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Judicial adjudication in housing rights in Brazil and Colombia: a comparative perspective

Tutela judicial do direito à moradia no Brasil e na Colômbia: uma perspectiva comparada

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Resumo

Constitucionalismo cooperativo é a palavra de ordem no século XXI, e a criação de uma rede judiciária é uma ferramenta importante para o desenvolvimento de um sistema de proteção aos direitos humanos. Este artigo contribui neste campo, relatando a moldura constitucional e as principais decisões havidas nas Cortes Constitucionais brasileira e colombiana, na proteção ao direito fundamental à moradia. A comparação é justificada pela proximidade histórica na transição jurídica em ambos os países – a do Brasil, em 1988, e a da Colômbia em 1991 –; e também pela clara inspiração que a Colômbia houve da constituição brasileira. Como a narrativa vai demonstrar, cláusulas constitucionais formais não foram o elemento-chave para assegurar eficácia ao direito fundamental à moradia; os resultados na Colombiana apresentam-se mais sólidos e baseados em parâmetros normativos, não obstante o texto da constituição não proveja direitos revestidos de eficácia imediata.

Palavras-chave: direito fundamental à moradia; jurisdição constitucional no Brasil e na Colômbia; direitos socioeconômicos; interpretação constitucional.

Abstract

Cooperative constitutionalism is the watchword in the 21st century, and the creation of a judicial network is an important tool to improve human rights protection. This paper intends to contribute in that field, reporting the constitutional framework and the main decisions held by the Brazilian and the Colombian Constitutional Courts in protecting housing rights. The comparison is justified by the historical proximity in the juridical transition in both countries – 1988 in Brazil and 1991 in Colombia –; and also by the clear inspiration that Colombia took in the Brazilian Constitution at the time of their Constituent Assembly. As the narrative may show, formal constitutional clauses were not the key element to assure some level of efficacy to the housing right; Colombian results seems to be more solid and based in normative parameters, even though the literal text of the constitution does not provide housing rights with immediate efficacy.

Keywords: housing right; judicial adjudication in Brazil and Colombia; socioeconomic rights; constitutional interpretation.

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1. COMPARATIVE CONSTITUTIONALISM: BARRIERS IN LEARNING FROM EACH OTHER

Constitutionalism and judicial review, as featured in postmodern political practice in democratic States, is an idea that has broken frontiers and now prevails from the United States to the more recently institutionally reorganized republics in Africa and Asia. After all, according to a so called canonical view, “the crowning proof of democracy in our times is the growing acceptance and enforcement of the idea that democracy is not the same thing as majority rule”¹ – which leads to an institutional design that contemplates counter majoritarian tools that may guarantee minorities a political voice.

The universalization of that model – constitutionalism and judicial review – brought an unexpected bonus: submission of conflicts related mainly to fundamental rights to Constitutional Courts worldwide, providing a rich environment to comparative analysis, and the possibility of a productive exchange between these same courts². That environment allows comparative constitutionalism to move from constitutional texts to real examples in constitutional adjudication, creating what Tushnet³ called judicial network, provided the necessary dialogue between Courts and countries.

That kind of exchange is especially useful in countries in which constitutional provisions related with fundamental rights embrace also the socioeconomic ones, proposing all the difficult questions related with immediate or progressive realisation, funding, minimum core, etc. In facing those challenges, getting in touch with foreign experiences might be enlightening.

¹ HIRSCHL, Ran. **Towards juristocracy. The origins and consequences of the new constitutionalism**. Cambridge-Massachusetts-London: Harvard University Press, 2004, p. 1.

² Zagrebelsky, referring to that same exchange phenomena uses the expression “judiciary cosmopolitanism” (ZAGREBELSKY, Gustavo. Jueces constitucionales. **Boletín Mexicano de Derecho Comparado**, nueva serie, año XXXIX, nº 117, septiembre-diciembre de 2006, p. 1135-1151).

³ TUSHNET, Mark. The Inevitable Globalization of Constitutional Law (December 18, 2008). **Hague Institute for the Internationalization of Law; Harvard Public Law Working Paper No. 09-06**. Available at SSRN: <http://ssrn.com/abstract=1317766> or <http://dx.doi.org/10.2139/ssrn.1317766>

The South African Constitution embraces expressly that idea, allowing their courts to consider foreign law in their own reasoning⁴. In other precedents, Constitutional Courts world have been evoking each other rulings, building a some what general consensus in conceptualizing human rights and the best strategies to protect them in an hostile environment as such provided by extreme individualism and profound social cleavages. The phenomena – one of the many aspects of what Schauer has already called legal transplantation⁵ – seems to be in an ascendant path, due to many reasons, among which one should include the growing importance of international courts and forums oriented to building a transnational view of the inherent relationship between democracy and law⁶.

That kind of global or transnational jurisprudence is perceived, especially by Constitutional Courts as a powerful tool to learn about foreign understanding related to human rights⁷; and also to increase the legitimacy and effectiveness in their own decisions. One notable exception in accepting foreign approaches in legal reasoning when it comes to human rights is the United States, the idea that any kind of interchange may result in a cultural contamination, therefore, in some kind of depreciation of the American constitutional interpretation is still somehow, present⁸. Even in the US, the perception that globalizing jurisprudence may be useful is a rising path⁹, as can be noted from Justice Breyer's assertion at Yale Law School, last September 19, 2014, according to which "The only way to preserve our American values, which are now widely shared, is to know more — not less — about what is going on abroad,"¹⁰.

⁴ South Africa Constitution, Chapter 2 – Bill of Rights, Sec. 39 – Interpretation of Bill of Rights: When interpreting the Bill of Rights, a court, tribunal or forum (...) (b) must consider international law; and (c) may consider foreign law.

⁵ SCHAUER, Frederick. **The politics and incentives of legal transplantation**. CID Working Paper nº 44, April 2000, Law and Development Paper nº 2, [on line], available at <http://www.hks.harvard.edu/var/ezp_site/storage/fckeditor/file/pdfs/centers-programs/centers/cid/publications/faculty/wp/044.pdf>, access in 02/15/2013.

⁶ The Venice Commission is a good example of an advisory body on constitutional matters that started assembling European countries, and that now aggregates also Latin American and Asian states like Chile, Korea, Morocco and Brazil.

⁷ One notable exception in accepting foreign approaches in legal reasoning when it comes to human rights is the United States, where it's still predominant the idea that any kind of interchange may result in a cultural contamination, therefore, in some kind of depreciation of the American constitutional interpretation. Systematizing objections to the use of foreign decisions as even a persuasive argument, POSNER, Richard. *No thanks, we already have our own laws*. Legal Affairs July/ August 2004. Available at http://www.legalaffairs.org/issues/July-August-2004/feature_posner_julaug04.msp, access in 01/31/2013.

⁸ Presenting objections to the use of foreign decisions as even a persuasive argument, POSNER, Richard. *No thanks, we already have our own laws*. Legal Affairs July/ August 2004. Available at http://www.legalaffairs.org/issues/July-August-2004/feature_posner_julaug04.msp, access in 01/31/2013.

⁹ Systematizing statistics and precedents in which the use of transnational jurisprudence, Globalizing Jurisprudence, MCKINSTRY, Lucy. *The Use of Foreign Authority in Domestic Constitutional Interpretation*. **Eruditio - Duke University's Undergraduate Humanities Journal**, Volume 28: 2007-2008, [on line], available at <https://web.duke.edu/eruditio/McKinstry.html>, access in 10/28/2014.

¹⁰ SHIMER, David. Supreme Court justice underscores constitutional values. **Yale Daily News**. September 19, 2014. Available at <http://yaledailynews.com/blog/2014/09/19/supreme-court-justice-underscores-constitutional>

Nevertheless, there are still barriers that elude the potential learning benefits when it comes to that desired exchange between constitutional courts. Social context, political ambience, judicial practice, institutional design; all these are elements that help understanding why in some cases, a Court's decision supports a broader comprehension or a minimalistic approach when it comes to a certain fundamental right; a mandatory remedy or a dialogical one¹¹.

Another barrier – prosaic, but still relevant – is language. Even though Spanish, is a language spoken by more than 330 million people, which may lead to a greater dissemination to the decisions held by, Latin American Courts, the fact is that the law community, even in that same continent has not achieved the ideal level of exchanging experiences and critical analysis. Language can also be the reason why the so-called constitutionalism of the Global South¹² encompasses distinct experiences like India and South Africa – but excludes Brazil and Argentina. Still, courts' decisions deal with repeated subjects – especially in the human rights field, where states echoes worldwide a quite similar agenda, strongly influenced by the concerns noted in the international community.

This paper is part of an effort toward breaking through this isolation¹³, sharing a judiciary perception revealed in recent decisions in Brazil and Colombia, on the particular subject of housing rights. The main purpose is to allow a broader understanding of how that fundamental right has been normatively entrenched in the Brazilian and the Colombian constitution, and how the judiciary, highlighting similarities and differences in each experience, is reading that formal provision. A dialogue may happen, in certain aspects, with decisions held by the South African Court, which has, since the *Governement of the Republic of South Africa and others vs. Grootboom vs. others*, also developed very interesting parameters to judiciary scrutiny when it comes to protecting housing rights.

values/; access in 10/28/2014.

¹¹ Pointing out the difficulties related with a real understanding of the real social, political, cultural and economic conditions that constrict constitutional law in a country in which you are not directly inserted, ZUMBANSEN, Peer, *Comparative, Global and Transnational Constitutionalism: The Emergence of a Transnational Legal-Pluralist Order* (2011). **Comparative Research in Law & Political Economy**. Research Paper No. 24/2011. Available at <http://digitalcommons.osgoode.yorku.ca/clpe/62>, access in 03/12/2013.

¹² MALDONADO, Daniel Bonilla. **Constitutionalism of the Global South**. The Activist Tribunals of India. South Africa and Colombia. US: Cambridge University Press, 2013.

¹³ A first effort in publicizing how socioeconomic rights have been judicialized in the Brazilian experience can be found in VALLE, Vanice Lirio do. **Judicialization of Socio-Economic Rights in Brazil: The Subversion of an Egalitarian Discourse** (March 30, 2012). Available at SSRN: <http://ssrn.com/abstract=2031719> or <http://dx.doi.org/10.2139/ssrn.2031719>. Analyzing the troublesome effect of judicialization – the regressive potential present in that kind of adjudication, VALLE, Vanice Lirio do, **Judicialization of Socioeconomic Rights in Brazil: Mercantilization of the Fundamental Rights as a Deviance in Rights Protection**. Paper presented in the 3rd YCC Conference - American Society of Comparative law, (April, 2014). Available at SSRN: <http://ssrn.com/abstract=2511648>.

