The Judicial Construction of Economic, Social and Cultural Rights in the Case of the Constitutional Court of Colombia.

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In the past two decades, the question regarding whether economic, social and cultural rights (ESCR) are judicially enforceable has been answered affirmatively.[2] The introduction of ESCR in many constitutions and the willingness of national and international courts to enforce at least the negative legal obligations –duties to refrain- derived from this set of rights, have given strong support to the proposition that ESCR, like civil and political rights (CPR), can be enforced through the judiciary branch. The judicial enforceability of ESCR raises new questions; some of the most puzzling are, first, under what theory of rights can ESCR be enforced, and second, what is the best judicial formula for adjudicating cases that involve violations of ESCR, that is, what reasoning model courts should follow to justify their decisions in ESCR cases.

According to the constitutional theory, "balancing" of rights has become the prevalent formula for judicial adjudication in cases of violation of fundamental rights. An increasing number of scholars and courts around the world regard the "balancing" of rights –particularly in the form of proportionality analysis- as the most suited methodology of adjudication for addressing infringements of rights. Commentators believe that its advantages in terms of rationalization of both judicial and governmental decisions, exceed the advantages of the traditional and formalistic categorical methods of adjudication.

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[2] Information about the judicial enforceability of ESCR in local jurisdictions can be found in International Commission of Jurists, Courts and the Legal Enforcement of Economic, Social and Cultural Rights. Comparative Experiences of Justiciability (2008), http://www.humanrights.ch/home/upload/pdf/080819_justiziabilitt_esc.pdf

Judicial decisions in cases of infringement of economic, social and cultural rights (ESCR) have also been influenced by the trend to balance rights. The South African experience has strengthened the support for "balancing" of rights as the correct methodology of adjudication. It has been argued this particular method –named reasonableness method- has allowed the South African Constitutional Court to achieve the appropriate balance between (i) separation of powers, (ii) limited amount of resources, and (iii) the enforcement of ESCR, particularly regarding the obligation to fulfill that stem from them.[3]

The following lines aim to illustrate a different experience of adjudication in cases of ESCR which have led to comparable successful results: The case of Colombia. The Constitution of Colombia, like its South African counterpart, recognizes a large number of ESCR, and has vested in the courts the power to enforce them. The Colombian Constitutional Court has enforced both negative and positive dimensions of ESCR. Judicial decisions since 1992 –like in South Africa- have (i) contributed to the creation of a culture of legislative and governmental accountability regarding ESCR, and (ii) promoted the achievement of higher levels of satisfaction of this set of rights. However, the Colombian Court tends to favor a different formula of adjudication: the categorical analysis on the grounds of a strong theory of individual rights

The Constitutional Court of Colombia has understood ESCR from the perspective of a traditional theory of rights according to which they are triumphs –achievements- that cannot be overridden by conflicting public interests. As a result, the Court has favored a categorical formula of adjudication. Under this formula, judicial activity focuses on the definition of the scope of the right. Competing public interests may be taken into account in order to establish the scope of the

[3] See Cass R. Sunstein, *Social and Economic Rights? Lessons from South Africa,* Mar. 7, 2001, http://papers.ssrn.com/paper.taf?abstract_id=269657 Anashri Pillay, *In Defense of Reasonableness. Giving effect to Socio-Economic Rights,* 8 ESR Review No. 4 3 (2007).

right, but once that scope is defined, it cannot be overridden by conflicting public interests. Therefore, the conception of ESCR that the Constitutional Court of Colombia has adopted differs from the South African conception. The South African Constitutional Court regards ESCR as protective shields against conflicting governmental interests.[4] This theory allows for positions of rights to be balanced against countervailing governmental interests. Given the tensions that these theories of rights and formulas of adjudication create in terms of judicial discretion and democratic debate, some intermediate formulas have been proposed. In the final part of this paper, I seek to analyze these proposals and make some suggestions that may contribute to the debate.

This paper is divided into three sections. The first one looks at the Colombian experience of judicial enforceability of ESCR. It describes how a categorical formula of adjudication has resulted from the strong definition of ESCR that the Constitutional Court has embraced, based on the idea of a minimum core. The second section evaluates the advantages and disadvantages of the Colombian approach. It also presents some intermediate proposals, between weak and strong conceptions of ESCR and between the categorical and the balancing formulas of adjudication, elaborated by different scholars. I will suggest some adjustments to these proposals and other alternatives. The last section presents my conclusion.

1. Strong Rights and Categorization. The Colombian Experience

[4] I took this term form Stephen Gardbaum, *Limiting Constitutional Right*, 54 UCLA L. Rev. 789 (2007).

1.1. Judicial enforceability of ESCR

The 1991 Constitution introduced for the first time in the Bill of Rights of Colombia a large number of ESCR such as the right to health care, the right to adequate housing, the right to education, and the right to work.[5] Moreover, article 94 authorizes the recognition of unlisted fundamental rights.[6]

The Constitution also created a specialized branch within the judiciary –the constitutional jurisdiction- responsible for adjudicating constitutional controversies. The Constitutional Court, a specialized constitutional tribunal, is the highest judicial body of the constitutional jurisdiction. The Court is entrusted with the task of preserving the integrity and supremacy of the new Constitution (article 241). This duty has allowed the tribunal to play an important role in the unification of the constitutional case law.

The constitutional jurisdiction deals specifically with two types of actions: the *tutela* action -a writ of protection of fundamental rights-, and the public action of unconstitutionality.

The *tutela* action enables any person whose fundamental rights have been threatened or infringed by a public official or a non-state actor –in the last case only in a restricted number of cases- to seek immediate judicial relief before any judge, through a summary and informal

[5] The ESCR explicitly recognized in the Constitution are: The right to have a family (article 42), special rights of the child (article 44), special the rights of adolescents (article 45), special rights of the elderly (article 46), the rights of the physically or mentally disabled persons (article 47), the right to social security including the right to have a retirement pension (article 48), the right to health care (article 49), the right to adequate housing (article 51), the right to recreation and leisure (article 52), the right to work and to labor safeguards (article 53), the right to bargain collectively (article 55), the right to strike (article 56), the right to private property but with ecologic and social responsibility (article 58), the right to intellectual property (article 61), and the right to education (article 67). Const. Col.

