Realizing Constitutional Social Rights Through Judicial Protection

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The central thesis of this paper is that we have not been able to argue adequately in favor of the concept of constitutional social rights, because a concept of rights has yet to be developed. Such a concept of rights will be presented here, in the aim to help judges to recognize when constitutional social rights have been violated through state inaction, and to give them judicial protection. This concept is sensitive to human realization, for it addresses the different capacities and conditions of individuals and avoids seeing natural or social disadvantages as objective limitations to the recognition and enjoyment of rights, as does the liberal tradition.

INTRODUCTION

The purpose of this essay is to make a conceptual contribution that aims to make judicial claims of constitutional social rights a real possibility. I believe that while constitutional law and judicial claims on constitutional social rights are only some of the means to achieve social justice, they should not be underestimated in the struggle for greater social justice. A concept of justice that is sensitive to each individual's different capacities and allows social inequalities to be corrected is more defensible than the progressive liberal conceptions which arise from an idealized notion of the human person as an autonomous, rational and reasonable being.

The concept of constitutional social rights presented here constitutes a proposal to consolidate a corrective concept of justice that is sensitive to

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the diversity of human experience. Such a concept provides conceptual and analytical tools to enable constitutional judges to recognize violations to constitutional social rights, without disregarding the democratic political regime.

I have divided my contribution to *Beyond Law* in two parts: first I present a developed concept of rights which is adequate for recognizing both negative and positive rights and, second, I show the relevance this concept has for the realization of constitutional social rights in Third World societies like Colombia's. The ideas exposed herein are a summary of the ideas I presented at (1) the 20th International Congress of Philosophy of Law and Social Philosophy, New York, July 1999, (2) at the Constitutional Courts Conference, Institute for Legal and Global Studies, Washington University School of Law, St. Louis, November 2001,[1] and (3) at the "Derecho y Economía" Forum, celebrated at the Universidad de los Andes, Bogota, August 2001.[2]

The concept "constitutional social rights" refers to those rights to the social minimum provision for basic needs.[3] Basic needs are represented by such basic goods as are necessary to lead a life with dignity and self-respect. Examples of these basic goods are food, clothing, shelter, medical aid, education, work and social security.

Constitutional social rights usually are not contained in written western constitutions (Diez-Picazo, L. M./Ponthoreau, M. C. 1991: 9 f., 17, 25). Still, several constitutional courts[4] and constitutional and legal theorists[5] have recognized such a "*Recht auf Existenzminimum*" in the interpretation of the constitutional texts. We are therefore justified in asking whether constitutional social rights are recognized in modern constitutional democracies despite the fact that these rights are not expressly written down in their constitutions.

The central thesis of this paper is that the question of whether there are any constitutional social rights in modern democratic constitutions could not be answered until now, because we lacked a developed concept of rights.[6] Such a concept of rights will be presented here.

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1 "Basic Social Rights, Constitutional Justice and Democracy, Constitutional" in *Ratio Juris (forthcoming)*.

2 The corresponding paper was published in Spanish (Arango 2001a.).

3 In German constitutional law, this concept corresponds to the concept of "*Recht auf Existenzminimum*" (Alexy 1997: 281).

4 In Germany: BVerfGE 40, 121 (133,134), BVerfGE 82, 60 I (85). In Switzerland: Schweizerisches Bundesgericht (Bger) Lausanne, II. Öffentliche Abteilung, 29. September 1995, EuGH 1996, p. 208. In Colombia: ST- 531 de 1992.

5 See for example Hart 1973: 194-5; Michelman 1979: 680; Alexy 1994: 454 ff.; Nino 1993: 295; Rawls 1993: 228-230.

6 This insufficiency in the analysis of the language of rights was pointed out by Hart 1973: 201.

The challenge posed by growing poverty has made it evident that the theory of rights is underdeveloped (Shue 1988: 687 f.). Such underdevelopment is manifest in the very justification of the theory, its logical structure, and the judicial recognition of rights.

