

**GLOBAL ADMINISTRATIVE LAW NETWORK - IMPROVING INTER-
INSTITUTIONAL CONNECTIONS TO PROMOTE INCLUSIVE GROWTH:
INTER-INSTITUTIONAL RELATIONS IN GLOBAL AND NATIONAL
REGULATORY GOVERNANCE**

IDRC GRANT NUMBER: 106812-001

PROJECT LEADER: RENÉ URUEÑA

FINAL TECHNICAL REPORT

PERIOD COVERED BY THE REPORT: APRIL 2012– DECEMBER 2014

COUNTRIES INVOLVED: COLOMBIA, INDIA, AUSTRALIA, BRAZIL AND ARGENTINA

RESEARCH INSTITUTION: UNIVERSIDAD DE LOS ANDES, COLOMBIA

PARTNER INSTITUTIONS: CENTRE FOR POLICY RESEARCH, INDIA;
UNIVERSITY OF NEW SOUTH WALES, AUSTRALIA; FUNDACAO GETULIO
VARGAS, BRAZIL

ADDRESS OF RESEARCH INSTITUTION: CRA 1 N° 18A- 12 BOGOTÁ,
COLOMBIA

TABLE OF CONTENTS

I. SUMMARY OF EXECUTION AND LESSONS LEARNED	4
II. CHALLENGES, LESSONS LEARNED AND RECOMMENDATIONS	6
III. PROJECT IMPLEMENTATION AND MANAGEMENT	8
IV. COMPONENTS	9
A. Component I: Relations between National Courts and Regulatory Institutions in ‘The Regulatory State of the South’	9
1. Synthesis	9
2. The research problem and objectives	11
3. Methodology	11
4. Project outputs, dissemination and impact	13
5. Research findings	15
6. Impact	19
7. Capacity-building	23
B. Component II: Climate Change as a Challenge of Multilevel Governance: Relations Among National Institutions in India and South Africa, and with the Emerging Global Climate Institutions	26
1. Synthesis	27
2. The research problem	28
3. Objectives	29
4. Methodology and Project Activities	29
5. Research findings	34
6. Project outputs and dissemination	38
7. Overall assessment and recommendations	47
C. Component III: Inter-Institutional Evaluation Through the Use of Indicators	48
1. Synthesis	49

2. The research problem	51
3. Objectives	52
4. Methodology and Project Activities	53
5. Research findings	54
6. Project outputs, dissemination and impacts.....	57
7. Capacity-building	62
D. Component IV: Relations between Local and Foreign Institutions in Enforcement of Anti-Corruption Law	63
1. Synthesis	64
2. Research Problem	64
3. Methodology and Project Activities	64
4. Research findings.	66
5. Project implementation and management.....	71
6. Project outputs and dissemination.	71
7. Impacts	73
ANNEX I: AMICUS CURIA.....	74
ANNEX II: COMMENTS ON THE DRAFT REPORT: BEST PRACTICE PRINCIPLES FOR IMPROVING REGULATORY ENFORCEMENT AND INSPECTIONS	82
ANNEX III. MEMORIAL ON BEHALF OF THE ORGANIZATIONS THAT REPRESENT COMMUNITARY MOTHERS IN COLOMBIA.	87
ANNEX IV: POSITION PAPER PRESENTED BEFORE THE REGULATORY COMMISSION FOR DRINKING WATER AND SANITATION (CRA) IN COLOMBIA	104
ANNEX V CONFERENCES OF COMPONENT I	109
ANNEX VI CONFERENCES OF COMPONENT III	120

I. SUMMARY OF EXECUTION AND LESSONS LEARNED

The project “Improving Inter-Institutional Connections to Promote Inclusive Growth” was divided into four components, which sought to demonstrate through country-specific case studies that the achievement of growth, inclusion and redistribution of developing countries can be understood by analyzing the interactions among different national, foreign or international institutions. The sub-components were:

- (i) Component I: Relations between National Courts and Regulatory Institutions in the Regulatory State of the South
- (ii) Component II: Climate Change as a Challenge of Multilevel Governance: Relations Among National Institutions in India and South Africa, and with the Emerging Global Climate Institutions
- (iii) Component III: Inter-Institutional Evaluation through the Use of Indicators
- (iv) Component IV: Relations between Local and Foreign Institutions in Enforcement of Anti-Corruption Law

Each component was led by researchers based in developing countries, in partnership with researchers in the United States and Canada. The overall project was directed by Rene Urueña, Professor and Director of the International Law Program at the Universidad de Los Andes in Bogotá, Colombia.

Project execution:

Status of the project and results

The project was executed according to the objectives determined by each component, and according to the budget as planned. All products, in terms of publications and policy papers, were achieved as planned. Overall, the project held more than 15 events and meetings in five countries involving junior researchers from the global south, and produced three books, two special journal issues, three *amicus curiae* briefs, three position papers before regulatory institutions, and more than 50 articles and book chapters in English, Spanish and Portuguese.

Two extensions were required. The first was required due to the change of a partner institution, from Bristol University to the University of New South Wales in Australia. The reason for this change was that the second leader of Component II, Bronwen Morgan, was granted a research professorship at the latter University. This delayed the execution of that specific component and, for that reason, an extension was requested to IDRC. The second extension was requested due to: a) delays in the editing and translating of the texts

produced by the four components; b) delays in the travel schedule of researchers in component II; and, c) delays in the organization of the final event in component I. IDRC agreed to the extension, underscoring its exceptional nature, and the undesirability of such delays. All activities were completed within the extended timeframe.

Overall flow of activities

The first period of reporting focused on getting the teams running (arranging logistic issues such as taxes, contracts with the partner institutions, and establishing adequate payment methods to all participants of the project). In the second period of reporting the main challenges were less administrative (although some administrative issues did emerge due to changes in the administrative protocols of the partner Universities, and the introduction of a tax reform in Colombia), and more substantive. All the teams focused on developing their research and their planned activities. This final period of reporting had as main challenge presenting the results of the research, reviewing and translating the final text of the outputs, and securing publication contracts.

Capacity building

Each sub-component made important contributions to their contexts and institutions, which are explained in each of the components sub-sections, particularly with regards to creating spaces for junior researchers to develop and present their ideas to policy makers and senior academics in prestigious fora. As a whole, the project had an important positive impact on the capacity of Universidad de los Andes in terms of management and administration of large projects. This research grant is one of the largest projects the Law Faculty has undertaken until now, and it served to build the administrative capacity in the Faculty and the University as a whole. Therefore, the project has triggered the creation of a new set of protocols, forms, and controls that were adopted as the new standard for all grant management at Los Andes.

In this context, one particular skill that the project has helped develop at Los Andes is the ability to help partners solve their own management challenges: drafting agreements, tax planning, establishing protocols of transparency and expense-reporting, etcetera. While these issues may seem marginal when compared to the substantive aspects of the project reported below, it is important to note that were these issues that seemed more daunting for our partners (sometimes, even more than the actual research), and a massive effort was made to build, from the ground up, management protocols and strategies that made sense considering the administrative capabilities of the institutions involved.

II. CHALLENGES, LESSONS LEARNED AND RECOMMENDATIONS

The main challenges in the execution of the project concerned, first, fostering a common conversation among the subcomponents with regards to inter-institutional interaction; and, second, adjusting administratively to changes and unexpected delays in some of the activities of the subcomponents.

With regards to the first challenge, all the research groups kept two goals at the same time: while they were developing their own case studies (anti-corruption, climate change, indicators and regulatory state), they looked for common instances of inter-institutional interaction, which could be shared and discussed with the other teams. The evidence started to be detected as the project developed, when the early research started yielding results. The central themes of the debate on inter-institutional interaction started to emerge as the case studies were closing, thus making the conversation among the teams harder, because they were all focused on closing their own publication and policy initiatives. While a virtual platform was created to share results, central conceptual themes of interaction were circulated as a draft, and several synergies between the anti-corruption, indicators and regulatory state teams did emerge, the overall theoretical conversation regarding interaction could have gone further.

The team leaders have an ongoing conversation, and a theoretical article is being drafted by the project leader, but this outcome cannot be included in this report. Professors René Urueña and Kingsbury are currently working on regards to a theoretical framework on Global Administrative Law (GAL), specifically on how the contents of GAL can be the result of institutional interaction. Despite this article is being drafted and cannot be included in this report, this upcoming paper not only strengthens the work among the members of the research team, it also continues to strengthen ties between academic institutions like New York University and Universidad de los Andes. Recently, Stephania Yate did a self-funded trip to NYU in order to meet professor Kingsbury, and to attend to some academic activities related with her current studies in international law.

On the other hand, some of the researchers are planning to attend to an academic event on indicators at NYU (René Ureña, Stephania Yate and Lina Bucheli already confirmed their attendance). In addition, some activities have been planned on regard of anti-corruption; first, René Urueña and Guillermo Jorge will participate in a conference about this topic, and second, Profesor Urueña will meet Mariana Mota Prada in the University of Toronto to participate in a conference regarding the same issue.

Finally, Los Andes is conducting a research project a new project called “From global rights to local practices” that aims to analyze specific cases about Regulatory State, with a new approach that includes local community participation as a central aspect. This project

was based on some of the result of this first project, and will use its academic findings within the activities with local communities in Latin America.

The lesson learned is that it seems necessary to hold at least one substantive wrap-up meeting with all research teams, even if it means directing extra resources to that effect. That meeting should involve substantive presentations of case studies, discussions about methodology, and socialization among researchers. Moreover, each team should be required to be present, or find a way to discuss their results with at least a two of the other teams. While our initial view was that it was more efficient to direct resources to actual research and to presenting the result to policy makers outside the project, the lesson is that this process of socialization and discussion among the teams is crucial.

The second challenge involved reacting to changes in the plans of some of the subcomponents, and to regulatory changes that affected the project. With regards to the first kind of challenge, the main issue was to develop protocols, forms and procedures at Los Andes in order to react to changes of plans of the research teams. The main problems were: 1) coordinate with IDRC and partner institutions the changes that could be done; and 2) communicate those that could not, such as the change of one partner institutions, concretely when the University of New South Wales was replaced by University of Bristol as a partner institution; or the decision to pay for ourselves the translations of the articles instead of sending the money to each researcher. Furthermore, regarding the second set of challenges, Universidad de Los Andes faced some uncertainty with the logistics of management for components II and IV, due to tax restrictions for the transfer of the money to other countries that did not exist at the beginning of the project, but were introduced through two tax reforms in Colombia in 2013 and 2014. This required that the form and classification of services for payment to the partner institutions had to be changed several times. Furthermore, the budget was also affected due to the volatility of the exchange rate, especially during the second semester of 2014, where the Colombian peso was devaluated in relation to both USD and CAD.

In this respect, four main lessons can be drawn. First, it seems important to increase the communication with researchers as the project comes closer to an end, not only with regards to substantive issues, but also to the specifics of budget execution. Second, institutions such as Universidad de Los Andes that work with the expectations of academic excellence of the global north, but operate in the still unpredictable regulatory environment of the global south, need to develop stronger protocols for adapting to external and internal changes. This project made an important contribution to this effect – an experience upon which new projects are now building. Third, it seems important that, unless the institutional capacity of partner institutions is extremely limited, IDRC might want to consider directly wiring the budget to each of the partner institutions, centralizing technical and financial reporting in the leading institution. Finally, even as the academic and policy-

making capacity in Latin America improves, a key skill that remains scarce is the ability to manage projects effectively, in a context-sensitive fashion.

III. PROJECT IMPLEMENTATION AND MANAGEMENT

The development of the first year of the project was described in the first interim technical report presented in March 2013. Since the beginning, the monitoring of its implementation and management was centralized at Universidad de los Andes, by a project manager and a project assistant (contact information of both persons can be found below). Each independent component had a leader in charge of the implementation and management of its respective component, in coordination with the staff at Universidad de los Andes.

The budget was received by Universidad de los Andes, which, according to the sub-agreements with UNSW and CPR, transferred the corresponding amount of the budget of component III to each institution. The budget for components I, II and IV was directly managed by Universidad de los Andes. The funds corresponding to travel expenses or stipends for research assistants outside Colombia was transferred upon receipt of an invoice directed at Universidad de los Andes. The transfer of the money was effectively made one month after receiving the invoice. Although the University made all the effort to avoid any complications with the payments, IDRC should take into account for forthcoming projects that some of the money transferred to the partner institutions or researchers abroad from Colombia could be subjected to national taxes. Furthermore, another difficulty that emerged from this type of projects is that in some cases due to exchange rates fluctuation the money that was originally projected for a specific part of the project can be reduced when transferred to countries with a different national currency. This was the case for all three partner institutions, CPR, UNSW, and even FGV, since wiring money to their research assistants also required exchanging the currency. In fact, most of the budget for FGV corresponded to payment to their research assistants, and that money had to be wired to different countries (Brazil, Germany, Argentina, among others).

The project established a website that was launched in 2014, which seeks to facilitate interaction between the researchers of the four components. The webpage is available at: <https://dig.uniandes.edu.co/index.php/es/>. We also anticipate that it will be useful in the future to help the researchers keep in contact, and as a tool of research since all the information of the case studies will be uploaded to the intranet. Although the website was, at the beginning, primarily used for this Project, the decision was to design a broader website in order to continue use it after IDRC's project was over. For that reason, the project leader created the Program in International Law and Global Governance, which at

the beginning only included this project, but has now grown to include new research projects.

What remains of this report describes the activities and outputs of each subcomponent.

IV. COMPONENTS

A. COMPONENT I: RELATIONS BETWEEN NATIONAL COURTS AND REGULATORY INSTITUTIONS IN ‘THE REGULATORY STATE OF THE SOUTH’

Project leaders

René Urueña, rf.uruena21@uniandes.edu.co
Universidad de los Andes, Colombia

Mariana Mota Prado, mariana.prado@utoronto.ca
University of Toronto, Canada

1. Synthesis

The component on the Relations between National Courts and Regulatory Institutions in the “Regulatory State of the South” concluded its work according to schedule. This component was coordinated by Rene Urueña and Mariana Mota Prado, therefore the work has been divided between two research teams, one in Colombia and one in Brazil.

Mariana Mota Prado is the supervisor of the Brazilian part of this component, which focused on developing case studies describing, explaining and assessing the regulatory role of courts in different sectors in Brazil. The main issue that these case studies sought to answer is when and how interest groups use courts to influence regulatory outcomes and to change the regulatory framework related to antitrust, telecommunications, health care plans, access to drugs and health treatments, capital markets, and banking. There is significant variation in the interaction between the regulatory agencies, the interest groups affected by the regulation, and the Brazilian judiciary in each of these sectors. This shows that the way agencies operate and interact with other institutions may not only vary from country to country, but can also be significantly different within the same country. Furthermore, these case studies analyzed what may be driving the judicialization of regulatory disputes (or the lack of it) in different sectors, and what kind of consequences this judicialization may have both on the regulatory framework and on regulatory outcomes. All the conclusions of this research are explained below in the research findings.

The Colombia research team, supervised by Rene Urueña, developed case studies in several countries in Latin America. During the first year of the project researchers focused on the development of case studies in Colombia and Argentina regarding the role played by national courts in the development of the healthcare and waste management services in Colombia, and the environmental regulation of the Basin River in Argentina. During the second year the search was expanded to include an investigation on the role of courts in the regulation of the right to consultation of indigenous people in Peru and Chile, and the role of courts in the protection of women victims of rape in Peru and Costa Rica.

Through the different case studies this component was able to:

- (i) Identify the conditions under which courts are likely to assume a stronger intervention in national regulatory regimes. Contrary to the Brazilian team, the Colombian researchers focused on the role played by Higher Courts in the regulation of different regulatory systems, and how the rights discourse has been used by this Courts to opposed the classical efficiency discourse that surrounded the creation of independent regulatory agencies. Higher Courts were more likely to intervene when the rights of vulnerable populations are being affected, such as women, displaced populations or children.

However, the research showed that most Courts used a strong rights, and weak or medium remedies approach, where the Courts indicate the problems of the system but give the regulatory agencies discretion to decide how to solve the regulatory failure. Only in a few cases do Courts implement a strong remedies approach, which normally requires creating a complex follow up system to guarantee that the regulatory agencies comply with all the order issued by the Courts. One of the reasons why the strong remedies approach is avoided by Courts is the lack of expertise in the issue, or the high political costs that the Court would have to pay if the regulatory failure is not solved.

- (ii) Examine the features of the interaction between domestic courts, domestic regulatory agencies, and interest groups, and evaluate them in relation to their effect on economic growth and social. Interaction between courts, regulatory agencies and interest groups emerged in most case studies for two main reasons. On the hand, the need for expertise requires the courts to consult with different stakeholders in order to issue its decision. On the other hands, courts have been concerned with create more participatory process in order to legitimate their intervention in regulatory issues.

- (iii) Present policy proposals for the improvement of regulatory regimes in the countries of study. These policy proposals show how the findings of the case studies can be used to promote inclusive growth and human development focusing on the protection of vulnerable groups, such as women.

2. The research problem and objectives

The research problem remained the same throughout the project, although changes were made to the specific case studies. The research responded to the following questions: How do courts affect regulatory policy, particularly policy impacting economic growth and social protection – e.g., regulation of health care or telecoms? How do existing adjudicatory structures deal with challenges to regulatory agencies by individuals, civil society organization, or corporations? What is the role of regulation theory in judicial reasoning? How do regulatory agencies interact with the human rights regime and institutions, and in particular what role do courts have in promoting economic and social empowerment of women? How do courts adapt to changes made at the regulatory level? Is there an identifiable pattern to how courts adjudicate challenges to regulatory agencies? To what extent the outcomes of judicial processes can be used to evaluate the performance of a regulatory agency?

The sub-project in Brazil aimed at exploring in greater depth the role that courts have performed in the Regulatory State of the South by analyzing the case of Brazil. Thus, we asked researchers to answer three questions: (i) *when* do interest groups go to courts?; (ii) *how* do they go to courts?; and (iii) *what is the impact* of litigation involving regulatory agencies (directly or indirectly) on regulation and on the regulatory framework? The sub-project in Spanish speaking countries in Latin America aimed at understanding the reasons, forms and effects that courts interventions have had in the Regulatory State of the South in Latin America. In doing so, researchers address one or several of the following questions: (i) *when* do courts intervene in regulatory regimens?; (ii) *what form* took the court's intervention (strong/weak rights v. strong/weak remedies)?; (iii) *what was the impact* of the court's intervention in the specific regulatory framework?; and (iv) *how* did different stakeholders react to the court's intervention? In order to answer these questions the researchers described, explained and assessed the regulatory role of courts in different economic sectors in different countries in Latin America.

3. Methodology

The component on the Relations between National Courts and Regulatory Institutions in the “Regulatory State of the South” was divided between the Colombia and the Brazilian team, the former was directed by René Urueña and the latter by Mariana Mota Prado. Both

teams worked on the same research problem but presented case studies from different Latin American countries.

The Colombian team implemented, primarily, a qualitative methodology to undertake the research. First all researchers were required to read the literature on the Regulatory State of the South, to start the research with a common theoretical basis. Furthermore, all researchers undertook a thorough study of the available literature relevant for their case study, and all researchers were encouraged to interview relevant stakeholders to complement their case study. In some cases, the budget of the project was used to conduct the interviews in different countries.

The Brazilian team conducted the research using both a qualitative and a quantitative methodology. This research shows that quantitative and qualitative studies can nicely complement each other, offering distinct but equally valuable contributions to empirical analyses. On one hand, quantitative studies may provide a nice overview of patterns and trends that are not captured by case studies. On the other hand, these quantitative analyses may not capture some the nuances in judicial outcomes due to the fact that such studies normally use a binary system of classification.

For instance, quantitative studies can classify outcomes as either favourable or unfavourable to agencies. Alternatively, one could think of a more nuanced classification based on the multiple types of interaction between agencies and courts. For instance, unfavourable decisions could characterize an adversarial interaction, i.e. cases in which the agency is one of the litigants and the courts often issue decisions against the agency that is justified and the reasons for the decision are fully articulated by courts. However, unfavourable decisions can be simply arbitrary and unfounded. Thus, the unfavourable decision may be informed by an adversarial interaction (where there is a meaningful dialogue between courts and agencies) or by an arbitrary interaction (where there is no dialogue). This distinction could have important implication for policymaking, as Juliano Maranhão and Luís Matricardi suggest in their qualitative analysis. By the same token, favourable decisions can indicate at least two different types of interactions. One is a cooperative interaction, i.e. the court is supportive of the acts of regulatory agencies and tries to reinforce the agency's legitimacy vis-à-vis interest groups and other spheres of government.

Another type of interaction is deference, which is characterized by a mere rubber stamp of the decision of the regulatory agencies. Differently from the cooperative interactions, deference is deprived from a substantive engagement with the regulatory activity. While the aggregate numbers cannot reveal such nuances, qualitative studies can. Thus, as the first chapter in this volume suggests, they can nicely complement each other.

4. Project outputs, dissemination and impact

A more detailed description of each event, with their photographic registry can be found in Annex V.

a. Outputs and dissemination before the first technical report on April 2013:

1. A workshop in São Paulo with collaborators and drafts of the nine papers to be included in the project.
2. A workshop in November 2012 in Bogota with collaborators and drafts of the three papers to be included in the project, the Argentinean researcher participated through Skype.

b. Outputs and dissemination between May 2013 and April 2014 (Second technical report):

1. Presentation of the case studies at the Law and Society Conference between May 30 and June 2, 2013
2. Harvard's Institute for Global Law and Policy Conference on the 3 and 4 of June 2013, where the results of the research from both the Colombian and the Brazilian team were presented.
3. Presentation of the project and one case study for Brazil, Colombia and Argentina at the Law and Justice Week in November 18-22, 2013
4. At the end of 2013 we launched the new home page of the international law area from the Law Faculty at Universidad de los Andes, where we presented the project and where we will disseminate the results of the project.
5. All the researchers have presented policy outputs based on their research, a description of each one of the outputs is provided below.

c. Outputs and dissemination between April and December 2014:

1. Final workshop at the Getulio Vargas Foundation Law School in São Paulo, Brazil. August 2014.
2. Presentation of one of the new case studies in a Conference at Universidad de los Andes called "Latin American Week for the Protection of Minorities". October 2, 2014.
3. Intensive course on Critical Approaches to International Investment Law: Challenges for the Regulatory State of the Global South. September 9-11, 2014

d. Publication of the research:

1. Edited book (Ediciones Uniandes) with the papers produced by the Colombian team:
 - “Waste management regulation and human rights: A case study on the constitutional protection of waste pickers’ rights in Colombia”, Carolina Moreno
 - “Regulating in the Shadow of the Courts: Healthcare Regulation and the Inter-American System of Human Rights”, Maria A. Prada and Santiago Rojas
 - “Environmental Expertise and the regulation by the judiciary: The Matanza - Riachuelo River Basin Case in Argentina”, Florencia Lebensohn.
 - “El rol de las cortes en la regulación de derecho de los pueblos indígenas a la consulta previa en Peru y Chile”, María Cecilia Ibáñez y Róbinson Sánchez
 - “Del escenario global a la política de atención a las víctimas de violencia sexual en Perú y Costa Rica”, Stephania Yate
2. Edited book (Routledge) with the papers produced by the Brazilian contributors and commentary by American and Canadian scholars:
 - “A Snapshot of Litigation Against Regulatory Agencies in Brazil”, Juliano Maranhão and Luis Fernando Matricardi
 - “CVM (Securities and Exchange Commission)”, Viviane Mueller Prado
 - “CADE (Antitrust Agency)”, Paulo Furquim Azevedo
 - “BACEN (Central Bank)”, Bruno Meyerhof Salama
 - “ANVISA and ANS (Food and Drug Agency and Private Health Care Agency)”, Fernando Aith
 - “ANATEL (Telecommunications Agency)”, Diogo Coutinho, Alexandre Faraco and Caio Mario da Silva Pereira Neto
 - “ANATEL and Special Claims Courts (Telecommunications Agency)”, Leslie Sherida Ferraz
 - “NAT and the Judicialization of the Right to Health in Brazil (Administrative Dispute Resolution System in the Health Care Sector)”, Leandro Molhano Ribeiro and Ivan Hartmann
3. A translation of the Routledge book into Portuguese, which will be published by FGV.

5. Research findings

a. Research findings from the Spanish speaking countries' case studies

As has already been mentioned this component of the project consists on a series of studies on the relationship between regulatory agencies and courts in the following Latin American countries: Brazil, Colombia, Argentina, Peru, Chile and Costa Rica. Most of the case studies parted from two common places. First, the recognition that more and more countries have constitutionalized social and economic rights, and that the common effect of constitutionalization of these rights is the increase of litigation invoking the violation of rights such as health, education, work housing, food, water, among others. Second, after more than 25 years since the implementation of the first institutional reforms in Latin America, which led to the privatization of public utilities and other basic services and the adoption of regulatory forms of governance, it is important to understand the way in which the rise of litigation has affected, challenge and changed the way regulatory governance is understood in Latin America.

