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Constitutional Courts as Bulwarks against the Erosion of Social and Economic Rights through Free Trade Agreements: Colombia and South Africa Compared

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ABSTRACT: *Over the past decades, the process of untrammelled trade liberalization has engulfed many parts of the world. Albeit the attenuated success obtained on trade facilitation on global trade in Bali 2013, the global proclivity toward bilateral trade deals remains patent. The acceleration of this trend can be explained by the inability of political masters and their economic sherpas to reach a comprehensive global trade deal. Within many bilateral agreements negotiated between industrialised countries, on the one hand, and emerging or developing nations, on the other hand, elastic provisions are included that go far beyond what negotiators contemplate in the Doha Round talks. To our understanding, the expansive content of the trade agreements are both cause and effect of the observable growing politicisation of trade negotiations and trade policy tout court. Some of these expansive provisions that are included in the final agreements often have debilitating effects on the attainment of economic and social rights of citizens in ways unforeseen or simply neglected during the negotiations. Increasingly municipal courts are joining social activists to unequivocally say 'stop!' to this trend. This article systematically compares the manner in which the highest courts in Colombia and South Africa have served as bulwarks against the erosion of constitutionally protected economic and social rights through free trade agreements entered with industrialised countries. It goes beyond the political interests at stake in some of the agreements to present the nature of the mandates (jurisdiction) of the respective constitutional courts par rapport the enforcement of international (constitutional) human rights rules; locus standi before the courts; res judicata (merits of decisions and interpretative philosophy) and comparative remedies available to afflicted citizens including class actions. Colombia and South Africa are selected because the constitutional courts in these emerging countries have recently been exuding a rare and patent streak in judicial activism. The comparative approach is used as an innovative contribution as it incorporates an important mutual learning component in view of identifying what constitutional norms and praxes are worth sharing.*

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1. INTRODUCTION

*To deny people their human rights is to challenge their very humanity.
To impose on them a wretched life of hunger and deprivation is to dehumanise them.*¹

The wise words of Nelson Mandela make up a fitting vestibule to the present endeavour. The purpose of this article is to underscore the importance of judges and the judicial process as important tools for citizens to make good their claims for the respect, protection and fulfilment of their socio-economic rights often provided for and protected under national constitutions. The clamour for human rights that ensures freedom from fear and from want is not for the faint of heart. It is a struggle that remains the leitmotif for many grassroots movements around the world. While civil and political rights have been secured in many countries, socio-economic rights including the rights to shelter, food, water and health largely remain unenforceable nice looking black letter norms. It is understandable that for many countries that are underdeveloped yet face many challenges, priorities in terms of rights are often hard to meet. However there are many instances especially in the more advanced developing nations or emerging countries where there is a reasonable expectation that the state has an important role to progressively provide for or at least demonstrate a measureable commitment to ensure that citizens are not wallowing in despondent social conditions. In many developing countries where citizens still find it hard to make their voices heard beyond electoral cycles, it is vital that institutions and mechanisms are in place to constantly ensure that the rights and interests of citizens are duly promoted and protected.

In the context of accelerated globalisation trends, marked by a salvo and rush to secure market access, key trading nations have spared no effort to side line global trade talks in favour of bilateral trade deals that ensure their own interests. In many of the bilateral trade deals negotiated by rich economies with developing and emerging markets most of the sensitive rights-relevant components that have been unresolved at the global level have found safe havens in the North-South free trade agreements (FTAs). Mindful of the technical nature of these deals and the urge to conclude them by major political and corporate actors in the North, the potential for unforeseen adverse effects downstream can never be discounted. FTA provisions have been integrated in many North-South deals that contain disciplines that are either not included in the global trade talks or that simply go farther in the substantive demands. Such provisions especially in the realm of intellectual property rules and investment norms have seriously impacted the manner in which citizens of the South can access public goods including decent health (medicines) and utilities (water).

It is argued that there is a strong movement from grassroots communities and civil society organisations to resist such trends. In those cases where civic actions have been inadequate to rein in untrammelled liberalisation, courts have been seized. The two cases studied (Colombia and South Africa) are selected because they have very activist constitutional courts poised and ready to defend rights that are encapsulated in the respective constitutions. Besides they are the

¹ Nelson Mandela, Address to the Joint Session of the Houses of Congress of the USA, 26 June 1990.

countries that have amongst the highest levels of income inequality in the world. They also serve as examples of societies where bilateral trade deals with developed countries are amply mediated and politicised. This means awareness tends to be sharper in these countries. Their experiences are invaluable for other developing and emerging markets contemplating bilateral trade deals with industrialised countries. Given the differentials in the levels of judicialisation and politicisation of the trade talks and the potential adverse effects they have on constitutional rights it is useful to employ a comparative approach to explore areas of synergy while highlighting the differences in praxes that could be mutually insightful regardless of the specificity of the contexts.

In pursuing the goal as outlined, using a comparative approach the article proceeds as follows. Part two of this article considers broader and background factors in both countries. As such it discusses economic growth and the threats in the area of social and economic rights in Colombia and South Africa. These aspects are further elucidated in part three by articulating the manner in which the respective governments have responded to the socio-economic conundrums facing their countries. This is done by looking at the adequacy of official responses as encapsulated in extant development plans and concrete actions taken. Part four then veers into the more technical aspects of the debate looking at the incorporation of treaties into law and the role of the constitutional courts in both states. This discussion also considers the remedies that citizens can use or the actions that can be taken in cases where socio-economic rights are not protected or are violated. While focus for Colombia is on those remedies that have actually been used par rapport given FTAs; in the case of South Africa emphasis is on the fact that there are indeed constitutional tools to be used in challenging specific provisions in acts incorporating treaties that adversely affect rights. The analyses then zeroes on the specific kinds of treaties that are of interest (FTAs). It elaborates on the interactions (adverse or otherwise) between constitutional (socio-economic) rights and specific provisions in FTAs. This is the mandate of part five. Part six presents an analysis of some of the respective national cases that have hinged directly on socio-economic rights as litigated before the courts. Finally, in order to reflect on some mutually relevant insights and considerations, part seven presents a comparative summary of the trends and extant proclivities in both countries.

2. ECONOMIC GROWTH AND THE THREATS IN THE AREA OF SOCIAL AND ECONOMIC RIGHTS IN COLOMBIA AND SOUTH AFRICA

Colombia is part of a group of countries with a medium level of human development, as measured by the United Nations Development Programme (UNDP) Human Development Index (HDI). Although these rankings have been relatively stable over time, most of the South American countries experienced a worsening of their economic situations between 2001 and 2010. Colombia is one of the countries where this phenomenon was most prominent. Colombia ranked 62nd in 2001 (above countries such as Brazil, Peru and Ecuador) but progressively declined until it ranked 79th in 2010 (only above Bolivia and Paraguay in the region).² In

² United Nations Development Program (UNDP), *Human Development Reports*, 2001-10, available at <http://hdr.undp.org/en>.

addition, Colombia also shows a relatively skewed income distribution, with a Gini coefficient among the highest regionally and globally. Recent years do not show an improvement on this aspect. Parts of the explanation for this situation are the four decades of internal armed conflict, which have increased the number of internally displaced people to worrying levels. The conflict involves leftist guerrillas and para-militaries, and is linked to and partly financed by the illegal drugs trade. These facts have a strong incidence on the development indicators, although recent years have shown an improving security situation and – at the moment of writing – peace talks are being held. Another relevant repercussion of the conflict on economic policy-making has been its impact on public spending because its military expenditure figures are among the highest in Latin America; only comparable to those in Chile. This military expenditure obviously reduces the budgetary space for policy-making in other priority sectors.

However, this relatively weak performance on human development strongly contrasts with its economic performance. Colombia has been included in the group of emerging countries called CIVETS.³ It has managed to maintain positive annual growth rates of per capita GDP over the last decades and has remarkably improved its performance during the years 2003–2008, when the economic growth rates increased to reach a peak in 2007 (7.5 per cent). Due to the global crisis, this dramatically decreased in the two following years, falling to 1.7 per cent in 2009 but increasing again in 2011 (6.6 per cent) and 2012 (4.2 per cent).⁴ Inflation has also been well managed. Inflation decreased remarkably from 22.6 per cent in 1994 to 1.94 per cent in 2013.⁵ Unemployment reached its highest level in 2000 (19.7 per cent) after which it decreased again, reaching 9.6 per cent in 2013.⁶ These unemployment figures contrast with the remarkable improvement in labour regulation reported by the 2013 World Bank's *Doing Business* Report.⁷ The degree of rigidity in employment laws diminished dramatically from a ranking of 59 in 2004 to 10 in 2010. Looking at these figures, it becomes clear why the economic success of Colombia is recognised worldwide, having now replaced Argentina as the third biggest economy in Latin America, after Brazil and Mexico. The country is now one of the most important destinations for foreign investment and it has been labelled as a '[...] regional leader in narrowing the gap with the world's most efficient regulatory practice.'⁸ Notwithstanding, some important challenges remain such as deficient infrastructure, insecurity and inequality that are pervasive.⁹

The level of protection of human rights has been presented as complicating, although not obstructing, important commercial agreements. Paradoxically, the (claimed) poor enforcement of fundamental rights seems to coexist with a relatively high level of institutional development

³ The CIVETS group includes: Colombia, Indonesia, Vietnam, Egypt, Turkey and South Africa.

⁴ World Bank, <http://data.worldbank.org/indicator/NY.GDP.MKTP.KD.ZG>.

⁵ www.dane.gov.co/files/investigaciones/boletines/ipc/cp_ipc_dic_13.pdf.

⁶ www.elcolombiano.com/BancoConocimiento/A/a_964_por_ciento_cayo_tasa_de_desempleo_de_colombia_en_2013_dane/a_964_por_ciento_cayo_tasa_de_desempleo_de_colombia_en_2013_dane.asp.

⁷ www.doingbusiness.org/rankings.

⁸ World Bank, *Doing Business 2013: Smarter Regulations for Small and Medium-Size Enterprises* www.doingbusiness.org/~media/GIAWB/Doing%20Business/Documents/Annual-Reports/English/DB13-full-report.pdf. at 26.

⁹ Trading Economics, *Colombia GDP Growth Rate 2001-2014*, www.tradingeconomics.com/colombia/gdp-growth.

and solidity. In fact, the last report of *Doing Business* (2013) presents Colombia as one of the countries with the most conspicuous improvement in institutional protection of investments.¹⁰ In addition, next to the long tradition of democratically elected governments (compared favourably within the region) other indicators point in the same direction, including corruption. According to the corruption perceptions index of Transparency International, in 2013 Colombia was only out-performed by four South American countries (Chile, Uruguay, Peru and Brazil) and scored better than Mexico in Latin America.¹¹

When juxtaposed with other African countries, the economy of South Africa is a behemoth. The country stands out as having the most sophisticated economy on the African continent. Mindful of the fact of having one of the biggest economies in Africa alongside a genuine willingness to represent Africa at the international level the country has been invited on many occasions to be the face and voice of the continent at important global platforms of decision-making. Its inclusion in the G20 and the BRICS (Brazil, Russia, India, China and South Africa) is corroborative of the fact that its position as the gateway to Africa is well acknowledged beyond Africa.

But the country is saddled with many problems that are concealed by the ambitions of its leaders for it to punch well above its weight at the global level.¹² While it is worthwhile to celebrate the successes chronicled in securing political freedom in the country, there is no question that economic freedom or the freedom from want remains a distant aspiration for many people in the country. To be fair, the ruling African National Congress (ANC) Government has made efforts in driving the social agenda but this effort is hamstrung by many problems. The first major problem is the very high level of corruption that is manifest in the execution of public tenders.¹³ This high level of corruption is aligned to the problem of incompetent leadership ascribed to the ruling ANC.¹⁴ The second major problem is unemployment¹⁵ (with official figures pegged at 25 per cent)¹⁶ which in turn is linked to the increased levels of insecurity in the country due to high levels of violent crimes.¹⁷ Finally, the issue of poverty looms large.¹⁸ Almost 50 per cent of black South Africans live below the poverty line (compared to 2 per cent of white South Africans who are in the same state).¹⁹ Poverty manifests

¹⁰ www.doingbusiness.org/rankings.

¹¹ Transparency International <http://cpi.transparency.org/cpi2013/results/>.

¹² Dianna Games, 'Building the BRICS of a New Global System: Cape to Cairo - South Africa's Search for Strategic Depth within BRICS', in Francis A. Kornegay and Narnia Bohler-Muller (eds.), *Laying the BRICS of a New Global Order: From Yekaterinburg 2009 to eThekweni 2013*, (Pretoria: Africa Institute of South Africa AISA, 2013), pp. 383-98, at 383.

¹³ Mamphele Ramphele, *Conversations with My Sons and Daughters*, (Johannesburg: Penguin, 2012), at 3, 9 and 73.

¹⁴ Prince Mashele and Mzukisi Qobo, *The Fall of the ANC: What Next?* (Johannesburg: Picador Africa, 2014).

¹⁵ Economist Intelligence Unit (EIU), *Country Report: South Africa* (EIU, December 2013).

¹⁶ Fiona Forde, 'Rainbow Nation Wants Its Pot of Gold', *The World Today*, February 2013, 69(1): 18.

¹⁷ Government of South Africa (GSA), *South African Defense Review 2013*, para. 41; Thomas Mandrup, *National Security, Crime and South African National Security Institutions*, (Institute for Strategy, Royal Danish Defense College, June 2010), at 12.

¹⁸ GSA, *Building a better world: The Diplomacy of Ubuntu* (White paper on South Africa's Foreign Policy, 13 May 2011), at 12.