Regarding its justification, to identify rights with liberties, as John Rawls and Jürgen Habermas do, is not tenable from a more realistic perspective which considers rights not only as spheres of liberty protected from state intervention but as necessary normative positions for the quality and dignity of human life.

With respect to the logical structure of rights, as has been rightly pointed out by Henry Shue, the thesis of the correlation between rights and duties which underlies the conception of various important legal theorists, such as Herbert L.A. Hart, is wrong, for it ignores that each right has not one, but several correlative duties (Shue 1984: 89). For example, the individual right to liberty entails not only the duty of all to respect that liberty, but also a duty to protect it in case of a threat by third parties, a duty to act if it depends on the exercise of others, and a duty to promote or assist in the case of a material impossibility to exercise such liberty.

Not only is the theory of the logical structure of rights erroneous, but it also is a restricted view of rights that results in an affirmation such as the following: it is possible to demand the judicial protection of basic civil liberties, because their existence is prior to that of the state and they imply no cost, whereas social rights are not basic, for they need to be determined by law and their cost is high. Nevertheless, a well-developed theory of rights does not exclude social rights from basic rights. That theory, on the contrary, solves the problem of the judicial protection of these rights. The fact that there are many duties and relevant actors involved in the fulfillment of constitutional social rights does not hinder their application by the judiciary. These characteristics of basic constitutional social rights demand the application of other principles, like the principles of subsidiarity and solidarity, which are not taken into account by the majority of judicial theorists and political philosophers that defend standard theories of rights.[7]

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[7] The justiciability of a right must not depend on special duties defined by the law, but on principles such as solidarity and subsidiarity, which allow the concretion of general duties for certain people according to different situations. The allocation of duties requires taking into account principles of allocation of duties to relevant agents. The principles of allocation of duties still require development by philosophers and jurists interested in "bringing down to earth" the discourse of human rights and give it practical operativity (Sen 1982: 3-39; Sen 1984: 69-81; Shue 1984: 83-95).

A DEVELOPED CONCEPT OF RIGHTS

A developed concept of rights[8] might be described as follows:

> *"A right is a normative position based on valid and sufficient claims, whose unjustified non-recognition imminently harms the right-bearer."*

Now, I describe in two parts a developed concept of rights. Later I will show the relevance of such a concept to understand the concept of constitutional social rights.

1. The first part of the concept of rights

According to the proposed concept, the concept of rights in its first part consists of three elements: a) a normative position, b) valid claims for this normative position, and c) the sufficiently valid claims upon which this normative position is based.

a) Normative position

The identification of rights with normative positions within a normative system emphasizes three aspects of rights: The "position" in which an individual is situated means that she or he (or it, by animal rights) is in a concrete relation to others;[9] but this is not a simple factual position. It is a normative or deontic position within a normative system that bonds a second part –duty-bearer– commanding him to do or to abstain from doing something. Viewed as a normative position, a right is the outcome of an imputation of a deontic status to valid claims. Such a concept of rights resolves the problem of the ontological status of rights, i.e. the problem of whether they exist as empirical facts or as metaphysical entities. It assumes that we –human beings–, ourselves, confer rights, not God or Nature. The question is not *what* rights are, but *how* normative positions are to be grounded. This is done by the fulfillment of the validity criteria for claims.

b) Valid claims

Normative positions are based on claims, that is, on reasons raised searching for recognition. Claims are different from emotions, interests or needs (Habermas 1998: 193). Although emotions, interests and needs are the factual basis of claims, they are not sufficient conditions for grounding a nor-

8 A "developed" concept of rights is one which entirely reproduces the language of rights – including not only negative, but also positive rights – and states the criteria for determining its violation.