The case studies indicate that national courts in the Global South, especially constitutional ones, tend to have a different role than the one assumed by the judiciary in the Global North. The judiciaries in the Global North have focused in formulating principles to improve the transparency and substantive rationality of rule-making, by adopting procedural requirements that restrict the liberty of action of regulatory agencies. Courts in the Global South have not only implemented procedural requirements that seek to improve transparency and the rationality of rule-making, they have also formulated detailed substantive policies that the independent regulatory agencies are compelled to adopt. The case studies presented in this component suggest that national courts are more intrusive in regulatory matters when the right of vulnerable people, such as women or IDPs, are being affected. Furthermore, the case studies suggest that high levels of regulatory intervention by Courts are triggered by the inactivity of the responsible administrative entities.

The conclusions reached by the case studies can be understood under three different frameworks. First, our research suggests that independent regulatory agencies (IRAs) are not merely “transplanted” or their policies “transferred” from their original site (usually the Anglo-Saxon world) into a new environment (in this case, Latin America), but that the internal rationale and institutional form of some IRAs changes as their policies are implemented over the years, and courts have an important role in this process. Such changes do not necessarily respond to the “best practices” discourse that is promoted by international stakeholders such as international financial institutions¹. Beyond the top-

¹ Ashley C. Brown, Jon Stern, & Bernard William Tenenbaum, *Handbook for Evaluating Infrastructure Regulatory Systems* (World Bank 2006).

down approach of best practices, the trajectory of IRAs seems also to involve adaptation and learning from other institutions following a different rationale. This may suggest that a way of improving delivery of services is to go beyond best practices, and to gear the interaction and adaptation that is already occurring toward a more purposeful process of experimentation.

Second, much of the dynamics between Courts, regulatory agencies and other stake holders, described in the case studies, can be thought of as instances of experimentalist governance, where an ultimate goal is set, and autonomy is given to relatively independent agents to use different means to achieve that goal, subject to constant review and deliberation.² Confirming the need to go beyond best practices, our research suggests that this is an important angle when thinking about regulatory governance in Latin America. However, it still seems unclear whether this is an actual emergence of experimentalist governance in the region.

Finally, even if the cases investigated provide uncertain evidence of an actual turn in Latin America toward experimentalist governance, such examples do underscore the importance of knowledge production and diffusion in regulatory governance in the region. Cognitive pathways develop, as knowledge flows between IRAs and other institutions that populate the regulatory space, transforming the way in which issues are framed and understood. To be sure, cognitive frameworks are important in general political processes, but they seem particularly relevant in the case of regulatory governance, where technical expertise plays a key role in shaping the issues, suggesting causal relations, and providing legitimacy for IRAs and other actors in the regulatory space.

b. Research findings from the Brazilian case studies

By focusing on a single country and a certain period of time, this sub-project managed to hold constant a series of variables such as political regime, legal system, cultural values and level of economic development. This allowed researchers to focus on the different ways in which courts interact with regulatory agencies in this context, assuming that the differences observed across the cases may not be explained by other structural differences, as it may be the case with cross-country comparisons.

The case studies developed in Brazil indicate that the pattern of litigation of regulatory decisions varies significantly from sector to sector, due to a series of factors, which include the openness and transparency of the regulatory agency and the low cost (financial and

² Charles F. Sabel & Jonathan Zeitlin, *Learning from Difference: The New Architecture of Experimentalist Governance in the EU*, 14(3) European L. J. 271–327 (2008); Charles F. Sabel & Jonathan Zeitlin, *Experimentalist Governance*, in *The Oxford Handbook of Governance*, 169–86 (David Levi-Faur, ed. Oxford U. Press 2012).

reputation) for certain groups to solve disputes in the judiciary. Better understanding these dynamics and the impact they have had on regulatory decisions (both procedurally and substantially) is likely to produce a robust body of knowledge to inform policy making moving forward. For example, on patterns of litigation across different sectors which could be used by policy makers to reduce the pressure to which courts are subjected due to the vast amount of cases. The research offers a quantitative analysis of patterns of litigation against 13 regulatory agencies in Brazil in Brazil, based on a database of 38.975 cases brought to federal courts that had been decided or where pending in 2010. This is followed by a qualitative analysis that provides a map of the benefits and costs of judicialization against regulatory agencies in Brazil. This allows the project to reach general conclusions on patterns of litigation.

The case studies show that there is significant variation in the interaction between the regulatory agencies, the interest groups affected by the regulation, and the Brazilian judiciary in each of these sectors. This shows that the way agencies operate and interact with other institutions may not only vary from country to country, but can also be significantly different within the same country. While the case studies included here do not turn to normative questions, their descriptive findings may help better inform the debate. Before discussing what are the positive and negative effects of interactions between courts and independent regulators, we need to understand what kind of interaction exists between these institutions and what influences or determines it. And before we consider as positive or negative the regulatory role played by courts in certain cases, we need to have a better picture of the full consequences of judicialization. Thus, the findings of this portion of the project should be directly relevant to a number of policy issues.

As to normative issues, the research shows that lower courts revise regulatory decisions more often than higher courts. Ultimately the agency prevails, but this comes at a high cost due to numerous appeals, the long time it takes to reach a final decision, and the uncertainty generate by this constant revision of judicial decisions. In this context, one possible solution offered by Maranhão and Matricardi is to create a branch of the judiciary that is specialized on regulatory issues. However, this may come at a high cost for certain sectors, as some of the case studies show.

What are the incentives that may be driving the interest groups that interact with regulatory agencies to seek alternative dispute resolution methods? Assuming that agencies are themselves political actors with particular interests, one could ask whether these are initiatives of the agencies themselves, or are merely responses to the demands of regulated companies. Viviane Mueller Prado hints at the fact that in the case of CVM the nature of the economic and regulatory activity creates particular incentives for companies to prefer administrative resolution of conflicts. A judicial dispute may put a company in the spotlight. In a sector that is highly sensitive to information, this may be highly problematic.

Thus, companies prefer to avoid it, whenever possible. In contrast, in the case of CADE, Paulo Furquim suggests that avoiding litigation (and the costs associated with it) seem to be a concern for the regulatory agency. Thus, in this case it is the agency that is seeking administrative resolutions of disputes.

These contrasting dynamics have important implications for an analysis of the potential consequences of the use of administrative mechanisms to solve regulatory disputes. If the agency is the one interested in making this happen, it may be sometimes forced to offer attractive deals to the companies, to entice them to sign the agreements. This raises an interesting question as to whether the agency is forced to be more lenient towards companies than it would have been if litigation were not so costly. It also raises the question of whether the opposite is happening, in cases where the companies are the ones interested in such administrative solutions. In such cases, companies would be the ones making the concessions, rather than the agency, and there would be more stringent regulation. None of the studies in this volume presents conclusive evidence regarding these potential consequences, but they both suggest that this may be a fruitful question for future research.

Curiously, the recourse to administrative dispute resolution mechanisms has not been observed in the case studies of new agencies. Is longevity the variable that explains the differences between old and new agencies? Or are these differences due to the specific dynamics and unique demands of the actors operating in these sectors? If the latter, the longevity of an agency may not be an important variable in understanding how it deals with conflicts. If the former, it may be reasonable to expect new agencies to develop more sophisticated forms of administrative resolution of disputes over time. The study of BCB developed by Bruno Salama sheds some light on these questions.

Finally, the patterns of litigation in the case of new agencies seems intrinsically connected with the interest groups that can potentially (and effectively do) bring demands to courts, and the institutional environment in which these groups operate. At least three of the new agencies included in this book enact regulation that has a direct impact on final consumers, who can bring issues directly to courts. These agencies are the private health care plans (ANS), the electricity agency (ANEEL) and the telecommunications agency (ANATEL). These sectors generate a large volume of consumer litigation against companies (indirectly impacting on regulation) and against the regulator (directly impacting on the regulation). This contrasts with the direct litigation of consumers and companies against the food and drug agency (ANVISA), which is not as voluminous as in the other two cases. The book produced under this component explores in more detail the differences between direct and indirect litigation across these sectors, and it also asks if litigation involving consumers is different from the one involving regulated companies and why.

6. **Impact**

The project sought to achieve an impact at two different levels. The first level would be to impact the knowledge that exists regarding the inter-institutional relations that take place in the regulatory space of countries in the global south, which is a subject of study that has been disregarded in most of the literature on the regulatory state. At this level the project has been very successful, since it has managed to disseminate new knowledge through its case studies in several international conferences. Knowledge of this subject has been disseminated through two different ways. On the one side, through the presentation of the research in different conferences around the world and, on the other side, through the publication of the research papers. Since most of the research is just being published it is difficult to track the impact that the research has had in terms of uptake.

The second level is the impact that the project sought to achieve through the policy outcomes. The research undertaken was not merely academic, it also sought to have a policy approach to the different issues that were being studied. For that reason the researchers, when choosing the case studies, were instructed to always keep in mind that the final objective of the project was to have a policy impact in the different countries of study.

In Argentina, the researcher, Florencia Lebensohn, met with several law firms that are promoting environmental litigation in the country to show the results of her research and to advise them on new forms of environmental litigation. She also received feedback for her research during those meetings.

The Brazilian component focused on addressing the undesirable costs of litigation, and understanding the reasons why litigation is initiated or not. The Brazilian team focused in having an impact in the judicial system. The contacts made during the World Bank's justice week with the Brazilian School of Judges were very useful since it allowed the researchers to share their case studies with judges across the country.

Policy impact between May 2013 and December 2014	
Although the documents elaborated by the researchers were presented during the period of the second technical report, further developments were made during the final stage of the project	
Researcher or team in charge	Policy impact
Maria Angelica Prada and	<i>Amicus curia</i> (Annex I) before the Colombian

Stephania Yate	Constitutional Court regarding the Framework Law on the Healthcare System in Colombia.
Carolina Moreno	Position Paper presented before the Regulatory Commission for Drinking Water and Sanitation (CRA) in Colombia (See Annex IV).
Rene Urueña and Maria Angelica Prada	Position Paper presented before the OECD as a response for the public consultation on draft Best Practice Principles for Improving Regulatory Enforcement and Inspections. The Commentaries on the Principles were sent on August 2013 (See Annex II)

Amicus curia (Annex I) before the Colombian Constitutional Court

The case study on the role of the Constitutional Court in the regulation of the healthcare system allowed the researchers to impact in the new framework of the healthcare system by presenting an *amicus curia* (Annex I) before the Constitutional Court, which reviewed a law that established the constitutional principles that will guide the regulation of the healthcare system. The *amicus curiae* focused on showing to the Court how certain elements of the law that focused too much on the importance of the fiscal policy in the country could become an impediment to the satisfaction of the right to health. As was shown by the study, several administrative institutions have fought the Court's efforts to expand and protect the right to health, and the main argument used by those agencies has been of fiscal character, as will be further explained below. The issue of the healthcare system continues to be an important topic in Colombia; right now the Senate is debating on a new law that will modify the complete healthcare system³. The researchers have kept informed on the process, and are preparing another *amicus curiae* that will be presented to the Constitutional Court once the law is enacted.

Policy impact regarding the waste management system in Bogota, Colombia (See Annex V)

The case study of waste management tackled an issue that has become very important for Bogota. In December 2012 the mayor of Bogota implemented a new waste management system in order to comply with the order given by the Constitutional Court regarding the

³ Noticias Caracol (2014) "En 2013 división por la Reforma a la Salud, en 2014 el debate continúa", available at: <http://www.caracol.com.co/noticias/actualidad/en-2013-division-por-la-reforma-a-la-salud-en-2014-el-debate-continua/20131223/nota/2042980.aspx>.

incorporation of informal garbage collectors into the formal waste management system.⁴ However, the system has faced several implementation problems and has been criticized by national institutions and the civil society. The researcher, Carolina, met with organizations that represent the informal garbage collectors and advised them on how to negotiate with the local government. She also attended several meeting to review the effectiveness of the new waste management system in Bogota.

As a response to the orders given by the Constitutional Court the Regulatory Commission for Drinking Water and Sanitation (CRA) has been one of the primary agencies in charge of guaranteeing the compliance with the orders. For that reason Carolina presented a policy paper to the Commission explaining the advances made by the local government in the implementation of the Court's decision, illustrating the main challenges still faced by the system and presenting some recommendations for both the local government and the CRA. As a result of the knowledge acquired through the research presented by Carolina, the team at los Andes was able to start a new project with the garbage collectors groups in Ciudad Bolivar, as is further explained below.

Comments on the Draft Report: Best Practice Principles for Improving Regulatory Enforcement and Inspections OECD

In July 2013 the OECD published a public consultation for commentaries on the draft Best Practice Principles for Improving Regulatory Enforcement and Inspections, which serve as a complement to the 2012 Recommendation of the Council on Regulatory Policy and Governance. The following is the call for commentaries:

“The goal of this consultation document was to present a basis for discussion on key issues as well as some key principles on which effective and efficient regulatory enforcement and inspections should be based in pursuit of the best compliance outcomes and highest regulatory quality. The principles address the design of the policies, institutions and tools to promote effective compliance – and the process of reforming inspection services to achieve results. Each of the principles represent a recommendation on one of the main issues for successful reforms and is accompanied by an explanatory text”.

(OECD, Public Consultation on Enforcement and Inspections, available at:
<http://www.oecd.org/regreform/regulatory-policy/enforcement-inspections.htm>)

The object of the commentary presented by Rene Urueña and Maria Angelica Prada was to address three issues relevant for effective regulatory enforcement and inspections which

⁴ Noticias Caracol (2012) “Comienza el nuevo esquema de recolección de basuras en Bogotá”, available at: <http://www.caracol.com.co/noticias/bogota/comienza-el-nuevo-esquema-de-recoleccion-de-basuras-en-bogota/20121218/nota/1812751.aspx>

are not being addressed by the Best Practice Principles, and which should be included in order to provide broader understanding of the topic: i) the role of courts in the regulatory process; ii) the challenges posed by the use of indicators; and iii) the importance of rights considerations for enforcement and inspection. The complete policy paper can be found in Annex IV to this document.

Policy impact between April and December 2014 Although the documents elaborated by the researchers were presented during the period of the second technical report, further developments were made during the final stage of the project	
Researcher or team in charge	Policy Output
Maria Angelica Prada and Stephania Yate	<i>Amicus curia</i> (Annex I) before the Colombian Constitutional Court regarding the Framework Law on the Healthcare System in Colombia.
Carolina Moreno	New policy outcomes regarding the waste management system in Bogota, Colombia.
Rene Urueña and Maria Angelica Prada	Position Paper presented before the OECD as a response for the public consultation on draft Best Practice Principles for Improving Regulatory Enforcement and Inspections. The Commentaries on the Principles were send on August 2013 (See Annex II)

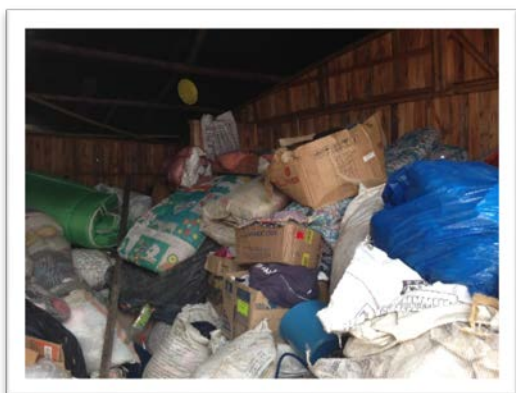
Amicus curia (Annex I) before the Colombian Constitutional Court

In May 2014 the Constitutional Court issued its decision T-313 of 2014, in which it acknowledged the participation of the researchers in the Constitutional process. Although not all of the arguments were accepted by the Court, it did accept the main argument of the *amicus curia* brief, according to which the article that contains the principle of fiscal sustainability can not be used by private actors or administrative entities to deny a person their right to health, as has been recognized by the Court previously. The complete decision is available at the following link: <http://www.corteconstitucional.gov.co/relatoria/2014/c-313-14.htm>.

Policy impact regarding the waste management system in Bogota, Colombia

Thanks to the research undertaken by Carolina Moreno, Universidad de los Andes has been contacted by a group of *recicladores* in the neighbourhood of Ciudad Bolivar in Bogota (one of the poorest neighbourhoods in the city), to help them guarantee that their rights

recognized by the Constitutional Court are respected by the local regulatory agencies. The researchers have already started working with the community, and we expect to continue working with them during 2015. Although this work will not be part of the present project, it could not have been possible without the research sponsored by IDRC. This new project has a different focus than the one sponsored by IDRC, the objective of the project is not to have an impact at the judicial level but to work with the community to help them acquire the knowledge necessary to guarantee that their rights are respected by the local authorities. This is done through workshops and legal counseling in the neighbourhood.



Comments on the Draft Report: Best Practice Principles for Improving Regulatory Enforcement and Inspections OECD

On May 16 2014 the OECD issued the “Best Practice Principles for Regulatory Policy Regulatory Enforcement and Inspections”, in which the organization acknowledged the contribution made by Universidad de los Andes to the development of the document. The complete report can be found here: <http://www.oecd.org/gov/regulatory-policy/enforcement-inspections.htm>.

7. Capacity-building

The project is providing Latin American researchers with the opportunity to work on an international and interdisciplinary research project, which will contribute to the improvement of their research skills. This is especially important in legal academia, which is a field of research that has remained very isolated (from other disciplines and other countries) in the last few decades in Brazil and Colombia. Law in Colombia and Brazil was traditionally thought by practitioners that had a formalist approach to the way law should

be thought, focusing more on legal practice and less in critical thinking or interdisciplinary approaches to legal problems. For that reason, research projects that seek to expand the discipline by introducing critical thinking and new methodologies have a great impact in promoting new approaches in legal teaching.

To ensure that this project has a substantial capacity-building effect many of the researchers that have joined the project are undergraduate and postgraduate (both Master and PhD) students, who have the opportunity to improve their research and analytical skills by conducting theoretical and empirical research under the supervision of the project directors. These students have been chosen for their outstanding academic records, and their interest in pursuing a career in academia or in the public sector. By including young scholars and policy makers, this project seeks to improve human capacities in countries in the Global South by encouraging them to research on regulatory issues that can have an impact in the promotion of inclusive growth and human development in their country.

Among the Colombian research team Carolina Moreno has been approached by the local government in Bogota as a result of her research on waste management. She has also used her research in the project to further develop her PhD dissertation on different forms of governance in Colombia. Carolina obtained her PhD in March 2014, the project helped her land several teaching jobs and she continues working with the local government in Bogota. She has also recently been hired as the Coordinator of *Consultorio jurídico* (a legal clinic) at Universidad de los Andes. According to her:



“Being part of the Global Administrative Law Network was a great experience. I had the opportunity to meet several international scholars that are working to understand the inter-institutional relations that facilitate governance at the national and local level. I also had the opportunity to improve my English skills by presenting my work in Boston at both the Law and Society Conference and the IGLP Conference”

Carolina Moreno, 2013



Florencia Lebensohn, whose case study focused on the role of the Argentinean Courts in the Riachuelo River Case, has presented her research at the University of Buenos Aires where she now teaches international environmental law. According to her, the research allowed her to meet experts working on environmental law in her country, which has been useful to further her career in Argentina.



Similarly, Maria Angelica Prada has been able to advance in her academic and legal career as a result of her research on the project. She is currently working with the political party Polo Democrático Alternativo in issues of healthcare protection as a result of her research on the role of the Constitutional Court in the healthcare regulatory regime. She has also been hired as a research assistant on international economic law as Universidad Externado as a result of the successful conclusion of the “Intensive course on Critical Approaches to International Investment Law: Challenges for the Regulatory State of the Global South”.



Stephania Yate first joined the project as an undergraduate student at Universidad de los Andes. After finishing her law degree, and due to her hard work in the project, she has been hired by Universidad de los Andes as coordinator of the new project “From global rights to local practices: Fostering participation at the micro-level in Latin America”, sponsored by IDRC. She has also been admitted to the International Studies Master at

Universidad de los Andes.



Robinson Sánchez joined the project during its second year, to conduct a research on the role of Courts in the protection of the right to prior consultation. At the time of joining the project he had started his Phd on international law at Universidad de los Andes. When he started working for the project his main problem was his few experience in presenting conferences, and

his lack of possibility to practice English. After one year with the project he has felt that both his academic and English abilities has improved exponentially.

Another important impact of the project was related to changes in behavior and relationships of researchers. Many contributors to the project reported that the experience of contributing to an edited volume that required multiple drafts and revision of drafts was a new experience to most of them. They reported that in their experience edited volumes simply require authors to produce their respective contributions without an effort to integrate these individual contributions into a coherent volume. They not only thought the experience was engaging and fruitful but some have indicated that they are likely to adopt the practice in future projects.

Furthermore, an important capacity building impact that the project has had for researchers in both Colombia and Brazil is the opportunity to work in a bilingual environment. Mariana Prado reported that the project has not only helped reduce the language barriers described earlier, but it has facilitated the exposure of Brazilian researchers to common practices and protocols that are used in Universities in North America in general, and in Canada in particular. This was a richer experience for Brazilian researchers than simply translating scholarship produced in Portuguese into English. Thus, the partnership with a scholar based in Canada was important for this dimension of the project. It is also important to note that the translation of the final product into Portuguese will be key to make the findings accessible to policy-makers and people who can influence policy change. Therefore, attuning to the numerous levels of language barriers that are embedded in scholarly endeavours such as this one seems key.

B. COMPONENT II: CLIMATE CHANGE AS A CHALLENGE OF MULTILEVEL GOVERNANCE: RELATIONS AMONG NATIONAL INSTITUTIONS IN INDIA AND SOUTH AFRICA, AND WITH THE EMERGING GLOBAL CLIMATE INSTITUTIONS

Project Team:

Centre For Policy Research, India.

Project lead: Navroz K. Dubash, ndubash@gmail.com

RAs: Anu Jogesh, Neha B. Joseph

UNSW Law Australia

Project Lead: Bronwen Morgan, b.morgan@unsw.edu.au

RAs: Sophie Duxon (resigned), Kim Coetzee, Sangeetha Chandrashekran

1. Synthesis

This project was motivated by the observation that a regulatory architecture for climate change driven by a clear global agreement on collective action and assignment of responsibilities is increasingly out of reach. In its place, a patchwork of climate governance is emerging, which rests on a mix of nudges from above and political mobilization and innovative action from below. This approach promises greater buy-in for domestic action, but also complicates both the processes through which these actions are recognized by the global regime, as well as the process through which they are assessed. In short, the direction in which global climate governance is evolving increases greatly the complexity of interaction between global and national levels. This trend in climate governance has raised at least two big sets of questions that has shaped this project:

First, to what extent and how can an international climate regime (or the process of negotiating it) induce changes in national and subnational policies and actions, and through what instruments and pathways does this influence operate? Second, what are the politics behind national and sub-national laws and processes, and what impact do these have on processes of regulatory negotiation in emergent climate regulation at each level – global and national/sub-national?

The project has addressed these questions based on detailed empirical study of climate policies and politics in India and South Africa with some insights from China. The Centre for Policy Research (CPR) component of this project is also informed by complementary work being undertaken with support from the Oak Foundation on the multilevel governance of climate change.

The work and outputs discussed in this final report fall in four major areas of work, with the first two categories comprising the core work of the project, and the second two areas describing complementary work partially supported by IDRC. Specifically, the work on national institutions of climate governance, and on monitoring, reporting and verification were core intended areas of work for the IDRC project. Over time, as it became apparent that the sub-national level of climate governance is an important area of work, this work expanded as a complement to national institutions. Moreover, the role of co-benefits – the fourth category of work described here – has become a fruitful lens through which to view institutionalization. Hence, this is a fourth, and complementary category of work, on which the IDRC project has had positive spill-over effects.

A. National institutions of climate governance in comparative context:

Formation of national plans, policies and actions through interaction with the global climate regime, including its monitoring, reporting and verification provisions; *This was*

the core research work of the project, funded entirely by IDRC and is based on detailed India and South Africa case studies. In addition, we have sought to draw on partial experience with China. This work was also informed by a major international conference “Building the Hinge” primarily supported by another funder, but with Bronwen Morgan’s participation supported by IDRC.

B. Monitoring, Reporting and Verification:

The shift to bottom-up climate policies means that the links between national policy frameworks and the international architecture of climate change governance become more process-focused, with a particular emphasis on monitoring, reporting and verification (MRV). For this reason, some substantial early work in the IDRC-funded project focused on this. However, the detail of international MRV is still contentious and being negotiated, and domestic MRV is as yet under-developed given the focus on substantive bottom-up climate policy content at this scale. This work is likely to bear fruit in the future as the above uncertainties recede, and international MRV emerges to provide a baseline for comparing national policy frameworks that are otherwise profoundly different, but which each must present their ‘outcomes’ by reference to a common process created by international MRV requirements. Current submitted publications however have not yet been able to integrate these insights.

C. Sub-national Climate Planning:

This component of the work has drawn on Indian research on state climate action plans (because India is a federal state). This research was co-funded by the Oak Foundation.

D. Co-Benefits between climate and development policy:

With a shift to bottom up climate policies, intellectual attention is focussed on understanding the interaction between development and climate policies. Work at the Centre for Policy Research on this theme, co-funded by the Oak Foundation, has informed our work on national institutions of climate governance

2. The research problem

The rationale of the project was to document emerging national and sub-national processes in countries that will have a crucial impact on climate change policy effectiveness in the next 10 to 15 years. Many of these changes are evolving in an anticipatory fashion ahead of a detailed prescriptive international agenda, and very few of them have been documented in published research, especially in academic journals. While policy developments proceed in response to political pressures and signals, the result is an ever more complex climate governance architecture, which has been worth elucidating in at

least two ways. First, we have sought to unearth and communicate the implications of a very diverse range of empirical developments in national climate policies. Second, we have attempted to illuminate these trends using social science literature in ways that enable scholars and policy-makers to have a broader debate across government and across intellectual disciplines regarding institutional responses to economy-wide climate policy integration. This debate should not become the preserve of only those immersed in the complexities of climate policy, particularly since, as we have predicted, it does indeed emerge that coordination between line ministries and new entities established to oversee climate policies is crucial.