[6] Article 94 states: "The enunciation of the rights and guarantees contained in the Constitution and in international agreements in effect should not be understood as a negation of others which, being inherent to the human being, are not expressly mentioned in them." Const. Col. A translated version of the constitution is available at http://confinder.richmond.edu/admin/docs/colombia_const2.pdf

process. Plaintiffs do not require an attorney to file a petition. Furthermore, judges must make decisions in a short period of time: no more than 10 days. First instance decisions can be appealed, but while the appeal is pending, the defendant must comply with the orders issued by the first instance judge. Final decisions are subject to discretionary revision by the Constitutional Court in a process similar to certiorari.[7]

The public action of unconstitutionality, created in 1910, enables any citizen to challenge in abstract terms the constitutionality of any congressional statute. It does not require standing in the form of a concrete injury. Moreover, petitioners do not require an attorney to file a petition. Before the 1991 Constitution, the Constitutional Division of the Supreme Court of Justice was responsible for adjudicating cases of abstract constitutional review. The new Constitution vests this power in the Constitutional Court. In addition, by extending the Bill or Rights, the Constitution compels the Court to take into account a comprehensive catalog of rights –including ESCR- when it exercises judicial review.

The *tutela* action and the public action of unconstitutionality have enabled the Constitutional Court to adjudicate cases of ESCR. Between 1992 and 2006, the Court decided 11,932 *tutela* action cases.[8] Around 55% of those rulings involved ESCR.[9] Moreover, in nearly 66% of those opinions, the Court decided in favor of the plaintiff.[10] In the same period of time, 4,664 decisions of abstract constitutional review were issued.[11] Until 2005, around 19% of those

[7] Const. Col. art. 86. See also Manuel José Cepeda-Espinosa, *Judicial Activism in a Violent Context: The Origin, Role and Impact of the Colombian Constitutional Court*, 3 Wash. U. Global Stud. L. Rev. 529 (2004).
[8] Data from the Constitutional Court web site in http://www.corteconstitucional.gov.co/relatoria/estadisticas/SENTENCIAS%20PROFERIDAS%20POR%20LA%20CORTE%20CONSTITUCIONAL%201992%20A%202007_archivos/image005.gif
[9] Statistics from Mauricio García Villegas & María Paula Saffon, *Is there Hope in Judicial Activism on Social Rights? Assessing the Dimension of Judicial Activism on Social Rights in Colombia*, 18 http://dejusticia.org/admin/file.php?table=documentos_publicacion&field=archivo&id=65.
[10] Supra1, 8.
[11] Supra note 7.

opinions analyzed ESCR issues.[12] Given the overwhelming number of *tutela* cases that have to do with ESCR violations, I will restrict my analysis to that group of decisions.

1.2. Strong Rights and Two Ideas of Minimum Core.

This section shows that the Constitutional Court of Colombia, at least in *tutela* cases, has constructed ESCR based on a traditional and strong theory of rights. First, the Court has understood ESCR as subjective –individual- rights which have (i) a right-holder, (ii) a duty-bearer, and (iii) specific duties or claims that the right-holder can enforce. According to this theory, what makes rights valuable commodities for their holder are the imminent consequences they have regarding the behavior of others toward the right holder: they have *peremptory force.* Second, the Court regards ESCR as spheres of protection that cannot be overridden by conflicting public interests.

In order for this theory to work, it is necessary to define the scope of the right. The Court has attempted to define the scope of ESCR through the idea of a minimum core. Two notions of minimum core have been embraced by the Court: A minimum core as an essential minimum, and a minimum core of obligations pursuant to the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the United Nation Committee on Economic, Social and Cultural Rights (Committee ESCR).[13] Through the incorporation of the notion of minimum core, the Court has understood ESCR as rules, this is, norms that contain definitive commands. Categorization has been traditionally the formula of adjudication of legal cases that involve the

[12] Johanna del Pilar Cortés Nieto et. al., Itinerario de la jurisprudencia colombiana de control de constitucionalidad como mecanismo de protección de derechos humanos (Centro Editorial de la Universidad del Rosario 2009).
[13] I take this classification from Katherine G. Young, *The Minimum Core of Economic and Social Rights: A Concept in Search of Content*, 33 Yale J. Int'l L 113 (2008).

application of rules. Thus, the Colombian Constitutional Court has implemented a categorical analysis for adjudicating cases of ESCR. In the following paragraphs I will elaborate on these ideas.

Contemporary constitutional provisions which recognize fundamental rights usually adopt one of the following structures: (i) A simple categorical, rule-like structure -e.g. "the death penalty is abolished"-; (ii) abstract requirements without mention of specific limits; (iii) an abstract definition of the scope of the right, followed by a description of its limits in terms of conditions under which an infringement is justified; (iv) an abstract definition of the scope of the right, followed by a general limitation clause that describes when a infringement is justified; or (v) an abstract definition of the scope of the right, followed by a statutory reservation clause, that is, a clause which enables the legislator to limit the right, or a clause that subjects those rights to legislative development.[14]

Most of the constitutional provisions that recognize ESCR under the Constitution of Colombia have the fifth structure; they contain abstract definitions of the scope of the right, followed by statutory reservations.[15] A formal reading of those provisions may lead to the

[14] The first fourth categories are proposes by Mattias Kumm, *Rights based Proportionality as the Test of Public Reason: Some Theoretical and Comparative Observations on the Point and Legitimacy of Proportionality based Judicial Review,* 4-6 (2007) http://www.clb.ac.il/workshops/2009/articles/kumm.pdf. The last category is presented by Robert Alexy, *The Construction of Constitutional Rights*, 3 (2009), in http://www.clb.ac.il/workshops/2009/articles/alexy.pdf. However, Alexy only mentions clauses that enable the legislator to impose limits on rights.