9 "Rights are relationships, not things" (Young 1990: 25); "It [a right] is a relationship and a social practice, and in both those essential aspects it is an expression of connectedness" (Michelman 1987: 91).

mative position. Therefore, in addition, valid arguments are needed. The insufficient differentiation between the anthropological or axiological levels on the one hand, and the linguistic level on the other, leads to multiple errors in the foundation of rights. Emotions, interests or needs are turned into normative positions via the recognition of valid claims. This change of levels can only be warranted of constitutive rules (Searle 1995: 43, 48) which make claims about emotions, interests, or needs valid. But, when is a claim valid? An example illustrates the point. A new-born baby cries when it is hungry or in pain. These cries are the expression of emotions that we interpret as claims for protection. But why are these cries not the exercise of a right? To be so, they would have to fit into constitutive rules that turn the basic fact of the cry into an institutional fact (i.e., the exercise of a right). Claims –like reasons– need to be valid to be recognized as rights. They have to fit rules of validity to become normative facts.

c) Valid and sufficient claims

We cannot exclude conflicts between valid claims of different individuals. Valid claims for normative positions ground prima facie rights, i.e. rights which are not definitive. When different valid claims come into conflict, there must be a rational resolution of the conflict. Only valid claims that can be objectively recognized as sufficiently grounded can be seen as definitive rights and be enforceable by the judiciary. Thus, the principle of proportionality (Alexy 1994: 100) becomes the heart of the constitutional balancing of conflicting valid claims for prima facie rights The sufficiency of a valid claim to justify a definitive right can only be determined by balancing reasons for and against it in the concrete case. This is the very meaning of the deontological character of rights: it can only be delimited by balancing normative valid reasons and not pragmatic ones (Freeman 1994: 313, 348-9).

This first part of the proposed concept is not enough for a complete description of the language of rights, specially positive rights. Positive rights raise different problems, which require the complementation of the concept of rights to be overcome. As Hart exhorted some time ago, a theory of rights needs to be developed which gives full account of the use of the language of rights by constitutional lawyers (Hart 1973: 201). The second part of the proposed concept of rights is aimed at partially fulfilling Hart's exhortation.

2. The second part of the concept of rights

The second part of the concept of rights consists of a two-part criterion, which permits the recognition of the violation of a right. First I shall ex-

plain why the second part is necessary. After that I shall explain how it functions.

Is the second part of the concept of rights really necessary? The first part –right as normative position based on valid and sufficient claims– is insufficient because it does not take into account the peculiarity of positive rights and works with a very primitive conception of causality (Arango 2001c).

Negative rights have duties of forbearance as correlatives, i.e. duties to abstain from doing something. This characteristic of negative rights has led some authors to affirm that they are absolute or universal, because they count for everybody under all circumstances. This structure of negative rights seems to facilitate the recognition of their violation. The violation of a right is seen as caused by a concrete act that presupposes the infringement of the duty to forbear. The occurrence of this act can be easily recognized and its illegality established. The practice of constitutional law shows, however, that conflicts between prima facie rights have to be taken into account. This requires accepting that rights are not absolute but relative, and that the enforcement of rights is a more complex process of balancing than it was taken to be before.

Positive rights have correlative duties to do (to serve, to provide) something. This raises the problem of knowing *how* a positive duty is to be fulfilled and *who* is obliged to fulfill it (Garzón Valdés 1987: 168; Shue 1988: 688-9). The indeterminate content and duty-bearer communicates to the recognition of the violation of positive rights. These difficulties lead some authors to conclude that positive rights are not really claim-rights (Feinberg 1980: 149; Böckenförde 1992: 154) until deemed so by the legislator. The violation of rights through action can be recognized more easily than the violation through omission. The omission of duties to do something can have different and multiple causes. Because of the indeterminate nature of the bearer of the duty and the content of the right, it is not easy to establish the cause of a violation. A direct, simple causality between act and violation does not work in the establishment of an omission to fulfill a positive duty. Here we are confronted with the dilemma of either to deny that the recognition of a violation of positive rights is reasonably possible, or to construct a hypothetical condition which makes this recognition possible. Because all rights are to be taken seriously, the construction of such a reasonable criterion must be attempted.