3. Objectives

Objective One: To elucidate the complexities of multi-level governance inherent in the interface between global climate regulation and national and sub-national institutions and policies particularly with regard to environment-development or environment-inclusion tradeoffs.

Objective Two: To communicate complexities (of climate policy making) to national and sub-national actors in order to enable more careful forms of institutionalization of climate policies into national development agendas.

Objective Three: To communicate the challenges of national and sub-national policymaking to academics and policy-makers active in global climate debates, in order to help design a global regime that is attentive to the multiple forms of leveraging national action, and equally to the hurdles in trying to do so.

Our summary of the research findings (section V.) specifically addresses the first research objective described above. In addition, we have completed several dissemination events to achieve objectives 2 and 3 of the grant proposal, which are discussed as part of dissemination events under project outputs (section VI.).

4. Methodology and Project Activities

Work on the project pertaining to Objective 1 is divided into India and South Africa case studies. In addition, we report on additional activities that go beyond the country specific work.

Methodologies and activities for the India-related studies:

National Institutions of Climate Governance: In 2013-14, research was conducted to map and analyse the institutions of national climate governance. This research was conducted by Navroz Dubash and Neha Joseph (Research Associate) through interviews with key policy makers, complemented by documentary analysis of national and sub-national plans, and minutes of official meetings that were obtained through petitions under India's Right To Information (RTI) provisions. The results were written up as a country case study. In addition, during the grant process, two papers were authored by Navroz Dubash on Indian climate politics and policy. These were largely based on secondary literature and provided a basis for the institutional study. While work on these were directly supported by the Oak Foundation, they were related to the larger theme of examining Indian climate policy in a multi-level governance context. The research has been compiled as a CPR working paper and submitted to the Social Science Research Network (SSRN). This link was taken down early in 2015 to update the paper to reflect some very recent changes put in place by the new government. The link will be re-posted in March 2015. The authors plan to share their preliminary findings with Indian climate researchers and practitioners (including government officials) before updating it and submitting it to a journal for publication.

Sub-national climate planning: CPR's project on State Action Plans on Climate Change involved a qualitative study of state climate plans in five states: Himachal Pradesh; Karnataka; Madhya Pradesh; Odisha; and Sikkim. The research was conducted by Navroz Dubash along with Anu Jogesh (Senior Research Associate) through a combination of document review as well as field visits in these states. Between 2012 and 2013 interviews were conducted with key officials, consultants, international agencies as well as local civil society organisations involved in the preparation of the plan in the five states. In addition, the authors also interviewed central government officials overseeing this effort. The study supplemented empirical findings with scholarship drawn from political science, governance and climate policy literature. In April 2013, CPR organized a daylong workshop with participation from key officials across seven states as well as external stakeholders where the authors shared their preliminary findings. After incorporating feedback, suggestions and further information on the plan process, the authors drafted five state plan reports. This was then synthesized into an overarching research report on the state climate plan process in India offering broad findings and recommendations for future action.

The reports were released at a panel discussion in February 2014. The panel consisted of experts in the field of development and governance and the discussion focused on how state climate plans could be mainstreamed in states' development and economic agenda. The authors have since met and shared their work individually with various organizations and bilateral agencies such as the Swiss Development Corporation, Department of International Development (DFID), and the German donor agency GIZ that are planning to support states in implementing their climate plans.

The authors have also published the study as a special report in a leading Indian social science journal, the Economic and Political Weekly in its November 29th 2014 issue. In addition, empirical findings from the state climate plans have been examined in the context of two theoretical lenses (the multilevel governance of climate change and sub-national governments as laboratories of innovation) for a forthcoming special issue in the Journal of Integrated Environmental Sciences. In the pipeline is also a co-authored editorial for the special issue that compares sub-national climate initiatives in India and the European Union. Finally, the authors are also in the process of submitting their work to other international journals to contribute to the body of literature on multi-level governance of climate change in emerging economies.

Co-Benefits: The India case has also been aided by a complementary study on ‘co-benefits’ as a key construct linking domestic action and global climate commitments or actions. A portion of Navroz Dubash’s time under this grant was used to support this work, although it was largely supported by the Oak grant. In 2012 Navroz Dubash along with other Indian researchers developed a framework to evaluate climate co-benefits of development actions for India using a multi-criteria analysis. It was initially presented as a working paper and discussed with climate, and energy experts as well as a representative of the Ministry of Environment and Forests in a workshop in Delhi. The paper was further refined and developed into a journal article. Elements of this framework have also been included in ‘The Final Report of the Expert Group on Low Carbon Strategies for Inclusive Growth,’ by the Government of India’s Planning Commission, released in April 2014.

Methodologies and activities for the South Africa Studies

Writing and research on International-National Intersections in Climate Policy: During the grant process, two papers were authored by Bronwen Morgan on key aspects of the interaction between national and international levels of climate governance. The first focused on monitoring and verification as an institutional site for linking the two levels, and was presented at a conference in June 2013 in Boston, USA. This was supported by the work of a research assistant based in Australia during 2013 (Sophie Duxson). The second explored the utility of regulatory theory for understanding the interactions between national and international climate governance policies, and was presented at the ‘Building the Hinge’ Workshop in December 2013 in India. Both papers were largely based on secondary literature and provided a basis for the institutional study.

National Institutions of Climate Governance: In 2013-14, research was conducted to map and analyse the institutions of national climate governance. This research was conducted through a field trip to South Africa by Bronwen Morgan (October 2013) followed by the

appointment of a researcher on a consultancy basis based in South Africa (Kim Coetzee) to continue the primary research in 2014 under the supervision of Bronwen Morgan. The research consisted of interviews with key policy makers, complemented by documentary analysis. The results were transcribed, analysed, workshopped and written up as a country case study, with the support of a second research assistant based in Australia (Sangeetha Chandrashekran). The working paper has been submitted to SSRN and can be found here at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2538294.

Note: Sophie Duxson resigned in December 2013 to take up a permanent job and this created a gap of 2 months before hiring a fresh research assistant due to the difficulty of recruiting over the summer vacation period.

Monitoring, Reporting and Verification: A considerable amount of research was carried out on this in 2013 by Bronwen Morgan and Sophie Duxson. This had three positive results. It resulted in a conference presentation, which generated useful feedback in June 2013. It assisted in helping to craft a conceptual framework that would allow the comparison of different national policy frameworks that are otherwise profoundly different, but which each must present their ‘outcomes’ by reference to a common process created by international MRV requirements. Thirdly, understanding what is at stake for South Africa and India in their negotiations over international monitoring and verification helps to clarify the political opportunity structure that drives national developments. Despite these three advantages, we ultimately found that these national political opportunity structures mattered more – so far – to the story of institutionalising climate change governance than the detail of MRV structures themselves. For the present, therefore, this work forms part of the background for the country case studies, but it also provides a basis through which to subsequently examine the case study results for their relevance to the evolution of the global regime.

Additional Comparative and Transnational Research

China and Brazil Comparative Cases: In our research proposal we had suggested that adding an additional case study of China was desirable, although not an integral part of the proposal. During the grant period, we made an effort to add a Chinese case, primarily by inviting a leading Chinese climate scholar to visit the Centre for Policy Research as a visiting scholar. Accordingly, Prof. Teng Fei, Assistant Professor, Tsinghua University was a Visiting Fellow at CPR for 2 weeks in August 2013. During this period, he worked closely with Indian case study authors, and helped develop a comparative framework for analysis. In addition, he presented a public seminar on “The recent development of climate policy in China: Progress in 12th Five Year Plan.” (<http://cprindia.org/seminars-conferences/4695-recentdevelopment-climate-policy-china-progress-12th-five-year-plan>). Unfortunately, due to the pressure of other time commitments, Prof. Teng Fei was unable

to follow up on delivery of a Chinese case study during the grant period. Moreover, as a result, a portion of the grant funds earmarked for a Chinese case were left unspent, with only the portion used for his trip to India expended. Finally, since he had other support for his travel, a smaller than expected amount was expended.

In addition, while not a part of our original grant proposal, we sought to engage a Brazilian scholar, Matias Franchini, to develop a Brazilian case study. While we had promising interactions, and he was able to share some secondary material, for reasons of time and other commitments (notably winning a fellowship to the US to work on other projects), he was unable to add a dedicated Brazilian case study.

Synthesis paper: Our original intent was to draft a synthesis paper that brought together insights from the various case studies. And indeed, we undertook collaborative work across the two case study teams to develop such a paper. However, we faced two obstacles in concluding the paper. First, the original intent was to draft a synthesis paper drawing only on India and South Africa, with an intent to explore adding on China. Brazil was not part of the original intent. However, as the project proceeded, it became clear that a two country comparative study would be of limited value. Hence, we actively sought to bring on China and Brazil papers. Given that our authors were side-tracked by other commitments, the absence of China and Brazil papers meant that we had an insufficient spread of evidence across the varieties of forms of climate governance, limiting our ability to fully develop a comparative framework. Second, and in part as a consequence of the first (in that we postponed meeting to try and get additional cases), we were unable to find time for the two project leads to meet for a final writing meeting prior to the conclusion of the grant period. Instead, we worked intensively through phone calls and email over the period of a week and developed a framework for comparative analysis. This framework was presented at a meeting in Berlin on Multilevel Governance of Climate Change in September 2014 to seek feedback. While the framework will need to be refined following further case material, it provides a solid base on which to build future comparative work.

Review of Institutionalization of Climate Governance: In the course of conducting this work, a broad literature review was undertaken on institutionalizing climate governance, with a focus on developing countries. This literature review informed the contribution by Dr. Navroz Dubash to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change, in his capacity as Lead Author.

Multilevel Governance Workshop: During the grant period, in December 2013, the Centre for Policy Research organized a major international workshop entitled “Building the Hinge: Reinforcing National and Global Climate Governance” in collaboration with the Mitigation Action Plans and Scenarios (MAPS) Programme at the Energy Research Centre, University of Cape Town. Participation of the South African team member

(Bronwen Morgan) to this workshop was supported by this grant. The workshop was designed to stimulate conversation about global and national governance of development and climate change, in the context of local planning and in the lead up to the negotiation of the 2015 UNFCCC agreement. It was meant to explore the linkages between ‘top down’ and ‘bottom up’ approaches to climate change and the ways in which each can be harnessed towards a climate regime that is both equitable and effective.

5. Research findings

The following are the research findings for various components of the India and South Africa studies:

National Institutions of Climate Governance

National climate policymaking has focused overwhelmingly on policy formulation in key sectors such as renewable energy, energy efficiency, and on adaptation focused sectors. However, there has been comparably little attention paid to the underlying institutional structures that will sustain those policies. A particular feature of climate change policy is that it requires cross-sectoral and multiscalar responses. This requires integration, coordination or at least non-conflictual layering with existing institutions. Research on India and South Africa, with some input from secondary research on China, was undertaken to address this question.

In the course of the project, we evolved the following framework for analysis in two parts. First, through what process, using which organizations, and with what forms of political engagement have national statements of aspiration (domestic plans, strategies, legislations and international pledges) around climate change been formulated? In addition, how has this agenda setting emerged through interaction between domestic and international politics? Second, what is the process through which climate governance is institutionalized, and with what outcomes? The focus of a great deal of climate policy has been on directly shifting incentives for other actors in government (such as line ministries) and outside government (such as businesses). However, shifting incentives is only one part of the role institutions can play. They can also forge new understandings through processes of socialization, and create new political opportunity structures. We believe this framework represents a conceptual advance over earlier ways of thinking about institutionalizing climate governance.

The India and South Africa case studies, in employing this framework, have arrived at the following:

India

Over the period under review in this study, 2007-13, India has witnessed growing institutionalisation of climate governance, in response to the proliferation of domestic policies addressing climate change. Four key observations regarding the manner in which this institutionalisation has occurred can be summarized as below:

- Although domestic policy has been driven by an understanding of domestic developmental needs, institutionalisation has largely been reactive, rather than systematic, to international climate developments. There has been no effort to engage in a deliberate construction of an institutional structure, keeping in mind the distinct challenges of mainstreaming, operationalizing co-benefits, and operation across scales;
- Institutionalisation has been characterised by a lack of stability in the existence of certain institutions, leading to inconsistency in the government's engagement with the issue and construction of the climate debate. An important implication of this lack of stability is that climate policy has been driven by leadership and change in leadership in-charge of the climate issue. In the context of thin and unstable institutions, the importance of particular leaders increases; over time, a more robust form of institutionalization would insulate decisions from idiosyncratic leadership;
- The performance of key climate governance functions have been highly dependent on different institutional configurations. For instance, since the dissolution of the office of the Special Envoy, which was mandated with co-ordinating climate policy across the government, coordination occurs in an ad hoc manner and often informally. The lack of engagement of the Prime Minister's Council with climate policy since 2011 has meant that there is no overarching structure that encompasses strategic thinking, monitoring and allows for course correction;
- The structures of climate governance that have been established are almost entirely closed institutions with few structured opportunities for public input and consultation.

South Africa

In relation to formulating national statements of aspiration (Q1), South Africa has:

- Designed and implemented a highly participatory and deliberative process to articulate national targets;
- Facilitated a unique two-way dialogue between scientists and policymakers that provides a high quality analytical base for formulating targets;
- Committed to relatively ambitious (albeit conditional) pledges to reduce carbon emissions as a result of skilful institutional entrepreneurship on the part of environmental bureaucrats and non-state actors that took advantage of positive feedback loops between domestic and international political opportunity structures.

In relation to the process of institutionalizing climate change (Q2), South Africa has:

- Moved from the phase of designing national climate governance policy to the early stages of implementation;
- This shift seems to be associated with a more cautious and fragmented approach than the bold and highly inclusive phase of designing national climate governance;
- National climate governance institutions continue to be located primarily in the (reorganised) Department of Environmental Affairs (DEA), despite some moves to locate some oversight functions in the sub-department of the more powerful Department of the President;
- Limited political influence of the DEA, especially in comparison to the crucial Department of Energy, is a significant constraint on effective implementation;
- ‘Unintended implementation’ has begun to occur via alternate institutional pathways not linked to directly to the DEA, particularly in relation to carbon tax (via the Treasury) and renewable energy (via the Department of Energy and the Treasury);
- Sub-national climate governance mechanisms in South Africa remain underdeveloped, with the exception of city-level initiatives in large cities such as Durban, Cape Town and Johannesburg;
- National MRV (monitoring, reporting and verification) in South Africa is still in the early emergent stage, but even at this point, opportunities to build on ‘home-grown’ monitoring and verification procedures in energy efficiency are being bypassed, and new procedures appear to be being designed from scratch.

Sub-National Climate Planning

During the grant period, the Centre for Policy Research undertook a qualitative study on State Action Plans on Climate Change in India as mechanisms of sub-national climate governance. This project has been jointly financed by IDRC and Oak Foundation funds. This line of work was originally primarily funded by the Oak Foundation. However, the linkage to the IDRC work on national institutions of climate governance provided an opportunity to more closely examine the federalism issues involved in linking state and national climate planning and institutions, broadening the work beyond its initial limited focus on state-level scope. In particular the linkage between the projects led us to explore the ideas of state as ‘laboratories of innovation’ shaping national efforts, and conversely the extent to which states were limited by national frameworks. In addition, the joint funding allowed for a more through process of review, notably a review workshop with state officials.

The research was based on five detailed state reports, leading to a summary paper titled, “From Margins to Mainstream: State Climate Change Planning in India as a ‘Door Opener’

to a Sustainable Future” (<http://state-climate-plans.cprindia.org/publications.html>) with clear findings and recommendations aimed at governments, donors and civil society. The findings include:

- State climate change action plans are treated synonymously with sustainable development planning. But because these plans are inadequately rooted in relevant scientific knowledge, they represent a lost opportunity to internalize climate resilience;
- Plans focus more on adaptation than on mitigation; states have perceived mixed signals about the appropriate role for mitigation from the central government;
- Capacity constraints limited states’ ability to develop these plans in-house. The assistance of donors and use of consultants largely failed to adequately enhance states’ long-term capacity or enable integration of climate expertise and local context. Moreover, the process design failed to break existing departmental silos and limited the development of creative ideas;
- State plans failed to live up to the intended outcome of signaling a ‘directional shift’ in development for a variety of reasons. Plan processes were not aimed at vision development, but too often led to marginal recommendations;
- Recommendations are incremental rather than transformational because of the process chosen for plan formulation, although there are pockets of innovation driven by individual initiative;
- While state level climate plans can be ‘laboratories of innovation,’ in the Indian case, this potential was limited by the framework imposed by the central government, limits in the process of plan preparation, and by capacity limits that were inadequately addressed by external support.

Co-benefits

During the grant period, CPR undertook a range of work to expand on the idea of cobenefits. This included development of this idea in the formulation of India’s Low Carbon Expert Group and 12th Five-year Plan, co-authoring an academic article, laying out the framework, organizing workshops in India and presenting the idea at other conferences, and pursuing the idea further in the course of developing the IPCC AR5 and in subsequent academic articles. Key concepts include:

- A ‘co-benefits’ based approach is a useful way for low income developing countries to contribute to climate mitigation, as it allows a concrete approach to assess tradeoffs and synergies across development and mitigation;
- While the concept has won wide support, it has had relatively limited conceptual clarity and is not sufficiently backed by methodological approaches;

- A ‘Multi-criteria Decision Analysis’ (MCDA) technique provides a useful basis for developing decision processes for co-benefits;
- A simple MCDA methodology was developed for India and released in the widely read Economic and Political Weekly;
- A co-benefits approach requires clear articulation of the multiple objectives, ensuring that non-quantifiable (or hard to quantify) objectives are also considered. A prominent examples of such hard to quantify objectives are the distributional consequences of particular policies. For example, the distributional gains of promoting public over private transport are often understated by other methods;
- To be effective and credible a co-benefits framework must be embedded within a larger deliberative process in order to determine weights given to objectives and obtain more complete information on potential synergies and trade-offs;
- A well defined co-benefits approach can increase the credibility of decisions, including providing a basis for determining ‘additionality’ of actions and finance required, which is a thorny issue that has bogged down climate talks. Specifically, a co-benefits approach allows a country like India to define the level of action it will undertake domestically, that are justified by the realization of co-benefits such as reduced air pollution, enhanced energy security etc. This sets a credible baseline for domestic action, and therefore a clear and consistent basis for requesting additional climate funds for actions that would yield specifically climate gains, but are not justified by India’s co-benefits assessment alone.

6. Project outputs and dissemination

The project has yielded several outputs. In addition, we have completed several dissemination events to achieve Objectives 2 and 3 of the grant proposal. In particular, a webpage titled, “Climate Change as a Challenge of Multilevel Governance” has been created on the CPR [website](#) to house all the key India and South Africa outputs funded by the IDRC grant. Below we first summarize outputs and then specific dissemination activities that achieve the two outreach objectives.

Written Outputs directly supported by IDRC:

India case study

1. Navroz K. Dubash and Neha B. Joseph. 2014. The Institutionalization of Climate Policy in India: Designing for Co-Benefits and Mainstreaming. Centre for Policy Research Working Paper.

2. Navroz K Dubash and Anu Jogesh, 2014. From Margins to Mainstream? State Climate Change Planning in India. *Economic and Political Weekly*. XLIX (48), pp. 86- 95.
3. Navroz K. Dubash and Anu Jogesh, “From Margins to Mainstream? Climate Change Planning in India as a 'Door Opener' to a Sustainable future,” Centre for Policy Research (CPR), Climate Initiative, Research Report (New Delhi: CPR, February 2014).
4. Anu Jogesh and Navroz K. Dubash, “Mainstreaming climate change in state development planning: An analysis of the State Strategy and Action plan on Climate Change, Himachal Pradesh,” Centre for Policy Research (CPR), Climate Initiative, Working Paper (New Delhi: CPR, February 2014).
5. Anu Jogesh and Navroz K. Dubash, “Mainstreaming climate change in state development planning: An analysis of Karnataka’s Action Plan on Climate Change,” Centre for Policy Research (CPR), Climate Initiative, Working Paper (New Delhi: CPR, February 2014).
6. Anu Jogesh and Navroz K. Dubash, “Mainstreaming climate change in state development planning: An analysis of the Madhya Pradesh State Action Plan on Climate Change,” Centre for Policy Research (CPR), Climate Initiative, Working Paper (New Delhi: CPR, February 2014).
7. Anu Jogesh and Navroz K. Dubash, “Mainstreaming climate change in state development planning: An analysis of the Odisha Climate Change Action Plan,” Centre for Policy Research (CPR), Climate Initiative, Working Paper (New Delhi: CPR, February 2014).
8. Anu Jogesh and Navroz K. Dubash, “Mainstreaming climate change in state development planning: An analysis of the Sikkim Action Plan on Climate Change,” Centre for Policy Research (CPR), Climate Initiative, Working Paper (New Delhi: CPR, February 2014).
9. Anu Jogesh, 2013. Time to Dust off the Climate Plan? *Economic and Political Weekly*, XLVII (48), pp. 24-25.
(<http://www.cprindia.org/publications/papers/4908-time-dust-climate-plan>).

South Africa case study

1. Bronwen Morgan and Sophie Duxson, “South African Climate Governance – Mitigation Actions in the Context of Monitoring, Reporting and Verification (MRV) Systems” UNSW Law Working Paper, April 2013.
2. Bronwen Morgan, 2014. “Are You Being MRV’d? Seeing Like A Planet and the Regulatory Challenges of Governing Climate Change Policy in Emerging Economies.” Paper presented at Annual Meeting of Law and Society Association, 2-5 June 2013 Boston, USA.

3. Bronwen Morgan, 2013. “Using Insights from Regulatory Theory to Reinforce National and Global Climate Governance Mechanisms”. Paper prepared for the workshop ‘Building the Hinge’, 5-7 December 2013, Alwar, India.
4. Sangeetha Chandrashekeran, Bronwen Morgan, Kim Coetzee, and Lucy Baker, “From Statements of Intent to Institutionalised Practice: What Makes Climate Change Policies Stick?”, Journal article submitted to Global Environmental Change, December 2014.
5. Sangeetha Chandrashekeran, Bronwen Morgan, Kim Coetzee, and Lucy Baker, ‘South Africa Case Study: Summary of Research Outcomes for Policymakers’, December 2014.

Complementary outputs by CPR supported by Oak grant with partial IDRC support:

1. Measuring the Co-Benefits of Climate Change Mitigation by Diana Ürge-Vorsatz, Sergio Tirado Herrero, Navroz K. Dubash and Franck Lecocq. Annual Review of Environment and Resources (2014) 39: 549-582.
2. Navroz K. Dubash, Of Maps and Compasses: India in Multilateral Climate Negotiations, in Waheguru Pal Singh Sidhu, Pratap Bhanu Mehta and Bruce Jones (eds.), SHAPING THE EMERGING WORLD: INDIA AND THE MULTILATERAL ORDER (Brookings Institution Press, Washington D.C., 2013). Available at: <http://www.cprindia.org/publications/papers/4845-maps-and-compasses-indiamultilateral-climate-negotiations-shaping-emerging>.
3. Navroz K. Dubash, D. Raghunandan, Girish Sant and Ashok Sreenivas, Indian Climate Change Policy: Exploring a Co-Benefits Approach, 48:22 ECONOMIC AND POLITICAL WEEKLY 47-61 (2013). Available at: <http://www.cprindia.org/publications/papers/4589-indian-climate-change-policyexploring-co-benefits-based-approach>.
4. Navroz K. Dubash, The Politics of Climate Change in India: Narratives of Equity and Co-benefits, 4(3) WIRES CLIMATE CHANGE 191-201 (2013). Available at: <http://www.cprindia.org/publications/papers/4601-politics-climate-change-indianarratives-equity-and-cobenefits>.

Dissemination Events

Dissemination pertaining to Objective 2

India:

Institutionalization of Climate Governance: The final paper on India’s institutional structure for climate governance was concluded toward the end of the project period and has been disseminated electronically through CPR’s email list as well as through the

project website. More targeted and focused outreach will be conducted through presentations at seminars and conferences.

Sub-national Climate Planning: A workshop on state action plans for climate change was held in India in April 2013, calling all key stakeholders – government officials, consultants, donors, and experts – involved in the preparation of state climate plans in seven Indian states.

The objective was threefold: discuss the preliminary findings of our research on SAPCCs; elicit feedback and additional inputs on the work; and understand what according to states were steps required to take the process of state climate planning forward. The resultant workshop report was widely disseminated electronically and is titled, “State Action Plans on Climate Change in India: Framing, processes, and drivers.” (http://state-climateplans.cprindia.org/uploads/2/3/7/5/23756750/sapcc_workshop_report_cpr_27_april_2013.pdf). Subsequently, a final report on state action plans draws from analysis of state climate plans in five states and offers trends on how plans were approached from a climate lens; the process involved in preparing the plans; plan recommendations, and mechanisms for finance and implementation. In addition the overarching report offers recommendations to central and state government officials, experts, and the civil society on how plans could be improved in the future and importantly, mainstreamed in the state planning process.