The comparative analysis between the Colombian Constitutional Court, and the Brazilian judicial decisions in the matter, evidences a very significant empirical finding: the effectiveness of a socioeconomic right do not rely in its normative assertion. After all, it is always very difficult bring to reality provisions that formulate allocative choices about public expenditure through socioeconomic rights. That practical evidence reaffirm that constitutional choices are not out of the politics realm of deliberation; and underlines the need of new tools, when it comes to adjudication in judicial review; tools that may face a structural problem related with the ineffectiveness of a socioeconomic rights, using the same approach.

This paper is presented in 6 parts: in Part I the possible contribution from the Brazilian and Colombian experiences to a supranational judicial network in the housing rights subject is discussed. Part II is dedicated to a narrative of the political processes that lead to the Brazilian and the Colombian constitution in the late 80's and early 90's. Understanding the political ambience is a key factor to comprehending the constitutional features on both countries, and the subsequent development of its interpretation in socioeconomic rights. Part III presents the constitutional provision in the Colombian and the Brazilian constitutions in regard to housing rights; it will also describe the general aspects of how the constitutional matter related with a violation of such right may be brought to judicial appreciation. In Part IV some relevant decisions will be brought to attention, in order to allow a glance of how those Constitutional Courts are dealing with these conflicts. Part V finally presents an important feature not explored by either of the courts: the participatory dimension, and its importance in enforcing a democratic practice.

2. REDEMOCRATIZATION IN LATIN AMERICA AT THE END OF THE XX CENTURY: THE BRAZILIAN AND THE COLOMBIAN CASES

The last three decades held a sensible number of transitional political changes in Latin America, most of them resulting in new constitutions¹⁴, or in profound amendment processes in the previous texts¹⁵. These experiences held in countries that carry common traces of historicity and geography, have been studied as different manifestations of what has been named Latin American constitutionalism¹⁶. The Brazilian and

¹⁴ Brazil was the first one to adopt a new constitution in 1988, followed by Colombia (1991), Paraguay (1992), Peru (1993), Venezuela (1999), Ecuador (2008) and Bolivia (2009).

¹⁵ Costa Rica was the first one to step into that path in 1989, followed by Mexico (1992) and Argentina (1994).

¹⁶ Analyzing features of the Latin America constitutionalism, UPRIMNY, Rodrigo. The recent transformation of Constitutional Law in Latin America: trends and challenges. *Texas Law Review*, Vol. 89, 2011, p. 1587/1609. Available at: <http://www.texasrev.com/wp-content/uploads/Uprimny-89-TLR-1587.pdf>, access in 01/31/2013. For a broader analysis, grounded in historical aspects of the constitutionalization process in Latin America, GARGARELLA, Roberto. *Latin American Constitutionalism, 1810-2010*. US: Oxford University Press, 2013.

the Colombian experiences are very close given to time proximity, therefore, to the express inspiration that the latter one took in ideas from the former. Surely, both texts have already been amended – but these changes have not subverted the original foundational idea translated in both constitutions.

2.1. Constituent Assembly in Brazil and Colombia – a brief historical overview

The two countries engaged themselves in a political transformation through negotiation and agreement, in spite of violence or revolution, even though they had experienced serious arbitrariness and violence in their recent past. That search for settlement brought very peculiar features to the political process through which both the constitution were written – and should be took into account in order to comprehend the result of the constituent assembly in each of the two countries.

In Brazil, after almost three decades of military dictatorship, and the defeat in 1984 of the massive popular movement in favour of direct elections to presidency¹⁷, the country found itself with a former leader of the conservative party as President – and the approval of a new constitution appears to be a proper strategy to consolidate the redemocratization process. Without the charismatic leadership of Tancredo Neves, and dealing with the contingency of a non-wanted President; a man who has had relations with the military regime; the delicate balance among forces needed something new in the public agenda that might lay as foundation to a deeper change.

The Constitutional Assembly was called through a constitutional amendment sent to the national Congress by President Sarney in July 1985, in the very early days of his term. The amendment granted constitutional powers to the National Congress, which was to be elect in 1986, a mild solution that brought a lot of criticism because it would lead to an accumulation of the ordinary legislative functions, with the more prominent task of carving the new Fundamental Law.

Despite the initial difficulties, the Constituent Assembly took place, and deliberation happened in an ambience of delicate balance between conservative forces, and progressive ones. Brazilian political literature points that the inclusion of a broad list of fundamental rights – related with liberty, but also socioeconomic ones – was the

¹⁷ The popular campaign asking for direct elections for presidency in 1984 was defeated – the constitutional amendment needed to do so was not approved, and so the Electoral College prevail as the way to nominate the President. Nevertheless, millions of citizens in the street asking for direct elections for the presidency showed conservatives that they would not be able to elect whoever they want; the solution was to compromise with Tancredo Neves candidacy – a man identified with the redemocratizing movement, but also a very experienced politician, who was believed to have the ability to complete the political transition with the military. Unfortunately, Tancredo Neves got ill in his inauguration's eve, and the Vice-President took office – at first, as a provisory decision; becoming definitive with the death of the elected President in April 21st, 1985. José Sarney, a former leader in the conservative party, indicated as Vice-President in the slate as a strategy of facilitating a winning in the Electoral College was, out of pure dumb luck, President in Brazil.

strategic path adopted by the progressive forces that were present at the Constituent Assembly, in order to create at least, priorities in the political agenda settled by social inclusiveness. That plan of action was complete with an institutional design that contemplates a variety of agents that might control the adherence, by the political process, to those constitutional values and priorities.

In 1988, the Constitution was promulgated, and given the name “the Citizen Constitution”, since it prioritised the country’s citizens and the national goal of social inclusion. Even though the 83 amendments that were already approved in the Brazilian constitution, the central distribution of power, and the main commitment with social transformation is still there – actually, it is reinforced by new clauses related with public funding for all those socioeconomic rights.

Colombia also had its Constitutional Assembly summoned through an unconventional path. At the end of the 80’s, President Virgilio Barco intended to summon a *referendum* to consolidate peace agreements with rebel political movements in Colombia – especially M-19, but the drug trafficking movement reacted so violently that the idea was postponed indefinitely.

The trigger to overcome that deadlock was a student movement called “The seventh ballot”. It all began with a popular campaign, proposing that the nation’s citizens, who were to vote for seats in the Senate, House of Representatives, Departmental Assembly, and other political positions, brought with them to the voting booth a seventh ballot (a simple paper with a pre-agreed message) in which they’d express their desire to have a Constitutional Assembly summoned. Answering to that informal call to express their desire for a new Constitution, 2 million citizens, comprising a total of 88% of the votes, brought the seventh ballot to voting booths – which showed the inevitability in summoning the Constitutional Assembly.

A legislative decree¹⁸ was then edited – *Decreto Legislativo* 927 de 1990 (3 de mayo) – allowing the electoral branch to consider ballots in which the people would be inquired about their agreement with the summoning of a Constituent Assembly, designated to promote a large constitutional reform. Those ballots should be offered and counted in the presidential election that would be held in the same year – and might give more formality to the undoubted popular will showed through the “Seventh Ballot” movement. One should take into account that the country had been under siege for the past 6 years, and that certainly, a Constituent Assembly could not be summoned by a simple act of the Executive branch “allowing” votes to be counted. It was a bold choice, quickly submitted to judicial scrutiny by the Supreme Court, arguing about that formal flaw.

¹⁸ The expression “legislative decree” could be deceiving; this is a normative act – for sure – but edited by the Executive Branch.

In spite of all the legal concerns, the Supreme Court of Justice held the decree constitutional¹⁹, pronouncing that the deliberation it held was among in the inherent powers grant to the President by the siege. The Court also proclaimed an “evident” connexion between the summoning of the Constituent Assembly; the definitions of a new institutional framework to political power and the overcoming of the violence and the lack of institutional order that determined the siege itself. As a result, convene the Constituent Assembly was affirmed to be possible, and the next step was to model the proceedings that may be applied.

The design of the procedure to be observed through constituent deliberation was turned public by *Decreto Legislativo* 1926 de 1990, drawing limits to the Assembly's deliberation – all of them related to a political agreement celebrated between the competing forces that lead Colombia to the path of violence and instability resulting in the siege²⁰. The Supreme Court of Justice in examining that new decree sustained the same approach about the importance of a free and unlimited Constituent Assembly, that should give voice to a (re)foundational pact among Colombians²¹. That premise leads to a decision holding unconstitutional the provisions in that decree which represented limitations to the free deliberation of the peoples representatives in the Constituent Assembly. In the use by the Court of a quotation from Bobbio²², one could identify the leading thought in those decisions: the political life is develop through conflicts never completely solved, in which a solution is achieved through agreements, truce and those more lasting peace treaties called constitutions.

The Constituent Assembly took place in Colombia in a very pluralistic political ambience, reincorporating social tendencies that were excluded of the political life²³.

¹⁹ COLOMBIA. SUPERIOR COUT OF JUSTICE. Sentencia 59, mayo veinticuatro (24) de mil novecientos noventa (1990). Sala Plena, Expediente No. 2149 (334-E). Available at ftp://ftp.camara.gov.co/camara/basedoc/csj_nf/sp/1990/csj_sp_s59_2505_1990.html.

²⁰ The political process to build some kind of agreement that may facilitate the approval of a new constitutional order is similar to the one held in South Africa. A broad conversation involving political parties, social movements and even paramilitary organizations in Colombia ended with the stipulation of subjects that should be reformed or brought to the constitutional reform – just like the 34 points that guided the South Africa constitutional process. In Colombia, due to a fear that the delicate balance might be lost, the proposal in Decreto Legislativo numero 1926 de 1990 was that only those specific subjects were to be considered in the deliberation process – and that was the clause ruled unconstitutional by the Court, given to the unacceptable result of the originary constituent power.

²¹ COLOMBIA. SUPERIOR COURT OF JUSTICE. Sentencia 138, octubre nueve (9) de mil novecientos noventa (1990). Sala Plena, Expediente No. 2214 (351-E). Available at ftp://ftp.camara.gov.co/camara/basedoc/csj_nf/sp/1990/csj_sp_s138_0910_1990.html, access in 02/05/2013.

²² COLOMBIA. SUPERIOR COURT OF JUSTICE. Sentencia 59, mayo veinticuatro (24) de mil novecientos noventa (1990). Sala Plena, Expediente No. 2149 (334-E). Available at ftp://ftp.camara.gov.co/camara/basedoc/csj_nf/sp/1990/csj_sp_s59_2505_1990.html, Consideraciones de la Corte, c) La conexidad.

²³ UPRIMNY YEPES, Rodrigo. **Should Courts enforce social rights? The Experience of the Colombian Constitutional Court.** [on line], available at <<http://www.google.com.br/url?sa=t&rct=j&q=housing%20rights%20colombia%20constitutional%20court&source=web&cd=9&ved=0CF8QFjAl&url=http%3A%2F%2Fwww.dejusticia.org%2Fadmin%2Ffile>>

As a result, the deliberative process was – just like in Brazil – very balanced, each subject held at a time, in a delicate operation destined to build consensus.