[15] For instance, article 49, regarding the right to health care, states:
"Public health and environmental protection are public services for which the state is responsible. All individuals are guaranteed access to services that promote, protect, and rehabilitate public health.
It is the responsibility of the state to organize, direct, and regulate the delivery of health services and of environmental protection to the population in accordance with the principles of efficiency, universality, and cooperation, and to establish policies for the provision of health services by private entities and to exercise supervision and control over them. In the area of public health, the state will establish the jurisdiction of the nation, territorial entities, and individuals, and determine the shares of their responsibilities within the limits and under the conditions determined by law. Public health services will be organized in a decentralized manner, in accordance with levels of responsibility and with the participation of the community.
The law will determine the limits within which basic care for all the people will be free of charge and mandatory.

conclusion that they do not have bearing on the legislator.[16] In order to avoid this conclusion and give effect to ESCR provisions, the Constitutional Court of Colombia has embraced a strong theory of rights according to which constitutional rights, including ESCR, are subjective rights that cannot be overridden by conflicting public interests.

According to the traditional theory of subjective rights, rights have three dimensions: they have a right-holder, at least one duty-bearer, and an object, that is, a number of specific claims/duties that the right-holder can enforce against the duty-bearer. Under this theory, having a right is important because of the protection it affords for the well-being of its holder.[17] Having a right cuts off further deliberation by its addressees about how to treat the right-holder with respect to the content of that right.[18] This feature of rights means that they have *peremptory force.*[19]

The Court has also embraced Dworkin's idea of rights as triumphs in cases of ESCR violations. Dworkin asserts that fundamental rights are moral rights that have made into legal rights by the Constitution. When an individual has a fundamental right, the government cannot

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Every person has the obligation to attend to the integral care of his/her health and that of his/her community."
Article 51, which recognizes the right to a decent housing, contains an example of the second type of statutory reservation: "All Colombian citizens are entitled to live in dignity. The state will determine the conditions necessary to give effect to this right and will promote plans for public housing, appropriate systems of long-term financing, and community plans for the execution of these housing programs."

[16] Alexy points out this problem, but he suggests a different solution to the one adopted by the Colombian Constitutional Court. See Robert Alexy, The Construction of Constitutional Rights, 4 (2009), in http://www.clb.ac.il/workshops/2009/articles/alexy.pdf.

[17] Wilfried Hinsch & Markus Stepanians, *Severe Poverty as a Human Rights Violation. Weak and Strong*, in Real World Justice. Grounds, Principles, Human Rights, and Social Institutions 295, 298 (Andreas Follesdal & Thomas Pogge eds., Springer 2005).

[18] Supra 398

[19] Hinsch & Stepanians explain the peremptory force of rights under the classic theory of rights in the following way:" The tight relationship it assumes between rights and duties is an attempt to vest rights with a maximum of regulative force. The demand that rights *must* have direct consequences for the behavior of others is given a *logical* interpretation: "must" is interpreted as logical necessity and "consequences for the behavior of others" as referring to duties towards the right-holder. Thus, the peremptory regulative force that allows rights to fulfill their protective function is taken to have *logically conclusive* force. Someone's having a right does not give its addressee just another, perhaps negotiable, reason to be considered while deliberating about how to treat the right-holder." Supra note 16, 299.

stop him from exercising it, even if the government and democratic majorities believe that such exercise will cause more harm than good. In particular, the government cannot restrict people's fundamental rights in order to achieve utilitarian goals in terms of maximization of a general utility.[20] Dworkin admits that the argument must not be overstated. He suggests that only in two cases fundamental rights could be overridden: when it is necessary to protect the rights of others member of the society as individuals[21] -not "the rights of the majority"-, or to prevent a catastrophe.[22] Thus, a fundamental right is a sort of immunity which the will of the majority cannot override by policy reasons.

The idea of fundamental rights under these two theories requires a previous analytical definition of the scope of the right; that is, a definition of the specific duties – the immunity- that stem from it. The Constitutional Court of Colombia has embraced two concepts of minimum core to fulfill this requirement. According to the categories proposed by Katherine Young, the Court has embraced the notion of minimum core as an essential minimum, and as a minimum core of obligations pursuant to the INESCR, and the observations of the Committee on ESCR.[23]

Young claims that courts use the first approach when they seek an absolute foundation for ESCR. In this case, the core of the right is defined by virtue of its heightened relation with a foundational norm such as survival, life, human dignity, and so forth.[24] The second approach, developed by the Committee on ESCR, refers to a minimum of both positive and negative duties

[20] Ronald Dworkin, Taking Rights Seriously 190-194 (Harvard University Press 1977). Dworkin emphatically states: "A right against the Government must be a right to do something even when the majority thinks it would be wrong to do it, and even when the majority would be worse off for having it done." Ronald Dworkin, Taking Rights Seriously 194 (Harvard University Press 1977).
[21] In this case Dworkin considers it is a legitimate justification for the government to consider that a competing right is in that particular case more important. In some way, Dworking is proposing a sort of balancing in cases of conflict of fundamental rights. Supra note 19 191-194.
[22] Supra note 19 194
[23] Supra note 19.
[24] Supra note 19 126.

that states must comply with in the short term to guarantee ESCR. Most of those obligations are operational, that is, steps that governments must take in order to guarantee those rights.[25] Young presents a number of concerns that I will discuss in the context of the Colombian case law.

1.2.1. Essential minimum core

During the early years of the Constitutional Court, justices engaged in a discussion about the nature of ESCR. Some justices argued that ESCR are fundamental rights in their whole extension –whatever that means- given their close proximity to the principle of human dignity, and their interrelation and interdependence with Civil and Politic Rights (CPR)[26]. However, the vision that has prevailed for most part of the Constitutional Court's history is that ESCR are not *prima facie* fundamental rights, but can reach that status -and thus can be judicially enforceable through the *tutela* action- when their infringement leads to the violation of a CPR –particularly the right to life-. This approach has been named the "theory of connection".