How does the second part of a developed concept of rights function? The recognition of a violation of a positive right depends on the construction of objective conditions (criteria) which eliminate the undetermined

content of the right (or its correlative duties) and of the duty-bearer. These conditions consist of a) a case of imminent individual harm, and b) an unjustified non-recognition of a valid and sufficient claim.

a) Imminent individual harm

The imminence of individual harm is the key to solving the problem of the indeterminate nature of the right's content. When a child is drowning in a pool, the content of the duty of the adult that stays beside the swimming pool observing the situation is clear. What is required to fulfill the right corresponds to that which has to be done to avoid its violation. In an urgent situation it is normally obvious what has to be done. Only in tragic cases, when acting implies risking imminent harm, it can be said that an omission is not a sufficient condition for a harmful consequence.

A developed concept of rights has a conceptual, necessary relation with the theory of responsibility.[10] It shows that not only acts but also omissions are to be taken as sufficient causes of harm (Hart/Honoré 1985: 33 f.; Nino 1991: 206). When a mother does not nourish her baby and nobody notices it, the baby can die. But when the child receives no education, an ill person no medical aid or an adult has no employment, the imminence of the harm can be questioned. It could be said that this is a problem of personal responsibility or a problem of individual preferences that cannot be objectively solved, because preferences are relative and incommensurable. The central key to knowing when an omission is a sufficient condition of an individual harm, is the urgency[11] of the situation. To determine it, we have to imagine what could happen if the basic need is not satisfied despite of imminence of the individual harm.

The problem of the determination of the content of rights (and of the correlative duties) can be solved by abandoning an abstract theory of "basic goods" or of the ideal priority of liberty-rights (Rawls 1971).[12] These theories are always culture-relative. It's important to notice that the urgency of a situation in which basic needs are not secured is an objective state of affairs.[13] It can be demonstrated with counterfactual arguments,

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10 The relation between the theory of risks and social rights is explored by K.-H. Ladeur in Ladeur 1994.

11 "Urgency is a two-faced notion. In moral arguments, appeals to relative urgency seem to be appeals to a consensus about how much people care about certain benefits, protections, etc. The structure of such arguments is first to claim that everyone admits in his own case that, as, being protected against certain consequence is more important then enjoying some other benefit" (Scanlon 1975: 667).

12 § 11, § 15, §16.

13 The consequentialist criterion, which the second part of the concept of right consists of, refers to the urgency of a situation and the necessity to act immediately to avoid an avoidable harm.

which show what can happen when an individual basic need is not fulfilled immediately, that is, when a valid and sufficient claim is not recognized.[14]

The "urgency situation-thesis" solves the problem of the indetermination of the content of rights. But is it able to solve the problem of indeterminate nature of the duty-bearer as well?

b) Unjustified non-recognition of a valid and sufficient claim

The non-recognition of a valid and sufficient claim may be justified or unjustified. It may be justified if a different person than the defendant is primarily obliged to fulfill the correlative duty. But the non-recognition of the right by the obligated subsidiary (e.g. the state) is unjustified, if the person primarily obliged fails to fulfill his duty, thus impeding the realization of the positive right, and if this failure allows an imminent threat to harm the right-bearer.[15]

Shue has convincingly argued that multiple duties and multiple duty-bearers can correlate to a single right (Shue 1980: 60). In the case of the moral right to life, it is clear that there is not only a correlative duty not to kill, but also the positive moral duty to assist persons whose life is endangered. This evidence complicates the recognition of the violation of the right by omission of the duty. The plurality of duty-bearers questions the existence of the right and hampers the recognition of its violation.

Modern law departs from a premise: the autonomy of the individual. This principle implies two other ones: the principle of personal responsibility and the principle of subsidiarity. According to the first, the individual is responsible for her destiny. According to the second principle, an individual has to be assisted when he is not able to take his own fate into his hands.

This is an objective fact that, in accordance with the underlying constitutive rules of the constitutional order (e.g. principles of equality and of personal security), becomes an constitutional fundamental right. The objective quality that activates the potential duty of the state to act is determined by the urgency of the circumstances. "The claims of needs suggest a sense of urgency. [...] We can postpone listening to a piece of music or going to a party, but we can't postpone the consumption of water when thirsty, or food when hungry, or medical attention when ill" (Dasgupta 1993: 39-40).