This was not the last event in the Colombian constitutional life – the political instability, and the recurrent issue of reintegrating in political life who had been involved with violent tactics in the past still impels new proposals in constitutional amendment. Such initiatives, like the previous constitution amendment that took place in 2003, and the current proposition in expanding jurisdiction to military courts, in order to examine incidents of violence and crime that occurred during the harsher siege period; although very important to build an accurate understanding about the Colombian constitutional ambience, won't harm the analysis in the judicial appreciation of conflicts related with socioeconomic rights, and specially, the housing rights.

Given to their root in a strong popular mobilization as a trigger to constitutional change, it is not surprising that in both countries, the new fundamental chart came to light with a strong commitment to promoting democracy in its two dimensions (representative and participative)²⁴ and to fundamental rights, social justice and promoting equality. The problem is that those new systems require a completely different way in building public choices. Public Administration has now constitutional guidelines about which should be the result of its own plan of action, and defiance of those same purposes qualifies as a constitutional violation, and can be object of judicial scrutiny, through a huge variety of lawsuits. A new balance of powers is to be establish, in a normative system in which constitutional law requires public action from the Executive and Legislative branch – and allows the Judiciary to rule about sufficiency, adequacy and efficiency of those same public policies.

2.2. Fundamental rights in the constitutional system in Brazil and Colombia

Even though theoretical categories like transitional, aspirational or transformation constitutionalism²⁵ were not organized in the early 90's – and cannot be pointed

php%3Ftable%3Ddocumentos_publicacion%26field%3Darchivo%26id%3D67&ei=wRoeUZSfLoaY-9QTu8ID4Ag&usq=AFQjCNHlpwsZ6gvQRI-38EUzpX_HvGLXlg&bvm=bv.42553238,d.eWU>, access in 02/15/2013: "As a result, more than forty per cent of the delegates did not belong to the Liberal and Conservative parties, which until that day had dominated the political scene, and many interpreted the situation as the end of the two-party system of political domination. Moreover, given that the voting system was based on qualified majorities, and there was no clearly dominant group, all the assembly's delegates had to seek consensus and organize dialogue and transactions to make decisions".

²⁴ In Colombia, participation as an essential feature of democracy was a pivotal subject; after all, the paramilitary organizations intended to be reinserted in the political life. In Brazil, on the contrary, consolidating a representative democracy was the first concern – after all, the constitution succeeded three decades of authoritarian military government, in which even when elections took place, the representation principle was undermined by elections rules, and the occupancy of political positions like Senator or mayor in the states capitals happened through direct nomination – and not democratic suffrage.

²⁵ Systematizing features of transitional constitutionalism, YEH JIUNN-RONG e CHANG WEN-CHEN. The Changing Landscape of Modern Constitutionalism: Transitional Perspective (march 31, 2009). **National Taiwan University Law review**, Vol. 4, No 1, pp.158, 2009. Available in: <<http://ssrn.com/abstract=1482863>>, access

as a model or inspiration for the Brazilian or Colombian constitutions –, the intention of promoting change and overcoming social exclusion presents itself as a clear objective in both political experiences²⁶. In fact, committing to fundamental rights was a strategy carried by progressive forces in both Constituent Assemblies to establish a political agenda oriented to social inclusiveness, in subjects where, at that time, there was not enough political consensus to allow a definite constitutional provision²⁷.

Both constitutions came to light with an extensive list of fundamental rights, including those referred to as socioeconomic ones. In a comparative perspective, that strategy aligns with a worldwide tendency in constitutional design present since the late 1990's, of formally recognizing socioeconomic rights. The analytic structure adopted particularly by the Brazilian Constitution – there are 78 individual fundamental rights listed in article 5; and 34 in article 6, which contemplates socioeconomic rights²⁸ – is a testimony of the belief that social transformation may be achieved through constitutional commitments.

Nevertheless, they differ in a very important aspect: efficacy. In the Brazilian constitution, art. 5º § 1º asserts that every fundamental right is endowed with immediate efficacy²⁹. That express command was jurisprudentially extended to each and every fundamental right – including the socioeconomic ones. The most important consequence of that assumption is that any violation of fundamental rights expressed in the

in 05/10/2012 and KHATIWADA, A. 2008. Constitutionalism of transition. **Kathmandu Law Review**, 1(1):1-17. Available in: <http://ssrn.com/abstract=1500826>. Access in: 04/07/2012. On the subject of transformative constitutionalism, CHRISTIANSEN, E.C. 2010. Transformative constitutionalism in South Africa: creative use of Constitutional Court authority do advance substantive justice. **The Journal of Gender, Race & Justice**, 13:575-614. Available in: <http://ssrn.com/abstract=18908885>. Access: 22/04/2012; KLARE, K.E. 1998. Legal culture and transformative constitutionalism. *South African Journal on Human Rights*, 14:146 e ss.; LANGA, Pius. Transformative constitutionalism. **Stellenbosch Law Review**, 2006. Available at < <http://sun025.sun.ac.za/portal/page/portal/law/index.afrikaans/nuus/2006/Pius%20Langa%20Speech.pdf>, access in 04/01/2012

²⁶ A detachment of an ordinary foundationalist understanding of the constituent moment, as the previous narrative shows may also be pointed as a feature in the Brazilian and the Colombian experience that brings them closer to transitional constitutionalism.

²⁷ The most significant example in the Brazilian constitution was the social function of property rights. The right to property is granted in art. 5o. XX, and its subordination to the so called social function is the following commandment (art. 5o., XXI) – the meaning of that constraining clause is not in the constitution, but has been developed through further legislation (Civil Code, Urban Planning Code and other legal documents), and is still object of intensive controversy.

²⁸ That number should not be took as final; there are other fundamental rights mentioned along the Brazilian Constitution. There is also a specific clause (article 5º, § 2º) which states that the rights and guarantees expressed in the constitution do not exclude other ones deriving from the principles contained in the Fundamental Text, or from international treaties in which Brazil is a signing party.

²⁹ Gilmar Mendes, former Chief Justice of the Brazilian Supreme Court, and still a Justice in the bench, remarks the difficulty proposed to the Court in facing “...the increasing demand from society with a deep commitment to the realization of fundamental rights...” That task, according to Mendes, “... can be especially complex in cases concerning socio-economic rights, which are declared in the Brazilian 1988 constitutional text by directly applicable legal norms...” (Mendes, Gilmar. **The Judiciary and the right to Health**, speech delivered in the “Judiciary and the right to Health” Princeton University, (EUA). March 25th, 2010, available at <http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=122591&sigServico=noticiaArtigoDiscurso&caixaBusca=N>).

constitution may be submit to judicial appreciation, in a competency shared by all the levels of the judiciary power, and not reserved to the constitutional court.

The judicialization of socioeconomic rights is, therefore, a clear possibility in the Brazilian system; resulting from the constitutional commitment with human dignity, set as a fundamental objective of the Republic (article 1º, III of the Brazilian constitution). In a comparative perspective, the Brazilian provision aligns with a worldwide tendency in constitutional design present since the late 1990's, of formally recognizing socioeconomic rights. The analytic structure adopted by the Brazilian Constitution – there are 78 individual fundamental rights listed in article 5; and 34 in article 6, which contemplates socioeconomic rights³⁰ – is a testimony of the belief that social transformation may be achieved through constitutional commitments.

It should be note that the immediate efficacy clause in Brazil was initially red as establishing towards the State, a duty of instantaneous and complete action needed to grant the constitutional socioeconomic right. Progressive realisation – a known concept that was adopted by the South African Constitution in some of the socioeconomic rights provisions – was seen as an alternative incompatible with the Brazilian constitution. That kind of perception about the meaning of immediate efficacy spread around the Brazilian constitutional literature, and was clearly, at the time, a political discourse: fearing that the constitutional commitments with social transformation might became symbolic promises, the assertion of the authority of such clauses and its possible judicial scrutiny was a way to its enforcement.

Colombia's constitution, differently, has an express list of rights provided with immediate efficacy (art. 85)³¹ – none of them, socioeconomic rights. On the other hand, socioeconomic rights are not associated to a clause of gradual implementation, as in South Africa's constitution. The public duties related to socioeconomic rights are extracted from general clauses like art. 2 of the Colombia constitution, which establishes that the effectiveness of principles and rights enounced in it is an essential purpose of the State. Another interesting feature in the Colombian system is an express clause (art. 13) that enounces priority in providing fundamental rights favouring the discriminated and the marginalized. That same clause refers to a special protection of those in a personal condition that expresses manifest weakness³².

³⁰ That number should not be took as final; there are other fundamental rights mentioned along the Brazilian Constitution. There is also a specific clause (article 5º, § 2º) which states that the rights and guarantees expressed in the constitution do not exclude other ones deriving from the principles contained in the Fundamental Text, or from international treaties in which Brazil is a signing party.

³¹ In the list contained in article 85 of the Colombian constitution, one may find a various range of rights such as the right to life, protection against torture and cruel treatment, personality, intimacy, self development, freedom of thought and religion, petition to public agencies, work, learning, due process, etc., etc..

³² Once again, one can see the convergence between the Colombian system, and the South African experience. After all, even without an express provision referring to a especial protection those victims of discrimination or marginalization, the assertion that protection of the the vulnerable should be a feature of public policy

A preference sign favouring any part of the population is not an express clause in the Brazilian constitution. On the contrary, in the right to health for instance, the Brazilian constitution refers to a principle of universalization – and there is still controversy over what the meaning of that principle is. Even though it seems reasonable that public plans and policies should privilege the vulnerable segments of society, especially in a matter like health; one could easily find in the Brazilian jurisprudence, the concept that States duties when it comes to health comprehends even wealthy people. That assertion is grounded in the idea that constitutional protection to a health's right is a direct emanation of human dignity as the fundamental grind of the Brazilian Federative Republic – and that feature is the same, and should be equally protected among rich and poor.

That double indeterminacy in the Brazilian system – fundamental rights granted, without a precise content and with no priority, parameters when it comes to who should be the prior addressees of public policies present as a result, an increasing level of judicialization about those rights, as will be demonstrated in the following.

The understanding of both constitutional systems – the Brazilian and the Colombian ones – when it comes to fundamental rights and their protection will not be complete without a glance of the legal guarantees that may apply when those rights are not fulfilled by the executive or the legislative branch.

2.3. Legal guarantees of fundamental rights in Brazil and Colombia

Once more, the approximation between the Brazilian and the Colombian constitution and others qualified as transformational or aspirational seems correct. Both of them incorporate a comprehensive institutional system that should work in case of constitutional infidelity by the political branches – and the judiciary is presented as the mediator, or even, the main responsible in promoting effectiveness of socioeconomic rights, even thorough correcting public policy.