¹⁹ European Commission, 'Cooperation between the EU and South Africa: Joint Country Strategy Paper' 10 (2007-2013).

itself in gross social divides between the rich and poor that have widened.²⁰ This poses a serious threat in terms of maintaining the social compact in the country. As Sharma notes, with a Gini coefficient being one of the worst in the world it is hard to explain the relative calm in South Africa.²¹ The myriad of problems being faced often lead to social explosion of anger as occurred in 2008 when many foreigners (and citizens considered sympathetic to foreigners) that were accused of depriving South Africans of jobs were seriously attacked leading to over 60 casualties.²² All these challenges have led some to assert that South Africa is a stalled state.²³

Both countries share many challenges in terms of gross inequalities. In South Africa for one the challenge of poor service delivery is huge. The socio-economic threats are compounded by or actually compound critical security problems. Such security matters in Colombia especially in relation to the Revolutionary Armed Forces of Colombia (FARC) are being negotiated. In South Africa violent crime is pervasive and having serious effects in terms of the image of the country and its ability to ensure social cohesion. This specific aspect of the ability of the states to address some of these problems will now be the focus of attention. The high inequality in both of these relatively successful emerging countries (South Africa showing a Gini coefficient of 63.1% in 2009 and Colombia 55.9% in 2010)²⁴ is serious. The relative success fortifies demands for an improvement of the quality of life and enjoyment of rights by every citizen. This is becoming a central issue in the public policies of both countries, including in fields with an international dimension as international trade policies.

3. ADEQUACY OF OFFICIAL RESPONSE: EXTANT DEVELOPMENT PLANS

Colombian political authorities have resolved to pursue an ambitious social agenda as included in the Constitution,²⁵ which provides that social expenditures have priority in the national budget except in cases of war or for national security reasons, and that the investment budget of this item cannot be lower than the social budget of the previous year, as a percentage of the total budget. In addition, the general welfare and the improvement of the quality-of-life of the population are the social goals of the state. This means, that the political authorities have to address unsatisfied needs in health, education, environmental protection and drinking water, and therefore social expenditure has priority in the development plans and public budgets.

In practice, the last decades have shown quite some continuity in the governmental policies of the state with Colombia identified by the IMF as one of the best performing countries in Latin America in terms of economic management. In the 1980s the performance of the Colombian economy served to justify the country's inclusion in the Baker Plan proposed

²⁰ Cornel Verwey & Michael Quayle, 'Whiteness, racism and Afrikaner identity in post-Apartheid South Africa', *African Affairs*, 2012, 111(445): 551-75.

²¹ Ruchir Sharma, *Breakout Nations 173* (Norton, New York, 2013).

²² Loren B. Landau, 'Loving the alien? Citizenship, law and the future in South Africa's democratic society', *African Affairs*, 2010, 109(435):213-30, at 214.

²³ Greg Mills & Jeffrey Herbst, *Africa's Third Liberation*, (Johannesburg: Penguin, 2012), at 59.

²⁴ <http://data.worldbank.org/indicator/SI.POV.GINI>.

²⁵ English translation: http://confinder.richmond.edu/admin/docs/colombia_const2.pdf.

goals.²⁶ The proceeding governments have followed more or less comparable economic policies close to the IMF and World Bank recommendations, deepening the programs of ‘modernization of the economy’ and the correction of structural problems by means of trade liberalisation, privatisation of the public utilities, health, and transport and more flexibility of the labour market among other reforms. Those reforms have served to maintain the support of the IMF and the World Bank and the access to the international financial markets. However, since the end of the 1990s, the economic and political situation worsened and Colombia initiated a series of precautionary structural programs with the IMF until 2006, when it reached the macroeconomic goals imposed by the IMF.

The present government (of President Santos since 2010) uses as its main slogan ‘prosperity for all’ highlighting the relevance of public investments in strategic economic sectors and social areas (mainly related to the victims of the armed conflict), but it also highlights the relevance of the participation of the private sector and civil society.²⁷ It should be noted that the Constitutional Court is deeply concerned with the accomplishment of the constitutional duties of the State regarding social expenditure of the national budgets.

Recognising the difficult problems posed by the threats facing South Africa, President Zuma instructed the Planning Commission to develop a long term development plan that addresses some of the concerns. The plan, which was released in 2011, expresses clear aspirations in terms of curbing unemployment. Important efforts have been made in terms of levelling the economic inequalities inherited from the apartheid era by introducing targeted programs such as the Black Economic Empowerment (BEE). But the problem with the BEE (now couched in broad based terms) is that it has actually created a very rich class of black South Africans thereby aggravating social tensions not only between racial groups but within racial groups.²⁸ In the view of ANC stalwarts much has been achieved under majority rule. They point to the fact that South Africa has chronicled success in terms of personal income growth.²⁹

What is more, there have also been efforts to introduce targeted transfers and social programs for the despondent. The government correctly contends that over the past decade spending on social services has amounted to an average of 63 per cent of the budget.³⁰ It avers that it has engaged assiduously to make sure the social and economic rights included in s.27 of the 1996 Constitution are fulfilled. Important safety net programs which ANC leaders point at include Older Persons Grant, Disability Grant and Child Support Grant. All these grants are managed under the auspices of the South African Social Security Agency. The government also notes that since the birth of democratic South Africa (in 1994) over a million citizens have been

²⁶ Luis Jorge Garay Salamanca, *Colombia y la Crisis de la Deuda*, Cinep Facultad de Ciencias Económicas Universidad nacional de Colombia Bogotá 127-28 (1991).

²⁷ www.dnp.gov.co/LinkClick.aspx?fileticket=m79BtGQ2eag%3d&tabid=1238.

²⁸ Aubrey Matshiqi, ‘Domestic challenges and the African agenda: Is South Africa just another BRIC in the wall?’ in Francis A. Kornegay & Narnia Bohler-Muller (eds.), *Laying the BRICS of a New Global Order: From Yekaterinburg 2009 to eThekweni 2013*, (Pretoria: Africa Institute of South Africa AISA, 2013), pp 418-34, at 429.

²⁹ Jacob Zuma, Address by President Jacob Zuma at the Broad-Based Black Economic Empowerment Summit marking 10 years of BBBEE, Gallagher Estate, Midrand, 3 October 2013.

³⁰ European Commission, *supra* note 19, 12.

provided with basic potable water supply ensuring that over 85 per cent of households can now boast of clean water. ANC leaders also assert that the government has sought to ensure the constitutionally protected right to decent housing by building over 1.5 million houses providing shelter to over 6 million people in the country. Respecting health, despite the great challenges faced in terms of the AIDS pandemic, improvements in health services have been registered with 90 per cent of children guaranteed access to immunisation schemes meant to prevent major infectious ailments.³¹ But some of the programs including access to social security and public housing have been compromised by irregularities in terms of abuse as some individuals have sought to game the system receiving more than their fair share.

In its pursuit of social justice goals, and from a more institutional perspective, the government can also point to entities such as equality courts that have been created following the Promotion of Equality and Prevention of Unfair Discrimination Act adopted in 2000 to address some of the gross instances of discrimination that were accommodated under apartheid. The Act transforms Magistrates and High Courts into Equality Courts when they are seized with matters pertaining to discrimination. The challenge in terms of these courts has been the fact that many citizens are simply unaware of their existence and also that the courts are not amply and adequately staffed to discharge their onerous tasks.³²

In Colombia, as in South Africa, governments are making efforts to respond substantively and institutionally to the challenges and threats faced. These steps taken are meant to foster growth and to channel economic gains to specific programs and schemes to respond to the socio-economic needs of the population. Some of these efforts cannot be delinked from international engagements entered into by the governments. International baseline commitments such as the Millennium Development Goals (MDGs) are regarded as vital by both governments. Realising some of the socially-oriented objectives in the MDGs, as well as the goals included in national constitutions, can be rendered difficult by other international treaties that these governments ratify. The reader is now escorted to the debate on the manner in which such international norms are received in both constitutional systems. Emphasis is also placed on the gatekeeping role of the constitutional courts to ensure that provisions contained in some international norms are in line with constitutional demands.

4. LEGAL INSTITUTIONAL DESIGN

Having examined the broader contextual issues, it is important to now critically examine the rule of law dimensions of the article with specific emphasis on the manner in which international norms are integrated into national legislation in both countries. Of great importance in this respect is the role that the constitutional courts can play in both jurisdictions to ensure that the treaty norms as incorporated into national law are fully consistent and compliant with the constitutions.

³¹ *Ibid.*, at 12.

³² Justin de Jager, 'Addressing xenophobia in the Equality Courts of South Africa', *Refuge*, 2012, 28(2): 107-16, at 112-3.

4.1. How Are Treaties Incorporated into Law?

The Colombian Constitution includes a series of principles that guide the conduct of international relations, such as the respect of national sovereignty and self-determination. It supports and accommodates the internationalisation of political, economic, social and ecological relations on the basis of fairness, reciprocity, and the national interest. It also backs the promotion of regional integration, particularly with Latin America and the Caribbean, and the creation of international organisations seeking a Latin American Community of Nations. These are all the main constitutional guidelines for international relations as provided for under the Colombian Constitution. The Constitution prevails over any other national legislation. International treaties ratified by Congress (such as trade agreements) are incorporated in the national legal order by means of an ordinary law. These national incorporating norms in themselves are subject to Constitutional rules.

Various national authorities participate in the area of international relations. Congress approves international treaties signed by the government, and may transfer specific competences to International Organizations (IO) to consolidate economic integration. The President is the head of international relations and he/she can negotiate treaties that should afterwards be submitted to Congress.

The Constitutional Court of Colombia (CCC) has the competence to effect an automatic judicial review of international treaties and the laws approving them. When a treaty is struck down, it cannot be ratified, but in the case of a multilateral treaty, the provisions that were not struck down may be partially ratified. The President also has the possibility to give temporary effect to provisional treaties of an economic or commercial nature, but if the Congress or the Court rejects its application they have to be suspended.

Under the Constitution of SA, treaties are integrated into national legislation through incorporating Acts of Parliament. This means that the system is essentially dualist for treaty norms or conventions and monist in as much as customary international law is concerned.³³ In contrast with the apartheid system, whereby judges tended to be antagonistic to international law especially international human rights law, judges in the post-apartheid South Africa have fully embraced international law. They have striven to interpret the domestic norms to the extent that they align with international law. Article 233 of the 1996 Constitution is very useful in this respect because it states that legislation has to be interpreted in such a manner that is consistent with international law.³⁴ Deputy Chief Justice Moseneke of the Constitutional Court of South Africa (hereafter CCSA) makes a powerful case as to why the courts are keen to adhere to international law. He states that:

our constitutional and consequently judicial predilection for international law norms is rooted in our stubborn determination to turn our backs on an unjust and insular past and to embrace globalized standards which are likely to represent what is just and

³³ Justice Dikgang Moseneke, 'The role of comparative and public international law in domestic legal systems: A South African Perspective', *Advocate*, 2010, 23(3): 63-6, at 64.

³⁴ John Dugard, 'International Law and the South African Constitution', *European Journal of International Law*, 1997, 1: 77-92, at 79.

equitable. We recognise that international norms, whilst adaptable, are more likely to serve as a valuable and more timeless dam wall against the narrow, inward looking patriotism, which sometimes renders the rule of law vulnerable to domestic populism.³⁵

In terms of the functional attributes of the various branches of government in treaty making, while the executive negotiates and signs treaties, Parliament (the National Assembly and Council of the Provinces) is expected to ratify the treaties before they become law in the country. This is the case for FTAs that are entered into by South Africa such as the Trade Development and Cooperation Agreement (hereinafter the TDCA, incorporating an FTA) that was signed between South Africa and the European Union (EU) in 1999 and came into force in January 2000.

4.2. Is There Any Special Status for Human Rights?

In Colombia, one of the most debated institutional developments concerning fundamental rights has precisely been the Constitution of 1991 which includes 101 articles on constitutional rights and which ‘defin[es] a highly ambitious social agenda that has helped brand the new Colombian State a social state of rights [...]’. The former Constitution of 1886 only included 36 articles referring mainly to civil and political rights.³⁶ But the CCC in its case law has gone further and ruled that the fundamental rights catalogue is open because the Constitution makes clear that international human rights treaties ratified by Congress prevail over national rules and the Constitution should be interpreted following the guidelines of those international treaties. In addition, rights and guarantees listed in the constitution and in international treaties are not the only ones.

As a consequence, international agreements ratified by the Colombian Congress recognising or protecting human rights have the highest hierarchy in the national legal order. The constitutional case law has further developed the doctrine of the ‘Constitutional Bloc’ creating a sort of unity between the constitutional rules that protect fundamental rights and other regulations protecting human rights that may also have the same hierarchy as the Constitution. Constitutional case law distinguishes between, on the one hand, the constitutional bloc *stricto sensu*, formed by some international treaties protecting human rights and the International Humanitarian Law; and, on the other hand, the constitutional bloc *lato sensu*, which does not have constitutional depth but is rather a parameter to evaluate the constitutionality of legal norms. This is the case of laws of special hierarchy as statutory and organic laws (enacted by qualified majority as a function of the relevance of the issue as the regulation of fundamental rights or the competences of public authorities). It is also the case for some international agreements on human rights that are not part of the constitutional bloc *stricto sensu*.³⁷ The CCC has included in the constitutional bloc *strictu sensu*, the following treaties ratified by Colombia: the Universal Declaration of Human Rights (UDHR), International Covenant on

³⁵ Moseneke, *supra* note 33, at 64.