The first time the Court proposed this approach was in decision T-406/1992.[27] The Court presented a list of axiological, analytical, and factual criteria that may guide the identification of fundamental rights. The axiological criteria are: (i) the direct relation between the right and constitutional principles, (ii) the possibility of claiming the protection of the right through direct application of the constitutional provisions, without further legislative developments, and (iii) the

[25] Supra note 19 151. Young includes a third approach to the concept of minimum core, the consensus approach, under which the minimum core is identified in the consensus achieved by the nations. P. 140. I did not find decisions in which the Constitutional Court of Colombia embraced this approach, so I will not discuss it in the paper.
[26] This rationale prevailed in a number of cases. See for instance Constitutional Court of Colombia (CCC), decision T-002/1992, May 8 1992 (regarding the right to education); decision 420/1992, Jun. 17 1992 (ordering to a public school the readmission of a pregnant teenager); decision T-429/1992, Jun. 24 1992 (ordering the admission in a public school of a child with learning problems); decision 471/1992, Jul. 17 1992 (ordering the payment of a retirement pension); decision T-570/1992, Oct. 26 1992 (regarding the right to water),
[27] CCC, decision T-401/1992, Jun. 3, 1992.

constitutional definition of an essential content –scope- which can not be overridden by the political branches. The analytical criteria are: (i) the explicit constitutional recognition of the right, (ii) the constitutional referral to an international treaty that recognizes the rights, (iii) the direct connection between the right and other explicitly recognized as a fundamental right by the Constitution, and (iv) the inherent nature of the right to human nature. Finally, the factual criteria are: (i) the specific characteristics of each case, and the kind of interests at stake, and (ii) the evolving nature of the concept of fundamental rights.

Regarding ESCR, the Court concluded that *prima facie* they cannot be considered fundamental rights because their realization demands large amounts of resources and policy decisions that only the political branches are entitled to make. Nevertheless, they become fundamental rights when they are in proximity to fundamental rights that fulfill the other criteria –which the Court understood are the CPR-, so that their violation leads to the violation of a fundamental rights. In that specific case, taking into account this rationale, the Court protected the right of the plaintiffs to basic sanitary services because it was in connection with their right to life with dignity.[28]

This rationale was adopted in another number of cases in 1992: In decision T-491/1992, the Court acknowledged that the right of the elderly to a retirement pension becomes a fundamental right when the right of the plaintiff to live with dignity is at stake; thus, the Court ordered the national social security institution to answer the petitioner's request of recognition of retirement pension within 42 hours.[29] In decision T-533/1992, the Court protected the rights to health care of an extremely poor person who required eye surgery, because it found it was in

[28] The Court ordered the municipality to finish the construction of a sewer system in plaintiffs' neighborhood. Supra note
[29] CCC, decision T-491/1992, Aug. 13, 1992.

connection with his fundamental right to live with dignity.[30] Finally, in decision T-571/1992, the Court granted protection to the right to health care of a poor woman who suffered from paralysis of her legs as a consequence of medical malpractice. The Court concluded her right to heath care was in connection wit her right to live with dignity, and ordered her treatment in a public hospital.[31]

The "theory of connection" has been the basis for most Colombian constitutional case law regarding ESCR. The Court has granted protection to ESCR when they are in close connection with CPR such as the right to live with dignity, and the right to due process.[32]

1.2.2. The minimum core pursuant to the Committee on ESCR

In 2001, a new rationale for adjudicating ESCR emerged. The new rationale claims that the minimum core of ESCR is also integrated by the minimum state duties that the Committee on ESCR has enlisted in its general comments. This argument has been used in tandem with the "theory of connection".

In decision T-968/2001[33], the Court used for the first time the general comments of the Committee on ESCR to define the minimum core of ESCR. The plaintiff alleged the violation of her right to decent housing because after an earthquake, the municipality had rejected her application for housing subsidies. Pursuant to article 93 of the Constitution -that provides for the interpretation of constitutional provision according to the Human Rights treaties ratified by

[30] CCC, decision T-533/1992, Sep. 23, 1992.
[31] CCC, decision T-571/1992, Oct. 26, 1992.
[32] The case law is enormous. See http://www.corteconstitucional.gov.co/
[33] However, because plaintiff's house was under construction by the time of the earthquake, the Court considered the local authorities had not infringed her right to decent housing. CCC, decision T-958/2001, Sep. 6, 2001.

Colombia[34]- the Court invoked the general comment 14 of the Committee on ESCR regarding the right to housing. In the Court's understanding of general comment 14, the duty of no discrimination means that the government must apply special consideration to the victims of natural disasters.

A new set of criteria to determine when ESCR turn into fundamental rights was proposed in decision T-859 of 2001[35]. The Court held that fundamental rights are those claims (i) oriented to the realization of human dignity, and (ii) that can be translated into subjective rights; that occurs when their scope – the duties that stem from them- has been defined. The Constitution, the legislator, the case law, and Human Rights treaties can be the source of the scope of ESCR. The general comments of the Committee on ESCR are the authorized interpretation of the ICESCR; therefore they are part of the text of the Covenant, and can be the basis for the definition of the minimum core of ESCR.

The right to health care, the Court asserted, is clearly directed to the realization of the value of human dignity. However, its scope cannot be easily deduced from the constitutional text. Moreover, the Constitution makes Congress responsible for its implementation. Nevertheless, the right to health care becomes a subjective right in at least three situations: (i) When its violation entails the violation of a fundamental right –theory of connection, (ii) when its scope has been defined by the Committee on ESCR, and (iii) when the legislator has developed it through policies and programs. Hence, the right to health care is fundamental regarding the minimum core of obligations enumerated by the Committee in its general comment No. 12. Moreover, this

[34] Article 93 states: "International treaties and agreements ratified by the Congress that recognize human rights and that prohibit their limitation in states of emergency have priority domestically.
The rights and duties mentioned in this Charter will be interpreted in accordance with international treaties on human rights ratified by Colombia."
[35] CCC, decision T-859/2003, Sep. 25, 2003.

right is fundamental when the legislator has created a health care system, and has defined the benefits the citizens are entitled to. All those duties can be enforced before courts.[36]

Since 2003, the general comments of the Committee on ESCR have played an important role in the adjudication of ESCR cases in Colombia: In decisions T-884/2003[37], T-214/2004[38], and T-218/2004[39] the Court relied on the non-discrimination and accessibility duties stated in general comment No. 14 on the right to health care. In decision T-025/2004[40], the Court defined the minimum core of the ESCR of forcefully displaced people according to the Committee's general comments and the International Principles of Internal Displacement. In decision T-642/2004[41], pursuant to the general comment No. 13 on the right to education, the Court concluded that the non-discrimination duty required that admissions to higher education must be based on academic criteria. In decision T-585/2006[42], the Court relied on the duty of accessibility, recognized in general comment No. 4, to grant protection to the right to decent housing of forcefully displaced people.