That kind of constitutional engineering is understandable through the historical perspective, in which extreme concentration of power in the Executive branch is point as a common reaction of the conservative forces in Latin America³³. In such a scenery, preventing inertia and providing formal mechanisms aimed to overcome the non-observance of those constitutional priorities is a constitutional feature as needed as the entrenchment of the fundamental rights themselves.

that promotes progressive implementation of socioeconomic rights was present since the earlier decisions like *Government of the Republic of South Africa and others vs. Grootboom vs. others*.

³³ GARGARELLA, Roberto. The constitution of inequality. *Constitutionalism in the Americas. 1776-1860. I-Con*, Volume 3, Number 1, 2005, p. 1-23, available at <http://www.ead.unb.br/aprender2013/pluginfile.php/904/course/section/1076/Int%20J%20Constitutional%20Law-2005-Gargarella-1-23.pdf>, access in 10/28/2014.

In Brazil, a violation of fundamental rights may be scrutinized by individual or collective lawsuits³⁴, in which judicial review (analysis of the constitutionality of a law provision) will be exercised – or not. The judicial complaint may simply involve an unfair exclusion of the plaintiff from the realm of a public policy that is already in course; or it may be grounded in the assertion that a constitutional provision requires some kind of public policy that simply does not exist.

Judiciary examination of a rights violation is granted to everyone by a constitutional principle called “access to justice”. Therefore, any conflict related to any right may be submitted to the judiciary – and if the prospective plaintiff cannot pay for the legal fees, he can be exempt by simply declaring that he cannot pay for them without prejudicing his basic needs. Legal representation is provided by a state institution called “Defensoria Pública”, which is a board of lawyers, that become public servants by public competition, whose job is to represent the underprivileged in lawsuits of any kind, even against the State that provides their own salary.

The scenery in Brazil is not complete without mentioning another public institution called “Ministério Público”, which represents the “society’s interests”. They too are public servants, with tenure and other guarantees granted so as to allow them to keep track of governmental activity, and even promote lawsuits if they believe the collective interest is not being sufficiently served. Tenure and no salary regression are important guarantees that should prevent the institution from feeling impaired of retaliations such as salary cuts or being fired. Also, selection by public competition – and not election – complete a framework in which those institutions are not called primarily to do political choices when it comes to public interests protection.

Usually, a lawsuit in Brazil involving fundamental rights will be settled by the lower courts and not by the Constitutional Court. This curious arrangement is due to an understanding in the Brazilian judiciary system that the Constitutional Court should not deal with factual evidences; their task is to only interpret and protect constitutional rules, and this is something that should be done without any consideration of facts. That is, the protection of the Constitution in Brazil happens through an evaluation of hypothetical risks and threats, without dealing with case-specific issues.

This is a very challenging feature of the Brazilian judicial system, especially after the 1988’s constitution and its large list of fundamental rights. Surely, when it comes to the violation of fundamental rights, the facts are all that matters. If not the facts of the

³⁴ Collective lawsuit is a literal translation of the Brazilian legal expression – in the United States they would be called “class actions”. In the Brazilian system, a collective lawsuit requires a violation of a right that transcends one single person; that encompasses a determinate collectivity, or even as indeterminate one – in what we call trans-individual rights. Those kind of lawsuits, according to the Brazilian procedural system, should be filed from the beginning, through an association, union or any other kind of organization that represent collective interests. Brazilian procedural law also allow a collective lawsuit to be filed by federation members (central government, States governments and municipalities) and by public institutions in charge of protecting societies interests.

case, at least the ones related to the public policies made by the government in that area. A proportionality test could never be held in disregard of the facts – and then, a decision about the constitutional meaning of social right rides on a very thin line between a merely abstract assertion, and a glance at the factual circumstances of the case.

There is not in the Brazilian system, a *writ*, or a particular way through which a citizen could bring his violation of a fundamental right directly to the Constitutional Court. There's a general remedy, called "extraordinary appeal", that is oriented to the Supreme Court – but it could involve any kind of constitutional litigation; it is not reserved exclusively to the protection of fundamental rights.

So how do fundamental rights get to the Constitutional Court in Brazil? Through the already mentioned "extraordinary appeal", that won't be granted if the discussion presented to the Court is found "contaminated" by a factual discussion. Of course, this is a very broad concept, which causes the Brazilian law community to assert that the Constitutional Court examines whatever they feel like examining, dismissing cases that seem unimportant or highly controversial, by declaring that the central point of that specific lawsuit is the discussion is of facts and not of rules or principles³⁵.

In that theoretical approach, the Brazilian Constitutional Court has already asserted that fundamental rights are justiciable and that the judiciary might in consequence, control and even formulate public policy, in order to assure that public programs will be answering to sensitive needs in such a field³⁶. There are even decisions from the Constitutional Court in Brazil where specific rights are examined – and proclaimed as invested with immediate efficacy, therefore demanding prompt deliverance of goods and services³⁷. The problem is that those decisions usually limit themselves to the assertion that the right is justiciable and that State has duties in promoting and protecting it. When it comes to establishing parameters to evaluate public policy or even the content of the right in discussion, the Constitutional Court is usually reluctant.

³⁵ As an illustration of what kind of litigation in fundamental rights the Court usually examines, health issues is on the "top ten" list. This is a clear example of that flexibility that the Court allows itself when it comes to grant – or not – a remedy due to excessive factual background.

³⁶ The first ruling in which the Constitutional Court proclaimed the possibility of judicial review fall upon public policies, striking them out or even formulating a substitutive model, or a new one that should fill the existing blank was dealing with a fundamental right do access to pre-school (BRAZIL. Federal Supreme Court. RE 410715 AgR, Relator(a): Min. CELSO DE MELLO, Segunda Turma, julgado em 22/11/2005, DJ 03-02-2006 PP-00076 EMENT VOL-02219-08 PP-01529 RTJ VOL-00199-03 PP-01219 RIP v. 7, n. 35, 2006, p. 291-300 RMP n. 32, 2009, p. 279-290). The lawsuit was filed due to the circumstance that the city of Santo André, despite the constitutional provision that grants pre-school as an element of the right to education, was not providing the required public service.

³⁷ It is also widely known and fairly reported the decisions delivered by the Brazilian Constitutional Court related with the health right. The rulings go to order the deliverance of medication, to granting medical procedures, or even to hire medic and other health professionals. To a brief view of judicial litigation in the field, FERRAZ, Octavio Luiz Motta. The right to health in the courts of Brazil: worsening health inequities? **Health and Human Rights Journal**. Volume 16, Issue 2: Special Issue on Health Rights Litigation.

Colombia, on the other hand, has a whole chapter in the constitution regarding the protection and application of fundamental rights (Chapter 4), and a wide range of procedures related with the preservation of the Constitutional itself³⁸. The crucial role was reserved to a particular provision (*acción de tutela*) designed to protecting constitutional fundamental rights violated or endangered by an action or omission of public authorities (art. 86). It is an exceptional remedy, and it should be rejected if any other judicial mean is available. It is the same constitution that allows the use of *acción de tutela* as a transitory mechanism oriented to preventing irremediable damage – and in that sense it has been largely applied, also due to a progressive interpretation held by the Colombian Constitutional Court.

It is interesting to underline that the judicial system in Colombia, offering the possibility of a direct motion to the Constitutional Court just like *acción de tutela*, provides in a certain way, a broader social control of the public policy that is in action. As long as any citizen, excluded or damaged by that same governmental plan, can submit that exclusion to the judicial control of the Constitutional Court; you don't have to rely so heavily in institutional controls like in Brazil.

Acción de tutela is not a remedy directed exclusively to the Constitutional Court; and this is a point that should be stress. It could be directly present by a citizen to any judge, even without legal representation. What happens is, as the Constitution deems this type of action as one that should be examined with priority, even if the litigation starts in a lower court. That feature leads to a tendency of the *tutelas* to reach higher decision levels in a relatively short time, enabling the Constitutional Court to give the necessary guidelines about the rights content.

Unlike in Brazil, in Colombia the appreciation of the facts does not seem to be a problem when it comes to judicial scrutiny in any level: the Constitutional Court's decisions dedicate a whole section exactly to the exam of the factual aspects of the controversy.

One more remark to be done about the Colombian Constitutional Court's and its vision of granting fundamental rights – and it is related with de courts orders. Aside from the ordinary type of ruling, in which the court provides individualized enforcement of a specific constitutional right, or deliver a negative injunction, striking down a normative command or a public policy in course of action; the Colombian Constitutional Court has also applied structural remedies³⁹. That innovative kind of ruling intent to frame, in

³⁸ New procedures were introduced to safeguard different types of rights and interests protected by the Constitution. Those tools include: 1) a writ to order administrative authorities to fulfil their legal mandates in specific situations (*Acción de Cumplimiento*); 2) a writ to protect collective rights (*Acción Popular*); 3) a writ to secure rights of specific social groups (*Acción de Grupo*); and finally 4) the writ of protection of fundamental rights (*Acción de Tutela*). (ESLAVA, Luis, Constitutionalization of Rights in Colombia: Establishing a Ground for Meaningful Comparisons (December 16, 2009). *Revista Derecho del Estado*, Vol. 22, pp. 183-229, 2009. Available at SSRN: <http://ssrn.com/abstract=1524547>).

³⁹ Describing the experience of the Colombian Constitutional Court with structural injunctions, LANDAU, David. The Reality of Social Rights Enforcement (March 2, 2011). *Harvard International Law Journal*, Vol.

a broader base, obligations that emanate from the constitutional provisions. A second very important characteristic of structural injunctions is that they are delivered, usually, in a combination of a ruling with some kind of supervisory jurisdiction, meaning, the Court monitoring – by itself, or with the help of official agents or even of society organizations – the implementation by government, of the initial commands expressed in the ruling.

In a preliminary comparative exercise, it should be noted that the Brazilian solution sank in opening up the alternatives of judicial scrutiny, by granting everyone access to Court, and by empowering public institutions that may support those nonconformism with the effectiveness grade of a socioeconomic right. The general idea seems to be that when the dispute about a social right arrives in Court, it will meet solution due to the juridical expertise of the constitutional judges. If the conflict is grounded in rights, law should provide the necessary criteria to solve the tension – facts details and administrative difficulties in offering the claimed right are not relevant to finding the proper legal answer. The problem is that especially in the grounds of social rights, there is much more than a judicial dispute. Social inclusion through a rights granting strategy is never set apart from an idea of distributive justice; it is never divorced from a choice about funding priorities. In short, debating the due content of a socioeconomic right is never merely a juridical debate.