³⁶ F. Saez, ‘The Judiciary’, in: M. Giugale, O. Lafourcade & C. Luff (eds.), *Colombia: The Economic Foundation of Peace*, 900 (Washington DC: World Bank, 2003).

³⁷ www.icesi.edu.co/contenido/pdfs/C1C-marango-bloque.pdf. Cf: Olaya M. Arango, *El Bloque de Constitucionalidad en la Jurisprudencia de la Corte Constitucional Colombiana*, in: Precedente 84, 79-102 (2004).

Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), Inter-American Convention on Human Rights, Protocol of San Salvador, ILO Convention 87, ILO Convention 98, ILO Convention 138, and ILO Convention 182 (cf C750/08). Some Decisions of the Andean Community of Nations (CAN) have been exceptionally included in the constitutional bloc when they have explicitly recognised human rights.³⁸

The 1996 Constitution of South Africa includes a special section on human rights and this is recognised as the Bill of Rights. It occupies a very special place in the corpus of norms in the new South Africa. As Peté and Du Plessis note, '[I]ying at the heart of South Africa's new constitutional order is a deep commitment to human rights.'³⁹ This attention and commitment to the pursuit of human rights was actually one of the main aspirations that President Nelson Mandela had as a key policy plank in the new SA that emerged in 1994.⁴⁰ Even as early as 1990 before he took office as president, Mandela would declare before a joint session of the United States Congress that:

We must also make the point very firmly that the political settlement, and democracy itself, cannot survive unless the material needs of the people, the bread and butter issues, are addressed as part of the process of change and as a matter of urgency. It should never be that the anger of the poor should be the finger of accusation pointed at all of us because we failed to respond to the cries of the people for food, for shelter, for the dignity of the individual.⁴¹

Indeed in South Africa's international relations, human rights are non-negotiable.⁴² The Constitution accords a very special place in terms of human rights and makes clear that national laws have to be interpreted to the extent that they are consistent with the Bill of Rights of the Constitution. In the same light, international treaties that relate to human rights also have a special status. South Africa has been very active in embracing many progressive human rights treaties. It is in this spirit that it was the first African country to ratify the Rome Statute of the International Criminal Court.⁴³

On what basis can treaties be deemed unconstitutional in South Africa? The Constitution of 1996 places an important emphasis on human rights. Justices are to interpret treaties and

³⁸ For example, CAN Decision 351/93 (C1490/00) on copyright, CAN Decision 391/96 on Common Regime on Access to Genetic Resources and understandings on biodiversity and traditional knowledge (Law 165/94, C519/94) whose constitutional bases are: PC (330, 79 (2), 81, 65 and 71) (Cf: C750-1/08 and L. Lizarazo Rodríguez, Ph. De Lombaerde, J.F. Ortiz, A. Parra and A. Rettberg, *Constitutional Aspects of FTAs: a Colombian Perspective*, Eur. L.J. (forthcoming, 2014).

³⁹ Stephen Peté and Max du Plessis, 'Behind the mask of the Rainbow nation: The limits of law in post-apartheid South Africa', in Catherine Jenkins & Max du Plessis (eds.) *Law, Nation-Building and Transformation: The South African Experience in Perspective*, (Antwerp: Intersentia, 2014) 169-98, at 176.

⁴⁰ Nelson Mandela, 'South Africa's future foreign policy', *Foreign Affairs*, 1992-93, 72(5): 86-97, at 87.

⁴¹ Nelson Mandela, Address to the Joint Session of the Houses of Congress of the USA, Tuesday, 26 June 1990.

⁴² Namia Bohler-Muller, 'South Africa's Pretoria Agenda: The Role of State Sovereignty, Non-intervention and Human Rights within the Context of Emerging Power Multilateralism', in Francis A. Komegay & Namia Bohler-Muller (eds.), *Laying the BRICS of a New Global Order: From Yekaterinburg 2009 to eThekweni 2013*, (Pretoria: Africa Institute of South Africa AISA, 2013), pp 365-382, at 366.

⁴³ Max du Plessis, 'Recent cases and developments: South Africa and the International Criminal Court', *South African Journal of Criminal Justice*, 2009, 22: 441-46, at 441. Cf: Yolanda Spies, 'South Africa's foreign policy: Highlights during 2011', *South African Yearbook of International Law*, 2011, 36: pp. 326-45, at 330.

laws to the extent of their consistency with the Bill of Rights. If such laws and conventions are not consistent with the Bill of Rights, the treaties and laws are appropriately quashed. This means that if the executive signs treaties, such as FTAs, that are deemed to violate social and economic rights that are protected under the Constitution of 1996, the Constitutional Court of South Africa (CCSA) can be seized of the matter by either legal or natural persons or both. It is very important to highlight that the dualist nature of South Africa's legal system of incorporation of international treaties has an important implication in terms of making recourse to the courts in an event of a violation. This implies that in case of a violation the courts can be seized to invalidate the law or national legislation adopted to incorporate the treaty or FTA into national law.

It is clear from the foregoing discussion that human rights have a special status within the constitutions of both countries. What stands out for Colombia is that specific international and regional human rights standards are explicitly mentioned in the constitutional bloc. While this is not as explicit under the South African constitution it is revealed below that the justices of the CCSA have taken a very progressive approach in giving life to the provisions on fundamental rights in the Bill of Rights.

4.3. Remedies: On What Legal Basis Can Cases Be Brought?

The Colombian Constitution created so-called constitutional actions to protect human rights. The Action of Protection of Fundamental Rights (APFR) is the most relevant constitutional instrument to protect fundamental rights since 1991. It is a somewhat concrete judicial review with strong influence from Spain and Germany,⁴⁴ but also with elements from concrete judicial review practice in the United States.⁴⁵ The specificity of this action is that any person can petition any judge, at any moment, through a preferential and summary procedure and without the intervention of a lawyer for the immediate protection of her/his fundamental rights. It is a subsidiary action because it can only be used when the plaintiff does not have any other legal recourse to protect his/her rights, or when he/she uses this action as a transitory mechanism to avoid irremediable damage. The decision can be appealed and may then be revised by the CCC. This represents more than 70 per cent of the total number of its rulings. Although it is a concrete judicial review, its impact can be larger than that of abstract judicial review, taking into account the importance that the CCC accords constitutional rights.

The Popular Action is another constitutional action with high impact in the protection of human rights, created to protect collective rights such as the homeland, public space, safety and health, administrative morality, the environment and free economic competition. This action has been used to reject the conclusion of the negotiations of some international treaties, such as

⁴⁴ Lopez Medina D.E., *Teoría Impura del Derecho: la transformación de la cultura jurídica latinoamericana*, 447 (Universidad de los Andes, Universidad Nacional de Colombia and Legis, Bogotá, 2004); Navia P. and Rios J., 'The Constitutional Adjudication mosaic in Latin America', *Comparative Political Studies*, 2005, 38(2): 189-217, at 212-3; Liliana Lizarazo Rodriguez, 'Constitutional Adjudication in Colombia: Avant-garde or Case Law Transplant? A Literature Review', *Revista Estudios Socio-Jurídicos*, 2011, 13(1): 145-82.

⁴⁵ García Villegas M. & Rodríguez C., 'La acción de Tutela', in De Sousa & García Villegas (eds.) *Caleidoscopio de las Justicias en Colombia* (Conciencias, Ediciones Uniandes, Universidad de Coimbra, Instituto Colombiano de Antropología e Historia, Universidad Nacional de Colombia and Siglo del Hombre Editores, Tomo I, 2001) 423-53, at 423. See also, Lizarazo Rodriguez, *supra* note 44.

preferential trade agreements and those with high environmental impact.

Class actions were also created under the Constitution of 1991. They are similar to popular actions but they address violations caused to a large number of individuals, opening the possibility for the victims to present individual actions. So far, this action has not been used to target FTAs, but in theory it could be used against the implementation of FTAs that may run at cross-purposes with fundamental rights.

Courts in South Africa have developed specific tools to direct the executive to specifically perform or desist from performing acts as directed by the courts. The kinds of remedies that can be envisaged by complainants in such cases that pertain to violation of socio-economic rights as protected under the Constitution are systemic due to structural implications of the violations. Systemic remedies are different from individual remedies. Individual remedies are necessitated where there is only a single victim of a right. Such individual remedies include damages, declarations and interdicts. Under South African Constitutional Law there are three kinds of systemic remedies: declarations, interdicts and supervisory orders.⁴⁶

Declarations *simpliciter* are regarded as of weak legal consequence as they engender no direct legal effects. As Bishop notes their usefulness comes to light especially ‘when confronting systemic violations of constitutional rights because the steps that need to be taken to address the violations may be complex, and therefore avoid precise formulation in a court order.’⁴⁷ In a sense, the orders are kept vague and deliberately ambiguous. Basically, these writs state that there is a violation of a right, but they allow the other branches of government with the ample latitude to respond duly as they judge fit in meeting the goal of the constitution that is being pursued. Declaratory relief was partly used in both orders that resulted from the *Grootboom* and *TAC* cases further discussed subsequently; it was used to delimit and circumscribe the boundaries of the government’s obligations in terms of fulfilling the right to housing and healthcare. The benefit of the declaration is that the court can use it to signal a weakness without getting bogged down in the administration and management of state affairs. The declaration also allows the court to avert using threats of contempt of court against the government. In so doing it accords the administration a cardinal wiggle room for response. But the downside is that such a declaration can be rather weak in terms of the desired effects that can be secured.⁴⁸

Interdicts are also orders directing public officials to correct or address a perceived injustice, which may emanate from a specific complaint but whereby the order aims to correct the perceived injustice in a systemic manner.⁴⁹ In terms of their legal consequences, such orders can be situated in the middle between declarations and supervisory orders. But the difference between them and declaratory relief is that they can be enforceable by an order of contempt of court. However, the onus is always on the complainant to revert to the court to

⁴⁶ Michael Bishop, *Constitutional Law of South Africa: Remedies* (2nd ed., Juta, Cape Town, 2008), 9-176.

⁴⁷ *Ibid.*, at 9-176.

⁴⁸ *Ibid.*, at 9-177.

⁴⁹ *Ibid.*, at 9-178.

ensure enforcement.⁵⁰

Supervisory orders or interdicts are varied but they share the trait that performance in the execution of the remedy is clearly under the auspices of the court. They all have the goal of ensuring that the state complies with the order. The most common form of such an order is an interdict that is issued by the court to the government. Appended to the order is an obligation for regular reporting on the state's compliance efforts with the said order. A variant of this was used in *51 Olivia Road* elucidated below to encourage the realisation of a negotiated agreement between the litigants. This agreement was then used as part of the court's final order. This is essentially known as the bargaining model of a supervisory interdict. In the *TAC Case*, the government introduced the argument that the CCSA could not use a supervisory order to encroach in the realm of the legislature and executive in terms of formulating and implementing policies. The state argued that it was not the remit of the courts to instruct the government as to how national policy ought to be conducted. The government submitted that declaratory relief as opposed to a supervisory interdict (issued by the court) had to be the route for the court to take. The CCSA disagreed. It upheld the High Court's power to grant such an interdict but added that it was not appropriate to grant such an interdict in the specific case. Therefore, courts can only grant supervisory interdicts as indicated in *TAC* when it is necessary to ensure compliance.⁵¹

4.4. What Role Do the Constitutional Courts Play in Treaty Interpretation?

In Colombia, socio-economic rights are part of the constitutional bloc and they have been considered as the corner stone of the legal reasoning of the CCC.⁵² Moreover, in accordance with the general understandings at the international level, the Court admitted that those rights have an 'essential, non-negotiable nucleus that may not be restricted' and another part which is progressive and has to be defined by law.⁵³ This means that socio-economic rights become fundamental when their violation or disregard could affect the dignity of a person and should be fulfilled immediately, even with the intermediation of the judiciary. Therefore, the main issue concerns the question whether the State should guarantee them in an immediate way (promptly), or whether they are rather to be regarded as goals of the State and their obligations are only subject to progressive compliance. The constitutional case law has systematically highlighted their character of fundamental rights and has also followed the parameters of international law, which identified which duties related to socio-economic rights and are of immediate enforcement and which ones are of progressive compliance, but this is not entirely clear.

Despite that perceived ambiguity their protection is ensured by their inclusion as constitutional rights whose enforcement has to be regulated by law. In some cases, the judiciary has been trying to give a more prominent role to its case law related to the scope of those

⁵⁰ *Ibid.*, at 9-179.

⁵¹ *Ibid.*, at 9-183.

⁵² M.J. Cepeda Espinosa, 'Judicial activism in a violent context: The origin, role, and impact of the Colombian Constitutional Court', *Washington University Global Studies Law Review*, 2004, 3 (special Issue): 617-42, at 617.