A project site was created to house these reports. The page received 183 unique viewers in the months of August and September 2014 alone. The overarching report was also posted on the Social Science Research Network (SSRN) website in August. According to SSRN, the report has been viewed 107 times thus far. Links to the site were shared with various state representatives who participated in the study as well as Climate Initiative’s 800 strong mailing list comprising of domestic and international experts, and practitioners in the climate, energy and development space. We have also been invited to co-edit a special issue of the Journal of Integrative Environmental Sciences focused on sub-national climate policy expected to be released in September-October 2015. The authors have been invited to state level meetings to discuss climate policy planning, namely in Bihar and for Uttarakhand. (The project lead was invited by the Madhya Pradesh state government, but was unable to attend).

Complementary activities adding to the discussion on the multi-level governance of climate change were also carried out, some of which was undertaken as part of CPR’s broader climate work. These include:

1. Talk by Prof. Harald Winkler, Group Leader, Energy, Environment and Climate Change, University of Cape Town on ‘Update on Climate Action in South Africa’ on 11 April 2012 at CPR.

2. Workshop on 'A Co-Benefits Approach to Climate Change in India' by Navroz Dubash (CPR), D Raghunandan (Delhi Science Forum), Girish Sant (Prayas) and Ashok Sreenivas (Prayas) on 18 January 2013, New Delhi.
3. Roundtable on 'State Action Plans on Climate Change in India: Framing, processes, and drivers' on 27 April 2013, New Delhi.
4. Talk by Dr. Teng Fei, Associate Professor, Institute of Energy, Environment and Economy, Tsinghua University on 'The recent development of climate policy in China: Progress in 12th Five Year Plan' on 7 August 2013, New Delhi.
5. Panel discussion on 'From Margins to Mainstream? State Climate Change Planning as a 'Door Opener' to a Sustainable Future' on 17 February 2014, New Delhi.
6. Roundtable on 'The Road (and Potholes) Ahead for India's Climate Change Policy Leading to the Paris Meet in December 2015' organized in collaboration with GLOBE INDIA for Members of Parliament in India on 12th August 2014, New Delhi. Available at: <http://www.cprindia.org/seminars-conferences/5410-road-and-potholes-aheadindia's-climate-change-policy-leading-paris-meet-d>.
7. Panel discussion with, Joanne Scott, Professor of European Law at University College London, Connie Hedegaard, EU's Commissioner for Climate Action, and former environment Minister Jairam Ramesh on 'European Union Climate Policy in the Context of the Negotiations for a 2015 Climate Agreement' on 11 September, 2014, New Delhi.
8. Round table discussion with Benito Müller and Anju Sharma at Oxford Climate Policy and Dipak Dasgupta, Alternate Member, GCF Board on, 'Enhanced Direct Access: The Green Climate Fund and the National Adaptation Fund of India' on 29 October 2014, New Delhi.

Apart from the above, Climate Initiative faculty and researchers have presented their work on state climate plans, the co-benefits based framework for climate governance, and multi-level governance of climate change at several conferences.

1. Presentation by Navroz K. Dubash on 'State Action Plans on Climate Change' at the Indian Administrative Service training programme on Climate change and state preparedness: Impacts, Vulnerability and Adaptation, organized by the Department of Personnel and Training Ministry of Personnel, Public Grievances and Pensions, Government of India & The Energy Resources Institute on 10 October, 2012, New Delhi.
2. Presentation by Navroz K. Dubash on 'Multilevel Governance of Climate Change: Experience from Indian States' at Seminar on Human Ecology by the School of Human Ecology, Ambedkar University Delhi on 14 December, 2012, New Delhi.

3. Presentation by Navroz K. Dubash on 'A Co-Benefits Approach to Climate Change in India,' at the Conference on Equity, Adaptation and Sustainable Development, 2013, organised by Tata Institute of Social Sciences between 22-23 February, 2013, Mumbai.
4. Presentation by Navroz K. Dubash on 'A Co-Benefits Approach to Climate Change in India,' at the Peer Learning Workshop on Mainstreaming Climate Change in Key Sectors, organised by National Institute of Administrative Research (NIAR), and Lal Bahadur Shastri National Academy of Administration (LBSNAA) on March 18, 2013, New Delhi.
5. Presentation by Navroz K Dubash on 'Co-Benefits and their Discontents' in a Consultative Workshop on Assessing Co-Benefits from Economic Development and Emission Reductions Projects, organised by World Bank, and Shakti, Climate Works on 29 July 2013, New Delhi.
6. Presentation by Navroz K Dubash on 'Indian Climate Policy: Engaging a Complex New Context' in the Climate Change Conclave, organised by the Ministry of Environment and Forests and CII on 2 September 2013 in New Delhi.
7. Presentation by Anu Jogesh on, 'A study of State Action Plans on Climate Change in India and their implications for mainstreaming climate and sustainable development policies at the sub-national level.' at the Thematic Workshop of Indo-European Multilevel Climate Governance Research Network, organized by Jadavpur University between 20-22 November, 2013.
8. Panel Discussion on 'Whither Climate Governance? A Discussion of National, Regional and Global Developments.' 4 December 2013, New Delhi.
9. Presentation by Anu Jogesh on 'Experience of climate plan preparation in five Indian states' at the State Consultation on Bihar State Action Plan on Climate Change, organised by Pairavi, Patna, Bihar on 14 December, New Delhi.
10. Participation by Navroz K Dubash on 'A Co-Benefits Approach to Low Carbon Development,' at a Meeting on Low Carbon Development in BRICSAM countries, hosted by the Oxfam on 17 February 2014, New Delhi.
11. Presentation by Anu Jogesh on, 'Raising Ambition in sub national Policies; role for Civil Society Organisations.' at the strategic meeting of the climate group, Beyond Copenhagen on 21 February, 2014.
12. Participation by Anu Jogesh at Uttarakhand Vulnerability Assessment workshop organised by the government of Uttarakhand and Climate & Development Knowledge Network (CDKN) on 17 June, 2014, New Delhi.
13. Presentation by Navroz K. Dubash on 'Mainstreaming climate change in key sectors and in development planning,' to officers of the Indian Administrative Service, organised by the Centre for Climate Change and Environment, Government of India-UNDP, and Lal Bahadur Shastri National Academy of Administration (LBSNAA) between 13-15 July, 2014, Mussoorie.
14. Talk by Navroz K Dubash on "Introduction to issues in Climate change" to senior Accountant Generals of various Indian states, responsible for preparing the audit reports of

their states, organised by The International Centre for Environment Audit and Sustainable Development. 18 September, 2014, Jaipur, India

South Africa

Outreach in South Africa was limited in part because the lead researcher was based in Australia for much of the grant period. However, following conclusion of the case study, the paper will be circulated to all interviewers and relevant policy actors once finalized. The process of carrying out the primary research in South Africa has disseminated knowledge of the project and there has been steady interest expressed by those coming into contact with the project in reading the outputs.

Dissemination pertaining to Objective 3

A primary mechanism for international outreach was a major workshop entitled “Building the Hinge: Reinforcing National and Global Climate Governance Mechanisms” held near New Delhi in January 2014. With primary support of the Oak Foundation and collaboration with the MAPS Programme at the Energy Research Centre, Capetown, South Africa, the workshop explored the scope for productive dialogue beyond the binary view that the choice is between ‘top down’ or ‘bottom up’ approaches to climate change. Key findings of the workshop can be accessed at cprclimateworkshop.cprindia.org. Among other themes, the workshop explored the scope for national climate plan processes to usefully interface with the UNFCCC process. The meeting included productive conversations between individuals with China, South Africa, Brazil and India experience that informed the structure of the subsequent India and South Africa cases. Subsequent outputs include a collaborative paper by several workshop participants entitled “Building Productive Links between the UNFCCC and the Broader Global Climate Governance Landscape” and submitted to Global Environmental Politics.

A literature review on institutions of climate governance was conducted for this project, which has led, indirectly to two important mechanisms of dissemination, both partially also supported by the Oak Foundation. First, the literature review was used as the basis for Navroz Dubash’s input to the chapter on “National and Sub-national Institutions and Policy” in the IPCC Fifth Assessment Report, in his role as a Lead Author. Second, this work led to further research and publication of a paper in Climate Policy on “Developments in National Climate Change Mitigation Legislation and Strategy” published in Climate Policy and cited in the same chapter of the IPCC report. This work was primarily conducted under the Oak Foundation, but the initial impetus was a literature review conducted as part of the IDRC project.

Our work on sub-national climate planning has also been recognized and used in international debates. Anu Jogesh, who is leading the state plans work, has been invited to be a member of the ‘Indian-European Multi-Level Climate Governance Research Network,’ a collaboration of leading Indian and European academic institutions in the research of climate policy. As part of the network, the state climate plan work has been presented at conferences in Kolkata, Berlin and Amsterdam. In addition, Anu is a co-editor of a special issue of the Journal of Integrated Environmental Sciences that compares sub-national climate initiatives in India and the European Union.

In addition, several opportunities for participation in international seminars and conferences provided a mechanism for dissemination of results. These include:

1. Presentation by Navroz K. Dubash on ‘Multilevel Climate Governance through an Indian Lens’ at the Earth System Governance Conference, 2013, organised by the Institute for Sustainable Development and International Relations (IDDRI). 28-31 January 2013, Tokyo.
2. Participation by Navroz K Dubash in the Mitigation Development Forum, organised by Energy Research Centre, University of Cape Town and co-sponsored by Centre for Policy Research in February 2014 at Cape Town. The workshop placed a particular emphasis on developing co-benefits based approaches. Navroz Dubash was also involved in the overall steering group for the workshop.
3. Presentation by Anu Jogesh on, 'State-led experimentation or centrally-motivated replication? A study of State Action Plans on Climate Change in India' at Indian-European Climate Governance Research Network: Berlin Publication Workshop., organised by Free University, Berlin. 12-13 April 2014.
4. Bronwen Morgan, 2014. “Are You Being MRV’d? Seeing Like A Planet and the Regulatory Challenges of Governing Climate Change Policy in Emerging Economies,” paper presented at Annual Meeting of Law and Society Association, 2-5 June 2013, Boston, USA
5. Presentation by Navroz K. Dubash on ‘Varieties of National Climate Change Governance’ at a workshop titled Towards a Global System of Multilevel Governance, organised by the Environmental Policy Research Centre, Free University Berlin and Institute for Advanced Sustainability Studies (IASS). 8 September 2014, Berlin.

Project outputs

Project outcomes can be further categorised into two areas. First, the impact that the studies have had in terms of their policy relevance as well as academic scholarship on the

subject and second, how the studies have built capacity on climate change and qualitative research among the research associates in CPR and UNSW.

a. Impact

While establishing direct causality between research work and policy impact is always challenge, we believe the work under this grant has contributed to policy impact in several different ways:

Attention to Institutions of Climate Governance: While the past few years has seen a growing attention to policies at the national and sub-national level, there has not been a complementary attention to institutions. Yet, without lasting institutions, neither mainstreaming of climate change, nor sustained attention to climate governance is possible. This project has attempted to shine a spotlight on this issue by means of two detailed case studies. While outreach on these case studies will continue after the grant period, the background work for the project has already been used, notably in the Fifth Assessment Report of the IPCC. A section on institutions, primarily authored by Navroz Dubash, highlights the empirical evidence on institutional arrangements. Moreover, a complementary paper funded by the Oak Foundation, on national legislations, plans, and strategies, has also been highlighted in the IPCC. Collectively, this work has contributed to an enhanced appreciation of the role of institutional change in climate governance. However, it is fair to say that these are relatively early days in this discussion and far more work needs to be done.

Sub-National Climate Planning: Our work is among the only detailed work in India, and indeed globally, to look in detail at sub-national climate planning. The effort has been recognized by many invitations to share the work at various events (as discussed in the main report) and also to participate in global efforts at advancing understanding on sub-national climate planning. Most pertinent, this has led to some invitations and requests by donor agencies and some state governments to provide feedback on how to better improve climate planning at the state level in the future. As noted earlier, there have been a sizable number of page views of the state plan reports posted on the CPR website as well as on SSRN.

Co-benefits: The importance of co-benefits as a larger frame for climate governance, and the need to develop institutions that are consistent with a co-benefits approach, are a central theme of this project. Our work has contributed to developing and expanding engagement with this idea in a number of ways. Work that was initiated before this grant, but has been continued through partial support by this grant, has led to a framework for co-benefits in India's 12th Five Year Plan and in India's Report of the Expert Group on Low

Carbon Strategies for Inclusive Growth. In addition, Navroz Dubash was involved in developing the presentation of co-benefits in the IPCC's report. And a recent co-authored academic review paper on co-benefits has been published in the widely read Annual Review of Energy and Environment.

b. Capacity building

The research undertaken under this grant has led to exposure of the two research associates in India, partially supported by the grant, to a wide range of literature in climate policy, multilevel governance, national and sub-national policies in the global south and to substantial development of research skills. Anu Jogesh has undertaken state visits to five states for research, and conducted interviews with high-level government officials leading to experience gained with interview based and inductive research skills. Apart from five working papers, she has authored three journal articles over the course of this grant, one of which has been published, and two of which are shortly to be submitted. Moreover, she has been invited to co-edit a special issue of an international journal on sub-national climate policy making. Neha Joseph has undertaken research assistance including participating in and transcribing and analysing interviews with highlevel government officials. She has coauthored a paper for the project, which will shortly be submitted for publication. In addition, both research associates have developed deep familiarity with the climate literature in their specialized areas (sub-national planning and institutions) but also in the broader arenas of climate governance through interaction with the broader team. They have also enhanced dissemination skills, including through developing websites (on SAPCC and climate institutions) and organizing and conducting workshops.

The research undertaken under this grant has led to exposure of the two research associates based in Australia and supported by the grant to a wide range of literature in climate policy, multilevel governance, national and sub-national policies in the global south. Both were knowledgeable about environmental policy in general and in the case of the second, climate change policy – but neither of them had any prior exposure to studying climate change policies in the global south. In addition, the consultancy contract for primary research in South Africa provided experience for that researcher with interview-based and inductive research skills.

All three researchers supported by the Australian-based component of the grant have been women, and one is a woman of Indian background.

7. Overall assessment and recommendations

The project was designed as a project complementing other work at the Centre for Policy Research and building on the scope for comparative work at University of New South

Wales to shed light on the emergent intersection area of domestic and global climate policy. The project has, we believe, demonstrated these linkages and made a credible start at providing an analytical way of assessing them. Moreover, through high profile and strategically placed output, the project has managed to inject ideas into relatively far reaching circles of policy making and academic consideration. Examples include the IPCC process, an international workshop with high-level participation, and policy-making fora of the government of India.

A key component of the project work was elucidating the linkages between climate policy and mainstream development policy, and illustrating how the advance of climate policy necessitated the engagement with domestic development drivers. Consequently, we feel this project has advanced understanding of how climate change can usefully be thought of, and indeed needs to be thought of, in the context of development policy and planning. This contribution will help, we hope bridge the divide between climate and development that has plagued climate politics.

One shortcoming of the project has been the relatively limited comparative experience beyond the two primary countries, India and South Africa. While the project was designed initially as a two-country study, with an option of adding a third (China), in the course of the project we attempted to bring in full case material from China and Brazil. We were partially successful in China and not at all so in Brazil. In hindsight, designing a project of this sort in a more explicitly multi-country comparative way from the beginning would have been productive. Looking forward, an initial framework for country comparison has been developed using the India and South Africa examples, which could inform a more thorough multi-country comparison in the future.

Our interactions with IDRC have been relatively limited, in part because this is part of a larger project being coordinated by another organization, but we could have done more to take the initiative to communicate more directly. We greatly appreciate IDRCs funding approach, which allows for serious attention to policy relevant research, without imposing a priori and often untenable requirements of particular and instrumentally focused outcomes. This is our second joint project with IDRC and we have had a very productive relationship on both occasions. We are grateful for IDRCs support.

C. COMPONENT III: INTER-INSTITUTIONAL EVALUATION THROUGH THE USE OF INDICATORS

Direction:

René Urueña, rf.uruen21@uniandes.edu.co

Universidad de los Andes, Colombia

1. Synthesis

The component on “Inter-Institutional Evaluation through the Use of Indicators” was built upon previous research on the use of indicators as a mechanism of global governance, which sought to understand the important role played by indicators in international institutions and its relationship with international law. The object of the component on “Inter-Institutional Evaluation through the Use of Indicators” was to focus on how national and transnational actors use indicators to shift power relations and to advance specific agendas.

The first batch of case studies focused on the local use of indicators by both private and public actors, showing that the turn to quantitative forms of governance is not only an international phenomenon. The local focus was actually a result of the research experience and background of the researchers that joined the project during the first year. The first team of researchers was composed mainly of Colombian, Brazilian and Kenyan young scholars with a legal background in constitutional, administrative and international law. This mix led to an interesting analysis on the role that indicators have played at the local level. The case studies that were undertaken during the first period of the component were: three case studies on how women’s social movements and NGOs have used indicators as a mechanism to advance pro women’s agendas in areas as diverse as displacement, criminal and social assistance policies; a case study on the impact that the Colombian Constitutional Court had on the creation of indicators to monitor the enjoyment of the fundamental right to health in the Colombia; and a case study of the use of corruption indicators in Kenya. Furthermore, this component supported the creation of the Justice Confidence Index in Brazil, which seeks to determine the legitimacy of national courts by measuring the public perception about the judiciary and the motivations that drive people to use the courts.

The project gained from these new case studies in two senses. First, conceptual frameworks underlying the case studies were produced through Global South scholarship (in this case, in Latin American institutions). As a result, this helped to reinforce, among Northern and Southern audiences alike, the legitimacy of new conceptual work produced in the Global South. In the process, they helped to challenge the traditional division of labour, whereby the conceptual frameworks are developed in the North, and then case studies are produced by scholars from the South, who play the role of “local informants”. Second, the case studies have broadened the subject of analysis. The first batch of case studies focused on the local use of indicators, and although some of the case studies did refer to the interaction of local actors with international institutions through the use of indicators, that type of interaction was not the main object of analysis of the first batch of papers. On the contrary, those case studies sought to gain a better understanding of how national institutions and social groups have used indicators within a specific regulatory space to present contesting claims of power, justice and redistribution. The team realized

that the project had acquired a local bias, primarily because of the focus given to the investigation by the different case studies, and that it was necessary to include transnational considerations to better understand the use of indicators.

The director identified the local bias that had been created by the first batch of case studies and, in response, coordinated a second phase for the component, which sought to have a more international character. The objective of the new case studies was to understand how international actors, specially international institutions, used indicators as a mechanism of global governance, and how the use of this quantitative tool affected countries in the Global South. These new case studies have given the project a more academic inclination, however, this does not mean that the new research did not have policy implications; the common characteristic of these case studies is the critical analysis of the use of indicators. These case studies sought to contribute to the field by putting the emphasis on the role played by international organizations in the regulation of the Global South through the use of indicators. Although, some authors had already discussed the importance of international organizations, there has not been a research project that allows to compare the practice ranking and knowledge creation of different international organizations towards the global south. This allowed the researchers to unveil power relations that had been obscured by the objectivity claim of the use of quantitative mechanism in transnational relations. The unveiling and understanding of such power relations may have a practical impact in States policies, especially in countries of the Global South. This is evident from the specific conclusions of each case study which are discussed below.

These first case studies were presented in May and June 2013 at the Law and Society Conference, and the Institute for Global Law and Policy Conference in Harvard University at Boston. As will be further detailed below, during the IGLP Conference several international young scholars approached Rene Urueña interested in joining the project. As a result of this the second year of the project 8 new case studies on the use of indicators as a mechanism of global governance and inter-institutional evaluation in the Global South have been developed. The first batch of articles will be published in a special bilingual edition of the International Law Journal (*Revista Colombiana de Derecho Internacional*) from Universidad Javeriana. The translation of the articles was paid for with the budget provided by IDRC. The work will be published in both Spanish and English in order to reach a wider audience.

The second batch of case studies were presented in June 2014 in a workshop at the IGLP conference, where the researchers commented the first draft of their peers, and plans for publication were discussed. A complete draft of the papers were presented in August in a conference in Cali at Universidad Icesi, and in a closed workshop in Bogota. During the workshop the researchers received final comments on their papers from the guest scholars.

A final version of the last batch of papers was submitted in December 2014, this version will be submitted for publishing at the International Organizations Law Review.

An important highlight of this component is that the researchers and the director received funding from Harvard to attend the IGLP conference in July, this allowed the project to save US\$5,000 dollars. Furthermore, the team won a grant from Universidad Icesi, which paid for the hotel and the flight tickets of some of the researchers. For that reason, the budget for the second conference was not fully executed. As will be evident from the financial report, the project used the budget necessary to hold the conference in Bogota, but some money was saved due to the contributions from Harvard and Icesi University.

2. The research problem

This component seeks to explore the way in which indicators are used by national and transnational actors to shift power relations, and to achieve social or legal change within a society in the Global South. In other words, this project seeks to understand the different ways in which indicators have become a technology of global governance. Although there is no agreed definition of the concept of global governance, it has been argued that such notion encompasses a broadening in the exercise of authority and power, as a result of the changes brought about by globalization⁵, both in terms of the instruments and actors. Governance has been commonly understood as a more far-reaching concept than regulation that uses authority to influence behavior and distribute resources.⁶ As has been recognized by John Braithwaite, Cary Coglianese and David Levi-Faur, in their editorial inauguration of the journal *Regulation and Governance*, “*we also conceived “governance” as broader than regulation, since governance is about providing, distributing and regulating. Regulation can be conceived as that large subset of governance that is about steering the flow of events and behavior, as opposed to providing and distributing*”.⁷

Despite the ambiguity of the term, a series of processes can be identified as inherently taking place within global governance. First, the broadening and relocation of the concept of authority marks the emergence of an increased recourse to informality or deformalization as forms of regulation, for that reason established concepts of international law cannot make sense of new transnational institutions, procedures, instruments and norms; second, global governance widens the relevant actors, which are not only of a

⁵ The term global governance was coined by James N. Rosenau, who sought to explain the way in which globalization has changed the way we understand international authority. See, Rosenau, J.N. (1992) *Governance, Order, and Change in World Politics*. In J.N. Rosenau and E.O. Czempiel (eds.) *Governance Without Government: Order and Change in World Politics*. Cambridge: Cambridge University Press.

⁶ Op Cit. Davis, K. E., Kingsbury, B. and Merry, S.E. (2012), p. 10.

⁷ Braithwaite, J., Coglianese, C. and Levi-Faur, D. (2007). Editors' Introduction. Can regulation and governance make a difference? *Regulation and Governance*, 1, 1-7, p. 3.

public and international nature, but includes actors of a private and hybrid nature – such as multinational enterprises (MNEs), NGOs, social movements and other forms of communities and peoples; third, there is a shifting weight from individual actors to interdependent relations, structures, procedures and networks; fourth, global governance emphasizes the multilevel character of governance activities, blurring the divisions between what is national, international or transnational⁸; and finally, global governance has deepened the effects of the ongoing process of fragmentation in international law.

Global governance can be exercised through a broad range of technologies, one of them being the use of quantitative methods – more specifically indicators – as a way of exercising and distributing power.⁹ Indicators have been criticized for their inability to accurately represent complex social phenomena into numerical data; however less has been said about their ability to construct new categories or to fill with content contesting legal concepts. In many cases, calling an indicator by a name such as the “rule of law index” asserts a claim that there is such a phenomenon and that it can be measured using a numerical representation. Thus, indicators are an important discursive tool, which generate knowledge by submerging complex social phenomena and local particularities into universal categories. Furthermore, indicators can have a regulatory effect, by enabling comparison and ranking among different actors, indicators help their users to exert pressure for “improvement” on indicator targets.

In order to achieve this objective the research has had a double focus. On the one side, some of the case studies focused on the use of indicators at the local level by national authorities or by groups of the civil society, in order to show how the use of indicators can also be used from the bottom-up as a form of resistance. On the other side, the second batch of case studies focus on international indicators, and the way international institutions use this instrument to interact with States in the Global South. By using both approaches the project presents a broader view of how indicators can become a mechanism of global governance and how they can be use to regulate inter-institutional relations.

3. Objectives

The main objective of the project was to establish a theoretical framework that could help understand how indicators have become tools of power for national and transnational actors to advance social and institutional change. This objective was fully met due to the combination of case studies, which allowed the researchers and the director to establish a comprehensive theoretical framework that could be useful to understand the use of

⁸ Op Cit, Von Bogdandy, A., Dann, P. and Goldmann, Matthias (2010), p. 7.

⁹ Op Cit. Davis, K. E., Kingsbury, B. and Merry, S.E. (2012), p. 4.

indicators as a tool of global governance both at the national and the international level. The case studies explored the following areas where the use of indicators challenge traditional narratives of the concept of authority in international and national law: (a) indicators and “law and development”; (b) indicators to guarantee compliance with international norms; (c) indicators as normative statements; and (d) indicators as political spaces.