The Colombian approach, on the other hand, embracing the factual analysis; providing priority to disputes submitted through *acción de tutela* and exploring the possibilities of structural injunctions seems to assume more clearly that enforcing socioeconomic rights is not a pure legal question; therefore it should go beyond the classical litigation model.

The clear insufficiency of the classical judicial tools to overcome social rights disputes become clearer when the good or service associated with the constitutional provision is scarce; a scarcity that does not depend merely on the willingness to spend money, but enclose other features that prevent an immediate solution to the lack in the offer. This is precisely the difficulty associated with the housing right – that is equally protected in the Colombian and in the Brazilian constitution.

3. HOUSING RIGHTS IN BRAZIL AND COLOMBIA: CONSTITUTIONAL FRAMEWORK

The main reference in the Colombian constitution to a housing right is art. 51⁴⁰; complemented by another disposition that refers to the State's duty to promote

53, No. 1, 2012; FSU College of Law, Public Law Research Paper No. 488. Available at SSRN: <http://ssrn.com/abstract=1774914>.

⁴⁰ Article 51 – Every Colombian has a right to a proper home. The State shall establish the necessary conditions to make that right effective, and shall promote social policies oriented to provide housing; adequate systems in long term financing, and associative forms of executing those housing programs.

progressive access to land property in favour of rural workers (art. 64). The housing right – it should be reminded – is not among the rights provided with immediate efficacy, as stipulated in art. 85.

The Brazilian constitution, on the other hand, only mentions the housing right in art. 6^o41, in a large list of socioeconomic rights. It should be clarified that the original constitutional text in Brazil did not mention a housing right; the reference was included by a constitutional amendment in 2000. There is no specific allusion to the efficacy of such right, but it is usually read as one of the many encompassed by the generic clause contained in the Brazilian constitution, art. 5^o § 1^o 42 which grants immediate efficacy to fundamental rights. That Brazilian constitutional clause, when interpreted together with the openness to new fundamental rights in art. 5^o, § 2^o 43, leads to a comprehension that immediate efficacy is a feature that should be recognized to every fundamental right express or implicitly extracted from the Brazilian constitution.

What should be kept in mind when housing issues are examined is the historical perspective in developing countries like Brazil or Colombia, because the root of these problems indicates meaningful variables that should be taken into account when thinking about judicial scrutiny.

In Colombia, population displacement⁴⁴ is a sensible issue, usually characterized as a side effect of the increasing power of armed groups, and their attempt to conquer power. Various paramilitary organizations operating in the country for many years, as a truly parallel power, created a reality in which armed conflicts were almost routine in some regions. A strategic interest of any of those groups in some localities might determine massive displacement from a villa or a small town. Displacement could take place also because a family or even an individual citizen opposed to the presence of the armed group which has gained power.

The result was a permanent displacement of population, a phenomenon that took place through a large period of time – sometimes through massive manifestations; sometimes silent and undetected, comprehending a family, or maybe a single individual, ordered to leave the community by members of one of the armed groups.

41 Art. 6^o – The social rights are education, health, food, work, housing, leisure, security, social security, mother and childhood protection, assistance to the unhelped, as ruled in this Constitution.

42 Art. 5^o § 1^o – The provisions defining fundamental rights and guarantees have immediate efficacy.

43 Art. 5^o, §2^o – Rights and guarantees expressed in that Constitution do not exclude others related to the regimen and principles adopted by itself, or to international treaties in which the Brazilian Federative Republic is a party.

44 The phenomenon is called in Colombia, “desplazamiento”. A perfect translation should take into account that the displacement in their country happened mainly due to political conflict between government and armed groups that for decades intended to conquer political power. Exile, for sure, is a word that would reveal that political background – but still, won't represent properly what happened, because the population was moving, but still in the countries' frontiers. That is why displacement was the chosen word to be used in that essay.

Those features resulted also in kind of a concealment of the problem, hidden in the broad scenery of an unofficial war⁴⁵.

This led to an important characteristic of the Colombian displacement: it stroke all kinds of people, and not a particular ethnicity, religion or social group, given that the main cause was simply being in the way of the war.⁴⁶ Another relevant feature – a consequence of the multipolar characteristic of the armed conflict – is that the displacement reached many regions in the country. The combination of those traces created a very heterogeneous group of displaced people – therefore, a collectivity that has no other identity other than having been struck (all of them) by the displacement. This will have implications in their own capacity to organize themselves as a social group, in order to demand from the State a proper response to that unfortunate reality.

That context enlarges housing problems in Colombia, after all, dealing not only with the goal of providing shelter, but also the challenge of inserting the displaced population into an unknown, even hostile environment must be dealt with. This insertion would mix people of different origins, culture, and history, which could result in further discomfort and conflict among them. Furthermore, losing their roots as a result of an unofficial war brought also the problem of belonging: the displaced do not perceive themselves as belonging to the community in which they are living.

In Brazil, housing problems are not so deeply related with displacement. Even though there is still an exodus to the richest metropolis in the South-East – especially when the dry season is more acute in the Northeast –; nowadays housing problems are related mainly to the absence of a comprehensive public policy oriented to providing that right, especially in the big centres. So, for decades, the government did not offer popular houses, or even financing plans – neither for popular housing, nor for the middle class ones⁴⁷. On the other hand, even the private sector was not offering financing or any kind of programme related with housing – the country was experiencing hiper-inflation, and banks were more interested in the financial market than in housing projects.

This turned the middle class towards cheaper properties – ones that could be bought without special conditions in financing – and left the needy with no alternative at all. The consequence was the multiplication of slums in most of the main capitals in Brazil, frequently located not only in the suburbs, but also in the centre of those cities⁴⁸.

⁴⁵ GIRALDO, Gloria Naranjo. El desplazamiento forzado en Colombia. Reinención de la identidad e implicaciones en las culturas locales y nacional. *Scripta Nova. Revista Electrónica de Geografía y Ciencias Sociales*, Universidad de Barcelona [ISSN 1138-9788] N° 94 (1), 1 de agosto de 2001.

⁴⁶ This is an entirely different reality when compared with recent history in South Africa, where displacement was a phenomenon that struck mainly the black population, due to laws in the apartheid regime.

⁴⁷ In the 70's, there was a public agency named Housing National Bank, that was in charge of financing houses – for the poor, middle class – but a series of scandals resulted in its closing.

⁴⁸ Another explanation could be offered to slums in the inner city: public transportation is also very precarious in big cities in Brazil, turning residency nearby work regardless of the conditions, very attractive.

That unorthodox solution sought by the less favoured, was consolidated through time, resulting in slums like “Rocinha”, in Rio de Janeiro, with a of around 100.000 people.

A final consideration should be made about the Brazilian housing rights context. Given the fact that the absence of public policies was the main cause of housing problems; a state of leniency was installed when it came to the occupation of public areas. So, for years the population built improvised shelter in public areas, occupying spaces that were originally intended for the expansion of the roads, or other infrastructure equipment like squares or leisure areas. The nomination of Brazil as headquarter for the World Cup in 2014 and the Olympics in 2016 provoked an expressive amount of public enterprises taking place in major capitals – which frequently involve finally giving public spaces occupied by the population, their originally intended public destination. Those public enterprises promote the debate around the eviction of those who have been living in those public areas, sometimes for decades, sometimes even paying taxes related with their precarious houses. In Rio de Janeiro, particularly, where both of the sports events will take place, the significant enterprises and transformations in transportation and infrastructure that the city must undergo to be prepared for the games, have turned populational exodus⁴⁹ a major issue.

4. JUDICIAL EXAMINATION OF THE HOUSING RIGHT IN BRAZIL AND IN COLOMBIA

Despite a common trace in history, comprehending the colonization process and violent domination in previous political regimes; and regardless of the clear inspiration that the Colombian Constituent Assembly found in the Brazilian experience with the 1988’s constitution; both countries have adopted different paths in dealing with socioeconomic rights – particularly, housing rights, as may be immediately perceived in the constitutional treatment of the subject adopted by each of the. Curiously, as the decisions came to be, the judicial interpretation in those rights in both courts has provided different approaches, and the results in the effectiveness standpoint, are unexpected.

4.1. Assertion of the justiciability of the housing right in Brazil and Colombia

The proclamation itself of the justiciability of the fundamental rights in Brazil was a direct consequence of the already mentioned constitutional clause that provides all of the fundamental rights with immediate efficacy⁵⁰. Even though in the earlier years of the 1988’s Constitution validity some discussion was established due to the evident

⁴⁹ The expression should be understood as comprehending all kinds of evictions: those related with illegal occupation and expropriations made due to public interest or social need.

⁵⁰ To a transcription of the mentioned constitutional clauses, see footnotes 27 and 28.

cost reflects of the assertion that socioeconomic rights might be judicialized, soon the conclusion was that the objection must be overcome by the granting of at least, the *minimum core* or those same rights⁵¹.

The turning point in the Brazilian Constitutional Court related with fundamental rights and public policy, was the conclusions stated in RE 410715 AgR, Justice Celso de Mello, ruled in 11/22/2005. In that decision the Court asserted that, “even though the primary prerogative in formulating and executing public policies belong to the Legislative and Executive power, it turns possible to the Judiciary, even in exceptional basis, especially when it comes to public policies designed by Constitution itself, order their implementation by a defaulter state agency, which omission – that implicates in the non-fulfillment of their juridical and political mandatory duties – shows itself apt to compromise the efficacy and integrity of social and cultural rights provided with constitutional status.”

That first proclamation was repeated and extended to the housing right, recently, in ARE 639337, Justice Celso de Mello, ruled in 08/23/2011, in which the Constitutional Court asserted that the minimum core notion in fundamental rights is enough to “guarantee do citizenry, goods and services provided by the State, sufficient to achieve the full enjoyment of basic social rights as a right do education, child protection, right to health, social security, housing, food and public security”.

The conclusion is that housing rights in the Brazilian system are qualified as fundamental (despite their socioeconomic nature); and they are provided with immediate efficacy, meaning that the State have duties in guaranteeing those rights at the same immediate pace. The judiciary may scrutinize public policy in the subject, assuring priority to the protection of the minimum core of the housing right.

The constitutional framework was not that clear in Colombia. A right to proper housing was proclaimed in the Constitution, but as a social right, and excluded of the clause that invested some of the fundamental ones with immediate efficacy (art. 85 in the Colombian constitution).