14 T. M. Scanlon explains the importance of empirical and counter-factual arguments by the recognition of rights: "[T]he view that there is a moral right of a certain sort is generally backed by something like the following: (i) An empirical claim about how individuals would behave or how institutions would work in the absence of this particular assignment of rights (claim-rights, liberties, etc). (ii) A claim that the result would be unacceptable. This claim will be based on valuation of consecuences [...], taking into account also considerations of fairness and equality. (iii) A further empirical claim about how the envisaged assignment of rights will produce a different outcome" (Scanlon 1995: 146).

15 At the level of private law, the injured person can be compensated for the violation of her right. But, at the level of constitutional law, it is unreasonable to wait until the right is violated to be able to claim for its protection.

The family, the national community or the human community are possible subsidiary duty-bearers in cases where the weight of the burden is too great for an individual or for a narrow group of persons (supererogatory duties).

The problems raised by the existence of multiple duty-bearers –and multiple possible rights' violators– can also be resolved by looking at the urgency of the situation. The urgency of the situation activates the principle of subsidiarity. If another primary duty-bearer –the family according to law or the state according to the national constitution– is not able to fulfill his positive duties, the recognition of the right cannot be simply denied. This raises the question of whether non-recognition is justified or not.

A non-recognition of a valid and sufficient claim is justified if one of the duty-bearers is not primarily obliged to fulfill it. This is the case, for example, if not the state, but the parents are primarily obliged to provide for the education of their children; it is also the case, when not the world community, but the national community, according to the human rights declarations and covenants, is obligated to provide for constitutional social rights. But if the primary duty-bearers are factually unable to fulfill their duties, the refusal to recognize and enforce a valid and sufficient claim can be unjustified. The continuance of this omission by the subsidiary obliged person is a sufficient condition to declare the violation of the right.

The conjunction of these two conditions, the imminence of the individual harm and the unjustified non-recognition of a valid and sufficient claim, resolves the problem of the indeterminate nature of the right. It may be seen as a consequentialist criterion[16] of the violation of a right. These conditions complement the first part of a developed concept of rights.

RELEVANCE OF A DEVELOPED CONCEPT OF RIGHTS FOR THE REALIZATION OF CONSTITUTIONAL SOCIAL RIGHTS

The arguments given up until now to reject an underdeveloped concept of rights have a moral character. But when the principle of equal treatment is introduced into the constitution, these arguments gain constitutional relevance (Michelman 1979: 679 f.).

So we can formulate and justify a new concept of constitutional social rights, based on a developed concept of rights as it is presented in this

[16] The criterion here presented as second part of a developed concept of rights is a consequentialist criterion. A consequentialist criterion is an elliptical one. It grounds the violation of a right by showing the performative contradiction (with a modern constitutional democracy) that means the non-recognition of a valid and sufficient constitutional claim, considering the concrete situation of the person.

paper. This new concept is immunized against the objection that such rights are indeterminate. It also shows that valid and sufficient claims to a social minimum providing for basic needs can be objectively recognized, not from the Rawlsian theory of *a priori* "basic goods," but from the perspective of a moderate rule-consequentialism (Sen 1985: 130; Sen 1996: 23). This new concept of constitutional social rights says:

> "A person has a constitutional right to a social minimum providing for basic needs, when –despite the urgency of the situation– the State omits to act, harming him or her without constitutional justification."

A consequentialist model for the recognition of rights like the one presented here diverts attention from the content of the right, and directs it to a situation that allows for the determination of all its elements. This model of rights is pivotal for defining basic rights and human rights (Arango 2001b: 43 f.), and also for enforcing constitutional social rights in non-well-ordered-societies.[17] The theory defended here is otherwise sensitive to human realization, for it recognizes the differences among the capacities and conditions of individuals, and avoids seeing natural or social disadvantages as objective limitations to the recognition and enjoyment of rights.