⁵³ *Ibid.*

constitutional rights. In fact, constitutional interpretation extended the use of the Action for the Protection of Fundamental Rights (APFR), foreseen only to protect civil and political rights listed in article 86 of the Constitution, to socio-economic rights. The Court established three circumstances in which APFR may be used for this category of rights:

(i) when they become fundamental “by connection”; (ii) when they are fundamental by nature, such as the fundamental rights of children, adequate nutrition and elementary education; and (iii) the right to the “vital minimum”⁵⁴ which is the “definition of the absolute minimum needed, without which the right would be unrecognizable or meaningless”.⁵⁵ The ‘vital minimum’ is considered as the corollary of human dignity, adopted by the Court to avoid human situations in extreme poverty.⁵⁶

By contrast, economic authorities consider socio-economic rights as a goal of the state and not as a fundamental right. For them, the obligation of the state can be limited, because it is not feasible to provide all public goods and services in an unlimited way even if the judiciary orders it. The availability of public resources to provide these goods is a necessary pre-condition, but also other requirements are crucial to avoid the collapse of the whole system; for example, paying certain taxes or fees, signing a contract, or fulfilling certain administrative procedures. They do not agree with the fact that the Court has taken those decisions without an explicit constitutional competence and by creating new budget allocations.⁵⁷ Economic regulators see this kind of judicial activism as a contribution to the uncontrolled expansion of public expenditure, without considering the long-term macroeconomic effects. Moreover, such orders by the Court may produce distortionary effects for social policies oriented towards the poorest population.⁵⁸

Despite these remarks, the CCC continues to rule that the cost of protecting a right is not a convincing reason to ignore constitutional rules that order the protection of all constitutional rights, particularly when human dignity is threatened.⁵⁹ This way, the Court is supposed to contribute to building the rule of law through constitutional interpretation by becoming the ‘equity jurisdiction’ and by granting more power to the weak. In short, Colombian constitutional case law seems to follow the international guidelines of the ICESCR, in spite of internal criticisms. It is presented even as an example of justiciability of socio-economic rights. The state recognises that the ICESCR has a regulatory character in the country by direct

⁵⁴ *Ibid.*, at 618.

⁵⁵ International Commission of Jurists, Courts and the Legal Enforcement of Economic, Social and Cultural Rights, *Comparative Experiences of Justiciability*, (Geneva: International Commission of Jurists, 2008), at 39. For a synthesis of the case law evolution on socio-economic rights: Lopez Medina, ‘Sistema de Salud y derecho a la salud: Historia de su interrelación en la jurisprudencia constitucional’, (2008), http://dejusticia.org/interna.php?id_tipo_publicacion=5&id_publicacion=392, at 21-3.

⁵⁶ Cepeda Espinoza *supra* note 52 at 698. The German Constitutional Court has strongly influenced this concept, as well as in other countries such as Switzerland, Brazil, Argentina and Spain. In the case of Argentina see: International Commission of Jurists, *supra* note 55.

⁵⁷ Hugo Palacios Mejía, ‘El Control Constitucional en el trópico Precedente 2001’, *Anuario jurídico Facultad de Derecho y Humanidades Universidad ICESI Cali*, 6, 3-19 (2001).

⁵⁸ Some of the critics refer to whether the Court is applying the P.C. or whether it is using arbitrary (or excessively discretionary) competences (Clara López Obregon, La Corte Constitucional: Usurpadora o garantista, *Precedente. Revista Jurídica*, 2001, 21-34).

⁵⁹ Cepeda Espinoza, *supra* note 52.

regulation of the Constitution and it is part of the Constitutional bloc.

In a speech at the University of Cape Town in 1990, the prominent Oxford legal scholar Tony Honoré (amongst others) proposed the creation of an entirely novel supreme court for the new South Africa. The proposal culminated into what is now the CCSA.⁶⁰ The CCSA is at the apex of the judicial architecture of the country. This architecture includes the Supreme Court of Appeal, High Courts and Magistrates Courts. Previously, the CCSA had the mandate to rule on the constitutionality of laws. Now it has general jurisdiction including constitutional review.⁶¹ As elucidated with great felicity by Justice Edwin Cameron: ‘The Constitution gives the Constitutional Court power to determine whether legislation accords with the constitution, and to declare it invalid to the extent of its inconsistency.’⁶² Since its creation, it has declared 60 legislative provisions invalid.⁶³

Under apartheid, courts seldom provided a teleological interpretation of the Constitution and legislation. They did regard their mandate as making law or using the law in effecting social change. Judges were reminded constantly that Parliament was Sovereign and Parliament alone made law. So judges adopted a conservative literary approach to interpreting the Constitution and laws. At the time, they regarded their brief as declaring, not making the law. They simply avoided commenting on the unjust nature of apartheid laws. When apartheid ended in 1994, the judiciary was almost exclusively white and male.⁶⁴

Following the constitutional reforms of 1996, a new entity was introduced in the form of a CCSA that had appellate jurisdiction on constitutional matters. Composed of eleven justices, they have the task of interpreting contentious issues when brought before the court. This means that the court’s brief is mainly reactionary to the cases brought before it.⁶⁵ It does not decide matters *sua sponte* and cannot be overtly proactive. However, from the numerous cases heard by the court (that is, its so-called dignity jurisprudence), it is clear that the majority of those who have served and still serve the Bench see their mandate as that of actively interpreting the Constitution in a way that lives up to the aspirations of making South Africa a more equal and dignified society. That is why the CCSA has consistently adopted positions that push the boundaries in terms of the demands that are made on the government to be more engaged and effective respecting service delivery especially for equitable access to housing, water, health and social security protections that are included in the South African Bill of Rights.

The CCSA’s positions on access to social justice are captured by the affirmation made

⁶⁰ Tony Honoré, ‘From constitution autoniniana to Constitutional Court, University of Cape Town’, 29 June 1990, 28 U. Oxford Legal Research Paper Series (September 2008).

⁶¹ Edwin Cameron, *Justice: A Personal Account* (Cape Town: Tafelberg, 2014).

⁶² Edwin Cameron, ‘Advocacy in the highest court: do’s and don’ts in London, Canberra and Johannesburg’, Speech at the World Bar Conference, London 2 (29 June 2012).

⁶³ Edwin Cameron, *supra* note 62.

⁶⁴ Murray Wesson & Gilbert Marcus, ‘The transformation of the judiciary’, in Catherine Jenkins and Max du Plessis (eds.) *Law, Nation-Building and Transformation: The South African Experience in Perspective* (Antwerp: Intersentia, 2014) 199-222, at 202.

⁶⁵ Theunis Roux, ‘Assessing the social transformation performance of the South African Constitutional Court: From Totalitarianism to the rule of law’, in Catherine Jenkins & Max du Plessis (eds.) *Law, Nation-Building and Transformation: The South African Experience in Perspective* (Antwerp: Intersentia, 2014), 223-40, at 226.

by former Chief Justice Arthur Chaskalson asserting that dignity is justiciable.⁶⁶ For his successor, Chief Justice Pius Langa, the verdicts in cases like social justice cases such as *Grootboom* and *TAC* among others, ‘indicate the delicate balance that the court has to strike in the realisation of the rights of those affected by legislation and government conduct. They indicate too how mindful the court is of the different roles that must be played by different arms of government in the realisation of those rights.’⁶⁷

Both constitutional courts have an important role in treaty interpretation. They are keen to push the boundaries of socio-economic rights. When seized with issues of inequality in the socio-economic field they have tended to regard themselves as the foremost guardians of the constitution: the trustees of the promises included in the Colombian Constitutional Bloc and in South Africa’s Bill of Rights. It is now important to zero in on the relationship between FTAs and fundamental rights focusing on some of the complementary and adverse linkages.

5. FTAs AND SOCIO-ECONOMIC RIGHTS

5.1. Merits and Demerits

Colombia, as well as most other South American countries, started a process of economic adjustment and trade liberalization in the early 1990s, known as the *apertura* (opening-up) program.⁶⁸ This new policy orientation implied initially a deepening of the Andean integration process, involvement in the Group of Three (G3) FTA (with Mexico and Venezuela), and later the negotiation of a series of FTAs. At the moment of writing, Colombia had 13 FTAs in force and 4 FTAs signed.

According to calculations of the government, the Colombia-US FTA would increase exports by more than 6% (DNP), and would stimulate new incoming FDI in infrastructure, industry, and rural development. Especially economic sectors relying importantly on unskilled labor were expected to benefit from the FTA; these include: textiles industry, auto parts industry, agriculture and tourism. This explains why certain (although a minority) sections of trade unions also supported the signing of the FTA.⁶⁹ In the case of the Colombia/Peru-EU FTA, net negative effects were expected for some of Colombia’s industries; in contrast with net positive growth effects for agriculture (sugar, vegetables and fruits) and energy, and an overall small but positive effect on GDP growth.⁷⁰ Colombian exports to the EU were expected to grow by

⁶⁶ Arthur Chaskalson, Speech delivered on the vision of the South African Constitution (March 2004).

⁶⁷ Pius Langa, Speech on Judging in a changing society: The South African context 9 (18 March 2004).

⁶⁸ A. Franco & Ph. De Lombaerde, *Las empresas multinacionales latinoamericanas. El caso de la inversión colombiana directa en Ecuador, México, Perú y Venezuela* (Tercer Mundo, Bogotá, 2000); P. Ochoa, *Export Promotion Policies and Instruments in Colombia*, 2(4/5) *Integration & Trade*, 133-45 (1998); Martincus C. Volpe, *Odyssey in International Markets. An Assessment of the Effectiveness of Export Promotion in Latin America and the Caribbean* (Washington DC: Inter-American Development Bank, 2010); Philippe De Lombaerde and Liliana Lizarazo Rodríguez, ‘Fine-Tuning Export Promotion Policies in Colombia’, in M. Dumont & G. Rayp (eds.) *International Business, Not as Usual* (Antwerpen: Garant, 2011).

⁶⁹ See Dinero, May 2, 2008.

⁷⁰ Vanzetti & Sam Laird, ‘Análisis de un Acuerdo Comercial Preferencial entre la UE y la Comunidad Andina’ (Corporación Andina de Fomento CAF, 2008) at www.mincit.gov.co/publicaciones.php?id=16997&dPrint=1. See also Joseph Francois et al. 2012. *Assessing the Economic Impact of the Trade Agreement Between the European Union and Signatory Countries of the Andean Community (Colombia and Peru)* (London: Centre for Economic Policy Research (CEPR), Brussels: European Commission – DG Trade, 2012) (updating the estimates in the

11 per cent (in the reference scenario). Given that unskilled wages were expected to increase more than skilled wages, small reductions in poverty and inequality were expected.⁷¹ Throughout the negotiation process of both agreements, several interest groups argued that various fundamental rights, ranging from the right to life, health, a safe environment, and work were potentially threatened by the FTAs.⁷²

Unlike countries such as Colombia, Chile and Mexico that have numerous FTAs with many countries around the world especially countries from the North, South Africa has tended to be more parochial on issues of trade liberalisation. First, this is a trend that can be regarded as sequel to the effects of the isolation that the insular apartheid governments imposed on themselves through disastrous economic policies and the sanctions that were imposed from outside as a means to counter the segregationist policies of the white minority governments. The sequestered mentality this left behind for most of the bureaucrats under apartheid spilled over when the regime collapsed. The second reason is that the ruling ANC party has been keen to maintain its alliances with the Communist Party and the Confederation of South African Trade Unions (COSATU). These are partners who have consistently exhibited a sterling aversion against greater liberalisation of free movement of factors of production especially the movement of persons. That being said South Africa has been a keen promoter of free trade in its own back yard through the Southern African Customs Union (SACU) and recently through the Southern African Development Community (SADC) FTA. It is keen to engage in such deals because South African companies are clearly the leading corporations in the Southern African region. As an exception to this trend, South Africa engaged FTA negotiations with the EU in 1997. These negotiations were concluded within a broader agreement: the TDCA. In addition to an FTA, the TDCA also includes a clear development cooperation dimension. The remaining paragraphs in this part now examine some of the merits and demerits of the TDCA between SA and the EU.

The TDCA between South Africa and the EU is an important agreement because it amply serves as a good case study in showing the merits and demerits of FTAs in terms of providing or securing social and economic rights. Regarding merits, the agreement includes a section on development and technical cooperation between the parties. It ensures and legally seals the cooperation that had been going on between the two parties. South Africa was and remains one of the highest recipients of EU aid money with the funds targeting poverty reduction and

previously commissioned Trade Sustainability Impact Assessment (SIA), performed by Development Solutions in 2009), and Ministerio de Comercio, Industria y Turismo (Min CIT), Acuerdo Comercial con la UE-Documento explicativo. (Bogotá: Presidencia de Colombia), 2010.

⁷¹ See also P. Giordano, M Méndez-Parra & M. Watanuki, 'Andean Countries at a Crossroads: Evaluating Pro-Poor Trade Integration Options', Working Paper, Computable General Equilibrium Models: Contributions for Latin American and the Caribbean Economic Policy, CEPAL/BID/CEPII, Santiago, Chile (2007).