The problem related with that constitutional design arrived at the Colombian Constitutional Court in the earlier days. After all, despite the fact that those rights were not included in art. 85 of the Colombian constitution; they surely were not supposed to be just a wishful thought. From the beginning, the Colombian Constitutional Court adopted a position in which in spite of reaffirming the difference on the efficacy level between the first generation of fundamental rights and the socioeconomic ones, it

⁵¹ As a matter of fact, that theoretical solution still faces a lot of controversy, due to the difficulties associated with the concept of minimum core, systematized in YOUNG, Katharine, *The Minimum Core of Economic and Social Rights: A Concept in Search of Content*. *Yale Journal of International Law*, Vol. 33, No. 1, 2008. Available at SSRN: <<http://ssrn.com/abstract=1136547>>. The Brazilian approach in the subject is clearly oriented to a value-based core, and this left unsolved the challenging possibility of judicial decisions valuing differently dignity and freedom when the plaintiffs are from different social stratum.

could discern the possibility of granting the latter some degree of enforceability due to its intrinsic relation – considering the circumstances of the case – with a right provided with immediate efficacy⁵².

The housing right specifically, was appreciated for the first time in Sentencia No. T-251/95, in which the absence of immediate efficacy in such a right was reaffirmed. A novelty in the Court's ruling was labeling housing rights as submitted to a progressive development clause⁵³ – an expression that in its meaning, is very close to the “progressive realization” clause contained in South Africa's constitution⁵⁴.

In the following decisions, the Court proclaimed equally the state's duty in providing access to housing programs⁵⁵ due to a public interest in facing the housing deficit and in protecting the dimension of human dignity that may be challenged by the unsheltered condition.

Finally, in the subject of the justiciability, the Colombian Constitutional Court also established that the abstract nature of the public interest clause – that is the foundation of State's duties related with housing rights – requires that its application should be oriented to conciliate public interest, individual rights and the social value expressed in cultural diversity⁵⁶. That understanding intends to avoid that housing rights, usually

⁵² COLOMBIA. Constitutional Court. Sentencia No. T-506/92, Justice Ciro Angarita Baron, Sala Primera de Revisión, ruled in 01/22/92. “Fundamental rights provided with immediate efficacy are those of liberty and formal equality, and also some rights designed to promote material equality, related with protecting life and human dignity. Their immediate efficacy comes from their general nature, and is valid in every case. Fundamental rights provided with indirect efficacy are those socioeconomic or cultural that have a narrow connection with fundamental rights provided with immediate efficacy. That kind of efficacy results from the necessity to establish a balance of the circumstances in each case, which in turn, is a consequence of the very nature of rights that presume an unequal treatment in order to achieve some level of material equality”.

⁵³ COLOMBIA. Constitutional Court. Sentencia No. T-251/95, Justice Vladimiro Naranjo Mesa, Sala Novena de Revisión de la Corte Constitucional, ruled in 06/05/95. “Constitutional rights submitted to a progressive development clause, like housing rights, may only produce effects with the fulfillment of some juridical and material conditions that turn them possible – meaning that primarily, those rights are not susceptible of immediate protection by *acción de tutela*. Therefore, housing is an objective right from an attendance character, that should be developed by legislation and promoted by Public Administration in accordance with the law.”

⁵⁴ Art. 26. Housing.- (1) Everyone has the right to have access to adequate housing.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right.

⁵⁵ COLOMBIA. Constitutional Court. Sentencia No. T-383/99, Justice Alfredo Beltrán Sierra, ruled in 05/27/99. “According to constitution, acquiring and preserving housing to Colombian families cannot be taken as a subject not knowledgeable to State given that, differently from what happened in an overcome individualistic understanding, authorities have a constitutional specific task to fulfill in a favored way, public necessities in acquiring houses, facilitating payment in adequate conditions”.

⁵⁶ COLOMBIA. Constitutional Court. Sentencia No. C-053/01, Justice Cristina Pardo Schlesinger, Sala Plena de la Corte Constitucional, ruled in 01/24/01. “It's precisely the abstract and undetermined character of the public interest concept that leaded liberal modern constitutions to consider the necessity in harmonizing it with individual rights and with the social value inherent to cultural diversity. That's why in order to provide prevalence of public interest, an indispensable requirement is that the jurist analyze in great detail the particularities of each case, trying to harmonize public interest with individual rights and, if that harmonization become impossible, promote a balance taking into account the value hierarchy pointed by constitution”.

scrutinized by an individual lawsuit – *acción de tutela* – may succumb to a hiper-individualistic perspective.

In sum, housing rights in Colombia are fundamental – but only invested of immediate efficacy when in narrow connection with first generation fundamental right such as liberty or material equality; therefore they can be judicially scrutinized, but in a perspective that allows that concrete connection due to particularities of the case.

4.2. Scope of judicial analysis in housing rights lawsuits in Brazil and Colombia

A clarification should be done in the scope of the judicial rulings in Brazil and Colombia, showing a curious paradox.

As a direct consequence of its own judicial system, litigation in Brazil related with socioeconomic rights – and housing is no exception – may be held in individual lawsuits, or in class actions. Adding to that the immediate efficacy of fundamental rights, one has an ambience where the Brazilian Constitutional Court is entitled to rule in a broader approach, drawing major lines concerning the contents of a right and the parameters that should be used to evaluate a possible violation – especially when that fundamental right has constitutional *status*, as happened with housing. That perception would be reinforced by the Constitutional Courts assertion of the possibility to control public policy, which should bring to attention the whole public action program in the field. Still, this is not what happens in Brazil.

Despite the proclamation of the justiciability of social rights – including housing rights – the Brazilian Constitutional Court has not yet dedicated itself to establishing parameters regarding the definition of the abstract content of such a right; nor has it spent time listing main features that should be followed by a public policy designed to provide such a right. The most frequent technique utilized by the Constitutional Court in dealing with those rights would be simply the proclamation of the (in) compatibility of a legal provision that might have some implication with housing, with the constitutional commitment in protecting housing rights, defining a somewhat negative certainty zone⁵⁷. The Brazilian Constitutional Court did not justify that strategy – there is no proclamation of a discretionary zone reserved to the public administration, or some kind of deference that should be given to administrative choices. As a result, the so-called control of public policies in housing rights is not instructional, but merely by reproach, in a non-dialogical relation between the Court and the Administration. There

⁵⁷ An example of that kind of strategy can be found in RE 407688, Justice Cezar Peluso, Tribunal Pleno, ruled in 02/08/2006, in which the Court asserted the constitutionality of a legal provision that allow a homestead property owned by someone who figures as a guarantor in a contract, to be reached by seizure. That same kind of decision can be delivered by the Superior Court of Justice, in examining exactly, constitutionality of national laws ruling any aspect of property, and how it could be challenged by any legal or judicial decision.

is not an effort in the sense of framing any normative concept of the content of the right itself, or even of the duties that may be established for the State to abide by in drawing correspondent public policies.

That path presents itself as especially doubtful when one takes into consideration the fact that the same Brazilian Constitutional Court asserted that each fundamental right has a *minimum core* that should be judicially protected. That proclamation leads to the inevitable recognition that in spite of the constitutional provision that fundamental rights are provided with immediate efficacy, there is a differentiation that should be done between the core content of such rights and the peripheral. That differentiation seems to be an operation to be held by the Constitutional Court, as the main guardian of the constitution; and in a broader basis, concurring to a greater effectiveness of the Fundamental Chart. In spite of all this, the Brazilian Constitutional Court has been opting for a path in which the content of the housing right, or the characteristics that should be applied to housing programs or public actions of eviction are not a primary concern and no answer is even hinted at to a public servant that intends to be guided by judicial interpretation in the fulfillment of his constitutional duties.

A predictable risk is that those decisions in housing rights do not really collude, neither to increase the protection level of such a right, nor to develop the democratic process inherent to the enunciation of a public policy in the field. Summing up, the Brazilian Constitutional Court, when dealing with housing rights has not perceived – or at least, has not given a proper answer – to the regressive potential of judicial decisions in socioeconomic rights in without considering the necessary dynamic interaction between legal and broader political processes⁵⁸.

An important symptom of how present that risk is, in the Brazilian reality, is the solution provided by lower courts to housing rights litigation. Frequently, conflicts involving eviction are being solved by compensatory measures – financial reparation for the lost house (or the house that is to be lost, at times); sometimes granting the plaintiffs a temporary aid called “social rent”, that is presumed to be enough to provide for the needed shelter. That kind of decision, taken in an individual basis is found by judges to be granting the housing rights – but it is certainly not doing so. Financial reparation or “social rent” does not generate the needed shelter, and usually, the result is simply the displacement of the evicted from irregular occupancy to irregular occupancy – and most probably, the repetition of the same problem and adjudication in the near future.

Colombia, on the other hand, has been experiencing a different path. Building the justiciability of socioeconomic rights in an inherent connection with liberty and material equality brought more than a case-oriented approach. The general line of

⁵⁸ LIEBENBERG, Sandra. **Socioeconomic rights**: adjudication under a transformative constitution. Claremont: Juta & Co. Ltd, 2010, p. 41/42.

thought in developing the possible content of the housing right is built in an inter-connectivity pattern, that takes into account how those different fundamental rights should relate. As a result, the judicial scrutiny necessarily ends up taking into account, not only a specific fundamental right, but also a whole set that is inherently related with the most evident one claimed in the lawsuit.

Differently from the Brazilian approach – in which the immediate efficacy is asserted in abstract, to each and every fundamental right –; in Colombia a conclusion about the possibility of judicial enforcement of a housing right can only be established when all the concurring rights are understood on a systematic basis. This is an approximation that mitigates somehow the regressive potential of the judicial decision; at least because it takes in account the whole system of fundamental rights and human dignity protection.

Even though judicial decisions in Colombia in the housing subject usually take place in *acción de amparo* – a procedure that, as it was already mentioned is oriented to individual claimings⁵⁹; the fact is that the definition of the connectivity of the concurring rights is a logic operation that is held in abstract, and then applied to the concrete situation. That logical operation is reflected even in the physic configuration of the Colombian Constitutional Court's decisions, usually divided in different sections which deal with the facts, the previous rulings and the juridical problem that should be faced. The Court's considerations are delivered in that same order, examining the juridical problem in abstract, and only then promoting the conciliation between the premises established in facing the juridical problem with the facts of the case.

That strategy in building the Colombian Constitutional Court's decisions results in the enunciation of abstract parameters that may orient the comprehension of the effects of a housing right, though qualified as a socioeconomic one, in public action. This was the context in which, for instance, the Colombian Constitutional Court affirmed that an eviction promoted by public administration in public areas should observe due process – meaning the citizen who would be struck by the eviction should be allowed argue against it. The Colombian Court also asserted that in situations where a state of legitimate trust was established between the citizens and the Administration related with the possibility of building in a determined area, an eviction process in that same place should be constrained, and the removal subordinated to the offer of an allocation alternative by State⁶⁰.

⁵⁹ It should be noted that sometimes, the Colombian Constitutional Court decides collectively a big amount of *acción de tutela*, in an accurate intellectual exercise of dealing with a problem in a macro vision, an them applying those macro parameters to individual situations – as an example, COLOMBIA, Constitutional Court, Sentencia SU-360 de 1999, Justice Alejandro Martínez Cabalero, Sala Plena, ruled in 05/19/1999, dealing with dozens of workers were claiming a right to oppose to eviction from public spaces.