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[36] The plaintiff in decision T-859/2003 suffered from knee problems and required surgery and medical treatment. He was affiliated to the contributive health system. The system denied the treatment arguing that some biological materials necessary for performing the surgery were not included in the basic list of services. The Court interpreted the list of services and concluded that, if the surgery was included, the materials necessary for practicing should be included too. Therefore, the Court ordered the system to provide complete medical treatment. Supra 31.

[37] CCC, decision T-884/2003, Oct. 2, 2003 (the plaintiff was a poor person who suffered from an ear condition. She had not yet been admitted to the subsidized health system. While her admission was pending, she was entitled to only a limited number of services provided by public hospitals. The court considered this situation was discriminative. However, before the case was decided, the subsidized health care system admitted the plaintiff).

[38] CCC, decision T-217/2004, Mar. 8, 2004 (the plaintiff, a child affiliated to the contributive health care system, who suffered early puberty, required a medicine excluded from the basic list of health services. The Court argued that the government had not provided any justification for the exclusion of the medicine; therefore the exclusion was a violation of the no discrimination duty).

[39] CCC, decision T-218/2004, Mar. 8, 2004 (in a similar case, the Court considered that the exclusion of a medical test, necessary for the diagnosis of early puberty, without governmental justification, was a violation of the duty of no discrimination).

[40] CCC, decision T-025/2004, Jan. 22, 2004 (ordering the government to adjust its policies directed to the assistance of forcefully displaced people, in order to guarantee in the short term the minimum core of their CPR and ESCR).

[41] CCC, decisions T-642/2004, Jul. 1, 2004 (the plaintiff by mistake had received notice of admission in a public university. She claimed she had relied on that information and demanded admission. The Court denied the protection).

[42] CCC, T-585/2006, Jul. 27, 2006 (ordering the government to provide assistance to the plaintiffs so they could make effective the housing subsides they have been granted).

1.3. Strong Rights and Categorization

The Colombian Constitutional Court's reliance on these two notions of minimum core has been an attempt to construct ESCR as rules under a strong theory of rights. The obligations that integrate the minimum core of ESCR are definitive commands that public officials must always comply with. If ESCR are interpreted as rules, it follows that their formula of judicial adjudication is categorization.

Categorization means classification and labeling.[43] Courts must decide whether a specific case falls under the umbrella of a single rule –either because there is an infringement of the rule or because the case complies with the factual description that the rule aims put in force- and then apply the legal consequence indicated by the provision. The analytical process follows a deductive scheme in which the rule is the major premise, the specific case the minor premise, and the ruling the consequence. To determine whether a case can be subsumed under a rule, judges appeal to traditional canons of interpretation[44]

[43] Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing,* 63 U. Colo. L. Rev. 293 (1992).

[44] Categorization is said to have the advantages of (i) simplicity because rules are thought to give "… judges a set of instructions that can be described reasonably well and can be applied in a sufficiently clear way so that one can often check on the correctness of a particular judge's use of them." (ii) Predictability because it determines beforehand which conditions or criteria will control, and exclude others, or prioritizes certain issues for separate or perhaps definitive evaluation. (iii) Objectivity because a rule construction eliminates judges' discretion -avoids legislation from the bench. See Stephen E. Gottlieb, *The Paradox of Balancing Significant Interests,* 45 Hastings L.J. 825 (1994).

For rights to be rules, they must have a concrete and defined content under which a specific case can be subsumed. Therefore, when rights' provisions are constructed in the form of rules, all moral determinations might be made at the outset in order to avoid further debate.[45]

In most of *tutela* cases that have to do with ESCR, the Court follows the categorization formula. The Court begins by defining the content of the right using one of the approaches of minimum core already examined. Later, it studies the conducts or omissions that plaintiffs allege have threatened or infringed upon their ESCR. The defendant is allowed to object to plaintiffs' arguments. However, the Court only admits arguments and evidence that proves the defendant has not infringed the scope of the right; justifications for any infringement or limitation of a right are not good defenses. As a result, most part of the legal debate deals with the definition of the scope of the right at stake. I will use an example to illustrate this claim:

In decision T-025/2004, a group of displaced people sued the National Council for the Attention of Forcefully Displaced People, a number of ministries, administrative departments, and other governmental institutions. They claimed those entities had violated their CPR and ESCR by denying them access to humanitarian aid, and public assistance in matters of health care, housing, education, childcare, vocational training, and so forth..

The defendants responded that they had already implemented a public policy to give relief to the forcefully displaced population. They also held that plaintiffs must wait until resources were available to them. Finally, the defendants argued that given the budget restrictions the country was facing, it was impossible for the government to give complete relief to all the victims of the internal conflict.