4. Methodology and Project Activities

The methodology of the component was to use case studies as a tool to understand how social actors, and national and transnational institutions use indicators as tool of governance. Researchers were invited to contribute to the project, and those selected were the ones that presented viable proposals for a case study on the use of indicators either by national or transnational actors. The case studies were produced through a very supportive process, in which all researchers received constant comments and advice on how to improve their work. For that reason, all articles were reviewed several times by the coordinator, the peer researchers, and experts on the topic.

a. Activities undertaken before the first technical report in April 2013

The case studies were presented by the authors at two international conferences in May and June 2013:

- a) In May 2013 at the Law and Society Conference Boston “Power, Privilege, and the Pursuit of Justice: Legal Challenges in Precarious Times”. For more information on the conference visit:
<http://www.lawandsociety.org/boston2013/boston2013.html>
- b) In June 2013 at the IGLP Conference “New Directions in Global Thought” at Harvard. For more information on the conference visit:
<http://www.harvardiglp.org/iglp-the-conference/>

b. Activities undertaken before the final technical report between April and December 2014

- a) IGLP workshop June 2014
- b) Conference "Indicators: Law, Gaps, and Democracy" at Universidad ICESI in Cali, Colombia, August 2014
- c) Workshop "Indicators: Law, Gaps, and Democracy" at Universidad de los Andes, Bogota

5. Research findings

The research shows that indicators have been relevant in promoting social and institutional change in the Global South. The first batch of case studies have demonstrated that indicators as a tool of governance is not only used by transnational actors, but it has become a powerful mechanism for the distribution of resources and power between national actors.

The three case studies conducted in Colombia show that women's social movements and NGOs have influenced the production and use of indicators to transform their claims for justice into public policies. The case study of Community Mothers in Colombia, developed by Lina Buchely from June 2012 to February 2013, shows how street-level bureaucrats use indicators to secure global funds.

On the other hand, the case study, developed by Marcela Abadía, on the use of indicators to measure the State protection of rights of women that had been victims of forced displacement shows how women's organizations have helped to construct these indicators in order to advance their own agenda on the regulation of sexual violence against women. This research shows how different organizations became aware of quantitative method's relevance, because indicators define which aspects will be relevant for the government and which ones will be left behind. Thus, different groups seized the spaces opened by the Constitutional Court in order to set how understand sexual violence within a gender perspective.

Similarly, Lina Cespedes shows in her case study how the process of constructing reliable indicators to determine Colombia's performance with the Constitutional Court's orders regarding internal forced displacement was a favorable scenario to further the interests of Sisma, a national women's organization, which was able to transform its agenda into specific parameters for lawmaking and public policy design, and to promote its interpretation of international law. During ten years of hard work, Sisma has been crucial for the inclusion of the feminist discourse within the internal displacement indicators and policies; their work has opened new spaces to promote public policy and citizen participation based on a gender perspective. However, despite Sisma includes gender issues on the national agenda, their work also had some adverse effects, for example the criterias to measure how the internal conflict affects women are still insufficient.

The other case studies also show how indicators are used by different actors to promote some specific agendas. For example, in one of the case studies on the use of indicators by the Constitutional Court in Colombia, Stephania Yate found that the use of these mechanisms of global governance could be useful to follow up the enforcement of public

policies and to generate a better interaction between institutions. Despite the Court could not develop their own indicators in right to health, a set of guidelines were established for other institutions, and as an unexpected result some private EPS are currently using the new rating developed by the Ministry of Health and Social Protection to promote their health care services.

All our researchers presented a full draft of their findings on the 27 of March 2013. The revised versions of the papers, including the commentaries received during the conferences, were delivered on December 2013. Currently the papers are being edited for publication.

Finally, the first batch of papers included a case study on the measurement of corruption in Kenya. This country has been measuring corruption since the 2007, in the context of on-going performance contracting reforms. It has developed “Corruption eradication” performance indicators, and tasked the Ethics and Anti-Corruption Commission (EACC) to monitor and evaluate their implementation. This case study connects to the other case studies in Latin America because despite cultural or geographic differences, indicators may be a predominant tool for governance at the local level. The case study on Kenya became very useful for the project since it analyses how contextual and institutional factors explain the distributional effect and the exercise of power that emerges from the use of indicators by different actors.

During the research it was established that the use of indicators to eradicate corruption has been more effective in the case of government indicators in Kenya, because it has been complemented with specific measures to attack the system features that facilitate corruption. On the contrary, Transparency International indicators can only follow up some forms of corruption and provide visibility about this issue, but its impact is limited if its effects are compared with the changes that the Kenyan government introduced; for example, in the State Procurement law or in the policy of recruitment of government employees. Thus, we could see some evidence of how the use of indicators in itself does not always have positive regulatory effects, since its regulatory power depends on the different actors that are involved in the measurement process.

The results of this research reveal that the Global South, as group of local institutions and stakeholders, plays an unexpected role in the power dynamic inherent in indicators, and tells a story of global governance very different to the unidirectional and structural one offered by colonialism, in which the south local actors always lose.

The second batch of case studies have been helpful in developing a general framework to understand the use of indicators by international institutions as a tool of global governance, and its impact in countries in the Global South. From the seven case studies developed in

this project it has become evident that the use of indicators challenges traditional narratives of international institutions and their use of the law in the following ways: (a) Indicators as normative statements; (b) compliance with international norms; (c) the creation of new political spaces; and, (d) accountability.

Indicators as normative statements often express values, pointing to a first area of overlap between indicators, international organizations, and the law. Indicators reflect an alternative form of normativity, which is often used by international institutions as a substitute for formal laws – much in the same way as soft law instruments are often used. If the indicator is stable and authoritative enough, it might influence behavior and might align expectations in the same way as international norms do. This is the case of the World Bank's Doing Business Index (DBI) and the Investing Across Borders Indicators (IABs), analysed in the research of Michael Riegner and Maria Angelica Prada. Michael Riegner's paper analysis the way in which international organization, especially the World Bank, govern through the production of interaction. The paper argues that existing norms of international institutional law already form a framework that legally structures global information governance. This framework defines forms, powers, procedures and accountability as well as substantive principles and limits for the collection, procession and dissemination of indicator data by international institutions. In doing so, it constitutes an "international institutional law of information" that frames the informational relationships between international institutions, states and individuals. Maria Angelica Prada's paper analyses the way in which the use of indicators has become a form of "law making by subterfuge", which has allowed international institutions regulate issues that otherwise would not have been possible due to the opposition of States parties to the institution.

A second, and perhaps the most evident, connection between indicators and international institutions refers to compliance with international norms. That is the case of human rights, where indicators provide international institutions charged with monitoring state compliance with a mechanism to fulfil their mandate. A clear example of this form of governance is the recent developments in the elaboration of the content of the Right to Development through criteria and indicators by a United Nations High-Level Task Force on the Right to Development (HLTF) charged with this important task, which was studied by Siobhán Airey.

In the third place, Indicators can create global spaces of interaction and political debate, sometimes complementing the politics and procedures of international institutions, and sometimes replacing them with a much more flexible forum for the mobilization of knowledge. The political space created by indicators has several distinct, yet linked, layers. A first layer is political debate within the institutional and cognitive framework created by indicators. As the Doing Business example shows, the design and development of

indicators have increasingly become a space of contestation and debate of opposing normative views, expressed in the process of constructing the indicator, and in the process of implementing its use. Thus deployed, indicators may open the space for a new way to promote participation by civil society before international organizations, either in the creation phase where some stakeholders can promote their ideas, or either in a posterior phase where it is possible to question the indicator or promote it.

Finally, the normative function of indicators may provide a useful platform for enhancing accountability of international organizations. Rene Urueña's paper "Indicators as Political Spaces" explains how while compliance with international norms will always be politically contextual, indicators provide a way out for international institutions: they give a "technical" measure of compliance that is, at least from the perspective of their creators, not subject to contextual debate. To International Institutions indicators are useful for naming and shaming states into compliance, and for a whole range of mechanisms of influence based on information, including acculturation and socialization of non-compliant states.

Furthermore, the case about the Victims' and Land Restitution Law in Cali elaborated by Lina Buchely, evidence how Inter-American Commission of Human Rights, cooperate with domestic stakeholders in a traditional review of state compliance with international norms (in this case human rights); by doing so, though, international institutions also develop a cognitive framework and a vocabulary that helps actors (both domestic and international) define and understand a complex local reality – a framework that then becomes part of the global common sense regarding the Colombian conflict.

6. Project outputs, dissemination and impacts

Detail information of each conference can be found in Annex VI.

a. Outputs and dissemination before the first technical report on April 2013:

1. A workshop in November 2012 in Bogota, where collaborators presented their first drafts of the case studies to be included in the project.
2. All authors submitted their papers on December 2014.
3. Presentation of the report of the impact of the Justice Confidence Index in Brazil (Pag. 60-61)

b. Outputs and dissemination between May 2013 and April 2014 (Second technical report):

1. Presentation of the case studies at the Law and Society Conference in June 3-4, 2013.
2. Harvard's Institute for Global Law and Policy Conference on the 3 and 4 of June 2013, where the results of the research from both the Colombian and the Brazilian team were presented.
3. Workshop on Human Rights Indicators and Public Policy at Universidad de los Andes, Bogota in December 13, 2013.

c. Outputs and dissemination between April and December 2014

1. June 2014 - IGLP workshop
2. July 28, 2014 - Conference "Indicators: Law, Gaps, and Democracy" at Universidad ICESI in Cali, Colombia
3. Submission of the first batch of papers, focused on Latin America, to International Law – Revista de Derecho Internacional (Universidad Javeriana, Bogota)
4. August 1 and 2, 2014 - Workshop "Indicators: Law, Gaps, and Democracy" at Universidad de los Andes, Bogota
5. Submission of the second batch of papers, focused on global governance and its impacts on the global south, for publication in the International Organizations Law Review.

Policy oriented outputs

The Policy oriented outputs enumerated below have already been reported in the previous technical reports. No new policy oriented outputs were produced by the researchers, since the second part of the component had a more theoretical character. This, however, is not a divergence from the original plan, since the first batch research did produce policy outputs as expected.

Policy outputs between May 2012 and April 2013 (first technical report)	
Researcher or team in charge	Policy Output
Luciana Gross Cunha and Rubens Glezer	Justice Indicators Project in Brazil. (Pag. 60-61)
Policy outputs between May 2013 and April 2014 (second technical report)	
Researcher or team in charge	Policy Output

Lina Buchely	Memorial presented on behalf of the Colombian communitarian mothers before the International Labor Organization (Annex III)
Maria Angelica Prada and Stephania Yate	<i>Amicus curia</i> (Annex I) before the Colombian Constitutional Court regarding the Framework Law on the Healthcare System in Colombia.

Written Outputs directly supported by IDRC:

First batch of papers.

1. Marcela Abadía. Política Criminal A Través Del Uso De Indicadores: El Caso De La Violencia Sexual En El Conflicto Armado Colombiano.
2. Migai Akech. Evaluando El Impacto De La Corrupción (La Percepción) De Los Indicadores Del Discurso De La Gobernanza En Kenia.
3. Lina Buchely. Indicadores Como Forma De Resistencia. Las Madres Comunitarias En Colombia Como Ejemplo Del Uso De Indicadores En El Sur Global Como Una Técnica De Dominación Contra-Hegemónica.
4. Lina M. Céspedes-Báez. Más Allá De Lo Que Es Medible. El Feminismo De La Gobernanza Y Los Indicadores En Colombia.
5. Stephania Yate Cortes. Promoting Indicators: The Case Of Colombian Health System.

Second batch of papers

6. Dawood I. Ahmed and Moamen Gouda – “Islamic Constitutions” – the following excerpt is a 8000 word section of the complete paper and explores the research design of creating the “Islamic Constitutions Index”.
7. Marie Guimezanes. Measuring the effectiveness of aid effectiveness: indicators from the Paris Declaration to the Busan Partnership.
8. Marta Infantino. International Organizations and Human Rights Indicators: Exploring Pluralism across Institutional Regimes.
9. Lina Buchely. The Conflict of the Indicators. A case study on the implementation of the Victims’ and Land Restitution Law in Cali, Valle del Cauca, Colombia
10. María Angélica Prada Uribe. Unveiling indicators: the power of governance through the ROL notion.
11. Michael Riegner. Towards an international institutional law of information.
12. Siobhán Airey. The Taming of the ShriLL - From Indicators to Indicatorisation.
13. Rene Uruena. Indicators As Political Spaces: Law, International Organizations, And The Quantitative Challenge In Global Governance.

14. Luciana Gross Cunha, Fabiana Luci De Oliveira, Rubens Eduardo Glezer. Brazilian Justice Confidence Index– Measuring Public Perception On Judicial Performance In Brazil.

Justice Indicators Project in Brazil

The context of its emergence is a sequence of studies and reports that rated the Brazil's judicial system amongst the most inefficient, iniquitous and corrupt in the world – which means it was not being effective¹⁰. Despite all the diagnosed problems, when we look at the Brazilian case, there is a continuing high rate of litigation in courts with a growing trend. Official statistics show that the total number of new cases in the state jurisdiction multiplied almost by five in two decades, going from 3.6 million in 1990 to 17.7 million in 2011¹¹. This growth is significantly greater than the observed growth in the population. Given the scenario those studies portrayed, it was necessary to build a systematic, detailed, and continuous measurement of the legitimacy and effectiveness of Brazil's judiciary, exposing the overall public perception and confidence in the country's judicial system. This need led to the creation of JCIBrazil in 2009, which has is still published and has been further developed and consolidated as a result of the budget assigned by this project.

The index JCIBrazil is a measure of how much people trust judiciary in Brazil. It is built based on a summary of variables that are shown - by the specialized literature - to influence public confidence in courts and in people declared level of confidence in the judiciary. JCIBrazil was built taking into account factors that lead people to use (or not) and trust (or not) the judicial system. The index works with five dimensions: efficiency (speed), responsiveness (competence), accountability (impartiality), independence (from external political influence) and access (ease of use and costs). The ultimate question this indicator seeks to answer is how effective the judiciary is in guaranteeing "justice" for individuals in Brazil in the eyes of the population.

JCIBrazil is composed of two sub-indexes: (i) *an index of perception* – how the general public perceives the various dimensions of the judiciary as a public service provider - and (ii) *an index of attitude* – what are the attitudes and beliefs of the general public regarding the role of judiciary in solving conflicts.

¹⁰ See (1) SADEK, Maria Tereza. Judiciário: mudanças e reformas. Estudos Avançados, vol.18, n.51, 2004. (2) STAATS, Joseph L. BOWLER, Shaun. HISKEY, Jonathan T. Measuring Judicial Performance in Latin America. Latin American Politics & Society - Volume 47, Number 4, Winter 2005, pp. 77-106. (3) UNITED NATIONS. Civil and Political Rights. New York: United Nations, 2005.

¹¹ Data from CNJ reports, Justiça em Números. Available at www.cnj.jus.br

The index of perception is based on a set of nine questions derived from the five dimensions posited by Staats, Bowler and Hiskey (2005), covering (i) trust, (ii) speed in deciding conflicts, (iii) cost of access (iv) ease of access, (v) independence, (vi) honesty, (vii) competence, (viii) perception of past (last five years) and (ix) expectations for the future (next five years).

The index of attitude is based on six different hypothetical situations where we ask the public how likely they would be to try and use the judiciary to resolve a conflict or problem - the possible answers to those questions are: (i) definitely not, (ii) probably not, (iii) probably yes, (iv) definitely yes. We have developed these hypothetical situations via cognitive interviewing to examine a range of conflicts in which the population of urban centers will often be involved and where they have a choice as to whether to raise proceedings in court, excluding issues where the people involved are not free to decide whether or not to seek a judicial solution. We present cases concerning consumer issues, family, neighborhood, labor and public law. We also tried to create situations in which people from very different income and social groups would all experience and situations in which respondents will be asked to envisage occupying different positions in the conflict – thus, for example, in one circumstance the respondent is the consumer, with a weaker position and in another situation the interviewee is the contractor, in respect of service provision, having a stronger position.

The impact of the index has been evaluated according its visibility and influence to promote more quantitative studies about the same issue. The index has been subject of increasing popular attention in national media, after monitoring between March 2009 to March 2012, we found 604 references among the press (printed newspapers and weekly news magazines), TV and law specialized sites on Internet (ConJur and Migalhas).

On the other hand, the JCI Brazil led to the creation of new indicators by other institutions working on the evaluation of the Brazilian legal system quality: Social Perception System of Indicators, by the Institute of Applied Economic Research, and Justice Confidence Index of Lawyers, by the Foundation for Research and Development of Administrative, Accountability and Economy. Despite there are differences between the methods used in each index, the studies shows similar results; there is a poor evaluation of judicial system and low confidence in courts, and at the same time an increase in the demand for judicial services as education and income increases.

Even though it is difficult to measure the direct impact of JCI Brazil in the design of public policies, Brazil has been advancing in the production of judicial statistics that were missing. The increasing presence of the index at the media should promote their use to design of public policy, especially the recent studies results and data because identifies some problems that had not been identified before.

Memorial presented on behalf of the Colombian communitarian mothers before the International Labor Organization

The memorial was prepared by Lina Buchely in January 2014. Besides, the organizations started a process of negotiation with the government. These negotiations are still on going.

7. Capacity-building

The project has provided young researchers with the opportunity to work on an international and interdisciplinary research project, which has contributed to the improvement of both their research and English skills. Furthermore, it has also given them the opportunity to interact with researchers from around the world, and with different disciplinary backgrounds, therefore, all the participants in the project have been able to build a network of contacts that will allow them to create worldwide projects for the production of interdisciplinary knowledge.

To ensure that this project has a substantial capacity-building effect many of the researchers that have joined the project are undergraduate and postgraduate (both Master and PhD) students, who have the opportunity to improve their research and analytical skills by conduct theoretical and empirical research under the supervision of the project directors. These students have been chosen for their academic outstanding academic records, and their interest in pursuing a career in the academy or in the public sector. By including young scholars, this project seeks to improve human capacities in countries in the Global South by encouraging young scholars to research on the use of quantitative technologies by social groups in areas that can have an impact in the promotion of inclusive growth and human development in their country.

The experiences of the individual researchers' shows how the project has enhance their opportunities and help them improve their career paths.



Lina Buchely used the research undertaken during the project as part of her PhD dissertation; she obtained her degree in March 2014. Her experience as an international researcher was highly valued, which helped her obtain in

January a position as a law professor at Universidad ICESI in Cali, Colombia. According to Lina the experience during the project allowed her to join a network of young scholars, with whom she has kept in touch and has been able to propose new projects to her University.



Marcela Abadia's work on the use of indicators as a mechanism of criminal policy in the case of sexual violence against women, which was presented in Bogota and Boston, has helped her position as an expert on criminal policy and women's rights. In January 2014 she was offered the position of Criminal Policy Director at the Ministry of Justice, which she is currently holding. She was also able to incorporate part of her research in her PhD dissertation, which was approved in May 2014.

The project has also been very successful in bringing young scholars together; who, after meeting at the international conferences where the papers were presented, have kept in touch and some of them have already started cooperative projects outside of the Global Administrative Law Network. As has already been mentioned before, this has attracted new young scholars who have decided to join the project to produce a paper for the second batch of case studies. All researchers reported that the project contributed to their academic formation by allowing them to be exposed to international scholarship, and giving them the opportunity to write and present their research in English. Furthermore, since the research team was constituted by young scholars from different countries, this network allowed them to exchange views and legal knowledge with researchers that had a different legal background.

D. COMPONENT IV: RELATIONS BETWEEN LOCAL AND FOREIGN INSTITUTIONS IN ENFORCEMENT OF ANTI-CORRUPTION LAW

Direction:

Kevin E. Davis, ked2@nyu.edu
New York University School of Law

Guillermo Jorge, gjorge@udesa.edu.ar

San Andres University School of Law

Maíra Rocha Machado, Maira.machado@fgv.br

Getulio Vargas Law School

1. Synthesis

This project is one of a set of collaborative research projects on the theme of Improving Inter-Institutional Connections to Promote Inclusive Growth being pursued by members of the Global Administrative Law Network.

It involves 1) 6 country studies (Argentina, Bolivia, Brazil, Colombia, Peru and Paraguay) of how legal and regulatory anticorruption institutions interact and focus on the identification of mechanisms for coordinating law enforcement proceedings against corruption; 2) a policy-oriented paper drawing on the country studies to examine efforts to develop coordination mechanisms and lessons learned in Latin America; 3) a discussion of the policy-oriented paper with international experts with a view to enriching the research findings and 4) publication and dissemination of the findings.

We consider that the project has met its objectives and constitutes a contribution to the existing literature and policy debate over anticorruption policies in Latin America.

2. Research Problem

Anti-corruption law is an important component of broader anti-corruption initiatives. Legal redress for corruption can not only deter, but it can also help to provide compensation to victims of corruption and overcome debilitating perceptions that corrupt acts can be committed with impunity. A striking feature of this pattern of enforcement activity is that it is often highly uncoordinated. In other words, there are no systematic processes for allocating jurisdiction to undertake particular enforcement actions; sharing expenses incurred or assets recovered; sharing information collected in the course of enforcement actions; or, holding actors accountable. Uncoordinated enforcement action has potential advantages, including a tendency to induce beneficial competition and experimentation. However, there are also potential problems as jurisdictional conflicts, disputes over the allocation of resources, sharing of information and expertise and, also, absence of accountability.

3. Methodology and Project Activities

This project was initially conceived to identify and assess the potential impact of various mechanisms for coordinating the activities of institutions involved in enforcing anticorruption norms.

In order to do so, we first prepared a preliminary guide for the elaboration of country reports by each country's researcher. Such guide was designed in very broad terms in view of getting a sense of the enforcement institutions, proceedings and rules in force or under debate in each country. On the basis of such guide, each country's researcher prepared preliminary reports, and a first set of tables was drafted to capture similarities and divergences among countries (delivered as annex to the "Second Technical Report").

The preliminary country reports produced in the first year of research showed few examples of successful coordination mechanisms. Besides, tables were over detailed and sometimes missed our focus on coordination of enforcement institutions.

In view of that, we refined the questionnaire used to guide the country studies in order to include not only descriptions of the roles played by various actors but also the reasons why anticorruption enforcement remains highly uncoordinated. A new set of questions, much more specific, was presented to the country researchers together with the tables to be reviewed. The sharpening of our theoretical framework led us to neglect monitoring institutions and proceedings that didn't have a plausible implication to law enforcement.

During the second year of research we deepened our qualitative research, reviewed the literature on some specific legal issues that have arisen in the course of our country studies, and formulated different ways of organizing the information collected. On the qualitative side, we have collected data mainly through interviews with representatives of the main public and private actors involved. Most actors acknowledge that coordination is a pressing problem. Several have given us access to information about ongoing coordinating initiatives, from formal memoranda of understanding among concerned institutions to more informal agreements, sometimes based on personal knowledge. Revisiting the literature and legislation about how each jurisdiction formally deals with some common coordination rules –precedence between civil and criminal proceedings; proceedings against individuals and legal persons based on the same facts, among others allowed us to prepare various schemes for organizing the data we have collected.

During the third stage of the project we tried to fine-tune the country studies. On the one hand, researchers had reviewed the tables and complemented their reports in view of the new questions we had raised. On the other hand, we expanded the contextual and historical grounds of each country's coordination challenges and shortcomings, and paid

additional attention to the specificities of the political context in which their anticorruption institutions are immersed.

After concluding that certain traits of the Brazilian experience are particularly enriching for the study of anticorruption coordination efforts, we decided to increase focus on what we call a “modular” institutional design (multiple functionally interchangeable institutions either coordinating or operating independently as appropriate, as we found it happens in Brazil) and explore the viability of modular anticorruption enforcement in the other countries studied. The first draft of the main paper was sent to the country researchers for comments, weeks before the final meeting in São Paulo, and we concluded its last version after the conference, taking account of numerous enriching insights offered by the participants.

Although the results of research are satisfactory, (ironically) coordination between the principal researchers and country researchers in pursuance of consistent research outcomes and reports was quite difficult. Efforts required from the principal researchers to ensure adaptation of country reports to the general guidance, methodological standards, and research objectives were much more than originally expected. Draft country reports were commented and went back and forth many times from the principal researchers to the country researchers until final versions were finally achieved.

4. Research findings.

In general terms, our research results show that the same functions or combinations of functions are often performed by different institutions in different countries. In the area of anti-corruption law enforcement at least, we are now convinced that a cross-country analysis limited either to a particular area of law, say civil, criminal or administrative law, or to a particular set of institutions, such as the courts and police, carries a serious risk of being misleading.

During our research many actors identified lack of inter-institutional coordination as one of the main reasons for failure in the fight against corruption. A common sentiment among anti-corruption officials, prosecutors, judges and policy makers, is that the anticorruption systems that the 6 countries that we studied built over the last 15 years deal mainly with small, administrative cases and have not yet been able to make progress in tackling high level political or grand corruption, whether motivated by business or political interests, precisely due to coordination problems. In the 6 countries studied, most of the criminal complaints relate to administrative or petty corruption. High-level, political corruption is usually addressed within the political system.