⁷² L. Silva, 'El proceso de negociación del TLC entre Colombia y Estados Unidos', *Colombia Internacional*, 2007, 65: 112-33; H.J. Gomez & J. Gamboa, 'Colombia', in A. Capling & P. Low (eds.) *Governments, Non-State Actors and Trade Policy-Making: Negotiating Preferentially or Multilaterally?* (Cambridge University Press, 2010); C. Vargas, 'Protecting Whom? Human Rights and the case for the Colombian PTA in the Canadian Parliament and the US Legislature' (Thesis submitted for obtaining an M.A. in Political Science at the Department of Political Science, Universidad de los Andes, 2011); Lizarazo *et al.*, *supra* note 38.

diminution of inequality.⁷³ The EU is also South Africa's largest trading partner.⁷⁴ The TDCA highlights the importance of this aspect. It is useful to note that these are funds that have been used in the past to support government priorities such as access to better service delivery in the area of education, health, water, food and housing. Another important benefit for South Africa of the TDCA is that it exposed South African negotiators to high stakes negotiations thereby technically prepping them for more arduous global trade talks. Also it kindled the minds of members of civil society organisations (CSOs) on the links that exist between social and economic rights that could be compromised by engaging in such deals. The merit here has been that CSOs and public interest groups in South Africa have been very keen to ensure that the deals that the government is engaging in do not dilute social and economic rights. It must also be noted that between 2008 and 2013, EU investment in South Africa accounted for 48686 jobs compared to 2371 jobs provided by South African companies in the EU.⁷⁵ Many believe that the TDCA has been beneficial for both sides.⁷⁶ Andriamananjara and Hillberry estimate that two per cent of total growth over the next 18 years following the entry into force of the agreement will occur as a result of the FTA.⁷⁷ The agreement is anchored on the concept of asymmetry. In other words, the EU is to adhere to higher temporal and quantitative standards than South Africa. While the EU has been expected to liberalize 95 per cent of its market in ten years, the *quid pro quo* for South Africa has been pegged at 86 per cent within a 12 year period.⁷⁸

There are a number of downsides to the TDCA. Firstly, the TDCA entailed the reduction of tariffs and scaling down of public revenues secured through excise and customs duties paid on EU exports to South Africa. Such public resources are vital in providing for social amenities especially for despondent communities, townships and informal settlements. Secondly, during the talks, South Africa's trade unions especially in the agricultural sector were against the negotiations and demonstrated against any deal.⁷⁹ The protest was because of concerns that subsidised EU agricultural products would flood South Africa's market should the agreement be finalised. There were patent concerns that it would lead to serious job cuts in South Africa. Thirdly, implications of the agreement have been serious for countries of the Southern African Customs Union (SACU) that share a common external tariff with South Africa. As South Africa is part of SACU, an FTA between the EU and South Africa technically meant an EU-SACU

⁷³ EU Commission Memo, 'EU Strategic Partnership with South Africa' (Brussels 17 September 2012) at 2.

⁷⁴ José Manuel Durao Barosso, 'Statement following the EU-South Africa Summit', Speech 12/165, 2 (Brussels, 18 September 2012).

⁷⁵ Jacob Zuma, Remarks to the media by President Jacob Zuma at the conclusion of the 6th SA-European Union Summit, Pretoria (18 July 2013).

⁷⁶ Karel De Gucht, Business Relations between the EU and South Africa, Speech delivered at the EU-South Africa Business Forum 1 (17 September 2012).

⁷⁷ Soamiely Andriamananjara & Russell Hillberry, 'Regionalism, Trade and Growth: The Case of the EU-South Africa Free Trade Agreement', at 16 (US Int'l Trade Commission, Office of Economics Working Paper No 2001-07-A, July 2001).

⁷⁸ Kalle Laaksonen, 'Free Trade Agreement (TDCA) between South Africa and the European Union: An Exemplar for Economic Partnership Agreements', 112, Pallervo Economic Research Institute Working Papers Helsinki 19 (December 2008).

⁷⁹ See Margaret Lee, 'The European Union – South Africa Free Trade Agreement: In whose interest?', *Journal of Contemporary African Studies*, 2002, 20(1): 81-106, at 91-4; Margaret Lee, 'The US and EU – Undermining Regional Economic Integration in Africa', 3 News from the Nordic African Institute 6 (2004).

FTA, despite the possibilities of invoking safeguards. The whole idea of giving SACU countries development money as the EU promised (in helping them compensate for lost tariff revenues) defeated the purpose of the FTA in the first place. For Lee, South Africa ought to have been patient and not rush to sign the agreement when it did.⁸⁰ Finally, North-South type FTAs, such as the EU-South Africa TDCA, are bad for regional integration in the sense that they divert resources that would otherwise have been secured through common revenue pools such as SACU's.⁸¹ To the extent that regional integration schemes are developed to use trade liberalisation gains in responding to social and economic needs of countries, argument can be made that such North-South FTAs distort the realisation of regional (socio-economic) goals.

5.2. Have the Constitutional Courts Heard Matters Related to FTAs and Socio-economic Rights?

In the Colombian case, FTAs in general, and North-South FTAs in particular, have met with strong opposition, not only nationally but also internationally, mainly related to the lack of protection of human rights by the state and with the potential negative effects of the implementation of these treaties on human rights and welfare of specific groups.⁸² The most relevant FTA has been the Colombia-United States (COL-US) FTA because it sparked issues that were adjudicated by various tribunals (via popular actions seeking to obstruct the negotiations and via the automatic preventive judicial review of the statute approving the treaty by the Congress). But the COL-US FTA relevance is also derived from the fact that it is a 'precedent' for future constitutional assessments of FTAs. As at the time of writing, the Court has ruled on 12 FTAs, which were recently signed by Colombia.

In 2005, an administrative tribunal tried to forbid the President from signing the COL-US FTA because collective rights were threatened.⁸³ The ruling at first instance accepted the arguments of the popular action by holding that the FTA involved US investments that may violate constitutional collective rights such as food security, culture, the rights of producers and consumers, and free competition. The ruling also referred to some Intellectual Property Rights (IPR) issues which would violate the right to health and, concretely, the right to access to medicines which would in turn also affect public finances by increasing health costs and compensations to the agricultural sector.⁸⁴ The Council of State set aside this ruling⁸⁵ due to the lack of competence of the administrative jurisdiction to adjudicate on the negotiations of international treaties, which is constitutionally attributed to the President. It also argued that the constitutional control of treaties is a competence of the CCC after its approval by the Congress and before its ratification. In 2007, another popular action was presented against the negotiations of the COL-US FTA⁸⁶, which was also rejected with the same arguments.

⁸⁰ Lee, *The European Union – South Africa Free Trade Agreement*, *supra* note 79, at 101.

⁸¹ Lee, *The US and EU – Undermining Regional Economic Integration*, *supra* note 79, at 6.

⁸² This section is based on Lizarazo et al. (2014).

⁸³ Suarez & Rincon, 'El escrito de impugnación del TLC', in: Herreño et al (eds), *TLC es Constitucional?* (Bogotá: ILSA, 2007, 149).

⁸⁴ *Ibid*, at 151-2. Lizarazo et al., *supra* note 38.

⁸⁵ Council of State: Ruling 25000-23-27-000-2005- 01725-01 (AP) of 06/07/2006.

⁸⁶ Council of State: Ruling AP 25000-23-25-000-2003-00136-01 (AP) of 01.03.2007.

Rulings 750/08 and 751/08 of the CCC reviewed the constitutionality of this FTA. The CCC held that the FTA does not regulate fundamental rights but its enforcement may have an incidence on them. It affirmed that the constitutional bloc is a binding framework for FTAs.⁸⁷ The Court rejected arguments based on the potential economic losses caused by the signature of FTAs because the analysis of convenience is a competence of the political authorities. The most important point of this precedent is that the Court held that judicial review verdicts on FTAs are *ex ante* or *a priori* rulings because the effective constitutionality should be evaluated when they are enforced. This means that constitutional competences of national authorities to control the execution of the FTA remain unaltered as well as the use of constitutional actions to protect the Constitution and fundamental rights when they may result in violation of rights by the enforcement of the ratified FTAs. In other words, judicial review of the law incorporating FTAs into national law lacks a *res judicata* character because if the enforcement of FTAs violates fundamental rights, it can be challenged. This position is complicated at the international level because of the potential violation of the principle of *pacta sunt servanda*.⁸⁸

Some issues with high impact on human rights were considered as ‘transversal aspects of the agreement’, and they were submitted to the test of constitutionality in a global way and not by product, seeking to avoid an analysis of the economic convenience that is the remit of political authorities. After this constitutional test, the Court upheld FTA rules on agricultural trade, SPS measures, labour issues (which were highly sensitive issues in the negotiations with the US) and IPR.⁸⁹ With respect to the latter issue, the Court emphasised that it should be enforced and interpreted according to the constitutional bloc, particularly regarding the protection of the constitutional right to health. It highlighted the unaltered competence of the state to decide how it will comply with the duties of the FTAs, having as binding guideline that the right to health has a higher hierarchy than IPR, which means that the latter should be interpreted respecting the principle *pro homine*. In short, the Court considered FTAs as a valid instrument of national policy-making in international trade issues, compatible with the Social Legal State when it is applied and interpreted under the parameters of the constitutional bloc.

Some trends were identified in the rulings analysing other FTAs. The ones signed with other American nations (Chile, Northern Triangle of Central America, Canada and Mexico) are very similar to the one signed with the United States and the Court followed the precedent (C 750-1/08). With respect to the FTAs with Europe (COL-EFTA), although the Court also found some similarities with the ones signed in America, it highlighted that they closely follow the normative design of the WTO (C941/10). This ruling further clarified that the CCC lacks the competence to rule on the conformity of national legislation with binding international treaties or that it may determine the alignment or consistency of FTAs with other international treaties

⁸⁷ Ruling C864/06 (Agreement of Economic Complementation CAN-MERCOSUR) has been the main precedent of sentences analyzing FTAs.

⁸⁸ In ruling C 941/10 the Court clarified that both types of clauses (self-executing clauses and non-self-executing clauses) that FTAs being implemented may be reviewed by the judiciary because they are also submitted to the Constitutional Bloc.

⁸⁹ The Court held that the FTA respected TRIPS (Trade Related Aspects of Intellectual Property Rights) Agreement of the WTO, the IPR agreements concluded under the WIPO (World Intellectual Property Organization), the Decisions of the CAN and the Paris Convention for the protection of industrial property on trademarks (cf. C 750/08).

such as the WTO agreements or other FTAs. In addition, it held that the differences among interpretations on the equity and convenience of FTAs should be solved by the principle *in dubio pro legislatoris*, and therefore FTAs enjoy the presumption of constitutionality because the evaluation of their convenience and effectiveness should be performed by the political authorities. All the verdicts were emphatic in ruling that the law incorporating FTAs is an ordinary law subject to the constitutional bloc, which means that the intensity of the test of constitutionality of FTAs should respect discretionary competences of political authorities, but it may become stricter when fundamental rights are at stake (with special reference to the rights to health, work and of minorities). The test of constitutionality would ascertain whether FTAs respect the constitutional principles of equity, equality, reciprocity and national convenience in a comprehensive way, taking into account the trade framework and the development levels of the partners, seeking to protect the Constitution but also the *de facto* equilibrium reached by the parties.

The Court analysed in detail some human rights issues in the case of the COL-EFTA FTA and in the Complementary Agreement on Annual Reports on Human Rights and Free Trade between Colombia and Canada. First, it stated that the *previous consultation of ethnic minorities (indigenous and afro-descendent communities)*, whose constitutional basis is the ILO Convention 169, may turn out to be affected by the treaty. The Court held that this fundamental right may be protected by means of the APFR before the enactment of the law. After the enactment, the protection may be ensured by the use of judicial review. Rulings deciding the automatic control of constitutionality of FTAs should verify whether the FTA regulations may affect these minorities.⁹⁰ Secondly, the elimination of export subsidies for agricultural products was upheld by the Court because this measure is a way to reach equitable international trade among states of different levels of development while ensuring at the same time that the commitments before the WTO are respected (C178/95, C864/06). It ignored the arguments showing the inequitable situation of developing countries vis-à-vis subsidies for agricultural products provided by developed partners to their nationals.

Some recent rulings of the CCC enforced these precedents when the Court analysed the constitutionality of some laws enacted to comply with the commitments under the COL-US FTA. In this respect, the enforcement of Law 1515/12 (approving the Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure) was conditioned (C350/13) on the respect of the constitutional bloc. Law 1518/12, which approved the highly controversial International Union for the Protection of New Varieties of Plants (UPOV) was struck down (C1051/12) because the requirement of *ex ante* consultation with the ethnic minorities was not met. This ruling put on the table the conflict involving multinational enterprises mainly in the mining and oil sector that are developing their economic activities in regions where Colombian minorities are based. Defenders of the promotion of foreign investment are pushing for a constitutional reform to eliminate this procedure, whereas human rights activists are strongly supporting the constitutional case law in this respect. The consequences of this judicial activism of the CCC seeking to accord

⁹⁰ Cf. rulings C608/10 (COL-Canada FTA) and C446/09 (North Triangle of Central America FTA).

precedence to fundamental rights over international trade remain hard to decipher.

Unlike the situation in Colombia, where the CCC has been seized of many issues pertaining to FTAs, in South Africa, the CCSA has not heard matters brought under the EU-South Africa FTA. However the CCSA has provided decisions on many cases that directly relate to social and economic rights elements that are included in the Constitution of 1996. These include those rights embedded under s.27 of the Constitution. Its positions adopted in cases that relate to access to healthcare, food, water and decent housing provide a strong indication as to the inclination of the CCSA should matters impinging directly on the FTAs and constitutional rights be brought before the court.

That being said, one of the most important cases heard on health was a direct legal challenge of the South African Medicines and Related Substances Act of 1997 by the pharmaceutical lobby group in the country. The government was considering amending the Act in order to facilitate access to cheaper medicines through the use of parallel importation and the activation of compulsory licenses to deal with its emergency health situation given the incidence and disease burden of AIDS. The representatives of the pharmaceutical companies were livid and filed a motion to challenge the legality of the Mandela government's actions. Due to the outpouring of virulent criticisms of the approach of the pharmaceutical companies they were forced to pull back and retrieve their petition. The use of parallel importation and compulsory licensing could have made it easier for the government to source cheaper medicines from more cost-effective suppliers.⁹¹

As revealed by a recent episode in South Africa the decision by the pharmaceutical lobby to withhold their motion was simply a stop-gap and ephemeral tactic mindful that the pharmaceutical association in the country is now planning to challenge new actions of the Zuma government to use cheaper options to ease access to affordable medicines. The Pharmaceutical Research and Manufacturers of America (PhRMA) in South Africa has vowed to take the government to court should the government re-assert its determination to take actions that sideline patent protection for specific drugs in its response to the issue of access to affordable medicines.⁹²

A comparison of the experiences of the Columbian and South African courts in the realm of litigating FTA matters from the purview of fundamental rights leaves the clear conclusion that the CCC has been more active in its reactions to the challenges brought before it of specific FTA provisions especially in the COL-US FTA. There are some reasons that explain the absence of FTA caseload for the CCSA. First, unlike Colombia, South Africa has entered fewer FTAs with industrialised countries. Second, and of greater importance, the degree of ideology driven activism amongst civil society organisations and local communities is patently higher in Colombia than in South Africa. In Latin America, in general, the sensitivities surrounding indigenous communities and their livelihood tied to land and natural resources are extremely crucial and courts are regarded as bulwarks to be used to defend the rights of poor segments of

⁹¹ J. Crook, 'Balancing Intellectual Property Protection with the Human Right to Health', *Berkeley Journal of International Law*, 2005, 23: 524.