[45] Mattias Kumm, *Rights based Proportionality as the Test of Public Reason: Some Theoretical and Comparative Observations on the Point and Legitimacy of Proportionality based Judicial Review,* 5 (2007) http://www.clb.ac.il/workshops/2009/articles/kumm.pdf

The Court began the legal analysis by defining the minimum core of the CPR and ESCR of the displaced population. The Court constructed the minimum core of these two sets of rights pursuant to (i) international treatments, (ii) case law, (iii) legislative statutes[46], (iv) the International Principles for the Treatment of Internal Displaced People, and (v) the general comments of the Committee on ESCR. Secondly, the Court examined the human rights situation of the displaced population using statistics provided by the government, NGOs, and academic institutions. The Court concluded that the situation of those persons was critical and demanded immediate relief. The situation was so critical that the Court declared an "unconstitutional state of affairs", a legal tool that allows the Court to adopt a sort of *erga omnes* decision, in order to protect the rights of the whole group of forcibly displaced people in the country. The Court tested defendants' policies and legal defenses against that minimum core previously defined. It rejected claims of lack of resources, argued that the expenditure necessary to alleviate the needs of the victims of forcefully displaced must be prioritized, and ordered the government to adopt economic and institutional measures in the short term. In sum, the Court held that the humanitarian situation of the displaced persons in the country was so critical, that any justification on the part of the government could not be considered.

The way in which the Court has interpreted the minimum core of ESCR and the absolutist approach it has adopted to adjudicate ESCR cases have received several criticisms that I will discuss in section 2.

2. In search of alternatives

[46] The Court considered that the benefits granted in legal decisions regarding the displaced population integrated the minimum core.

2.1. Advantages and Disadvantages

At the doctrinal level, a number of disadvantages have been attributed to the rule construction of fundamental rights, hence to the subsequent application of the categorical method of adjudication. These objections can be summarized in the following way: First, this construction allows for excessive judicial discretion in the interpretation of the rule, and in the selection of the rule to be applied in a particular case. Second, this construction excludes the political branches from the definition of the scope of the right.[47] Most of the scope of the right is defined when judges interpret the rule to be applied in a particular case. Third, this construction allows for judicial interference in the allocation of scarce public resources. Decisions about the national budged should be limited to the Congress because of its democratic composition.

These criticisms have been reproduced against the Constitutional Court of Colombia's ESCR decisions. The detractors of the Court argue that it has usurped the institutional jurisdiction of the political branches and has made important decisions about rights which should be reserved for representative bodies. They also hold that the Court has adopted decisions with serious economic implications which only the legislator is entitled to make. Moreover, they state that the Court has made transcendental decisions at the policy level without having the knowledge and the expertise necessary for it. Finally, the detractors assert that the Court had become a sort of unchecked absolute power.[48]

[47] See Supra note 44. Supra note 43.

[48] A summary of the opponents' arguments is in Maria Paula Saffon, *Can Constitutional Courts be Counterhegemonic Powers vis-à-vis Neoliberalism? The Case of the Colombian Constitutional Court* 5 Seattle J. Soc. Just. 533 (2007).

The concept of minimum core is also exposed to many objections at the international and national level. Katherine G. Young in a recent paper highlights the problems of the idea of a minimum core. She argues that the essential vision of the minimum core fails to provide a fixed content to ESCR because the notions on which it relies –such as survival and dignity- are subjective. It also does little to challenge the current set of distributions in society, and may even obstruct some distributive efforts. Lastly, it relies on a fixed and stable version of normative argument. Young also considers that the Committee on ESCR's attempts to define a minimum core of ESCR obligations has been unsatisfactory. In her opinion, the duties that stem from ESCR are intrinsically polycentric and cannot be subject to a definitive ranking. Moreover, the Committee's attempt does not address the problem of how to correlate the large number of obligations enumerated in the ICESCR.[49]

At the national level, it can be argued that the idea of a minimum core, grounded on the Committee on ESCR' general comments, lacks democratic legitimacy. The Committee does not have a democratic –representative- nature, and therefore cannot make decisions about citizens' rights. In the case of Colombia, the Constitution only allows for the application of international treaties, not for the enforcement of general comments issued by an international body whose decisions are not compulsory. Hence, according to this objection, general comments can only have an auxiliary role in the definition of the scope of ESCR.

Regarding the categorical method of adjudication bound to a strong idea of fundamental rights, the criticisms highlight its formalism. This method does not allow judges to harmonize the protection of plaintiffs' rights with the guarantee of everybody's rights. It neither addresses the collective dimensions of ESCR nor other fundamental rights. Moreover, categorization can

[49] Supra note 12.

obstruct distributive efforts[50], in particular when retrogressive measures are adopted in order to expand people's access to services such as health care and education.

However, the Colombian approach has many advantages which should be explored by scholars and other legal systems. First, under the Colombian legal system, ESCR are subjective – individual- rights. Therefore, courts can provide remedies on an individual basis and guarantee plaintiff's access to concrete goods and services. This feature is especially important in emergency cases when immediate remedies are necessary.[51] For instance, in cases of forced internal displacement, courts have played a primary role in assuring the displaced population minimum means for survival.

Second, while dealing with individual claims, Colombian courts, especially the Constitutional Court, portray victims as individuals. They describe the kind of difficulties plaintiffs have to face in a country with high levels of poverty and insecurity. [52] The kinds of stories that judicial decisions tell bring human dramas into the law, which has proved to be useful to make the law more sensitive to demands of material justice and equality.

Furthermore, the strong conception of rights that the Constitutional Court has embraced, combined with the categorical formula of adjudication, have allowed the tribunal to adopt strong remedies with a high level of legitimacy. Appealing to the traditional legal discourse gives judicial decisions an appearance of objectivity which contributes to their acceptance by the community. This situation is a kind of paradox; the legal formalism associated with

[50] Justice Rodrigo Uprimny. Concurring opinions in decision T-1207/2001. CCC, decision T-1207/2001, Nov. 16, 2001.

[51] Judges can even issue provisional orders while the case is pending, in order to avoid damages that could not be repaired in the future.

[52] Katarina Tomasevski argues that this is one of the advantages of the human rights approach to poverty reduction. Katarina Tomasevski, Human Rights and Poverty Reduction. Strengthening pro-poor law: Legal enforcement of economic and social rights 6 (2005), http://www.odi.org.uk/RIGHTS/Meeting%20Series/EcoSocRights.pdf

categorization is usually criticized for hiding very controversial decisions under an appearance of objectivity. However, in this case, categorization has been useful to achieve higher standards of material justice and compliance. Categorization has helped the ESCR discourse to gain acceptance among a traditionalist legal community.