Inspired by the Brazilian experience, an emerging view favors dividing responsibility for enforcement among multiple institutions that are able, but not required, to coordinate their activities (a “modular” approach to anti-corruption enforcement, as we call it). In Brazil at least five distinct institutions, including the police, the public prosecutor, ad hoc legislative committees and various auditing bodies, have the authority to investigate corruption offences. The Brazilian anti-corruption institutions often operate independently, but on several occasions they have combined forces quite effectively to pursue specific enforcement actions as well as to formulate and implement broader enforcement strategies. The structure of this “web of accountability” has been credited with inducing significant improvements in the performance of Brazil’s anti-corruption institutions over the past three decades.

Our findings suggest, however, that the viability of this type of institutional modularity model is context-specific, much dependent on a range of political, intellectual and institutional factors. Our cross-country comparison reveals that, for better or worse, Brazil’s neighbors have not converged on highly modular anti-corruption enforcement regimes. Actually, there is little evidence that the modular approach to anticorruption enforcement is viable outside the intellectual, political, institutional, economic context of Brazil. While Peru has opted for a more integrated model, most of the other countries have multiple anticorruption institutions performing the same function, but none of them has developed coordination mechanisms as effective as those applied in Brazil.

There is no single best explanation for why we have failed to observe functional convergence. Political interference, resource constraints, the absence of a depoliticized meritocratic bureaucracy, limited experience, the availability of arrangements with comparable appeal – all of these factors appear to cause institutional divergence. Many of these factors are likely to be difficult to overcome in the short term. This set of findings would be troubling if we were convinced that institutional modularity was the uniquely optimal approach to anti-corruption enforcement. However, the indications from Peru that other institutional arrangements might offer comparable performance suggest that pessimism would be premature. A definitive assessment of the merits of institutional modularity in enforcement of anti-corruption law will require more in-depth analysis of the performance of modular regimes and their alternatives.

Another finding is that the development of coordination mechanisms, whether formal or informal, requires experience on the part of the multiple actors, which in turn can only be construed as long as they are able to act without fear of political interference or retaliation. A combination of factors, including the level of political support for anticorruption institutions, the independence and professionalism of the bureaucracy and the judiciary, the openness towards private-public partnerships and collaboration, are crucial to understand

the variations in coordination mechanisms across and within the countries studied. The landscape varies widely.

In Bolivia, the enforcement of anti-corruption policies is dominated by the Executive and strategically applied to discipline political opponents. On the one hand, this puts anticorruption rhetoric at the center of the public debate and promotes a certain degree of institutional commitment to transparency and the fight against corruption. On the other hand, although the strategic political use of anti-corruption policies by the Executive can sometimes boost enforcement proceedings, it also generates resistance and inhibition from bodies associated with other branches of the government. Specifically, in many instances the political use of the anti-corruption framework by the Executive and public authorities within its domain causes prosecutors and judges to withdraw and refrain from cooperating.

In Argentina, high level authorities of the Executive have withdrawn corruption from their public discourse. With an important number of corruption scandals involving some of the highest authorities of the country, including the President, the Vice-President and a good number of ministries, the problem of corruption has been conspicuously absent from the Government's rhetoric. In this context, the enforcement of anti-corruption policies basically depends on each official or state agency's own approach. Regarding investigation and prosecution, cases tend to move forward when political protection from the top has been withdrawn: defendant public officials tend to be subject to investigation and trial only after they have left office. However, on the administrative side, the absence of an anti-corruption policy promoted and articulated from the Executive has not stopped several low-profile anti-corruption initiatives, (involving, e.g., the social security system or the healthcare system for retired people), especially against schemes that undermined public policies at the core of the Government's agenda (e.g. the reform of the armed and security forces). When these specific anti-corruption reforms are implemented at the heart of a specific public institution, the job is done "quietly" (trying to avoid public notice). This "self-centered" approach to administrative anti-corruption reform makes coordination between different agencies hard to achieve, particularly because of the care most public officials take not to do anything that might disturb the highest state authorities. This disposition among Argentine officials works as an inhibitor of most anticorruption initiatives, even when there has been no explicit sign or even suspicion that it could affect a specific political leader.

In Paraguay, efforts are mostly rhetorical. In the last two decades, at least three national anti-corruption programs were designed and implemented. Sponsored by international actors such as the UN, USAID and other international bodies, these programs have achieved multiple results in terms of norms creation and institutional redesign, but they still have not succeeded in building effective anti-corruption practices. Paraguay now has a complete legal and institutional anti-corruption framework but lacks experience in

enforcement. Coordination is therefore restricted to formal agreements with no practical implication. There is no actual coordination, only memorandums of understanding expressing the intentions of public agencies to coordinate in the future in purely abstract terms.

Colombia is revising its domestic legislation in order to comply with the OECD Convention against Transnational Bribery, of which it became a member in 2013. In this country, anti-corruption efforts are oriented to the enhancement of market competition, the involvement of the private sector, protections and rewards for whistleblowers, and public-private partnerships to tackle corruption in a collective fashion. Most of these initiatives are, however, so recent that there is yet not much data to evaluate. Before this recent trend, the issue of corruption in Colombia was practically ignored as it was closely associated with the violence the country experienced in conflicts with drug barons and paramilitary organizations.

In general, we find that Brazil and Peru have the most highly developed and formal sets of coordination mechanisms, but the two countries have adopted rather different approaches to achieving coordination.

In the case of Peru, many anti-corruption reforms and institutional building efforts took place after the fall of the Fujimori regime. Experience with the prosecution of corruption committed during the Fujimori era allowed anti-corruption institutions to reach quite a substantial level of sophistication and to understand how coordination would help their work. The post-Fujimori anti-corruption campaign has however waned over time. State institutions are currently in the process of re-orienting their efforts towards the fight against corruption, among other grounds because of the political objective of becoming a party to the OECD Convention against Transnational Bribery. Their practical experience makes it easier for public authorities to pursue coordination. An interesting new trend in Peru is the expressed desire of anti-corruption authorities to achieve coordination not only among the different relevant public institutions but also with the private sector. Recent initiatives are directed at both involving the private sector in preventive mechanisms (both at the company level and through public-private initiatives) and bringing the private sector closer to the enforcement authorities (e.g. through special channels to report misconduct).

Moreover, Peru has created specialized agencies for each phase in the enforcement process. This tends to facilitate coordination among actors performing the same function. Brazil, by contrast, typically has multiple agencies performing any given function but has created many formal mechanisms to support inter-agency coordination. Brazil has also created numerous intra-agency coordination mechanisms.

Brazil has established a merit-based system for recruitment and promotion of employees while other Latin American bureaucracies are seldom characterized by regularized and impersonal procedures and employment decisions based on technical qualifications and merit; Argentina, Bolivia, Colombia, Paraguay and Peru suffer from tremendous difficulties in creating a stable and professional civil service. The professionalization and de-politicization of the Brazilian bureaucracy may explain why political interests have had less influence on anticorruption enforcement in Brazil than in any of the other countries we have studied.

Most efforts to coordinate prosecution of anti-corruption cases are aimed at intrainstitutional cooperation. Only a few examples of inter-institutional coordination mechanisms can be observed in prosecution (e.g. administrative proceedings in Brazil, criminal cases in Argentina that have been prosecuted by different state agencies working together, and criminal cases in Bolivia, where the Ministry of Transparency and the Fight against Corruption can intervene in the criminal proceeding with or without becoming a party).

The countries in our study generally have well-developed legal rules that serve to coordinate criminal and other types of proceedings – the fundamental principle of *ne bis in idem*, which bars multiple criminal proceedings against the same defendant arising out of the same facts; rules ensuring that criminal proceedings are resolved before civil proceedings arising out of the same facts; and establishing that findings of fact in criminal cases are treated as conclusive in civil proceedings. Aside from these rules concerning criminal proceedings, and an analogous set of rules giving tax proceedings priority over other proceedings, there is little coordination in adjudication. In some countries efforts have been made to ensure that determinations in administrative proceedings are reported to prosecutors or to the judiciary. The general principle, however, is that criminal, civil, administrative, legislative and fiscal proceedings are all independent of one another. As a consequence, a single corrupt act may lead to separate proceedings in both criminal and civil courts, disciplinary proceedings before some sort of administrative body, a special legislative inquiry, and an audit.

Finally, an interesting new trend is the increasing involvement of the private sector in anticorruption initiatives. In Colombia and Peru, the anti-corruption authorities have promoted coordination not only among the different relevant public institutions but also with the private sector. Recent initiatives are directed at both involving the private sector in preventive mechanisms (both at the company level and through public-private initiatives) and bringing the private sector closer to the enforcement authorities (e.g. through special channels to report misconduct). In Bolivia, such debates with the private sector are taking place within the framework provided by the “National Council against Corruption”, a private-public entity which is composed by six public institutions and 30 civil society

organizations including unions, and groups from the private sector. Brazil has already taken such a step, by introducing leniency agreements partially based on the effectiveness of compliance programs and the cooperation from the private sector, and Argentina is slowly moving in the same direction through the reform of the criminal procedure code – already passed by Congress but waiting for implementation – and the criminal code – which has not been sent to Congress yet.

5. Project implementation and management.

Past 12 months were devoted to the preparation of the main paper out of the country studies and the organization of the São Paulo Conference.

Country studies were submitted to successive readings and codification. Exchange with the authors of the country studies was more timid than initially planned as none of them was able to participate in the Sao Paulo Conference.¹² Written comments to the main paper provided by them were useful to clarify and sharpen the description of institutional dynamic and procedures presented at the main paper.

During 2014 we have applied to FAPESP (<http://www.fapesp.br/en/>) for extra funds to cover hotel and air tickets for the participants. Other expenses regarding meals and logistics were covered by Fundação Getulio Vargas.

6. Project outputs and dissemination.

The project outputs and dissemination concern (i) the São Paulo Conference, (ii) other public presentations made by the principal researchers and (iii) the publication plan.

(i) The São Paulo Conference was organized to put together people from different backgrounds: public administration, political science and law. Among the legal scholars, we have invited experts in criminal law (from civil law and common law traditions) and law and development. Around 100 hundred lawyers, students, scholars and public officials subscribed to attend the conference – their names and email addresses will allow us to send them the final paper in Portuguese and further information about the publication of the book in Spanish.

Five panels (on “inter-institutional coordination in anti-corruption law”; “How to coordinate: investigation and evidence gathering”; “sanctioning and double jeopardy”;

¹² A “save the date” message was sent to them in February 2014 and all country researchers confirmed their participation. Both the peruvian and the colombian researchers needed to cancel because they suffered health problems right before the meeting. The bolivian researcher had a conflicting activity which he hadn’t previously realized about, and we were not able to fix a new date in which we could all make it.

“public-private initiatives”, and “forward looking: institutional change and innovation”) and a final roundtable discussion on “What kind of research do we need?” were carried out.

A small but qualified audience participated in the debates, commenting and questioning the findings presented at the occasion, which enriched the main paper of this research.

(ii) During the last months, the preliminary version of the paper was presented and discussed several times. One of us (Maira Machado) presented the main findings regarding Brazil at 10th International Conference of the Brazilian Institute of Criminal Law (IBCrim) in Sao Paulo (August 2014) to lawyers and public officials from the whole country; at the Master Program of Public Security and Criminal Law Enforcement of Bahia Federal University in Salvador (September 2014) to law enforcement professionals (mainly judges and public prosecutors) from northern region of Brazil; and at the Seminar "Interinstitutional and Public-Private Coordination in Anti-Corruption Law" organized by the Federal Public Attorney (Advocacia Geral da União) to dozens of public and private lawyers in Sao Paulo (November 2014). Portions of the theoretical analysis were presented by Kevin Davis at the Conference on Grand and Petty Corruption in Developing States: Business, Citizens, and the State, Yale University, April 30, 2014, and the main findings of the Argentine country study were presented by Fernando Basch (researcher for the Argentina country study) at the “International Conference on Corporate Criminal Responsibility” at the Universidad de San Andrés (August 29 and 30, 2014).

(iii) The main paper in English will be submitted to an American Journal (Attachment 1). Translation to Portuguese (Attachment 2) will be submitted to FGV Press to be published as a pocket book (<http://editora.fgv.br/colecao-fgv-de-bolso>). Translation of the main paper to Spanish (Attachment 3), together with the 6 country studies will be submitted to a leading legal Latin American publisher based in Argentina (Editorial Del Puerto).

Written Outputs directly supported by IDRC:

1. Fernando Basch, 2014. Coordinación Anticorrupción En Argentina
2. Martín Zapata, 2014. Esfuerzos En La Implementación De Un Sistema Anticorrupción Coordinado: El Caso Boliviano.
3. Maíra Machado, Bruno Paschoal, 2014. Brazil Country Study. Coordination of Legal Responses to Political Corruption
4. Marcela Abadía, 2014. Corrupción Y Coordinación Institucional En Colombia.
5. María Belen Gracia, 2014. Caso De Estudio: Paraguay.
6. Iván Meini, 2014. Estado De La Cuestión Del Sistema Anticorrupción En El Perú.
7. Kevin E. Davis , Maíra Machado, Guillermo Jorge. Coordinating The Enforcement Of Anti-Corruption Law: South American Experiences.

7. Impacts

As we pointed out in our previous technical reports, we believe our research and country studies are the first to focus on inter-institutional coordination among Latin American anti-corruption enforcement agencies. Our findings are an important contribution to a number of legal and institutional reforms that are under development in different Latin American countries: a criminal law reform attempting to introduce criminal responsibility of legal persons in Argentina; a similar criminal law reform in Peru, which is also exploring ways to engage the private sector in the prevention of corruption through innovative reporting channels and public private collaborative initiatives; the institutional reforms which are taking place in Colombia as a means to complying with the international standards following the country's becoming a state party to the OECD Convention against Transnational Bribery; the implementation and enforcement of the new Brazilian anti-bribery legislation; and the recent legislation passed in Bolivia regarding corruption reporting mechanisms.

ANNEX I: AMICUS CURIA

Señores Magistrados

CORTE CONSTITUCIONAL DE COLOMBIA

Magistrado Ponente

Dr. GABRIEL EDUARDO MENDOZA MARTELO

E. S. D.

REFERENCIA: INTERVENCIÓN CIUDADANA –REFERENCIA: PROYECTO DE LEY ESTATUTARIA 209 DE 2013 SENADO-267 DE 2013 CAMARA POR MEDIO DE LA CUAL SE REGULA EL DERECHO FUNDAMENTAL A LA SALUD Y SE DICTAN OTRAS DISPOSICIONES

STEPHANIA YATE, identificada con la cédula de ciudadanía No. 1.020.757.801 de Bogotá, y **MARÍA ANGÉLICA PRADA URIBE**, identificada con la cédula de ciudadanía No. 1.136.880.002 de Bogotá, ciudadanos en ejercicio, haciendo uso de la facultad conferida en el inciso 1º del artículo 242 de la Carta Política¹³ y dentro de la oportunidad legal pertinente para ello, intervenimos en este proceso con el fin de solicitar que se declare de la constitucionalidad condicionada de las norma acusadas, por ajustarse a los preceptos superiores, a las disposiciones procesales vigentes y a los mandatos y principios que gobiernan el Derecho Constitucional y de Familia, toda vez que las obligaciones y derechos contemplados en las normas demandadas sean también aplicables a los compañeros permanentes que conformen una unión marital de hecho, independientemente de la orientación sexual de la respectiva pareja.

I. LAS NORMAS IMPUGNADAS

A continuación se transcriben los artículos 6, 7, 8 y 10 del Proyecto de Ley Estatutaria Número 209 de 2013 del Senado y 267 de 2013 de la Cámara, por medio de la cual se regula el Derecho Fundamental a la Salud y se dictan otras disposiciones, que se pretende sean declarados exequibles condicionalmente.

“Artículo 6. Elementos y principios del derecho fundamental a la salud. El derecho fundamental a la salud incluye los siguientes elementos esenciales e interrelacionados: (...)”

¹³ “ARTICULO 242. Los procesos que se adelanten ante la Corte Constitucional en las materias a que se refiere este título, serán regulados por la ley conforme a las siguientes disposiciones: // 1. Cualquier ciudadano podrá ejercer las acciones públicas previstas en el artículo precedente, e intervenir como impugnador o defensor de las normas sometidas a control en los procesos promovidos por otros, así como en aquellos para los cuales no existe acción pública”.

i) Sostenibilidad. El Estado dispondrá, por los medios que la ley estime apropiados, los recursos necesarios y suficientes para asegurar progresivamente el goce efectivo del derecho fundamental a la salud, de conformidad con las normas constitucionales de sostenibilidad fiscal.”

“Artículo 7°. Evaluación anual de los indicadores del goce efectivo. El Ministerio de Salud y Protección Social divulgará evaluaciones anuales sobre los resultados de goce efectivo del derecho fundamental a la salud, en función de los elementos esenciales de accesibilidad, disponibilidad, aceptabilidad y calidad.

Con base en los resultados de dicha evaluación se deberán diseñar e implementar políticas públicas tendientes a mejorar las condiciones de salud de la población.

El informe sobre la evolución de los indicadores de goce efectivo del derecho fundamental a la salud deberá ser presentado a todos los agentes del sistema.”

II. LA SOSTENIBILIDAD FISCAL COMO PARTE DEL DERECHO A LA SALUD

El artículo 49 de la Constitución otorga una doble connotación a la salud en Colombia, como derecho fundamental y como servicio público. En cuanto servicio público la Constitución establece que éste se encuentra a cargo del Estado, sin embargo autoriza que la prestación del mismo se lleve a cabo por entidades públicas o privadas. Por lo que deja abierta la puerta para que el legislador establezca el modelo del sistema que será utilizado para garantizar el derecho a la salud de los colombianos. Como lo ha reconocido la Corte Constitucional en diferentes ocasiones:

“La primera condición para poder garantizar el derecho de toda persona al acceso a los servicios de salud en los términos constitucionales (art. 49, CP) es, precisamente, que existan un conjunto de personas e instituciones que presten tales servicios. Este Sistema puede ser del tipo que democráticamente decida el legislador, siempre y cuando tenga como prioridad, garantizar en condiciones de universalidad el goce efectivo del derecho a la salud dentro de los parámetros constitucionales” (énfasis fuera del texto original).

Dado que la salud es tanto un derecho fundamental como un servicio público a cargo del Estado, el artículo 49 permea la interpretación del artículo 365 constitucional, que regula el régimen de los servicios públicos, y las demás disposiciones que establecen los principios de la constitución económica en el país. Es así como esta Corporación ha reconocido que el conjunto de preceptos que integran el concepto de Constitución económica colombiana han

de ser interpretados en conjunto con el contenido dogmático de la Constitución (título I y título II de la Carta).¹⁴

El artículo 365 establece que *“Los servicios públicos son inherentes a la finalidad social del Estado. Es deber del Estado asegurar su prestación eficiente a todos los habitantes del territorio nacional”*. Adicionalmente, el artículo 334 de la Constitución incorpora el principio de sostenibilidad fiscal como parte del Estado social de derecho que predomina en Colombia, al establecer que:

“La dirección general de la economía estará a cargo del Estado. Este intervendrá, por mandato de la ley, en la explotación de los recursos naturales, en el uso del suelo, en la producción, distribución, utilización y consumo de los bienes, y en los servicios públicos y privados, para racionalizar la economía con el fin de conseguir en el plano nacional y territorial, en un marco de sostenibilidad fiscal, el mejoramiento de la calidad de vida de los habitantes, la distribución equitativa de las oportunidades y los beneficios del desarrollo y la preservación de un ambiente sano. Dicho marco de sostenibilidad fiscal deberá fungir como instrumento para alcanzar de manera progresiva los objetivos del Estado Social de Derecho. En cualquier caso el gasto público social será prioritario”

Si bien el principio de sostenibilidad fiscal se encuentra contenido en la Constitución, éste no puede ser interpretado de forma autónoma a las demás disposiciones de la Carta. Por lo que no se puede entender como una sujeción de los derechos al principio de sostenibilidad fiscal. La Corte Constitucional ha reconocido que el derecho a la salud en cuanto derecho fundamental “entraña tanto obligaciones positivas como negativas y tiene facetas prestacionales y otras que no lo son. Entre las obligaciones de carácter prestacional, adicionalmente, hay algunas que implican el diseño de políticas públicas complejas que requieren gasto y cuyo cumplimiento es entonces progresivo, y hay otras, más sencillas, que no exigen la adopción de un programa completo sino de una acción simple”¹⁵.

Esta Corporación ha establecido en reiteradas ocasiones que la faceta prestacional y progresiva del derecho a la salud no justifica la inacción prolongada de la administración. Por el contrario es una obligación tanto del gobierno como del congreso adoptar todas las medidas necesarias para progresivamente alcanzar la cobertura total del servicio de salud:

“es deber del Congreso y del Gobierno adoptar todas las medidas económicas, políticas y administrativas para alcanzar en un término breve la cobertura total de los servicios de salud para toda la población colombiana, destinando cada año mayores recursos para hacer efectivo el derecho irrenunciable a la salud,

¹⁴ Sentencia C-791 de 2011, M.P.

¹⁵ Sentencia T-760 de 2008, M.P. Manuel José Cepeda

*avanzando en forma gradual pero rápida y eficaz para lograr en un tiempo razonable el bienestar social de todos”.*¹⁶

Adicionalmente, la Corte ha reconocido que el derecho fundamental a la salud comprende el derecho a acceder a servicios de salud de manera oportuna, eficaz y con calidad.¹⁷ Estos principios han sido reconocidos por la Corte como parte esencial del derecho fundamental a la salud, por lo que el gobierno tiene la obligación de garantizar el acceso oportuno, eficaz y de calidad a los servicios de salud. Todos estos elementos llenan de contenido el derecho a la salud reconocido por el artículo 49 de la Constitución, y generan tanto obligaciones positivas como negativas en el Estado. El principio de sostenibilidad fiscal debe ser interpretado de tal manera que se promueva el derecho a la salud en todas sus concepciones, y no como un mecanismo para restringirlo.

Habiendo dicho esto, el principio de sostenibilidad fiscal en sí mismo no es contrario al Estado social de derecho sino que, por el contrario, es fundamental para poder alcanzar los fines sociales del Estado. Como reconoció la Corte Constitucional el artículo 334 de la Constitución está en plena consonancia con los principios del Estado social de derecho ya que reconoce la intervención del Estado en la economía con el objetivo de mejorar la calidad de vida, la distribución equitativa y de preservar el ambiente sano.¹⁸ La sostenibilidad fiscal en el marco de la Constitución colombiana, por lo tanto, se convierte en un instrumento para alcanzar de manera progresiva los objetivos del Estado social de derecho.¹⁹ Por lo tanto, la sostenibilidad fiscal es un principio subordinado a los objetivos y derechos del Estado social de derecho, entre los cuales se encuentra el derecho fundamental a la salud y el objetivo de alcanzar progresivamente su universalidad.

Aclarar la relación entre el principio de sostenibilidad fiscal y el derecho fundamental a la salud tiene implicaciones prácticas muy importantes, no sólo porque evitará que los entes estatales tomen decisiones que violen el artículo 49 de la Constitución sino porque permitirá armonizar la función de control y supervisión de los entes administrativos con la jurisprudencia constitucional que ha definido el contenido de este derecho. Es por eso que es tan importante que la Corte Constitucional aclare el contenido del artículo 6 i) y especifique de qué manera el derecho a la salud puede guiar, y en algunos casos limitar, las políticas de sostenibilidad fiscal que llevan a cabo los entes reguladores de la salud.

Por las razones expuestas anteriormente le solicitamos a la Corte que declare exequible condicionalmente el artículo 6, parágrafo i), en el entendido de que el principio de

¹⁶ Corte Constitucional, sentencia C-130 de 2002, MP Jaime Araujo Rentería.

¹⁷ Sentencia T-760 de 2008, M.P. Manuel José Cepeda

¹⁸ Sentencia C-288 de 2012, M.P. Luis Ernesto Vargas Silva

¹⁹ Ibid.

sostenibilidad fiscal no puede ser usado por la administración como un mecanismo para no garantizar el derecho fundamental a la salud.

III. EL USO DE INDICADORES

La ley en estudio presenta en su artículo 7 la regulación referente a la evaluación anual de los indicadores del goce efectivo del derecho a la salud, esta disposición, si bien es general, plantea interesantes preguntas respecto al rol que otorga a los indicadores en el escenario de la salud. Este apartado tiene como propósito resaltar las fortalezas de los indicadores de derechos, pero también llamar la atención sobre la importancia que tiene que la Corte Constitucional como institución encargada de la guarda de la Constitución y de los derechos fundamentales de todos los colombianos, juegue un papel activo en la supervisión de la creación de indicadores que realmente provean un panorama del estado de la salud en Colombia y no sean una herramienta para ocultarlo.

Es importante resaltar que el uso de indicadores para medir el goce de derechos es una estrategia que ha empleado la Corte desde la sentencia T 025 de 2004 y se ha sugerido su implementación para el seguimiento de la T -760 de 2008 en repetidos autos de seguimiento en la Sala Especial de Seguimiento. Bajo este entendido es claro que se trata de una herramienta válida y que puede ser de mucha utilidad, sobre todo si se tienen en cuenta que cada vez adquiere más fuerza en el ámbito de los derechos humanos, al ser empleada como instrumento para determinar las violaciones a tratados de derechos humanos.