⁹² <http://keionline.org/node/1908>.

the society that take potential threats from FTAs very seriously. But even in the absence of FTA litigation it is worth noting that in South Africa as in Colombia as well important matters have been brought before the courts impinging on socio-economic rights.

6. COMPARING JUDICIAL PROTECTION OF SOCIO-ECONOMIC RIGHTS

6.1. Contexts and Cases

Although there is a clear relationship between average income levels (correlated with the availability of financial resources) and guaranteeing socio-economic rights, the lack of resources or its inefficient allocation has led to judicial activism in Colombia where increased activity in terms of rights litigations and more jurisprudential development can be observed. From an international perspective, the Colombian constitutional case law is not the only case of justiciability of economic, social and cultural rights. The linkage of some socio-economic rights with civil and political rights (right to life, right to be free from torture or cruel, inhuman and degrading treatment, and right to respect for private and family life) has also been used in other countries and by the Inter-American Court of Human Rights.⁹³ However, a recent study puts in figures the relevance of the constitutional case law in Colombia. It showed that Colombia is the middle-income country 'with the highest per capita rate of right to health litigation' with 3.289 legal actions per million of persons, followed by Brazil (206), Costa Rica (109), Argentina (29), South Africa (0.3) and India (0.2).⁹⁴

In Colombia, from an institutional perspective, the Constitution of 1991 positioned constitutional adjudication as one of the central features of the institutional design of the state and created the CCC to protect, among other competences, constitutional rights. However, the economic consequences of its rulings have also been criticised for distorting prices and affecting the fiscal management and legal certainty to such an extent that the Court is seen as a problematic institution for growth and development.⁹⁵ The CCC has also been regarded as an illustration and model of the growing role of courts in Latin America since the 1980s.

Economic regulators have tended to adopt an institutional economics perspective, emphasising the need for a synergetic relationship between law and economics to solve the conflicts of interest in an efficient manner and to ensure a better allocation of scarce resources. They defend the principles of macroeconomic stability and market liberalisation as crucial for the viability of the Colombian state.⁹⁶ For them, the Court has been adjudicating in economic

⁹³ International Commission of Jurists, *supra* note 55, at 65-9.

⁹⁴ E. Lamprea, 'Colombia's Right-to-Health Litigation in a Context of Health Care Reform', in A. Gross & C. Flood (eds.) *The Right to Health at the Public/Private Divide: A Global Comparative Study* (Cambridge University Press, 2013); M. Ottar, L. Rakner & O. Motta Ferraz, 'The impact of health rights litigation: A comparative analysis of Argentina, Brazil, Colombia, Costa Rica, India and South Africa', in Alicia Ely Yamin & Siri Gloppen (eds.) *Litigating Health Rights: Can Courts Bring More Justice to Health?* (Cambridge: Harvard University Press, 2011), 273-303.

⁹⁵ Edgar Alberto Novoa Torres, 'Reestructuración, campos jurídicos y Corte Constitucional', in Jairo Estrada Alvarez (ed.) *Intelectuales, tecnócratas y reformas neoliberales en América Latina* (Convenio Andrés Bello Conciencias, Universidad Nacional de Colombia, 2005) at 374.

⁹⁶ Salomon Kalmanovitz, 'Constitución y modelo económico', in *El Debate a la Constitución* (Universidad Nacional de Colombia and ILSA, Bogotá, 2002); Sergio Clavijo, 'Qué tal manejamos? El Caso de la Constitución de 1991', Borradores de Economía (June 2001); Sergio Clavijo, 'Fallos y fallas económicas de las altas cortes: el

matters without an explicit constitutional competence, creating new budget allocations. Those decisions are found to be neither reasonable nor efficient for the redistribution of scarce resources. They contend that the rulings even distort regulatory measures enacted by Congress. For instance, the Court is accused of regulating markets as health, labour or housing. These aspects fall within the remit of the Congress.⁹⁷ A study claims that the Constitution weakened the legislative and executive power, creating two new centres of power: the CCC and the Board of Directors of the Central Bank. The assessment of the actions of these bodies led again to diverging views between lawyers, who defend the role of the Court, and economists, who consider that the intervention of the Court damaged the economic environment, whereas the Central Bank should have more autonomy as monetary authority.⁹⁸

Even defenders of the role of the CCC in protecting rights express their reservations about the resources needed to comply with the rulings that grant the rights. Another preoccupation is about beneficiaries of these rulings. Although poor people are usually mentioned as target groups, the benefits may not be generalised or may be deviated by pressure groups.⁹⁹ In fact, these ‘progressive’ rulings are criticised for displacing the legitimacy of executive and/or legislative decisions, which appear to be inadequate to provide socio-economic rights. In spite of the fact that socio-economic problems of parts of the population are apparently being solved by the CCC, the solution is not always coordinated with governmental social policies for all.¹⁰⁰

Recently, the interaction between rights and fiscal policies has been important in the field of internally displaced people because of the long-lasting armed conflict. In 1999, the IMF estimated the number of internally displaced persons in need of public assistance at about one million, which signified an important pressure on public resources.¹⁰¹ In 2004, the CCC (T025/04) declared the ‘unconstitutional *status quo*’ (*estado de cosas inconstitucional*) because public policies had not been providing assistance to internally displaced people, despite the fact that Law 387/97 established measures to prevent internal displacement and to assist and provide socio-economic stability for this population. Instead of improving, the problem has been worsening and since 2008 the Court is constantly requesting the government to comply with ruling T025/04 and is even going further to rule on the coordination of public policies related to the internal displacement between the national level and the territorial entities (ruling A007/09).

caso de Colombia 1991-2000’, 12 *Revista de Derecho Público*, 27-66 (2001); Alberto Alesina, *Reformas Institucionales en Colombia* (Fedesarrollo-Alfaomega, Bogotá, 2002); D.E. Wiesner, *El Origen Político del Déficit Fiscal en Colombia: El Contexto Internacional 20 años Después*, Archivos de Economía (DNP, Dirección de Estudios Económicos, Bogotá Colombia 2004).

⁹⁷ Maurice Kugler & H. Rosenthal, ‘Checks and balances: an assessment of the institutional separation of political powers in Colombia’, in *Institutional Reforms, the Case of Colombia* (Cambridge: MIT Press, 2005) at 76-102. See also, Kalmanovitz, *supra* note 96.

⁹⁸ Mauricio Perez Salazar ‘Costos, beneficios y orden constitucional’, *Revista de Economía Institucional*, 2001, 5: 129-46, at 141-3.

⁹⁹ B.M. Wilson, ‘Institutional Reform and Rights Revolutions in Latin America: The cases of Costa Rica and Colombia’, *Journal of Politics in Latin America*, 2009, 1(2): 59-85, at 77-8.

¹⁰⁰ Novoa Torres, *supra* note 95, at 368-70.

¹⁰¹ IMF Country Report 99/149:24.

According to the UN High Commissioner for Refugees, in spite of the peace negotiations initiated in 2012 with the FARC, the number of internally displaced persons continues to grow worryingly. The official figures show that at the beginning of 2013 they amounted to 4.7 million, following the guidelines of the Law on Victims and Land Restitution of 2011, which also includes the displacement provoked by demobilized groups.¹⁰² In ruling T239/13 the CCC recognized the duty of protection of this population, based on General Comments 4 and 7 of the Committee of the ICESCR. This ruling reiterated that even if the Constitution recognises that the complete fulfilment of socio-economic rights requires an important investment of public resources, which are not immediately available, their realisation should be gradual and progressive and that this does not mean that the state is entitled to deny any immediate effect to socio-economic rights. In addition citing international doctrine such as the Limburg Principles, the CCC reiterated its consolidated precedent that the minimum core content of each right should be guaranteed for the whole population. The progressivity refers to a higher coverage above the minimum core content and the competences of the legislative power are limited by this recognised level of fulfilment because they cannot be reversed; otherwise, these measures are presumed to be unconstitutional and should follow a strict test of constitutionality. This presumption may be set aside if the state can demonstrate that there are urgent and imperative reasons that justify this regression in the fulfilment of the economic right.¹⁰³ In these rulings, the CCC balanced the right to property with the right to a dignified housing; its sympathies were clearly with the latter.

In South Africa, the CCSA has been very active in socio-economic rights adjudication. Positions for and against the approach of the CCSA are very divided with supporters and detractors noting the merits and demerits of allowing the CCSA to engage proactively in dignity and equality jurisprudence as it has done over the past two decades.¹⁰⁴ The court has not wavered in its approach regardless of these debates and divisions. As Christiansen argues, ‘the Constitutional protection of social rights and its enforcement by the Court continues to inspire social justice advocates in their work within South Africa and abroad.’¹⁰⁵ As noted earlier, many cases have been brought before the CCSA. In the majority of these cases that hinged on the right to water, decent housing, social security protection and affordable healthcare, the court has consistently adopted an approach that seeks to uphold the dignity of citizens who are in need as envisaged in the post-apartheid constitution. This has been the situation in decisions such as *Grootboom* (decent housing: to an extent); *51 Olivia Road* (decent housing); *TAC* (health), *Khosa* (social security) and *Mazibuko* (water).

The *Grootboom* Case¹⁰⁶ hinged on access to decent housing and shelter. It dealt with to the obligation that the Government has under s.26 of the South African Constitution respecting the right of access to decent and adequate housing. The vital facts of the case were the following.

¹⁰² www.unhcr.org/cgi-bin/texis/vtx/page?page=49e492ad6.

¹⁰³ cf. T239/13, C507/08, C671/02, T 119/12 and T454/12.

¹⁰⁴ Eric C. Christiansen, ‘Adjudicating Non-justiciable Rights: Socio-economic Rights and the South African Constitutional Court’, *Columbia Human Rights Law Review*, 2007, 38: 323.

¹⁰⁵ Eric C. Christiansen, ‘Exporting South Africa’s Social Rights Jurisprudence’, *Loyola University Chicago International Law Review*, 2007, 5(1): 29-43, at 29.

¹⁰⁶ *Government of the Republic of South Africa and Others v. Irene Grootboom and Others* (Case CCT 11/00).

The matter was sparked off by the fact that 510 children and 390 adults were living in despicable conditions in the Wallacedene informal settlement. They illicitly squatted on land that was earmarked for low cost buildings by the authorities. Officials took a decision to forcefully enter and destroy their shacks and possessions. As such they were forced to squat in the adjacent sports field and local community halls. The High Court of the Cape of Good Hope found that as per s.28 of the constitution the children and their parents were entitled to shelter; and ordered the Cape Municipal Council and Oostenberg Municipality to provide them with tents and basic sanitary facilities. In 2000 following the failure of the Government to respond to some of the offers it had made the Grootboom Community to relieve it of its plight, the CCSA was seized of the matter. Justice Zak Yacoob wrote the majority opinion noting that it was the role of the government to ensure that citizens are not deprived of water, health, food and shelter. These were salient rights that were interlinked and key to human dignity and the advancement of society. The court was keen to make the point that the right to adequate housing could not be regarded in sequestered isolation. Within available resources and at worst progressively the state must ensure these rights. The state in any case cannot ignore those whose needs are most urgent and whose rights are most in peril. If such measures of government did not respond to the needs of the most desperate then they fell short of any requisite reasonableness test. The court was sympathetic to the efforts made by the government since 1994 to build affordable housing for the population but noted the importance for temporary relief for those in desperate need, with no shelter and wallowing in crisis and survival. So the court issued a declaratory order compelling the state to devise programs to provide relief for those in desperate need and not covered by extant public programs.

In *51 Olivia Road*,¹⁰⁷ still a matter that concerned the right to decent housing the City of Johannesburg sought to evict people from homes in inner city areas believed to be unsafe and unhealthy. The Supreme Court of Appeal upheld the eviction but the CCSA in a unanimous decision read by Yacoob J held that the municipality had the obligation pursuant to s. 26(2) of the Constitution on the right to housing to engage people in a meaningful way prior to evicting them from their homes if they would eventually become homeless. The CCSA found that the Supreme Court of Appeal was wrong to have upheld the eviction order, without any prior engagement by the city to help the people evicted.

The *Treatment Action Campaign (TAC) Case*¹⁰⁸ critically examined access to affordable health care and specifically access to AIDS medicines. The case was first brought to the Pretoria High Court and the applicants took issue with certain restrictions put in place by the Government in the handling of a key AIDS drug: nevirapine. These restrictions violated rights guaranteed by the Bill of Rights under sections 7(2), 8(1) and 27 of the Constitution. The second issue was demand for the government to ensure an effective, comprehensive and progressive program for the prevention of mother-to-child transmission of HIV throughout South Africa (paragraph 5). In its judgment, the CCSA ordered the government to remove the restrictions it

¹⁰⁷ *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Ors* (CCT 24/ 07) [2008] ZACC 1, 19 February 2008.

