, although build up in order to achieve a further protection in Human Rights, also shows how it could be read as an instrument to perpetuate the difference between two sets of rights.

4. LINKING THE EXPERIENCES: SOME CONCLUSIONS

It is interesting to see in both, international and Colombian contexts, the experiences that the possibility to protect effectively rights was made in relation to considerations such as interdependence or connexity. However the actual protection in the Colombian context of economic, social, and cultural rights have been due to one difference: the existence of an institution with relevant weight within a structure such as the Constitutional Court. This has been relevant in the Colombian context

¹⁵ The fundamental rights of the Colombian Constitution appear to be more or less the same rights that are established in the ICCPR. This is important in order to link in clearer way the international arena with the Colombian one.

since the possibility to follow an argumentation that led to the protection of rights, was mainly by the binding interpretation of the Court, which changed not only the understanding of the fundamental rights, but also the concept of intimate beliefs of Law in the Colombian society (concretely the hierarchy in the sources of Law).

Maybe the possibility of an effective protection in the international panorama will be possible not only with a change in the concrete provisions, but also with the establishment of a body with a sufficient weight in order to make decisions legally binding for States. It could be rather adventurous to propose something like this but, for instance, some positive experience can be found in the establishment of a body such as the International Criminal Court. However, this will mean a dramatic change in the international structures and in the political will on behalf of States, to establish some sort of independent tribunal (or Court or Committee) that would decide on the realisation of the economic, social, and cultural rights. This will imply also a dramatic change in the covenants. Nevertheless it is not bearable to continue living in a world where poverty is attacked with the same systems that have been ineffective through the past century.

Even though the emancipatory characteristic of rights' theory have been proven to be quite effective in this area, political will can frustrate any of these possibilities. In the Colombian case it is fairly possible that the government with the new reform, will limit the scope of the tutela to the extent that it would be impossible to protect economic, social, and cultural rights¹⁶. In the international context even though the arguments to protect the different sets of rights have been set out, the political interests that made the ICESCR adopt a provision such as article 2 (1) limits the enforceability of these rights. Therefore it is possible to conclude that it is necessary to gain some political momentum that will push the rights for their protection. In the international arena, theories such as the ones stated by SEN, in the sense of finding that the cases of famine and poverty in the world are due mainly to the lack of entitlements in the existing legal systems (*El derecho a no tener hambre*, 2002: 20), can be helpful to start building strong political movements with the help of NGO's, that can have some weight in these decisions¹⁷.

16 Anyway I predict that the struggle has a long way to go since the possibility that led to the protection of economic, social, and cultural right was done by judicial activism of the Constitutional Court. It is still to be seen how the Court will interpret again any provision limiting the scope of the tutela if it has the opportunity.

17 The problem is that NGO's with high weight seem not so compromised with the theme of the respect and the conditions to protect economic, social, and cultural rights. For example Amnesty International even though claiming to protect "internationally recognised human rights", in the 2002 report for Colombia, fails to make an analysis of those and concentrates mainly in the armed conflict. Also, Human Rights Watch has as a policy, the protection of international human rights law, and in their reports they primarily intend to seek the protection of civil and political rights rather than the economic, social, and cultural ones. The position of these NGOs in the international order is not of a low weight and it is possible that if none of them start to worry about these matters the initiative for changes in politics is not going to appear due to States' activities. Therefore

Finally there is a question that is through this entire article and is the possibility of thinking law as a separate discipline of politics. We have seen that in the international arena and in the Colombian case, law and its theory appears strongly tied to political goals. Is it necessary to gain, in the context of Human Rights, some political strength, momentum, or representation in order to build up legal theories that sustain goals? In other words, is Law, by itself, powerful enough to achieve some social changes? The debate is not new but it is important to underline that for social change to occur, it is necessary to understand the role and real dimensions of the Law which is represented in this context by the Law of Human Rights in order to start rebuilding the world as a more fair and just place to live.

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if no real momentum is gained for politics to support rights theories that have been temporarily effective, the counter movement repressing rights gains will rise and probably win. How much violence can be saved if these rights have effective mechanisms for their protection?