Sin embargo, se debe tener en cuenta que el uso de indicadores puede plantear tanto ventajas como serios peligros al momento de ser la piedra angular al crear políticas públicas para el sector de la salud. Diversos estudios respecto a indicadores, plantean que de no tener un proceso adecuado al momento de crear indicadores, estos pueden llegar a cerrar el debate público y dejar excluidos importantes cuestiones que atañen a la población.

Al respecto, el Informe sobre Desarrollo Humano del año 2000 que realizó el Programa de Naciones Unidas para el Desarrollo (PNUD), llama la atención afirmando que los derechos nunca podrán medirse íntegramente sólo por medio de las estadísticas, ya que hay cuestiones que no se ven reflejadas en las cifras. En el informe se reconoce que los indicadores pueden ser de gran utilidad al reflejar información de vital importancia, pero también estos indicadores deben cumplir con ciertas características que eviten la distorsión de la información. Por esta razón se afirma que los indicadores deben ser:

“• Pertinentes desde el punto de vista normativo, al transmitir mensajes acerca de cuestiones sobre las que se pueda ejercer influencia directa o indirecta adoptando medidas normativas.

• Fiabiles, al permitir que diferentes personas los utilicen y obtengan resultados congruentes.

• Válidos, al basarse en criterios determinables que midan lo que pretenden medir.

• Capaces de medir de manera consecuyente a lo largo del tiempo, lo cual es necesario si se quiere que pongan de manifiesto si se están realizando progresos y alcanzando los objetivos.

• Susceptibles de desagregar, para centrar la atención en grupos sociales, minorías y personas.

• Concebidos para separar, siempre que resulte posible, el supervisor de lo supervisado, para reducir al mínimo los conflictos de intereses que surgen cuando un actor supervisa su propio desempeño. Usar los datos como corresponde es decisivo cuando están en juego los derechos.”

Estas características son generales pero reflejan el arduo proceso de construcción que deben tener los indicadores para que no sean mecanismos que encubran la violación de derechos.

Por otra parte, se debe resaltar que el artículo prevé que todos los agentes del sistema sean informados de los resultados anuales de la evaluación que se realice por medio de los indicadores, pero no prevé la socialización del proceso mismo de creación de los indicadores. No puede olvidarse la importancia del rol que deben jugar todos los actores involucrados, incluida la sociedad civil. Al respecto el informa del PNUD afirmaba:

“La tarea de evaluar los derechos no se limita a la opinión de expertos y el debate internacional. El auge de la sociedad civil ha ampliado las posibilidades de análisis, en particular en el plano local, y las organizaciones de la sociedad civil suelen situarse a la vanguardia en la generación de nuevos criterios. Ante la ausencia de datos, los expertos jurídicos y políticos han recurrido a veces a clasificaciones para evaluar el desempeño en materia de derechos humanos, pero a menudo han motivado controversias en lugar de propiciar el diálogo entre los que propugnan el cambio y las instancias evaluadas. Hoy día se necesita información que habilite a la gente con datos concretos y no con opiniones.”

De acuerdo a lo anterior, es claro que el proceso y uso de los indicadores debe ser

sumamente cuidadoso para que no sea perjudicial. Para esto es necesario estudiar los procesos, los actores y los recursos disponibles para lograr el resultado adecuado, ya que de acuerdo a la Organización Mundial de la Salud son pocos los países que son capaces de producir datos de la calidad suficiente para permitir un seguimiento del progreso de los sistemas de salud²⁰. Debido a lo anterior, es necesario que se supervise el proceso de creación y el uso de los indicadores por parte de la Corte Constitucional, en un proceso inclusivo que garantice los derechos de la población.

Finalmente, es relevante referirse al uso de indicadores como principal guía de las políticas públicas en salud. Al respecto se debe mencionar que emplear indicadores como principal herramienta para la creación de políticas públicas puede llevar al denominado “uso excesivo” de los indicadores, lo cual se refiere a que

“Las estadísticas por sí solas no pueden reflejar todo el panorama de los derechos y la evaluación no debe concentrarse sólo en ellas. Todo análisis estadístico debe partir de una interpretación, basándose en un análisis político, social y contextual más amplio.”

Por esta razón, es necesario que el artículo 7 de la ley estatutaria no emplee los indicadores como el único recurso en el cual se basen las políticas públicas en salud, sino se entienda como una herramienta más que ayuda a su construcción, pero que no cierre el debate y la participación por otras vías.

VI. SOLICITUD

Conforme a los argumentos expuestos, solicitamos a la Honorable Corte Constitucional que en la Sentencia que ponga fin al juicio de inconstitucional, declare la exequibilidad de las norma acusadas, condicionado esto a que las obligaciones y derechos contemplados en las normas demandadas sean también aplicables a los compañeros permanentes que conformen una unión marital de hecho, independientemente de la orientación sexual de la

²⁰ “Few developing countries are able to produce data of sufficient quality to permit the regular tracking of progress in scaling-up health interventions and strengthening health systems. Data gaps span the range of “input”, “process”, “output”, “outcome” and “impact” indicators: e.g. few countries carry out regular national health accounts studies; data on the availability and distribution of health workers are often incomplete, inaccurate and out of date; few countries have systems that can monitor service delivery; and data on population access to essential services are limited.” Ver: ORGANIZACIÓN MUNDIAL DE LA SALUD. Monitoring The Building Blocks Of Health Systems: A Handbook Of Indicators And Their Measurement Strategies. Disponible en: http://www.who.int/healthinfo/systems/WHO_MBHSS_2010_full_web.pdf.

respectiva pareja, en el entendido que así no quebranta ninguna disposición de orden constitucional.

Por otra parte, que se declare como constitucional el artículo 7 bajo el entendido que los indicadores que se creen para la medición del goce efectivo del derecho a la salud son una herramienta que debe estar sujeta a supervisión y que no debe ser la única fuente que sea consultada para la creación de políticas públicas en salud.

VI. COMPETENCIA DE LA CORTE CONSTITUCIONAL

De conformidad con lo consignado en los artículos 241 de la Constitución y 43 de la Ley 270 de 1996, a la Corte Constitucional de Colombia atañe la vigía de la integridad y preeminencia de la Constitución, y respecto de dicho fin, consumará la función de “[D]ecidir sobre las demandas de inconstitucionalidad que presenten los ciudadanos contra las leyes, tanto por su contenido material como por vicios de procedimiento en su formación”.

Por tratarse de una demanda instaurada por un ciudadano contra apartes normativos contenidos en una ley de la República, son ustedes, Honorables Magistrados, competentes para conocer y fallar sobre esta demanda.

VII. NOTIFICACIONES

Los suscritos reciben notificaciones en la Universidad de los Andes, ubicado en la Carrera 1# 18A-10, Edificio RGC, oficina 337.

Cordialmente,

María Angélica Prada
Stephania Yate Cortes

ANNEX II: COMMENTS ON THE DRAFT REPORT: BEST PRACTICE PRINCIPLES FOR IMPROVING REGULATORY ENFORCEMENT AND INSPECTIONS

Rene Urueña²¹

María Angélica Prada²²

Faculty of Law

Universidad de los Andes

This document is part of the project: “Global Administrative Law Network - Improving Inter-Institutional Connections to Promote Inclusive Growth: Inter-Institutional Relations in Global and National Regulatory Governance”, funded by the International Development Research Centre

The Draft Report on “Best Practice Principles for Improving Regulatory Enforcement and Inspection” is a useful guide for States seeking to organize or reform regulatory inspection and enforcement. This comment propounds three issues relevant for effective regulatory enforcement and inspections which are not being addressed by the Best Practice Principles, and which should be included in order to provide broader understanding of the topic: i) the role of courts in the regulatory process; ii) the challenges posed by the use of indicators; and iii) the importance of rights considerations for enforcement and inspection.

I. The Role of Courts in The Regulatory Process

Courts interact with regulatory agencies in different ways, through judicial review of their decisions, through judicial enforcement of status and contracts,²³ through the constitutional review of statutes,²⁴ and through the use of litigation by the stakeholders of a specific regulatory regime. While it is acknowledged that in the most developed countries

²¹ Rene Urueña is an Associate Professor and Director of the International Law Program at Universidad de Los Andes (Colombia). He also belongs to its Global Justice and Human Rights Clinic, working in human rights and foreign investment. He earned his Doctorate at the University of Helsinki (eximia cum laude), and holds a postgraduate degree in economics from Universidad de Los Andes. Prior to joining Los Andes, Rene was a visiting scholar at the Institute for International Law and Justice at New York University School of Law. He has published on international law and global governance, and currently leads a project on Inter-Institutional Relations and Economic Development, which brings together a network of scholars from Latin American and Africa.

²² Maria Angélica Prada is a Research Fellow and the Coordinator of the Master’s Program in International Law at Universidad de los Andes (Colombia), where she also teaches international economic law. She is currently a researcher of the “Global Administrative Law Network” Project, funded by the International Development Research Centre. Prior to joining academia, Maria worked at the International Legal Office of the Colombian Ministry of Commerce.

²³ Posner, Richard (2010) “Regulation (Agencies) versus Litigation (Courts) An Analytical Framework”, in Kessler (ed.) *Regulation vs. Litigation Perspectives from Economics and Law*. Chicago: University of Chicago Press.

²⁴ Especially in those countries with Constitutional Courts, such as Germany, India, South Africa and others.

judiciaries have assumed an important role in the functioning of the regulatory State, the role they have adopted differs significantly from that experience in several developing countries, especially those with an active Constitutional Court.

As indicated by Majone, for example, judiciaries in the United States have developed standards of judicial review for standard setting and other rule-making proceedings of the regulatory agencies. In this regard, they have succeeded in formulating principles to improve the transparency and substantive rationality of rule-making, by adopting procedural requirements that restrict the liberty of action of regulatory agencies.²⁵ In other Countries such as India and Colombia, the Constitutional Courts have played an important role in influencing regulatory change or even regulating themselves²⁶. As Thiruvengadam and Joshi²⁷ have argued in their study of judicial intervention in the regulation of the Indian telecommunications sector, domestic judiciaries in the global South have certainly intervened in the regulatory field that appertains independent regulatory agencies.

Moreover, Courts might, in some cases, also replace regulatory agencies in their inspection and enforcement role. For example, in the United States although the Federal Trade Commission has antitrust enforcement authority, most antitrust cases are brought in federal courts leaving aside the administrative agency.²⁸ The role played by Courts in the regulatory sphere has been criticized for several reasons. Some argue that judicial review has had a negative impact on agencies performance, among others because it has led them to make fewer rules and to seek less accountable ways of making policy.²⁹ As result many have sought to restrict judicial review³⁰ and to discourage Courts from intervening in decisions made by regulators.³¹

According to Richard Posner the use of litigation and regulation tends to differ in four dimensions: “(a) regulation tends to use ex ante (preventive) means of control, litigation ex post (deterrent) means; (b) regulation tends to use rules, litigation standards; (c) regulation tends to use experts (...) to design and implement rules, whereas litigation is dominated by generalists (judges, juries, trial lawyers), though experts provide input as witnesses; and (d)

²⁵ Majone, Giandomenico (1998) “The Regulatory State and its Legitimacy Problems”. Reihe Politikwissenschaft / Political Science Series No. 56, p. 10.

²⁶ See for example, Urueña, René (2012) “The rise of the constitutional regulatory state in Colombia: The case of water governance,” 6 Regulatory & Governance 282-299; and Thiruvengadam, Arun K. and Piyush Joshi (2012) “Judiciaries as crucial actors in Southern regulatory systems: A case study of Indian telecom regulation,” 6 Regulatory & Governance 327-343.

²⁷ Op Cit. Thiruvengadam and Joshi (2012).

²⁸ Op Cit., Posner, Richard (2010), p. 12.

²⁹ Susan Rose-Ackerman presented some of the criticisms in his text, Rose-Ackerman, Susan (1993-1994) “American Administrative Law under Siege: Is Germany a Model?”, 107 Harv. L. Rev. 1279-1302, p. 1279.

³⁰ See, *ibid*.

³¹ Op Cit. Thiruvengadam and Joshi (2012), pp. 328

regulation tends to use public enforcement mechanisms. Litigation more commonly uses private enforcement mechanisms – private civil law suits (...).”³²

The Draft Report takes into account the interaction of regulatory agencies with other governmental institution at the national and local level. However, it hardly mentions the relationship that exists between Courts and regulatory agencies, which should also be taken into account when organizing or reforming regulatory inspection and enforcement. We will show how the interactions between courts and regulation should be included as part of the principles for improving regulatory enforcement and inspection.

Principle 2 recognizes that the potential of market forces, private sector and civil society actions to support compliance and enforcement should be explored wherever possible. When deciding whether to assign inspection and enforcement resources to a specific regulation the administration should first verify whether existing judicial remedies guarantee compliance through deterrence. The use of litigation to guarantee compliance focuses on ex-post deterrence, which in its private and adversary character borrows the methods of competitive markets.³³ Therefore, when the commentary to principle 2 states that “governments should consider using market-based mechanism rather than direct inspection and enforcement action”, they should take into account what role litigation is playing in the specific case. This conclusion is also important for principle 6, since duplication could also exist between the role of courts as ex-post regulators and regulatory agencies, especially those that have quasi-judicial mechanisms to achieve enforcement.

Principle 7 includes within its commentary the following statement: “Governments should ensure that inspectorates issue guidance to their staff on how to handle specific situations and how to interpret legislation in a consistent manner”. These guidelines should also include the interpretation that has been made by courts of the specific legislation and case law relevant to specific situations. This way the inspectorates can decide how to handle specific cases, taking into account whether their action could be challenged or not in court.

Principle 9 states that “governments should ensure clarity of rules and process for enforcement and inspection”. To provide clarity regarding the powers of the inspector and the rights and obligations of the regulated subject, the government should inform of any new interpretation made by the courts on this topics. Otherwise, the regulated subjects will not have clarity regarding the rules, their rights and obligations, and the possibility to challenge and appeal the decisions made by the inspector.

II. The Challenges Posed by the Use of Indicators

³² Op Cit., Posner, Richard (2010), p. 13.

³³ Ibid., pp. 13-15.

The Draft Report stresses the importance of indicators to evaluate the actions and effectiveness of the regulatory agency for the following principles: Principle 1: Regulatory Enforcement and inspection should be evidence-based and measurement-based: deciding what to inspect and how it should be grounded on data and evidence, and results should be evaluated regularly; Principle 7: Governance Structure and human resources policies for regulatory enforcement should support transparency, professionalism, and focus on outcomes. Execution of regulatory enforcement should be independent from political influence, and compliance promotion efforts should be rewarded.

Under principle 1 indicators have two objectives. First, a set of well-defined indicators should be used to evaluate the inspector's actions and their effectiveness. Second, the use of outcome indicators that the agency aims to influence, and is required to track and report on them regularly. Principle 7 recommends the use of performance indicators based on outcomes in order to support transparency, professionalism, and focus on outcomes.

To rely on indicators for evaluation, both of the agency and the regulated subject, constitutes a challenge due to the need to collect sufficient and reliable data. This is especially difficult when composite index are constructed to measure outcome or performance, where aggregation of data from multiple source may be necessary. Indicators can be a powerful source of regulation³⁴, by setting standards against which performance is measured and evaluated, evaluators may exert significant governance power over the actor being evaluated.³⁵ Therefore, indicators can empower regulatory agencies vis-à-vis the regulated subject; but they could also be used to hold regulators accountable. The regulatory and accountability power of indicators is not fully developed in the Draft Principles.

Another problem, which is accurately addressed by the Draft Principles, is the difficulty to demonstrate a causal relationship between the number of violations and the poor or good performance of an agency. For a thorough analysis of performance and outcomes, qualitative analysis could complement the use of indicators, since quantitative mechanisms have some limitations due to the need to simply the reality into numerical data.

An additional issue that is not being addressed by the Draft Principles is that, when using indicators the government should publish all the relevant information pertaining to their creation: how data is recollected, the method is to create the indicator, the underlying theory or ideas used to shape the indicator. Monitoring methods should always be accessible and transparent. This principle applies not only for the indicators used to

³⁴ See, Davis, Kevin E., Benedict Kingsbury, Sally Engle Merry (2012) "Indicators as a Technology of Global Governance," 46(1) *Law and Society Review* 71-104.

³⁵ Ibid, p. 77-78.

monitor the compliance of regulated subjects, but also for those used to monitor the performance of the regulatory agencies.

III. The Importance of a Rights-Based approach to Enforcement and Inspection.

Rights and regulation have been understood as two different ways of framing social problems. However, in many cases a social issue is being simultaneously address through regulation and rights discourse. Morgan gives the following examples of interaction: “Take, for example, questions about law and equality as they arise in the context of race, class and gender. Problems of racial inequalities can be framed as a question of rights with relative ease. Responses to economic and class inequalities are commonly associated with regulatory regimes. Gender inequalities in the work force, on the other hand, seem to link to both rights and regulation, depending on whether we think about anti-discrimination rights or labour regulation”.³⁶

The interaction between rights and regulation has increased due to the privatization of public utilities, many of which are considered as civil, constitutional or human rights. For example, the provision of health services is not only an issue of regulation but also of rights. More commonly, the difference between rights and regulation is an expression of the dichotomy between courts and regulatory agencies. As we have already argued courts can have an impact in regulation, in a similar way regulation can affect, promote and even jeopardize rights. For this reason we propose to incorporate a rights-based approach to enforcement and inspection, we will give some examples of the way in which rights considerations can be included in the Principles.

The Draft Report could integrate rights considerations into principle 3, which establishes that enforcement needs to be risk-based and proportionate: the frequency of inspections and the resources employed should be proportional to the level of risk and enforcement actions should be aiming at reducing the actual risk posed by infractions. The notion of risk includes two considerations: the likelihood of an adverse event and the potential magnitude of the damage caused. As part of the later, the comments clarify that it should analyze the number of people affected and the severity of the damage for each. We submit that within this analysis the administrative body should also take into account whether constitutional or international human rights could be jeopardized by the adverse effect, if the answer is positive then the potential magnitude of the damage caused should be classified as high and enforcement and inspection should be prioritize for this case.

³⁶ Morgan, Bronwen (2007) “The Intersection of Rights and Regulation: New Directions in Sociolegal Scholarship”, in Morgan (ed.) *The Intersection of Rights and Regulation: New Directions in Sociolegal Scholarship*. England: Ashgate Publishing Limited.

Principle 10 states that transparency and compliance should be promoted through the use of appropriate instruments such as guidance, toolkits and check-lists. These instruments should raise awareness of the rights involve in the regulated activity, and specify how compliance requires the regulated subject to respect those rights.

ANNEX III. MEMORIAL ON BEHALF OF THE ORGANIZATIONS THAT REPRESENT COMMUNITARY MOTHERS IN COLOMBIA.

Organización Internacional del Trabajo

Reclamación conforme al artículo 24 de la Constitución de la OIT

Organización de madres comunitarias colombianas Contra República de Colombia

-Datos de contacto de los reclamantes.-

Memorial de reclamación

La organización PROVIDA respetuosamente presenta esta reclamación contra el Estado de Colombia, miembro de la Organización Internacional del Trabajo, con arreglo a lo dispuesto en el artículo 24 de la Constitución de la OIT y al Reglamento relativo al procedimiento para la discusión de reclamaciones presentadas con arreglo a los artículos 24 y 25 de la Constitución de la OIT. Lo anterior justificado en el incumplimiento del Estado Colombiano del Convenio 100 sobre igualdad en la remuneración, adoptado el 19 de julio de 1951, y del Convenio 111 relativo a la discriminación en el empleo, adoptado el 4 de marzo de 1969³⁷.

La reclamación que se presenta ante la OIT tiene su sustento en la realidad que afecta a las madres comunitarias, del programa de hogares comunitarios del Bienestar Familiar, quienes desarrollan labores de cuidado de niños, en situaciones de discriminación con respecto a los trabajadores regulares en Colombia. A las madres comunitarias, pese a que materialmente cumplen con todos los requisitos para que su trabajo sea considerado

³⁷ Consultado el 2 de diciembre de 2013. Tomado de: http://www.ilo.org/dyn/normlex/es/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:102595

producto de un contrato laboral, legalmente no se les reconocen las garantías mínimas, de salario y prestaciones laborales, que le son reconocidas a los demás trabajadores en el ordenamiento jurídico colombiano.

La reclamación se fundamenta en la trasgresión sistemática, por parte de Colombia, de los convenios 100 y 111, por no adoptar las medidas necesarias, primero, para garantizar la aplicación a todos los trabajadores del principio de igualdad de remuneración entre la mano de obra masculina y la mano de obra femenina por un trabajo de igual valor; y segundo, para formular y llevar a cabo una política nacional que promueva, por métodos adecuados a las condiciones y a la práctica nacionales, la igualdad de oportunidades y de trato en materia de empleo y ocupación, con objeto de eliminar cualquier discriminación a este respecto.

Partes

Los nombres y direcciones de las partes de esta reclamación son las siguientes:

Reclamado: República de Colombia

Representada por el Presidente de la República, Juan Manuel Santos, con domicilio en la casa de Nariño- Carrera 8 No.7-26; Edificio Administrativo: Calle 7 No.6-54. Bogotá D.C., Colombia - Conmutador (57 1) 562 9300.

Reclamante: Organización PROVIDA

Párrafo que describe la labor de la organización y los datos de notificación

Introducción

Este documento tiene como propósito evidenciar la situación irregular, tanto jurídica como social, en que se desenvuelve la labor de las madres comunitarias del programa de Hogares Comunitarios del Bienestar Familiar (HCB). Para estos efectos se hará un recuento histórico de las noticias y momentos importantes que tienen que ver con las madres comunitarias en la historia de los HCB, de manera que se pueda evidenciar el contexto de violación de derechos que han tenido que afrontar estas mujeres. Posteriormente se hará un análisis legal y jurisprudencial que dé cuenta de la forma y evolución en que se ha concebido la figura de la madre comunitaria dentro del ordenamiento jurídico colombiano. Finalmente, retomando las premisas que ha arrojado el documento, se expondrá la manera en que la labor de la madre comunitaria, de acuerdo a las condiciones discriminatorias en la cual es concebida, viola tratados internacionales de la OIT, suscritos por Colombia, específicamente el convenio 100 y el convenio 111. Se espera demostrar, primero, que la forma en que está regulada la labor de las madres comunitarias, resulta injusta y discriminatoria contra el trabajo de cuidado que ella realizan, y que históricamente la ha sido atribuido a las mujeres.

Esta reclamación tendrá la siguiente estructura. Primero, se hará una contextualización del problema que incluye un recuento noticioso de las reclamaciones de las madres

comunitarias durante los últimos años. Segundo, se hará un recuento de la evolución legal y el desarrollo jurisprudencial del tema tanto en la Corte Constitucional como en el Consejo de Estado. Tercero, se hará una breve exposición de las razones por las cuales Colombia viola los convenios 100 y 111 de la OIT. Finalmente se expondrán algunas conclusiones.

1. Contextualización

Los paros y huelgas de las madres comunitarias, que son una constante en el programa de hogares comunitarios del ICBF, casi que desde su creación, son el reflejo de una regulación legal precaria que de manera crónica ha venido vulnerando el derecho al trabajo y a la igualdad de las mujeres que desempeñan estas labores. La falta de un vínculo legal claro, la ausencia de un salario justo como contraprestación a la labor, y la insistencia de los órganos estatales en ignorar el problema, son factores que han influido para que diferentes organismos nacionales e internacionales hayan entrado a revisar la situación irregular en que se desarrolla el programa de hogares comunitarios.

La sentencia T 628 de 2012, es el resultado, aún tímido, de años de protestas y debates que han clamado por mejoras en la situación legal de las madres comunitarias. La sentencia representa un avance pues por primera vez, desde la creación del programa de Hogares Comunitarios, se reconoce jurisprudencialmente que se puede declarar contrato laboral si las condiciones en que se desarrolla el trabajo de las madres comunitarias cumplen con los requisitos del contrato realidad. Además, en la sentencia son cuestionadas las condiciones de igualdad bajo cuales es regulado el oficio de las madres comunitarias. Se afirma que el hecho de que la labor de estas mujeres no sea considerada como un trabajo, no es per se discriminatorio; lo que termina siendo discriminatorio, son aquellas diferencias entre las contraprestaciones que recibe un trabajador regular y una madre comunitaria, y que van en perjuicio de éstas últimas³⁸.

Y es que el problema central que ha aquejado a la labor de las madres comunitarias es esa indeterminación legal en su vínculo con el ICBF, que de manera sistemática se ha prestado para arbitrariedades. De acuerdo con el Decreto 1340 de 1995, la vinculación de las madres comunitarias y la de cualquier persona que participe en el programa de hogares comunitarios, será tomada como una contribución voluntaria³⁹. Que sea voluntaria, como se puede ver en la sentencia SU 224 de 1998, quiere decir que no hay vínculo laboral, y esto a su vez implica que las mujeres que cuidan niños en los hogares comunitarios, siguiendo lineamientos previamente establecidos por el ICBF, sometidas a un control de ésta entidad, so pena del cierre del hogar, deben hacer su trabajo a cambio de una supuesta beca, que está muy por debajo de un salario mínimo⁴⁰.

³⁸ Corte Constitucional. Sentencia T 628 de 2012. M.P Humberto Sierra Porto.

³⁹ Decreto 1340 de 1995, artículo 4.