An example of the application of a developed concept of rights can be illustrated with the right to education. To some theorists, this right is a mere political goal, and not a true, enforceable basic right at all (Böckenförde 1992: 154). Thousands of children beg for coins on the streets of the cities of Colombia. These children are deprived of food, shelter, health and education. This is a paradox in the context of a constitution that establishes that education is compulsory and free in public institutions. But for practical reasons this mandate has remained on paper: there are not enough places in schools, nor enough funds to cover additional costs that would allow all children to go to school; also, in many cases the parents live in misery and require the income generated by their children's begging on the streets to cover the basic needs of the family, which then in practice deprives these children of an education. There is, therefore, a vicious circle: children of low-income families are condemned to live in poverty, for they lack formal education and then have little chance to find a job that would free them from this situation. Hence, the question is whether children have a basic right to demand from the State not only a place in an institution, but also

17 In Colombia, of the nearly 1200 decisions handed down each year by the Constitutional Court, 60 percent are concerned with the recognition of constitutional social rights, and about 80 percent of these cases are awarded. Asopposed to the situation in "well-ordered societies," where liberties prevail over equality, in the Third World this relation is inverted: social rights are appreciated to be more important than individual liberties.

the resources which would allow them to attend school in an effective manner. The best constitutional reasons speak in favor of constitutional judges making the authorities guarantee not only the availability of places for these students, but also the material resources to secure the exercise of constitutional social rights. The reasons against it –i.e., lack of money or infrastructure, and the responsibility of the parents– do not justify the non-recognition of such a constitutional position, for its non-recognition by the State causes imminent damage to the individual, namely by excluding him from the benefits of progress and by condemning him to social exclusion.

The main reservation against the recognition of constitutional social rights is that their realization depends on the degree of economic development of the society, as well as on the political will of the people concerning the distribution of resources and the definition of priorities. It is said that if a judge recognizes the right to education and orders a public authority to deliver a food subsidy, it would be imposing its decision on the will of the majority. If that subsidy were not recognized by law, the judge would not be able to grant it. In the case at hand, children from poor families would in fact have no access to education because they lack the basics, and their families could not do without the income generated from begging.

The objection just mentioned starts from a materialist vision of social relations and a voluntarist approach to state action. It is said that effective access to education for children living in poverty depends on the distribution of resources "from the haves to the have-nots" as well as on the decision of the majority to approve that distribution. Such a vision of social life is reductionist and incompatible with the constitution. Social relations go beyond material exchange. A society without human dignity, accustomed and immune to human pain, the degradation of life, and blind to marginality and discrimination, is not a society that can aspire to build and identify itself as a social, constitutional and democratic state of law.

In a constitutional and democratic state of law, constitutional justice must not be allowed to replace the organs of political expression. It must purport to correct the excesses and omissions that run contrary to a higher perception that, in its content, guides the acts of all the authorities. This orientation is also valid in the realization of social rights in general. Judicial protection of constitutional social rights starts from a thesis of the theory of justice that can only be outlined here, for its full development would take far more than the pages of this essay. I refer to the thesis that holds that constitutional social rights are associated with compensatory justice rather than distributive justice. This is compatible with the function of correction exercised by constitutional control.

I will briefly explain this thesis. In the political philosophy of the last third of the 20th century, especially under the influence of John Rawls, the topic of the "social minimum specified by basic needs" was always understood as a topic concerned with distributive justice. The reason is simple. Any recognition of constitutional social rights implied economic redistribution. This view explains why the perfect scene for that recognition was the Parliament itself, according to the principle of "no taxation without representation." Nevertheless, the criticisms of the progressive liberal model made by Republican theorists, feminists, communitarists, neo-Marxists and neo-Aristotelians showed how the distributive focus with respect to rights, especially constitucional social rights, is too narrow (Habermas 1996: 345 f.). The reason is obvious. It is not reasonable to make a nominally fair distribution, when those who will supposedly benefit from it find themselves living in altogether different conditions. Amartya Sen, responsible for the change in the indexes for measuring world poverty, has accurately shown that it is not the same to distribute the same amount of resources to everyone, when the differences between the capacities of people to make "effective liberty" of these resources are so evident (Sen 2000). It is not the same to give a pound of rice to A and a pound to B, when A burns twice the calories of B. This simple example shows that a genuinely fair distribution is one which takes into account the conditions of each person, for example whether people are often discriminated against where he comes from or whether he has geographical or natural disadvantages and thus requires some form of compensation. This last concept is precisely the key to the relationship between justice and basic social rights. Every distribution of resources must be preceded by a correction *via* compensation of the objective disadvantages of people. If this does not happen, any distribution, as fair and equal as it may seem, would not take into account the relevant factors for the allocation of rights and the distribution of public responsibilities. This thesis, which makes the recognition of constitutional social rights part of compensatory justice, is really based on a more realistic idea of the human being than that adopted by the majority of liberal philosophers.