⁶⁰ Recently, in Sentencia T-437 de 2012, the Colombian Constitutional Court granted *tutela* to an old man that has been living in a public space for almost 20 years, even paying taxes for the occupied area. The main reason

The combination of the housing right, and the previously mentioned constitutional provision of a special protection favoring the most vulnerable also allowed the Colombian Constitutional Court to grant protection in favor of women who are heads of the family⁶¹ and children⁶².

The paramount decision in housing rights, in which that abstract reasoning, followed by its concrete application in the existent *acciones de tutela* is certainly Sentencia T-025 de 2004⁶³, in which the Colombian Constitutional Court decided at a time, 105 *acciones de tutela*, all of which concerned the inadequacy or insufficiency of the public policy designed to deal with the internally displaced people. In that decision, the Court proclaimed what it called an “unconstitutional state of things”⁶⁴, meaning, a general incompatibility between the public policy that was in course to provide shelter for those people, and the constitutional parameters related with the promoting of social inclusion, material equality and human dignity. In the ruling, the Court examined the postponing arguments that Public Administration usually presents – budgetary problems, constrictions related with bigger priorities, etc. – asserting a general obligation for the State in taking action, granting a minimum level of protection and preventing regression in that same cover.

One additional comment deserves to be made, due to its novelty. In the Colombian judicial system, the procedure to be observed in “*acción de tutela*” is regulated by Decreto 2591 de 1991, in which a provision can be found (art. 27)⁶⁵ that allows the

was that it could be seen a legitimate trust by the petitioner, that his occupancy has been somehow taken as regular by Administration, that was offering him public services and charging him taxes. (COLOMBIA. Constitutional Court, Sentencia T-437 de 2012, Justice Adriana María Guillém Arango, Sala Tercera de Revisión de la Corte Constitucional, ruled in 06/12/12.)

⁶¹ COLOMBIA. Constitutional Court. Sentencia T-079 de 2008, Justice Rodrigo Escobar Gil, Sala Cuarta de Revisión de la Corte Constitucional, ruled in 01/31/08.

⁶² COLOMBIA. Constitutional Court. Sentencia T-617 de 1995, Justice Alejandro Martínez Caballero, Sala Séptima de Revisión de tutelas de la Corte Constitucional, ruled in 21/13/95. This is a decision with many in common with *Government of the Republic of South Africa and others vs. Grootboom vs. others*, where de pivotal reason to the granting of the *tutela* was a massive presence of children in a community struck by eviction. The decision of the Court determined also that the correspondent public agencies should take the necessary provisions in order to provide the basic conditions necessary to preserve the families’ unity and the children’s protection: “The existence of minors does not block a judicial or administrative order of eviction. Nevertheless, the State cannot disregard its duties related with child protection, preserving familiar unity, especially when the children live in inhuman conditions”.

⁶³ COLOMBIA. Constitutional Court. Sentencia 025 de 2004, Justice Manuel José Cepeda Espinosa, Sala Tercera de Revisión, ruled in 01/22/2004.

⁶⁴ This was not precisely the first time in which the Court applied that concept; as a matter of fact since 1997 there have been seven decisions of this kind, in a broad range of subjects, as noncompliance with the state’s obligation to affiliate numerous public officials to the social security system, massive prison overcrowding, lack of protection for human rights defenders and failure to announce an open call for public notary nominations (RODRÍGUEZ-GARAVITO, César. Beyond the courtroom: the impact of judicial activism on socioeconomic rights in Latin America. *Texas Law review*, Vol. 89 (7), 2011).

⁶⁵ Art. 27 – In every case, the judge will establish the effects of his decision to the concrete case, and will maintain competency until the right is entirely reinstated or the menace causes ceased.

Court to dedicate itself to a supervisory jurisdiction. That strategy is being fully used in monitoring the compliance with the Court's decision in such a difficult matter as that of the displaced people. The Court even ordered⁶⁶ and has already promoted a special public audience that, according to its own ruling should "evaluate the effectiveness of the different disciplinary, fiscal and judicial mechanisms that provide compliance with the orders delivered by the Constitutional Court as ruller of an *acción de tutela* intending to protect displaced people; also the obstacles and institutional practices that have turned difficult the application of the decision.

So here is the paradox: Regardless of the apparent stronger character of the housing right in the Brazilian constitution due to its immediate efficacy, the fact is that judicial protection by Constitutional Court is being held in a minimalist approach. This is a curious deviation from Mark Tushnet's thesis⁶⁷ that opposes two models: strong rights and weak courts, or weak rights and strong courts. In Brazil, housing rights may be seen as strong – but in reality, they are not, due to the lack of density in the correspondent constitutional clause. Judicial review in Brazil may be theoretically qualified as a strong-form, considering that courts have general authority to determine what the Constitution means, through constitutional interpretations equally authoritative and binding to the other branches⁶⁸. Despite that apparent strong-rights and strong-courts combination, minimalist rulings do not reveal, and are not capable of generating the intended transformational effect.

In Colombia, on the contrary, the lack of immediate efficacy did not paralyze the Court. In a creative interpretation, inserting housing rights in the complex of fundamental rights that should be protected in order to preserve the core value of human dignity, the Colombian Constitutional Court carved a strategy that enhances the transformational potential of its own practice, exchanging parameters and evaluation with public administration, in order to improve public programs in the subject. Even the binding effect, that is not clearly stated in the Colombian Constitution, was affirmed by the Court through the expansion of the originally *inter partes* effects of *tutela*, granting *inter communis* effects to persons who have not actually filed the corresponding *tutela*, but share common circumstances with the plaintiffs, belong to the same community, and might be negatively affected by a decision that does not include them.

Even the public audience that took place in the displaced people matter is a demonstration of a dialogic practice of judicial review in socioeconomic rights; an approach that does not rely exclusively in the judicial capacity to interfere and transform

⁶⁶ COLOMBIA. Constitutional Court. Auto 219 de 2011, Justice Luis Ernesto Vargas Silva, Sala Especial de Seguimiento a la Sentencia T-025 de 2009, ruled in 10/13/2011.

⁶⁷ TUSHNET, Mark. **Weak courts, strong rights. Judicial review and social welfare rights in comparative constitutional law.** United States: Princeton University Press, 2008.

⁶⁸ TUSHNET, M. 2003. Alternative forms of judicial review. **Michigan Law Review**, 101:2781-2802.

reality, but requires a broader range of public agents, critics and social organization, that should provide a pluralistic view⁶⁹, enhancing the chances of a consistent and progressive public action in the subject. Activism here appears not to be a behavior pattern drawn in an adversarial contraposition between power branches; activism in the Colombian Constitutional Court is a strategy designed to increase institutional capacities and coordinate public efforts in order to fulfill the State's constitutional commitments.

5. JUDICIAL PROTECTION IN HOUSING RIGHTS AND DEMOCRACY: A SUBJECT TO BE FACED IN BRAZIL AND ALSO IN COLOMBIA

The Constitutional Courts' courses evidence that litigation in housing rights is probably a phenomenon in a progressive curve. The housing deficit in Brazil, in 2008 was estimated in 5,5 million (in governmental numbers)⁷⁰; in Colombia, in 2005 the same deficit was established in 3,8 million⁷¹. Besides that, the judicialization of the public policies is also a tendency in those countries – as it seems to be in the whole world⁷² – in a pattern that doesn't seem likely to change in the next years⁷³. The classic causes for that phenomenon, such as the discredit of the Executive and Legislative branch, or in the other side of the spectrum, a strategy held by those same political branches oriented to depoliticize those subjects – therefore, lightening their political burden in any course of action; those are problems that would still be in the scenery. The challenge is how to protect housing rights, in the sense the constitution intended to do, without falling back into the trap that is the judicialization of socioeconomic rights.

⁶⁹ On the importance of a polycentric view when it comes to the enforcement of socioeconomic rights, dialoguing with the South African experience in judicial review, RAY, Brian, Policentrism, Political Mobilization and the Promise of Socioeconomic Rights (December 9, 2009). **Stanford Journal of International Law** Vol. 45, p. 1; Cleveland-Marshall Legal Studies Paper No. 08-154. Available at SSRN: <http://ssrn.com/abstract=1098939>.

⁷⁰ These data were found in a survey held by the Cities Ministry, cited by the federal legislative, available at <<http://www2.camara.leg.br/camara/noticias/noticias/ADMINISTRACAO-PUBLICA/196187-DEFICIT-HABITACIONAL-NO-BRASIL-E-DE-5,5-MILHOES-DE-MORADIAS.html>>, access in 02/14/2013.

⁷¹ These data are provided by Centro de Estudios de la Construcción y el Desarrollo urbano y regional, available at <http://www.cenac.org.co/index.shtml?apc=l1----&x=20152718>, access in 02/14/2013.

⁷² HIRSCHL, Ran. The judicialization of mega-politics and the rise of political courts, **Annu. Rev. Polit. Sci.** 2008. 11: 93-118.

⁷³ In the Colombian experience in judicialization of politics, mapping challenges and benefits, YEPES, Rodrigo Uprimny. Judicialization of politics in Colombia: cases, merits and risks. *Sur*, São Paulo, v. 3, Selected Edition 2007. Available from <http://socialsciences.scielo.org/scielo.php?script=sci_arttext&pid=S1806-64452007000100003&lng=en&nrm=iso>. access on 15 Feb. 2013. The Brazilian experience in the same path is described in VALLE, Vanice Lírio do. Judicialization of Socio-Economic Rights in Brazil: The Subversion of an Egalitarian Discourse (March 30, 2012). Available at SSRN: <http://ssrn.com/abstract=2031719> or <http://dx.doi.org/10.2139/ssrn.2031719>.

5.1. Scarcity and public choices

When it comes to housing, two variables are extremely important. One of them is the scarce nature of the intended good – and the argument here is not only based in the budgetary problems. One house is rarely like another. There are intangible aspects that give particular value to a house – and not to another. Location, community, personal history, working place proximity, availability of public transportation, familiar neighborhood – all those are aspects that influence the value that someone perceives in a particular house. So the scarcity is an inevitable problem when it comes to housing programs – because it is not physically possible to assure to every possible displaced or evicted person, that their new destination would be just like the place they are currently leaving.

The second variable – intrinsically related with the first one – is that if scarcity is an inevitable issue, choices should be made, and when it comes to public choices, every inclusion brings a correspondent exclusion. If a public park is to finally be created, providing better life quality in a community, it may require evictions if the public area is invaded. So here we face a first choice: maintaining people in the invaded area and depriving the neighborhood of the park, or building the park at the cost of those people's houses? We can always build the park somewhere else – would this be an acceptable solution? Will it increase the costs? Would it suffice to guarantee the benefits the building of the park seeks to provide?