¹⁰⁸ *Minister of Health and Ors v Treatment Action Campaign* (Case CCT 8/02).

put in place on the use of nevirapine (para 3). CSOs like TAC played an important role in the case. Other CSOs were Children's Rights Centre (third respondent); Institute for Democracy in South Africa (first amicus curiae) and Community Law Centre (second amicus curiae). The right to health has been a very contentious issue in South Africa especially in the context of the very high incidence of AIDS in the country. As in the TAC case, where there was tension between government policy and the desires of the CCSA, other lower courts have also parted company from the government in cases where a gross injustice was being done due to limited access to AIDS medicines. For instance, in 2006 the Durban and Coast Local Division of the High Court ordered the government to provide prisoners at the Durban Westville Prison with ARVs (AIDS drugs), which the government failed to. This culminated in a caustic outburst from the judge, Nicholson J, leading him to threaten the administration that: 'Should that continue the members of the judiciary will have to consider whether their oath of office requires them to continue on the bench.'¹⁰⁹

The *Khosa* Case was about social security.¹¹⁰ The court found (Mokgoro J for the majority) in these joint cases that permanent residents (in this instance from Mozambique) also have the right to social security. This right will not be realised by South African citizens by depriving permanent residents of the same. Denying permanent residents of the rights actually infringes the right of equality. In their dissenting judgment, Ngcobo J and Madala J were of the view that the government had to prioritise its citizens first and that permanent residents could not claim a right to social security even if it would be constitutional for their children to do so.

Access to water is also an issue that has been heard by the CCSA.¹¹¹ In *Mazibuko* the applicants brought their complaint in the South Gauteng High Court because where they lived in Phiri (Soweto) the City had decided (through a special program) to curb water supply due to non-payment of bills (Gcin'amanzi Project). The project was piloted in Soweto in 2004. The city held that 6 K/litres of free water per month was sufficient for every household and also decided to install pre-paid metres to charge consumers of excess use of 6 K/litres per month. The applicants went to the High Court, which found for them. But at the Supreme Court of Appeal, the water quota was judged adequate and the court did not consider the issue of fairness of pre-paid metres. At the Constitutional Court the applicants sought to re-affirm the High Court's decision and cross appeal the Supreme Court of Appeal's order. Therefore, at issue here was access to sufficient water under s.27 of the South African Constitution. The question for the CCSA was whether the Free Basic Water Policy of the City was a reasonable one given the need for progressive realisation of the right to sufficient water. The CCSA found that this was an important litigation for an important social/economic right and that it was vital but that although needs in terms of water remained acute, the use of metres and the quota applied by the City and actions of review by the City meant it was doing what it had to in terms of progressive attainment of the right to sufficient water.

The increased caseload in terms of socio-economic rights in South Africa can be

¹⁰⁹ *N and Others v Government of the Republic of South Africa and Others* (N°3) 2006 (6) SA 575, at paragraph 33.

¹¹⁰ *Khosa and Ors/ Maulale and Ors (joint cases) v Minister of Social Development* (CCT 12/03).

¹¹¹ *Lindiwe Mazibuko and Ors v City of Johannesburg and Ors*, Case CCT 39/09 [2009] ZACC 28, 8 October 2009.

explained by a very strong and active civil society made of NGOs that are aware of the salient issues. But this has not always been the case. A common criticism against NGOs in the past was that they tended to dwell more on civil and political rights and not on social and economic ones. But some in South Africa are increasingly considering economic and social rights in their own work.¹¹² They have played a big part in the increased caseload serving in many of the cases as friends of the court.

What stands out in both countries is the role of civil society groups in the cases that are brought. While in Colombia the majority of the matters heard have pertained to the issues surrounding socio economic rights as health or housing of all the population, having special consideration vis-à-vis internal displacement and associated challenges, in South Africa the crucial trend has been to right some of the socio-economic wrongs fomented under apartheid. What is even more crucial in the present task is not simply a rehearsal of what the courts have done in specific instances. What is more useful is to probe into the motives and the rationale behind their decisions. Why have they adopted certain lines of thinking as reflected in their verdicts? This is all about the underlying judicial philosophy mirrored in the rulings.

6.2. What Judicial Philosophy Has Been Used by the Courts?

Two tendencies in Colombian constitutional adjudication have been identified: the ‘traditionalist-positivist’ tendency that does not differ from statutory interpretation and ‘new constitutionalism’ that uses a broad interpretation of constitutional principles. The hypothesis put forward is that the first tendency is dominated by judges following a judicial career whereas the second is pushed by judges mostly coming from academia. Whereas the Supreme Court of Justice followed the first tendency before the constitution of 1991,¹¹³ the CCC followed the second, based on the neo-constitutionalism approach to constitutional adjudication. It tries to impose the *stare decisis* doctrine and introduced conditioned and integrated rulings to strengthen the law-making role of the judiciary.¹¹⁴

The Constitution of 1991 has been categorised as ‘aspirational’, rather than ‘protective’, because it shares some characteristics of aspirational constitutions as the maximisation of objectives through rights and principles and the promotion of judicial activism, whereas protective constitutions consider constitutional rights as political questions for the Congress. Aspirational constitutions normally show a significant difference between their objectives and the social reality, and therefore seek to improve these realities.¹¹⁵ As it has been said, the Constitution of 1991 increased the rights catalogue and the judicial mechanisms to protect

¹¹² J.C. Mubangizi, ‘The role of non-governmental organizations in the protection of human rights in South Africa’, *Journal of South African Law*, 2004, 340, 324-42, at 340.

¹¹³ The constitutional case law of the Supreme Court was judged as too formal, eroding rights protection and increasing the distance between constitutional rules and reality (Cepeda Espinoza 2004 at 32, quoted by M. Schor, ‘An essay on the emergence of Constitutional Courts: the cases of Mexico and Colombia’, Legal Studies Research Papers Series 1-3 (Suffolk University Law School, September, 2008).

¹¹⁴ D. Landau, ‘The Two Discourses in Colombian Constitutional Jurisprudence: a New Approach to modeling Judicial Behavior in Latin America’, *George Washington International Law Review*, 2005, 37(3); D.E. Lopez Medina, *El Derecho de los Jueces* (Editorial Legis, Bogotá, 2000); Cepeda Espinoza, *supra* note 52.

¹¹⁵ Mauricio García Villegas, ‘Law as Hope: Constitutions, Courts and Social Change in Latin America’, *Florida Journal of International Law*, 2004, 16: 3-4.

them.¹¹⁶ In particular the concrete judicial review (APFR) and the method of rights analysis (balancing) empowered Courts to protect rights of social groups excluded from political power which give constitutional adjudication a growing democratic relevance, because citizens have the possibility to present claims, creating a sort of political capital for courts, a culture of rights and putting case law at the centre of the political debate. In this way, the CCC has been displacing legislators as main guardians of rights and abandoned legal formalism as method of interpretation. The Colombian Court is therefore placed in the Latin American vanguard of the justiciability of rights, because it has been ‘deepening the social basis of democracy’ in a country with high inequalities.¹¹⁷

As contended by some, judicial activism in Colombia is also justified by ‘the crisis in representation and the weakness of the social movements and opposition parties’.¹¹⁸ Moreover, political fragmentation in Colombia is a strong argument to defend the judicial activism of the CCC because the other powers have not had the capacity to threaten its institutional stability and the Court felt supported by the public opinion.¹¹⁹ Although the CCC is considered one of the most glaring avatars of judicial activism in Latin America, there is no generalised opinion that this activism is one of the main contributing factors to the welfare of the country.¹²⁰ In fact, the complexity of economic regulations and socio-economic rights constitutes a challenge for constitutional case law argumentation.¹²¹

López has conducted a study in this respect.¹²² He states that ‘anti-formalism’ in Colombia was introduced by the CCC, applying a ‘new version’ of Kelsen’s theory¹²³ and a ‘Latin American’ version of the theories of Hart, Dworkin and Alexy, and that most of the main Colombian authors of this hue have been law clerks of the CCC.¹²⁴ Another interesting finding was that when the Court sought to put fundamental rights above the legal order, it based its arguments on authors like Radbruch, Holmes, Frank, Cardozo and Hart.¹²⁵ López concluded that the use of principles alongside rules based on Dworkin and Alexy have also been systematically integrated by the CCC.¹²⁶

¹¹⁶ Schor, *supra* note 113.

¹¹⁷ *Id* at 14-5.

¹¹⁸ For a historical overview of those circumstances, see Rodrigo Uprimny Yepes & Carlos Rodríguez Garavito, *Constitución y Modelo Económico en Colombia: Hacia una Discusión Productiva entre Economía y Derecho 2* Documentos de Discusión 2 DeJusticia Bogotá-Colombia (2006)

¹¹⁹ Rodrigo Uprimny Yepes & Mauricio García Villegas, ‘The constitutional Court and Social Emancipation in Colombia’ in De Sousa Santos B. (ed.) *Democratizing Democracy: Beyond the Liberal Democratic Canon (Reinventing Social Emancipation: Towards New Manifestos)*, (Verso, 2007). Paper available at www.ces.uc.pt/emancipa/research/en/ft/justconst.html.

¹²⁰ M. Herdegen, ‘La Corte Constitucional en la Relojería del Estado de Derecho’, in *Justicia Constitucional: el Rol de la Corte Constitucional en el Estado Contemporáneo* (Ricardo Sanín Restrepo, Coordinador Académico, 2006), 65-80, at 67-8.

¹²¹ Kugler & Rosenthal, *supra* note 97; Sergio Clavijo, *Descifrando la ‘Nueva’ Corte Constitucional* (Libros de Cambio Alfaomega Colombiana S.A., 2004); Sergio Clavijo, *Impacto económico de algunas sentencias de la Corte: El caso de la mesada pensional 14 y de las regulaciones de vivienda* (2004), available at www.banrep.gov.co/junta/publicaciones/Clavijo/corte0904.pdf.

¹²² Lopez, *supra* note 44.

¹²³ Recasens Sichez propagated Kelsen’s theory in Latin America: See Lopez, *supra* note 44, at 428-434.

¹²⁴ Lopez, *supra* note 44, at 416-7.

¹²⁵ *Ibid.*, at 444.

¹²⁶ *Ibid.*, at 454-7.

The balancing method is responsible for the increasing number of justiciable rights and the direct application of the Constitution above statutes. Therefore, it is also responsible for the escalating conflict between the Court and the economic regulator. Uprimny and Rodríguez¹²⁷ argue that the Constitution recognises the normative force of socio-economic rights and imposes normative restrictions on economic policy. They defend the constitutional control of economic policies by way of the reasonableness test; this means that the Court should not only analyse whether the objectives of a reform or a treaty respect the Constitution but also that the means are ‘potentially adequate’ for these purposes.

More concretely, the application of the balancing method by the CCC has been analysed with contradictory hypotheses and conclusions. A first study states that the CCC seeks to give a normative character to constitutional principles through the binding force of case law but also through jurisprudence, mainly based on the German model.¹²⁸ The Court is said to be a political body trying to enforce its position through the introduction of vertical precedents and the use of ‘tests’ in the balancing judgment of conflicting rights seeking to diminish the influence of textualism, historicism and systematic interpretation because textualism in particular is not adequate provided that constitutional principles are undetermined and their scope is given by moral and political contents that may not be interpreted by this method.¹²⁹ López considers the US model as a guide for the balancing method and the ‘reasonableness test’. He also supports the use of the ‘equality test’ and the theory of intensity on these tests, because these procedures promote the ‘objectivity of constitutional adjudication’.¹³⁰ This study shows the complexity of case law transplant and the way it has been integrated into Colombian constitutional case law.

By contrast, a former justice of the Court criticised the way in which the balancing test has been applied because the Court confuses and mixes the European proportionality test with the American equality test.¹³¹ The use of the ‘intensity test’, based also on US case law, which proposes flexible control in economic, fiscal and international matters, is judged as arbitrary because it is not established in the Constitution and the Court lacks the competence to regulate this procedure. He concludes, first, that the Court is using the reasonableness test not only to limit legislation but, mainly to implement ‘axiological emptiness’. As a result, the reasonableness test is a powerful tool that enables the Court to use discretionary competences to create legal emptiness. Secondly, interpretation based on values and principles lacks definition and hierarchy and it therefore causes legal uncertainty.¹³²

Finally, a comparative study concluded that the CCC applied the ‘reasonableness test’

¹²⁷ Uprimny & Rodríguez, *supra* note 119, at 7-10.

¹²⁸ López, *supra* note 44, at 4, 7-8.

¹²⁹ *Ibid.*, at 55-6 and 74.

¹³⁰ See López, *supra* note 44, at 74-81. In addition, he refers to D.M. McCormick & R.S. Summers (eds.) *Interpreting Precedents* (Aldershot: Dartmouth Publishing, 1997, 532-8), to justify the binding force of the precedent in continental systems: López, *supra* note 44, at 107-8.

¹³¹ J. Araujo Rentería, ‘Los métodos judiciales de ponderación y coexistencia entre Derechos Fundamentales. Crítica’, in Konrad Adenauer Stiftung (ed.) *Anuario de Derecho Constitucional Latinoamericano*, 853, 853-77 (2006) available at www.juridicas.unam.mx/publica/rev/indice.htm?r=dconstla&n=20062.