In closing, I wish to recall a case that was solved by the Colombian Constitutional Court in 1992, in which the court recognized and protected the constitutional social right to health. A man of 63 years of age requested through a writ of protection (*acción de tutela*)[18] that the State be ordered to finance an eye operation to allow him to avoid losing his sight and be able

18 Writ for the protection of constitutional fundamental rights. See especially Cepeda 1993: 199-202.

to work. The man stated that his family was unable to help him economically. The first level judge (*de primera instancia*) rejected the request. It argued that the correct legal procedure was a criminal case for the crime of not providing assistance and that, similarly, there was no act of omission by the local authority. However, after reviewing the sentence, the Constitutional Court granted the injunction and ordered a study of whether the claimant was in conditions of indigence which would make him a beneficiary of special state protection as ordered by article 13 of the Political Constitution for persons in situations of manifest weakness.

The above-mentioned case helps to illustrate how the Constitutional Court has constructed a hypothetical situation which activates the positive duty of the State vis-à-vis people in situations of manifest urgency. This is an assumption based upon a democratic, social and legal constitution through a systematic interpretation. If the fundamental right to health of the claimant were not protected in this case, he would have to unfailingly accept his new condition as a blind person due exclusively to the poverty of his relatives. This conclusion cannot be demanded of a person that lives under a constitution like Colombia's. The court's argument can be reconstructed as follows:

(i) The State, through Congress, is competent to decide to provide public aid to help people, e.g. to decide democratically how to distribute the resources of society;

(ii) In principle, the right to health is not a demand a person can make of the State until and in accordance to the provisions made by law;

(iii) But when (a) a person (and his family) are in a situation of need which imminently threatens his/their basic rights (in this case, the right to physical integrity and to work), (b) the legislator has not taken the required measures to face these situations, and (c) the positive action of the State can avoid this situation, (d) while its omission to act is condition enough to harm the fundamental rights of the affected party;

(iv) Then the State has a *prima facie* obligation to provide positive aid to favor the person under these circumstances.

With the above argument, the Constitutional Court has constructed the presumption of judicial protection of basic social rights, given the specific conditions of the case. In ulterior cases, the Court has proceeded to invert the burden of proof to favor the person seeking protection, and as a consequence has left the State to prove why the positive provision of aid would not be acceptable in a case. The golden argument to favor this con-

struction lies in the fact that a grave legislative or administrative omission cannot have greater force than the principle of immunity of basic rights, whose enjoyment is a condition for the stability of a free and democratic political regime.

CONCLUSIONS

There is no clarity on the concept of rights in political and economic philosophy. This contributes to making the issue an ideological one.

There is even less clarity with regards to the concept of basic social rights and the manner in which they are recognized by constitutional judges.

For a better and greater understanding of judicial protection for basic social rights, a developed concept of rights is required, which not only takes into account the practice of recognizing negative rights, but above all the human person in his uniqueness.

In this sense, the integrated theory of rights sketched out by Amartya Sen seems to be more adequate and comprehensive than the liberal theories of authors like Rawls or Habermas.

The exercise and protection of both liberal rights and of social rights implies economic costs. Their structural differences and differences in content do not impede both rights from being protected by judges.

The economic costs of recognizing basic social rights do not obey to judicial arbitrariness, but to the practical realization of a social state of law with the aid of an evolved concept of rights. This kind of State has been considered by the Colombian constituent as the most adequate to face the situations of extreme poverty, inequality and armed conflict that Colombian society endures.

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