The usual proposition – and in fact, the inclination of the Colombian Constitutional Court⁷⁴ – is that the State should provide some form of alternative sheltering to the displaced or evicted, and it seems to be a good solution. The problem is that the alternatives provided by State embrace modifications in the many elements that compound housing provision. A large community that is evicted because they are placed in some kind of risk area may not agree do be separated in many settlements. Or they might prefer to be settled somewhere else – even more distant, but where they could stay together.

In Rio de Janeiro, recently, the settlements provided by a public policy called “My house, my life”, a joint effort of the three federation levels, normally provides apartments located in small buildings – and that choice has proven to be a controversial one, because people in the slums or irregular occupations usually prefer houses. Why?

⁷⁴ The Brazilian Constitutional Court has not examined any case like this – so there is no precedent to allow any kind of speculation. The Brazilian judiciary as a whole – and the reference is especially to the lower courts – is deciding just like the Colombian Constitutional Court, trying to establish a balance between a compelling public interest that may determinate the eviction, and the protection of the housing right; usually this is done by demanding Public Administration to provide some kind of alternative of shelter to the evicted.

Because another floor can be built if the family grows, a son get married, a mother-in-law comes to live with the original family.

Scarcity and public choices is a duality that pervades housing conflicts; and this is a central idea that has not been incorporated to the Constitutional Courts decisions in the subject. The supposedly technical decision that orders public authorities to provide some alternative to the deprived cannot be executed without taking into account non-technical variables – such as the sense of belonging and individual autonomy and even the subject of the legitimacy of such a choice.

For sure, the already mentioned decision in Sentencia 025/04 and the following pronouncement in supervisory jurisdiction are exceptions in the Colombian scenery. But even in there, the normal standards of the Court's decisions do not take into account that inherent duality in scarce resources and public choices.

5.2. Legitimacy and emancipation

One of the indicated causes to judicialization of socioeconomic rights – and housing should not be an exception – is the low level of social organization, which presents the political path as a winding one, turning the judicial response more appealing. When the Court began its work, the Colombian population turned to the constitutional instance to demand answers to problems that, in principle, should be debated by means of citizen's participation in the political sphere and resolved by the State's action⁷⁵. In Brazil, the number of "extraordinary appeals"⁷⁶ has risen from 10.780 in 1990, to 42.790 in 2012⁷⁷. The activist trace of both Constitutional Courts is usually pointed – by themselves and by part of the law community – as a valuable one.

In Brazil, in 2008, in the inauguration of the President of the Supreme Court, one of its Justices – Celso de Mello – reaffirmed that judicial activism could be justified by many causes, as a positive jurisprudential construction that could allow the real practice of rights proclaimed by the Constitution itself, including the supremacy of the Fundamental Chart, many times disrespected and wounded by inadmissible omission of the public powers⁷⁸. The combination of these perceptions lead Constitutional Courts in Brazil and Colombia toward a very tricky road, in which the real democratic transformation intended to be held by the constitution may be replaced by another authoritarian

⁷⁵ SOUSA SANTOS, Boaventura de and AVRITZER, Leonardo Avritzer. *Opening Up the Canon of Democracy*, in SOUSA SANTOS, Boaventura de (ed.). **Reinventing Social Emancipation: Toward New Manifestos**, Volume 1: Democratizing Democracy: Beyond the Liberal Democratic Canon (2005).

⁷⁶ As already mentioned in that same paper, "extraordinary appeal" is the *writ* that may be presented to the Brazilian Supreme Court, allowing the examination of a conflict involving fundamental rights.

⁷⁷ Data extracted from the statistic's page of the Supreme Federal Court, available at <<http://www.stf.jus.br/portal/cms/verTexto.asp?servico=estatistica&pagina=pesquisaClasse>>, access in 02/15/2013.

⁷⁸ Data extracted from the press page of the Supreme Federal Court, available at <<http://www.stf.jus.br/arquivo/cms/noticiaNoticiaStf/anexo/discursoCM.pdf>>, access in 02/15/2013.

ruling, in which violence is not be the main tool, but the cultural stereotype that sees the impoverished as passive beneficiaries of social goods is constantly reinforced⁷⁹.

If the enforcement of housing rights necessarily involves managing scarcity and public choices, this is a decision that trespasses the technical frontier, and requires a broader legitimacy, that could only come with a dialogical trace. After all, as pointed by Dixon⁸⁰, in enforcing rights, courts have a much greater capacity, even a responsibility, to play an active role in countering “blind spots” and “burdens of inertia” in the political process than is envisaged in other theories. This is a task that might be largely facilitated with practices of monitoring the implementation of the decisions, like experienced by Colombia in Sentencia 025/04.

In Brazil, that responsibility in punctuating the correspondent roles in the democratic process of each and every branch of power seems to be ignored by the Court. Relying on the immediate efficacy of the housing right, the Constitutional Court acts and decides as if everyone knew perfectly well what the content of that right should be.

In the Colombian case, the cooperative constitutionalism and the dialogical exercise have already begun – at least in regard to the outlining of the attributes that should endow public policies or programs. Granting due process in evictions initiatives; recognizing the juridical relevancy of a state of trust related with an occupation; assigning the State an obligation to offer alternative solutions when promoting massive removal of people; fixing those premises the Colombian Constitutional Court initiates the dialogue, at least with public authorities.

A dimension that is still unexplored by both countries is the participatory ones – and that is the point where legitimacy meets emancipation.

As rightly highlighted by Liebenberg⁸¹, human rights adjudication permanently contemplates a paradox between the universal and the particular; the universal pre-tension deeply rooted in the human rights discourse, and the necessary compliance with the multiple particularities in the real life. Housing rights contemplates that same paradox, not only due to the particularities of individuals, situations or locations, but because they cannot be provided without the overcome of the problems of scarcity and public choices. Building any kind of solution in housing rights that ignores the dynamics of the stricken collectivity, inspired by an abstract idea of how shelter should be provided, may lead to a judicial order that is unfit to solve the real problem.

⁷⁹ LIEBENBERG, Sandra. **Socioeconomic rights**: adjudication under a transformative constitution. Claremont: Juta & Co. Ltd, 2010, p. 41.

⁸⁰ DIXON, Rosalind, Creating Dialogue about Socioeconomic Rights: Strong-Form versus Weak-Form Judicial Review Revisited (2007). **International Journal of Constitutional Law**, Oxford Journals, Vol. 5, No. 3, pp. 391-418, 2007. Available at SSRN: <http://ssrn.com/abstract=1536716> or <http://dx.doi.org/10.2139/ssrn.1536716>.

⁸¹ LIEBENBERG, Sandra. Engaging the paradoxes of the universal and particular in human rights adjudication: The possibilities and pitfalls of ‘meaningful engagement’ (2012) 12 **African Human Rights Law Journal** 1 – 29.

A judicial solution, built on a top-to-bottom basis can be easier – but may find in its own addressee, the main resistance. It may be found lawful by the evicted or the unsheltered but unjust, and therefore, illegitimate. That is why enlarging the universe of carvers of the judicial solution may be important not only to reinforce the legitimacy, but also to strengthen people's right to, as an autonomous person, be involved in the solution of the problem that is afflicting their own life – not the judge's, nor the public official's. As remarked by Sachs⁸², in socioeconomic rights justiciability, the solution is not necessarily in the binomial libertarian *versus* communitarian – but it could also be found in a dignitarian vision, in which respecting human dignity must involve emancipation and autonomy. After all, if freedom is the possibility of choosing your own life project, the public choices that would impose effects on your life and house should be open to participation.

In South Africa, that participatory dimension in housing rights conflicts has been explored with the setting of “meaningful engagement” as a requirement to public initiatives that may menace housing rights. The leading case was *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others*, the Constitutional Court orders that “The City of Johannesburg and the applicants are required to engage with each other meaningfully and as soon as it is possible for them to do so, in an effort to resolve the differences and difficulties aired in this application in the light of the values of the Constitution, the constitutional and statutory duties of the municipality and the rights and duties of the citizens concerned”.

A second case rapidly presented itself to the South African Constitutional Court – *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* – in which the engagement idea was still present, even though in a much more modest proportion. In spite of the still exploratory path in adopting meaningful engagement as a condition to court's appreciation in South Africa, this is an alternative to incorporate the participation of the plaintiffs not as a blessing, but as a way to conciliate in judicial review, rights and democracy. It is an experience not immune to criticism – losing a normative perspective in the solutions building being the main problem – but still, in times of judicial network, it is a possibility that might be adapted and explored in major conflicts in Brazil or Colombia.

The participatory dimension is something that concerns only those driven by a constructive comprehension of constitutionalism. In that standpoint, a judicial decision should not be evaluated solely by the material effects that it provides directly; a judicial decision might have indirect or symbolic effects that favors designing a public policy; allows forming coalitions to influence the issue; enhances the perception of the subject as a rights violations and transforms public opinion about the problem's urgency and

⁸² SACHS, Albie. **The strange alchemy of life and Law**. Oxford: Oxford University Press, 2009, p. 173.

gravity⁸³. This is a significative addition to the importance of the judicial decision – even though it does not assume a naïve presumption that Court by itself would transform the world.

6. CONCLUSION

The report of the Brazilian and the Colombian judicial appreciation of housing rights, even in the narrow limits of a working paper suggest important remarks. First, it is more than clear that the proclamation itself of the immediate efficacy of a right is not enough to guarantee an effective result in its protection. As demonstrated, that constitutional clause was not enough in Brazil – and not necessary in Colombia.

A second important conclusion is that abstract concepts are also not very useful in solving housing needs. Particular conditions – of the plaintiffs, of the location, of the relationship established by the occupier and the Public Administration – may be extremely relevant to the ruling. Even the proclamation by the Brazilian Constitutional Court that the minimum core of the housing right should be protected is not enough, neither to fulfill the protection, nor to orient public authorities in what the requirements that should be applied in a housing program are. This is an important observation, and should be taken into account by those who feel that minimum core is the key concept to give socioeconomic rights a higher degree of effectiveness⁸⁴.

In sum, granting a complex right such as housing is a task that should be faced one step at a time, prioritizing the construction of a normative concept that might be tested in each concrete situation. That logical operation won't be completed in a single judgment, but should be revisited in each and every one of them. Knowledge is an asset that is built through aggregation – and that is no different when it comes do judicial adjudication.

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⁸³ RODRÍGUEZ-GARAVITO, César. Beyond the courtroom: the impact of judicial activism on socioeconomic rights in Latin America. *Texas Law review*, Vol. 89 (7), 2011.

⁸⁴ BILCHITZ, David Giving Socio-Economic Rights Teeth: The Minimum Core and Its Importance; 119 *South African Law Journal*, 484 (2002).

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