In fourth place, through the adoption of a strong conception of rights grounded in the idea of a minimum core, the Constitutional Court has created a strong normative framework which has been very useful for accountability purposes. There is a minimum set of obligations against which governmental and private decisions[53] can be tested. Moreover, this set of obligations is an important tool for monitoring the compliance with judicial decisions. It is true that there is a significant level of ambiguity in the conceptions of minimum core that the Constitutional Court of Colombia has relied on. Despite the ambiguity problem -which will always exist-, the standards defined by the Court have at least forced state and non-state actors to justify in terms of fundamental rights their decisions that have a negative impact on ESCR.

Finally, the Court's references to international law have also supported the legitimacy of judicial decisions of ESCR cases. The Court's rulings are not perceived -in most cases- as judicial impositions, but as the result of international consensus. Colombia's legal community tends to be very formalistic; however, international and foreign law historically has played an important role in the development of the legal system.[54]

2.2. Alternatives? Lessons for Colombia

[53] As it was indicated in previous sections of this paper, through *tutela* action it is possible to sue non-state actors in some specific cases.
[54] See Diego López Medina, Teoría Impura del Derecho. La Transformación de la Cultura Jurídica Latinoamericana (Legis Editores 2004).

In spite of the advantages of the Colombian experience described above, there are many lessons to learn from international scholars and other national experiences, particularly from the South African example[55]. In the following lines I will explore alternative approaches and lessons from other countries.

In a recent publication, Mark Tunshet proposes a sort of dialogic model for the adjudication of ESCR, based on the formula "strong right / weak judicial review". Tushnet's main concern is how ESCR can be judicially enforced without turning the constitutional system into a sort of judicial supremacy that nullifies the democratic debate. By strong rights, Tushnet means rights that cannot be easily overridden by political majorities; hence, they demand more

[55] The South African experience is not exempted from criticism. The purpose of this paper is not to analyze the South African experience; however, some disadvantages attributed to the system can be highlighted. Some objections to the balancing method –reasonableness formula- are summarized by Alexy in the following way: (i) Argumentation theoretical objections, which claim that balancing is not a rational and objective method of argumentation. (ii) Doctrinal objections, which argue that balancing of rights threatens the idea of rights because it undermines their strict validity as rules. (iii) Objections about the over-constitutionalization of the legal system. (iv) Institutional objections, which claim that the balancing approach leads to a "(…) shift from the parliamentary legislative state to a constitutional adjudicative state." (v) Interpretation theoretical objections, which question whether a principle construction is a correct interpretation of fundamental rights and the conclusion that results from a balancing analysis can have universal validity. (vi) Validity-theoretical questions, which argue that the hierarchical nature of the legal system is jeopardized by the balancing method because it allows putting constitutional interests and other sort of interests on the same level. (vii) Science-theoretical objections, which hold that the rationale of judicial decisions in which the balancing method is applied can explain the specific decisions, but does not have a directive power for future decisions. Alexy supra note 15. See also Stavros Tsakyrakis, *The Balancing Method on the Balance: Human Rights Limitations in the ECHR* 5 and 17 (2007) http://www1.law.nyu.edu/nyulawglobal/fellowsscholars/documents/sgenftsakyrakispaper.pdf Alexander Aleinikoff, *Constitutional Law in the Age of Balancing,* 96 Yale L.J. 943, 973-81 (1987). Paul W. Kahn, *The Courts, the Community and the Judicial Balance: The Jurisprudence of Justice Powell,* 97 Yale L.J. 1, 7-9, 15 (1987-1988).
In the South African context, Sandra Lieberberg argues that the reasonableness test does not seem to be robust enough to protect vulnerable groups who face an absolute deprivation of minimum essential levels of ESCR and for whom progressive improvements in the provision of services cannot undo the damage already suffered. Sandra Lieberberg, *Basic Right Claims. How responsive is the 'reasonableness review',* 5 ESR Review No. 5 7 (2004). Sisay Yeshanew claims that the reasonableness formula applied alone is problematic because (i) it is not suitable for of individual rights claims about the provision of concrete goods and services, (ii) it throws the burden of proving the unreasonableness of a program on the litigants who may be those most in need, (iii) it lacks a clear and principal basis, and (iv) it fails to link the review with a more detailed elaboration of the content of the right. Sisay Yeshanew, *Combining the "Minimum Core" and "Reasonableness" Models of Reviewing Socio-Economic Rights"*, 9 ESR Review No. 3 8 (2008). Similarly, David Bilchitz considers that the reasonableness approach is problematic because (i) it does not provide any certainty about content of ESCR; (ii) it deflects the focus of the inquiry from the urgent interests at stake, and allows those interests to be balanced against multiple considerations; (iii) it does not provide certainty about the nature of governmental obligations; and (iv) it fails to establish a principle criteria to determine the circumstances in which it is legitimate for judges to interfere. David Bilchitz, Poverty and Fundamental Rights: The justification and Enforcement of Socio-Economic Rights (Oxford University Press 2007).

than just rational justification in order to limit rights. By weak judicial review, he understands a system of judicial review in which courts can adjudicate rights, but never have the last word. Democratic majorities can overturn their decisions. Moreover, under a weak system of judicial review, courts admit the existence of reasonable differences and engage in weak remedies, such as simple declarations, or recommendations for the adoption of policies.[56]

Justice Rodrigo Uprimny of the Constitutional Court of Colombia proposes a different approach, which attempts to combine the advantages of the Colombian and South African experiences. In his concurring opinions in decisions T-1207/2001[57] and T-654/2004[58], he argues that the Colombian approach in matters of health care is problematic in terms of equality. First, he argues that the protection of individual cases impacts the system and limits its attempt to extend health services to the poorest population. Second, adjudication on an individual basis can be unfair for those persons in the same situation as the plaintiffs, but who do not go before the court.