¹³² *Ibid.*, at 871-4 and 877.

seriously.¹³³ It identified three types of tests in Colombian case law: ‘a European test which is based on proportionality with equal intensity; an American test that distinguished different levels of intensity, and a combination of the two’ (C093/01, cited by Bernal¹³⁴ and by Conesa)¹³⁵. It is a ‘tropicalized’ model, combining the two standard models, but which is not necessarily seen as negative.¹³⁶ The study also argued that the Colombian model has been cited in other Latin American countries, including Mexico.

In South Africa, unlike the formalistic and legalistic approach of judges under the apartheid system the majority of the judges of the CCSA have leaned on concepts of equality and especially dignity to hammer a very specific kind of jurisprudence. This approach has been anchored on a deep sense shared by the majority of the justices that the CCSA has a mandate to reverse the wrongs that were perpetrated by a biased and tainted judiciary that sanctioned the apartheid system. This is the kernel of the message of Deputy CJ Moseneke when he noted that under democratic South Africa judges are the guardians, custodians or trustees in the realisation of the promise so finely crafted in the 1996 Constitution that seeks a more dignified life for all South Africans irrespective of colour, religious or sexual orientation.¹³⁷ So while the charms of positivists are always looming large in the work of the judges to ensure that the letter of the law and the Constitution is applied, they are keen to also use their office as instruments to ensure a better natural law oriented proclivity toward dignity and justice. Again, as Justice Moseneke argues: ‘Our Constitution is pro-poor. It is cognizant of vulnerability in society. It is premised on a past that has entrenched vacuous but real divisions ... Our Constitution seeks to achieve a caring, sharing and empathetic society.’¹³⁸

The CCSA sees its role as being proactive in forging social justice. Justice Yacoob makes the point that simply stating rights in the Bill of Rights does not mean the rights have been realised.¹³⁹ Put otherwise, the CCSA has to work its will to ensure that there is justice and that black letter norms protecting rights are activated to correct past and current instances of injustice. This is truer for a country still haunted by steep levels of inequality and indignity.¹⁴⁰

While the approach adopted by the CCSA has been very defensive of socio-economic rights there are caveats to be sounded. As Roux argues, the court has to proceed with circumspection in terms of the speed and political pressures it is wont to exert on the other

¹³³ L. Conesa, ‘The Tropicalization of Proportionality Balancing: The Colombian and Mexican Examples’, Cornell Law School LL.M. Paper Series 8 (Cornell Law School, 2008) at 13.

¹³⁴ C. Bernal Pulido, *El Juicio de la Igualdad en la Jurisprudencia de la Corte Constitucional Colombiana*, Universidad Externado de Colombia, VII Congreso Iberoamericano de Derecho Constitucional 5, 8, 12 (2002) available at www.cajpe.org.pe/rij/bases/nodiscriminacion/BERNAL.PDF.

¹³⁵ Conesa, *supra* note 133, at 9.

¹³⁶ Conesa, *supra* note 133, at 10.

¹³⁷ Dikgang Moseneke, Deputy Chief Justice of South Africa, A jurisprudential journey from apartheid to democratic constitutionalism, 62nd Annual Meeting of the American College of Trial Lawyers 5 (New York City, 19 October 2012); Dikgang Moseneke, Speech to the National Association of Democratic Lawyers Annual General Meeting 9 (Tribute to Former Chief Justice of South Africa Pius Langa, 20 November 2010).

¹³⁸ Dikgang Moseneke, Courage of principle, Address to mark 30th anniversary of the assassination of Ruth First 10 (17 August 2012).

¹³⁹ Zak Yacoob, A dynamic constitution, Address during Constitution Week, presented at the University of Cape Town 2 (12 March 2012).

¹⁴⁰ Zak Yacoob, South Africa: The road to democracy, Address at the Francis Carey School of Law, University of Maryland 3 (16 October 2012).

branches of government. He notes that '[a]s experience from other countries has shown, constitutional courts that assert their role in the political system too early and too vigorously, risk overreaching themselves to the ultimate detriment of the rule of law.'¹⁴¹ While this is true, it is arguable that the crass nature of the apartheid regime and the injustices it helped to engrain in SA would not be reversed with passive and docile judges unwilling to give life to the words of a very progressive constitution.

7. ASSESSMENT OF THE TWO CASES

The cases of Colombia and South Africa illustrate a global phenomenon referring to a strong defense of the use of comparative experiences and case law to encourage judicial activism in the defense of socio-economic rights.¹⁴² Judicial adjudication on socio-economic rights is having a judicial and political character, because it applies rules or principles to concrete cases but it is also discretionary when it chooses a specific way of interpretation,¹⁴³ under the guidelines of constitutional supremacy.¹⁴⁴ As a result, although the discretionary competences of the legislative and the executive branches are respected by the judiciary, it becomes activist when they omit duties of fulfillment of socio-economic rights.¹⁴⁵ This trend of implementing procedural ways to protect these rights are being adopted worldwide, but the particular advancements are mostly recognised in Latin America where Colombia is the most notorious case of judicial activism, as well as in other countries in other regions such as India and South Africa.¹⁴⁶

This phenomenon is known as the globalisation of the balancing method, because national and international courts are more and more inclined to adjudicate in constitutional and human rights matters.¹⁴⁷ It has been described as a 'viral' phenomenon because it expands rapidly from one jurisdiction to another and then worldwide.¹⁴⁸ At the same time, the balancing method is considered as one of the characteristics of the globalisation of legal thought¹⁴⁹ and its expansion has been explained because of the crisis of Legal Formalism, attributed partly to its incompatibility with globalisation.¹⁵⁰

This phenomenon has not been sufficiently analysed from the perspective of global trade

¹⁴¹ Theunis Roux, 'Assessing the Social Transformation Performance of the South African Constitutional Court: From Totalitarianism to the rule of law', in Catherine Jenkins & Max du Plessis (eds.) *Law, Nation-Building and Transformation: The South African Experience in Perspective*, (Antwerp: Intersentia, 2014).

¹⁴² International Commission of Jurists, *supra* note 55, at 103-5.

¹⁴³ *Ibid.*, at 74.

¹⁴⁴ *Ibid.*, at 80.

¹⁴⁵ *Ibid.*, at 81.

¹⁴⁶ *Ibid.*, at 95-6.

¹⁴⁷ J. Bomhoff, 'Balancing, the Global and the Local: Judicial Balancing as a Problematic Topic in Comparative (Constitutional) Law', *Hastings International and Comparative Law Review*, 2008, 31(2): 3.

¹⁴⁸ A. Stone Sweet & J. Mathews, 'Proportionality, Balancing and Global Constitutionalism', *Columbia Journal of Transnational Law*, 2008, 47: 73-165, at 113, 161.

¹⁴⁹ D. Kennedy, 'Three Globalizations of Law and Legal Thought: 1850-2000', in D.M. Trubek & A. Santos (eds.) *The New Law and Development: A Critical Appraisal* (Cambridge University Press, 2006) 19-73, at 22; Bomhoff, *supra* 147, at 4.

¹⁵⁰ J. García Amado, 'La Filosofía del Derecho de Habermas y Luhmann', *5 Serie Teoría Jurídica* 67 (Universidad Externado de Colombia, 1997).

liberalisation where issues related to the potential negative effects of trade on human rights have become a critical point for the enforcement of FTAs. Positions that defend trade liberalisation argue that it increases wealth which implies an improvement in human rights compliance, such as the right to property, non-discrimination and the right to trade. Nevertheless, defenders of socio-economic rights oppose this argument because the right to property does not have the international status of a fundamental right and that the right to trade is not a human right.¹⁵¹ Some proposals have been suggested to harmonize human rights improvement and trade liberalisation as the protection of vulnerable populations of trade liberalisation, the allowance of clauses of differential treatment and the creation of retaliatory measures by international organisations to protect human rights in case of violations.¹⁵² As this has not been implemented yet, some national courts are taking up leadership in the protection of vulnerable groups even if this goes against international commitments of the countries.

Important cross-sectional insights can be deduced from the underlying philosophical approaches of the Colombian CCC and the South African CCSA. In both institutions, one can identify a strong predilection of the justices to fortify the undergirding premises of democracy in a context of gross inequalities. Especially in the case of South Africa, the justices make no apology for adopting a very strong stance on reversing the socio-economic ills inherited from the apartheid era. However, in both cases, especially in Colombia, it is clear that measuring the effects or impact in terms of welfare changes for the societies is hard to reach. However, on a balance of probabilities, it is fair and accurate to state that both courts have adopted a very activist approach to adjudication and this approach has important positive knock-ons in terms of the rule of law and institutional depth needed in these ambitious emerging markets.

The nature of the mandates (jurisdiction) of the respective constitutional courts *par rapport* the enforcement of international (constitutional) human rights rules is dissimilar. The CCC has a very strong mandate in terms of judicial review for invalidating laws that incorporate treaty provisions that are adverse to the attainment of fundamental rights, socio-economic rights being part of them. At the municipal pedestal *stricto sensu*, the CCC has had to grapple mainly with issues surrounding the right to health (with future relevant implications for the FTAs), internally displaced persons as a result of the armed conflict that afflicted many parts of the country for many years, and the right of minorities vis-à-vis foreign investment. In South Africa, the CCSA has been very progressive in its efforts to ensure the protection of socio-economic rights given that it is operating in a context scarred by a history of patent and crass inequalities.

In as much as *locus standi* or standing is concerned, cases can be brought before the courts by both natural and legal persons. There is an option for class actions and this has been the case for some of the petitions lodged at the courts. Respecting *res judicata* (merits of decisions and interpretative philosophy) in both cases acceptance of the approach and philosophies of the courts especially in the case of CCC is hardly catholic. There are cogent concerns expressed *par rapport* the CCC and CCSA on the dangers of being too aggressive and

¹⁵¹ F. Van Hees, *Protection v. Protectionism. The Use of Human Rights Arguments in the Debate for and against the Liberalisation of Trade* (Åbo, 2004) at 60.

¹⁵² F. Van Hees, *supra* note 151, at 63-4, 70-1; Lizarazo *et al.*, *supra* note 38.

progressive in ensuring that their tasks as trustees and guardians of the constitution are duly discharged. Pushing the boundaries of demands on political masters may actually tantamount to an encroachment on the turf of the other branches of government. This entails the real risk of legislating from the Bench. As such in making the efforts to ensure protection of socio-economic fundamental rights embedded in the constitutions the courts may actually be violating a key precept of the same constitutions which they have so fervently sworn an oath to uphold: separation of powers. It is a fine balance. Justices have the unenviable task of feeling the pulse of their respective societies in deciding on how to navigate this fine balance.

For the two cases, the executive branch plays an important role in negotiating and concluding international treaties. The legislature in both countries ratifies the texts. In the case of Colombia in particular, there is a strong role envisaged for the CCC in terms of *ex ante* judicial review for international treaties including FTAs. This is an approach that has been used by the CCC but not the CCSA. In addition, the use of constitutional remedies against FTAs that may violate constitutional rights has been explicitly accepted by the CCC, even if these treaties are already in force. There is room for mutual exchange of insights and constitutional experiences in this regard. Room for mutual learning is even sharper in terms of comparative remedies. In both countries important instruments have been put in place to reverse the course of injustice perceived in the realm of socio-economic rights.

8. CONCLUSION

Currently, Colombia is experiencing a period of remarkable economic progress and trying to reach a peace agreement with internal armed groups. Of course there are still a lot of things to do, but meanwhile the civil society seems to be strongly supported by the judiciary in the protection of constitutional socio-economic rights as it has been shown in this article. Across the Atlantic, the year 2014 marks an important milestone in the history of South Africa. In 1994 the apartheid system collapsed in favour of majority rule. With charismatic leaders led by Mandela the country braved the enormous challenge in 1994 of joining forces from very disparate political persuasions to forge ahead in the spirit of peace and reconciliation. One of the important measures adopted following the demise of apartheid was the adoption of a new constitution containing a hallowed section of Bill of Rights. Upholding this Bill of Rights has been a very active and even proactive Constitutional Court. The CCSA has not missed an opportunity to forcefully uphold the social and economic rights that are enshrined in the new Constitution. The anniversary of twenty years of political freedom provides a unique opportunity for reflection. Have the realisations made in terms of freedom from fear been secured? Have enough efforts been made in terms of social justice demands in one of the most unequal countries in the world? There is hope that the latter challenge is being confronted by the CCSA in its own way and to the extent allowed under the Constitution. The approach that the CCSA has so far taken in being very firm in defence of access to socio-economic rights protected under the Constitution is ample corroboration that the CCSA would be poised to quash rules incorporating provisions in future FTAs that erode access to socio-economic rights enshrined in the Constitution.

Given that the globalisation of human rights adjudication is pursued by national courts, especially in emerging economies, and that this phenomenon has been ignored by the growing globalisation of trade, it is important to make both converge. As at the multilateral level trade agreements seem to be slower to reach than bilateral or regional agreements, in the same way, as international organisations are not pushing the international enforcement of socio-economic rights as the most important component of the right to development, it seems that national constitutional courts are filling this gap, by protecting vulnerable groups even against advocates of international trade agreements. This is not necessarily the ideal institutional design but it is a phenomenon, which is growing in countries that are at present the main receptors of foreign investment.

This article sought to present two emblematic cases of economic success but with high inequalities that are perfect settings for the emergence of judicial activism as a way of canalization of the vindication of social needs. Even if the judiciaries in Colombia and South Africa may be criticised of being politicised and challenging legal certainty at the international level, they are also remarkable institutions that canalize the aspiration of civil society in a peaceful way instead of using violent protests. As national economic regulators have been confronted with this judicial activism, in the future international economic regulators as the World Bank, the WTO and the IMF will be confronted with this phenomenon that may well have a strong influence in the regulation of international economic relations.