Uprimny considers that given the budgetary restrictions Colombia faces, it is naive to think that the maximum realization of ESCR can be achieved in the short term. However he also acknowledges that ESCR have a strong content of dignity that in many cases is important to protect. Therefore as an attempt to find a balance between a deontological and a consequentialist reasoning, he proposes the adoption of the South African reasonableness formula. Uprimny asserts that the reasonableness method –balancing method- offers a good analytical methodology to evaluate public policies and programs, and improves the results of ESCR adjudication in terms of equality, since it allows for making decisions with global impact.

[56] Mark Tushnet, Weak Courts, Strong Rights. Judicial Review and Social Welfare Rights in Comparative Constitutional Law (Princeton University Press 2008).
[57] CCC, decision T-1207/2001, Nov. 16, 2001.
[58] CCC, decisions T-654/2004, Jul. 8, 2004.

Furthermore, Uprimny proposes the adoption of the Committee ESCR's notion of minimum core as the criteria for the judicial enforceability of ESCR. He claims that the idea of a minimum core limits the power of courts for issuing remedies that involve expensive medical treatments. This sort of expensive remedies can impact the finances of the system and restrict its attempts to expand its services to the poorest. By limiting the kind of remedies that courts can grant, Uprimny argues it is possible to promote equality because it will ensure that the whole population receives the same kind of services in the short term. However, he holds that the notion of minimum core must be reformed; it should embrace minimum services necessary for survival.

Finally, Justice Uprimny argues that when the legislator defines new contents of ESCR, those contents must also be enforceable before courts and protected through the principle of non-retrogression. Congress is the one with the knowledge and the legitimacy necessary for making decisions about the expansion of social services, given its fiscal impact.

I reckon, as Justice Uprimny points out, that there are important lessons to be learned from the South African experience, especially from the principle construction of ESCR, and the balancing –reasonableness- formula of adjudication. First, the reasonableness method allows for harmonizing different rights and public interests at stake. The decisions of the Constitutional Court of Colombia tend to focus exclusively on individual claims. The South African approach brings into judicial adjudication considerations related to resource allocation and the collective dimensions of ESCR. It also allows harmonizing ESCR with other fundamental rights. The reasonableness formula could help the Constitutional Court of Colombia to improve the consequences of its decisions in terms of equality.

Second, the reasonableness method tends to be more deferential to democratic principles. The Constitutional Court of South Africa usually involves the legislative and the executive branches in the design of remedies for ESCR. By involving the Congress and the executive branch, the Court ensures that is decisions that may imply allocation of resources have democratic legitimacy.

Finally, since the reasonableness method aims to analyze the "reasonableness" of congressional governmental decisions that impact ESCR, it may help to achieve higher standards of accountability. Government and Congress are forced to give reasons for their decisions. Those reasons can be evaluated by the judiciary branch but, more importantly, by the people.

The previous proposals contain important suggestions that may help solve the tension between democratic requirements and the individual and collective protection of ESCR. Now, I will attempt to make some suggestions –some of them grounded in Uprimny's and Tushnet's proposals- that I hope can also help to solve this controversy.

First, I believe that Stephen Gardbaun's proposal of the structure of fundamental rights should be adopted as the theoretical model for studying ESCR. Gardbaun presents a two-stage analysis of fundamental rights. The first one concerns the internal delimitation of the rights. In this stage, moral reasoning is used to define the internal content of the right. The second stage concerns the analysis of external limitation. In this stage courts examine whether competing interests can restrict to some extent the already established internal definition of the right.[59]

The idea of an internal delimitation recognizes that there are obligations which cannot be overridden by competing public interests under any circumstances. The way the Constitutional

[59] Supra note 3

Court of Colombia has attempted to define the minimum core of ESCR could be useful for addressing the internal delimitation of ESCR. In spite of their ambiguity, the general comments of the Committee on ESCR put together many international experiences which are lessons for countries committed to ESCR. Moreover, Urpimny's idea of a right's scope which is expanded by the legislator, or even by the executive branch, when it creates social programs without legislative mandate, could introduce dynamism to Gardbaun's proposal. Case law derived from a method of adjudication like the one I am trying to portray in this paper should also play an important role in defining the internal dimension of ESCR.

The idea of external limitations recognizes that rights are part of a complex system of interests, principles, and values that must be correlated in some way. Rights provide a sort of immunity, defined in the internal dimension of the right, but sometimes must surrender to other goals of the society. However, not any public interest must be allowed to override a right. To ensure that no public interest defeats a right, courts must engage in balancing, but always taking into account, first, that rights have a privileged hierarchy in the constitutional system, and thus other governmental interests must always receive less weight in the balancing process, and, second, that since rights have a superior hierarchy, the burden of proof that an external limitation is legitimate and constitutional, should lie with the defendant. Finally, courts should conduct a strict analysis of governmental and congressional justifications, in order to promote a culture of accountability.[60]

Balancing should also be used for fashioning remedies. In Tushnet's terms, the remedy stage should promote a dialogue between state branches. Moreover, the remedy stage is the

[60] Lieberberg has a similar proposal. Sandra Lieberberg, *Basic Right Claims. How responsive is the 'reasonableness review',* 5 ESR Review No. 5 7 (2004).

appropriate opportunity for considering policy arguments. In order to make ESCR effective, once the remedy is concerted, courts should engage in a monitoring function, this is, courts should supervise that political branches comply with what they promised.

3. Conclusions

The description of the Colombian experience of judicial enforceability of ESCR shows that the judicial formula of adjudication of ESCR depends on the theory of rights adopted by any constitutional system. In the case of Colombia, the Constitutional Court has embraced a categorical methodology as a result of its construction of ESCR as strong individual rights, that is, as immunities that cannot be overridden by other public interests. South Africa, on the other hand, has understood ESCR as protective shields that can eventually be overridden by other competing interests. Given this construction of ESCR as principles, the South African Constitutional Court has favored a balancing method of adjudication.

Both formulas of adjudication have many advantages and disadvantages. A number of alternatives have been proposed to combine both methodologies, and thus alleviate the common tension between democracy and the protection of rights. These proposals have in common the recognition that formulas of adjudication must open opportunities for dialogue between State branches, and ensure that no competing interest can override ESCR.

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