⁴⁰ Corte Constitucional. Sentencia SU 224 de 1998. M.P. Hernando Herrera Vergara.

Pareciera que fuera una cosa más de conveniencia. El trabajo de cuidado es voluntario e independiente cuando se trata de reconocer a las madres comunitarias las prestaciones equivalentes a las de los trabajadores regulares. Sin embargo hay sujeción a horarios, formatos de asistencia, planes de trabajo, calidad en la prestación del servicio de educación y alimentación, cuando el ICBF decide que es necesario el cierre de un hogar comunitario. Luego de un año de expedida la sentencia, las cosas parecen no haber cambiado demasiado para las madres comunitarias. Inconformes, en agosto de 2013, se van a paro indefinido, nuevamente, pues las promesas hechas por el gobierno aún no se han cumplido. En Junio de 2013 el ICBF había prometido que todas las madres comunitarias recibirían una bonificación mensual equivalente a un salario mínimo. Había dicho además que las madres con edad superior a 65 años, deberían retirarse, pero que se les reconocería una renta vitalicia, pues es de entender que no hubieran podido cotizar para una pensión⁴¹. Sin embargo, cuando Caracol Radio, en agosto de 2013, le preguntaba a Olinda García, presidenta nacional del sindicato de trabajadoras al cuidado de la infancia y adolescencia, sobre los motivos del paro, ella afirmaba, primero, que ese salario mínimo prometido no había llegado aún; y segundo, que la renta vitalicia prometida a las madres retiradas, exigía tantos requisitos, que prácticamente era imposible acceder a ella⁴².

Los paros y las protestas no resultan en medidas extremas, pues si hemos de mirar en la historia del programa HCB, encontramos que se trata de una secuencia de promesas de cambio incumplidas, de intervenciones y recomendaciones internacionales desacatadas, y de intentos de desaparición y privatización del mismo programa.

Desde 1995 el Comité DESC hizo la recomendación de que se mejorara la situación desigual en que es regulado el trabajo de las madres comunitarias. Éste comité exhortó al gobierno para que dictará las disposiciones necesarias para que las madres comunitarias fueran concebidas como trabajadoras y tuvieran derecho al salario mínimo. Sin embargo, en la revisión que hace el comité en el 2001, se encuentra que la situación no ha cambiado en lo absoluto⁴³. Luego, en el 2002, en el estudio que se hace en el foro distrital sobre políticas públicas para la infancia y la mujer, se encuentra nuevamente que salvo ciertos avances en seguridad social, las recomendaciones hechas han sido desacatadas. Por el contrario, más que proponerse políticas públicas que propendan por la mejora en la

⁴¹ Consultado el 24 de Noviembre de 2013. Tomado de: <http://www.elespectador.com/noticias/nacional/articulo-428068-madres-comunitarias-recibiran-bonificacion-equivalente-al-salari>.

⁴² Consultado el 24 de noviembre de 2013. Tomado de: <http://www.caracol.com.co/noticias/actualidad/mas-de-50000-madres-comunitarias-y-sustitutas-entran-a-paro-indefinido/20130826/nota/1957600.aspx>

⁴³ INFORME ALTERNATIVO AL QUINTO INFORME DEL ESTADO COLOMBIANO ANTE EL COMITÉ DE DERECHOS ECONÓMICOS, SOCIALES Y CULTURALES (E./C.12/COL/5). Consultado el 24 de Noviembre de 2013. Tomado de: http://colombiadiversa.org/colombiadiversa/images/stories/que/DIVULGACION/INFORME_COMITE_DE_SC_1.pdf

situación de las madres, para ese entonces se encuentran vigentes planes del gobierno de Uribe por re estructurar el funcionamiento del programa, que se traduce en el despido de trabajadores del ICBF, y en la privatización de la labor de cuidado⁴⁴.

Si bien las propuestas de privatización de las madres comunitarias no se han desarrollado a cabalidad, si tenemos que a partir del 2010, con la implementación del programa “De cero a siempre”, si se han ido imponiendo requisitos, por ejemplo de capacitación o de edad, que han dejado prácticamente inútiles a muchas madres comunitarias. Las inconformidades no se han hecho esperar, y de hecho, gran parte de las manifestaciones que se dieron en el 2011, provenientes de las madres comunitarias, fueron por la implementación de dicho programa⁴⁵.

Aún con la presión de las organizaciones internacionales como el Comité del DESC, que viene pendiente del tema de las madres comunitarias desde 1995, hoy, en 2013, la igualdad en el trabajo de estas mujeres aún no se concreta materialmente. Si bien existen nuevamente promesas, como la de una remuneración equivalente al salario mínimo, y de una vinculación laboral en estricto sentido para el 2014⁴⁶, teniendo en cuenta los incumplimientos sistemáticos por parte del Estado en su compromiso de mejorar las condiciones en que se desarrolla la labor de las madres comunitarias, vale la pena hacer un seguimiento del cumplimiento de estas propuestas, de manera que finalmente sea posible eliminar la discriminación contra la mujer, que se encuentra latente en la regulación del programa HCB.

Todo lo anterior nos muestra que la problemática social y jurídica que afrontan las madres comunitarias se encuentra muy vigente, y valdría la pena estudiarla. En las siguientes páginas se pretenderá hacer un informe que dé cuenta de la situación legal, política y social que ha envuelto la labor de las madres comunitarias, desde su creación en 1987, hasta hoy.

2. Regulación legal y desarrollo jurisprudencial

2.1. Evolución legal y reglamentaria

En la ley 89 de 1988, se crean los Hogares Comunitarios del Bienestar Familiar. Estos funcionarían mediante becas que asigna el ICBF y los recursos que se obtengan localmente. Estos recursos serán destinados para que, de manera mancomunada, puedan ser atendidas las necesidades básicas de nutrición, salud, protección y desarrollo individual

⁴⁴ Comité Pro DESC de las trabajadoras comunitarias, Et. Al. ¿En qué vamos? Principales debates. Ediciones Ántropos. Bogotá, 2003.

⁴⁵ Consultado el 25 de noviembre de 2013. Tomado de: <http://www.eltiempo.com/archivo/documento/MAM-5402777>

⁴⁶ Consultado el 25 de noviembre de 2013. Tomado de: <http://www.eltiempo.com/archivo/documento/CMS-13112277>

y social de los niños de estratos sociales pobres del país. Esto quiere decir que el objeto principal de los hogares comunitarios será, el de suplir todas las necesidades de los niños, que por su condición social, no pueden ser suplidas.

En el decreto 1340 de 1995, se establece que el ICBF, a través de su junta directiva, será el encargado de establecer los criterios y procedimientos que den organización y funcionamiento al programa de hogares comunitarios.

El Acuerdo 21 de 1996, proferido por el ICBF, resulta de fundamental importancia, pues en éste documento es que se trazan los criterios generales de funcionamiento de los HCB. Dentro de estos criterios, entre otras cosas, el ICBF establece que los hogares comunitarios funcionarán bajo el cuidado de una madre comunitaria, escogida por la asociación de padres de familia, o la organización comunitaria. En el mismo acuerdo se establece que las madres comunitarias deberán tener el siguiente perfil: *“hombre o mujer con actitud y aptitud para el trabajo con los niños; mayor de edad y menor de 55 años, de reconocido comportamiento social y moral, con mínimo cuatro años de educación básica primaria, posea vivienda adecuada o tenga disposición para atender a los niños en espacio comunitario, acepte su vinculación al programa como un trabajo solidario y voluntario, esté dispuesto a capacitarse para dar una mejor atención a los beneficiarios, tenga buena salud y cuente con el tiempo necesario para dedicarse a la atención de los niños”*. Es de destacar que en éste acuerdo también se reglamenta el lugar de funcionamiento de los hogares comunitarios. Se dice que estos podrán funcionar en la casa de la madre comunitaria, en espacio comunitario, o en espacio cedido por persona pública o privada; y que el lugar donde funcione el hogar deberá contar con las adecuaciones necesarias de manera que se garanticen condiciones físicas, ambientales y de seguridad para los niños.

Otro punto de importancia trascendental que regula el Acuerdo 21 es el de la distribución y asignación de recursos para los hogares comunitarios. Según el acuerdo, los recursos que financien los HCB, vendrán de las siguientes entidades: 1) Del gobierno nacional a través del ICBF; 2) Los que asignen las entidades territoriales; 3) Las cuotas de participación de los padres de familia y el trabajo solidario de la comunidad; 4) Los aportes de las personas naturales, jurídicas, públicas, privadas y organismos internacionales; 5) Y los demás que la comunidad decida destinar. Ahora, el pago de la beca que se les da a las madres comunitarias como bonificación por su labor, proviene de las cuotas de participación que pagan los padres de familia. La bonificación está determinada por el número de niños que atiende, y para el 2012, esta cifra oscilaba entre los \$349.000 y los \$ 407.000⁴⁷.

⁴⁷Consultado el 25 de noviembre de 2013. Tomado de: <https://www.icbf.gov.co/icbf/directorio/portel/libreria/php/03.0113.html>

En cuanto al vínculo existente entre madres comunitarias e ICBF, no se encuentra ninguna remisión legal. Para regular éste punto solo hay una disposición reglamentaria, que es la que se ha prestado para las ambigüedades que han generado la indefinición e informalidad que caracteriza y afecta el trabajo de las madres comunitarias. El decreto 1340 de 1995, en su artículo 4, dispone que la vinculación de las madres “*constituye contribución voluntaria, por cuanto la obligación de asistir y proteger a los niños, corresponde a los miembros de la sociedad y la familia; por consiguiente, dicha vinculación no implica relación laboral con las asociaciones y organizaciones comunitarias administradoras del mismo, ni con las entidades públicas que en él participan*”. Esta disposición resulta ambigua, en la medida que no se establece de manera clara cuál es el vínculo que hay entre madre comunitaria e ICBF; solo se limita a establecer que no es de naturaleza laboral. Además resulta discriminatoria con respecto a otros trabajadores. Como se ha visto la labor de las madres comunitarias no es independiente; la existencia de un determinado hogar comunitario, así como el trabajo de las madres, está sujeto a todos los lineamientos que imponga el ICBF, so pena del cierre del hogar o el despido de la madre. Adicionalmente, aunque sea una cantidad ínfima, las madres comunitarias también, al igual que los trabajadores, reciben una contraprestación directa, en dinero, por su trabajo. Existen pues las condiciones necesarias para que sea una relación laboral la que cobije el trabajo de las madres comunitarias, por lo cual resulta injusto que estas no reciban las mismas prerrogativas legales que los trabajadores regulares.

Aun cuando las cosas no han mejorado lo suficiente, sí se debe decir que gracias a la presión de ciertos organismos internacionales (como el comité para el cumplimiento de los DESC y los entes encargados del cumplimiento del CEDAW, y de movimientos nacionales como el sindicato de trabajadoras al cuidado de la infancia en hogares de bienestar (SINTRACIBOHI), o el comité PRODESC de las trabajadoras comunitarias) se han conseguido ciertos avances en materia normativa, específicamente en el área de protección social. Vale la pena que se revisen estos avances⁴⁸.

Inicialmente las madres comunitarias, por mandato de la ley 100 del 93 entrarían al sistema por medio del régimen subsidiado de salud, el cual brinda atención a las personas que no cuentan con capacidad de pago. Sin embargo, con la promulgación de la ley 509 de 1999, se les trasladó a ellas y a todo su grupo familiar al régimen contributivo. La base para cotizar no sería el salario mínimo, sino el monto correspondiente al valor que cada madre recibiera como bonificación; y el porcentaje sería el 4% sobre éste monto. En cuanto al tema de pensiones, se tiene que la ley 1187 de 2008 dispuso que los aportes de las madres comunitarias al régimen general de pensiones sería subsidiado por el fondo de solidaridad pensional. Además prioriza el acceso de las madres comunitarias al subsidio de la

⁴⁸ Comité Pro DESC de las trabajadoras comunitarias, Et. Al. ¿En qué vamos? Principales debates. Ediciones Ántropos. Bogotá, 2003.

subcuenta de subsistencia, cuando estas no puedan cumplir con los requisitos para acceder al fondo de solidaridad pensional. Para poder acceder a esta subcuenta se establece como requisito que se acredite, por medio del ICBF, ser efectivamente una madre comunitaria. El régimen de riesgos profesionales también quedó cubierto cuando en noviembre de 2011 se autorizó el plan de ordenamiento territorial, en el cual se establecía la afiliación gratuita a éste sistema, para todas las madres comunitarias⁴⁹.

En lo que respecta al tema de la bonificación como contraprestación a la labor de las madres, se debe decir que también ha habido una evolución notable. Desde la creación del programa de HCB hasta el 2002, la bonificación no alcanzaba a representar si quiera un 50% del salario mínimo legal vigente⁵⁰. Luego en 2008, con la ley 1187, se ordenó que el pago a las madres comunitarias ascendiera al 70% de un SMLV. Finalmente, luego de proferida la T 628 de 2012, la Corte, en aras de hacer más igualitario el trabajo de éstas mujeres, decidió que la bonificación debía ser por lo menos equivalente al salario mínimo. Y ahora, en octubre, como respuesta a las protestas de las organizaciones de madres comunitarias, existe también la promesa de que para el otro año, a más tardar a partir de junio, ellas también contarían con un vínculo laboral, con todas las garantías legales⁵¹.

2.2. Avances jurisprudenciales

Estos reconocimientos no son más que la punta del iceberg. Corresponden a logros muy recientes que no representan en lo absoluto la situación irregular y discriminatoria por la que han pasado las madres comunitarias desde la creación del programa HCB. Basta con mirar de manera detenida las sentencias, tanto de la Corte Constitucional como del Consejo de Estado, para darse cuenta de las contradicciones en que las altas cortes incurren, solo para seguir manteniendo a las madres comunitarias por fuera de las garantías del régimen laboral.

2.2.1. Corte Constitucional

Las sentencias, todas de tutela, que han llegado a la Corte Constitucional, en los más de 20 años de vigencia del programa HCB, son solamente 3. Por esto, y para conseguir un análisis completo de las decisiones de la Corte, procederemos a estudiar cada una de las tres sentencias, buscando posicionar la decisión de La Corte dentro de un espectro que nos permita entender, desde la perspectiva constitucional, como ha sido concebida la labor de las madres comunitarias.

⁴⁹ Consultado el 25 de noviembre de 2013. Tomado de: http://www.portafolio.co/detalle_archivo/MAM-4940685

⁵⁰ Comité Pro DESC de las trabajadoras comunitarias, Et. Al. ¿En qué vamos? Principales debates. Ediciones Ántropos. Bogotá, 2003.

⁵¹ Consultado el 25 de noviembre de 2013. Tomado de: <http://www.eltiempo.com/archivo/documento/CMS-13112277>

T 269 DE 1995

La sentencia resuelve una demanda instaurada por una madre comunitaria a quien el ICBF decide cerrar el hogar comunitario a su cargo. Los derechos que la demandante considera vulnerados son los de la libre expresión, trabajo, debido proceso e igualdad. Según ella, el ICBF inicia una persecución en su contra, que termina con el cierre del hogar, del cual ella recibía su sustento vital, luego de que ella exige alimentos y otros servicios para la manutención del hogar, que al ICBF le es obligatorio dar.

La tutela le es negada a la madre comunitaria. la Corte aduce los siguientes argumentos: Primero, que el cierre del hogar comunitario no implicaba que la demandante no pudiera seguir desarrollando otras actividades para su sustento. Y segundo, que la relación surgida entre ICBF y la madre comunitaria, en la medida que éste nunca ostentó la calidad de empleada, es de carácter civil y bilateral; por ende no puede haber vulneración del derecho al trabajo. El resto de cargos fueron desestimados sin pronunciamiento alguno.

Con respecto a ésta sentencia hay varios puntos importantes en los que hay que detenerse. Hay que hacer énfasis en que la madre comunitaria, en los hechos que relata, afirma que su sustento se vida deriva de su labor como madre comunitaria. Es a partir de la bonificación que recibe, que es posible que pueda acceder a su mínimo vital. Esto por un lado implica que el trabajo de cuidado que desarrolla deja de ser voluntario. Deja de ser voluntario porque la madre comunitaria no lo hace en su tiempo libre, ni como un hobby, ni por caridad; lo hace porque lo necesita. Como se verá en las demás sentencias, este es un común denominador en las madres comunitarias: ninguna se hace cargo de los hijos de otra porque se le facilite el cuidado, porque sea caritativa o porque le divierta; lo hace porque necesita los ingresos que esta actividad le provee para mantenerse. Así como un médico o un abogado atienden a sus pacientes o a sus clientes para poder mantenerse, así mismo lo hacen las madres comunitarias. No hay diferencia.

Hay que tener en cuenta que para ese entonces no había sido promulgado el decreto que determina la calidad de la vinculación de la madre comunitaria, por lo cual no existían fundamentos normativos que le permitieran a la Corte esclarecer de qué talante es el vínculo contraído entre demandante y demandado. Pese a esto, se considera que La Corte tomó el camino fácil, al argumentar de manera tan mediocre, y sin recurrir a principios y normativa vigente del derecho laboral, como el principio del contrato realidad. Se decide más bien considerar el vínculo como de carácter civil. De haberse tomado un camino distinto, lo más seguro hubiera sido de que se llegase a la conclusión, dadas las condiciones de desempeño de la labor de la madre comunitaria, –dentro de las cuales está el hecho de que en la práctica no es una labor voluntaria – de que existen los elementos necesarios para decir que existe un contrato laboral. Y que de éste contrato se debió entonces desprender la existencia de un despido sin justa causa.

SU 224 de 1998

Una madre comunitaria interpone demanda contra el ICBF, por sentir violados sus derechos al trabajo y a la igualdad. Fundamenta estas vulneraciones con base en el cierre del hogar comunitario que había tenido bajo su cargo durante siete años; y del cual recibía el sustento para cubrir sus necesidades básicas. El cierre se da luego de que la mujer sobrepasará la edad límite, 55 años, para poder ejercer como madre comunitaria.

De nuevo la Corte decide en contra de las pretensiones de la madre comunitaria, pero esta vez con un salvamento de voto. La decisión se fundamenta ésta vez, en que por expresa disposición reglamentaria, la labor que desempeñan las madres comunitarias debe ser entendida como voluntaria, y no como producto de una vinculación laboral.

Aunque en éste caso ya es posible remitirse al decreto 1340 de 1995, en donde se regula la relación existente entre la madre comunitaria y el ICBF, el análisis hecho por parte de la Corte continúa siendo muy pobre. Como bien se expone en el salvamento de voto, el asunto central de la providencia debió ser el de dilucidar la verdadera naturaleza del vínculo contraído entre ICBF y madres comunitarias. Sin embargo, en la providencia se puede ver cómo éste aparte es despachado sin mayor análisis sustancial. La Corte se limita a enunciar los elementos propios de un contrato laboral, para luego, sin ninguna confrontación material que medie, decir que en el caso de la demandante, y en general de las madres comunitarias, estos elementos no se cumplen. Finalmente, y siguiendo una argumentación completamente exegética, se dice que no puede hablarse de una vulneración al derecho al trabajo, en tanto que, de acuerdo al decreto 1340, no existe una relación laboral.

Es claro, y en esto se coincide con los magistrados que salvaron su voto, que una argumentación adecuada con respecto al cargo por la vulneración al derecho al trabajo, debió traer consigo una discusión doctrinal, que confrontara la realidad fáctica de la labor de la madre comunitaria, con la idoneidad de la norma que regula la relación, y con la aplicabilidad del principio de contrato realidad en derecho laboral.

Con respecto a la violación del derecho a la igualdad, la Corte nuevamente es limitada en su argumentación. No se extiende más allá del criterio usado –el de la edad – para el cierre del hogar comunitario, y la desvinculación de la madre. Se llega a la conclusión de que no existe discriminación, pues el criterio, establecido en un acuerdo, le es aplicable a todas las demás madres comunitarias.

Nuevamente, no se tiene en cuenta la condición desigual en la cual trabajan las madres comunitarias, al no recibir los mismos beneficios y las mismas contraprestaciones que recibe un trabajador normal.

T 628 DE 2012

Una madre comunitaria, que padece de Sida, demanda al ICBF, por considerar que le han sido violados sus derechos a la igualdad, a la dignidad humana, a la salud, a la seguridad social, a la intimidad y al debido proceso. Según ella, el hogar comunitario que estaba a su cargo, y en el cual trabajaba para obtener su sustento, fue cerrado, luego de una persecución iniciada en su contra, luego de que los funcionarios del ICBF se enteraran de su enfermedad.

Por primera vez, luego de más de 20 años de creadas las madres comunitarias, la Corte Constitucional resuelve una sentencia en favor de ellas. En esta sentencia, finalmente La Corte decide darle importancia a la situación irregular de vulneración de derechos a la que estaban siendo sometidas las madres comunitarias del programa de hogares comunitarios del ICBF.

La Corte deja lado el análisis exegetico y superficial que caracterizaba las anteriores sentencias en ésta materia, y se encarga de dar un nuevo giro. Se aleja de la tesis primitiva, sostenida anteriormente, en la cual se toma la relación entre el ICBF y la madre comunitaria como de carácter civil. La Corte entiende, y así lo expone, que aunque haya normativa que regule el tema, también existen preceptos constitucionales que abren puertas para que la regulación de la relación ICBF – madres comunitarias, tome otro rumbo.

Sin embargo, concretamente en materia laboral no se llega a un punto fijo. Si bien la Corte abre la posibilidad de que un juez competente puede llegar a declarar la existencia de un contrato de trabajo, dadas las condiciones fácticas de ejecución del contrato por parte de la madre comunitaria, esto se daría para cada caso en concreto, y la Corte no estaría facultada para hacerlo toda vez que se estaría excediendo en sus facultades como juez de tutela. Llegando de ésta manera a decirse simplemente que la relación existente con la madre comunitaria, es un régimen especial situado entre el derecho laboral y el derecho civil.

Hay otra parte de la argumentación de la Corte que resulta de suma importancia: es la que se desarrolla alrededor del derecho a la igualdad. La Corte, esta vez, además de centrarse en el factor de la discriminación, que conllevó al cierre del hogar comunitario, en éste caso el sida, lleva el asunto a un nivel más abstracto, cuestionando las condiciones de igualdad en los cuáles es regulado el oficio de las madres comunitarias. En éste aspecto afirma que el hecho de que la labor de las madres comunitarias no sea considerada como un trabajo, no es perse discriminatorio; lo que termina siendo discriminatorio, son aquellas diferencias entre las contraprestaciones que recibe un trabajador regular y una madre comunitaria, y que van en perjuicio de éstas últimas. Las diferencias en detrimento de las madres comunitarias, luego de una confrontación entre los beneficios que recibe cada uno,

trabajadores y madres, termina demostrándose; dando lugar entonces a la existencia de la discriminación.

2.2.2. Consejo de Estado

Sin ser muy prolífica la producción jurisprudencial, en materia de madres comunitarias, en el ámbito administrativo, si se ha encontrado que el Consejo de Estado resuelve con un poco más de frecuencia temas relacionados con los hogares comunitarios. El tema que ha resuelto éste tribunal y que nos interesa particularmente, es el que tiene que ver con las fallas en el servicio que se ocasionan al interior de los hogares comunitarios. Nos interesa pues es en éstos fallos que el Consejo de Estado entra a analizar la naturaleza del vínculo entre madre comunitaria e ICBF.

Las acciones que llegan al Consejo de Estado con casos que involucran madres comunitarias, son apelaciones o tutelas, que recurren alguna decisión previa de acción de reparación directa⁵². Se demanda al ICBF para que se le declare responsable por alguna falla en el servicio ocasionada al interior de un Hogar Comunitario, y que presuntamente es imputable a la madre comunitaria que está a cargo. Más allá del juicio que se haga con respecto a la configuración de la falla en el servicio, lo cierto es que el Consejo de Estado ha sido uniforme en su jurisprudencia al establecer que el ICBF debe ser responsable por los hechos de las madres comunitarias, cuando éstos se den dentro del hogar comunitario, en razón de su labor⁵³.

No obstante, el análisis que hace el tribunal resulta un tanto contradictorio: Por un lado, se toma la posición de que no hay vínculo laboral u oficial, atendiendo a las reglamentaciones al respecto. Sin embargo, es a partir del análisis que se hace de ésta misma reglamentación, que el Consejo de Estado, considera que hay una relación, técnica, administrativa y económica, lo suficientemente estrecha entre los hogares comunitarios y el ICBF, como para conseguir que se configure la responsabilidad en cabeza de la entidad estatal⁵⁴.

En éste punto es de recordar que la falla en el servicio se configura cuando obra una acción o una omisión de una entidad administrativa o de sus dependientes, a partir de la cual es generado un daño antijurídico. Que el Consejo de Estado determine que las madres comunitarias no tienen vínculo laboral u oficial, pero que el ICBF si debe responder por

⁵² Concejo de Estado. Sala de lo contencioso administrativo. Sección segunda, subsección B. Sentencia del 28 de Noviembre de 1996. Expediente 13023. C.P. Javier Díaz Bueno.

⁵³ Concejo de Estado. Sala de lo contencioso administrativo. Sección tercera, Subsección C. Sentencia del 9 de mayo de 2011. Expediente: 050012331000200101546 02. C. P. Enrique Gil Botero.

⁵⁴ Concejo de Estado. Sala de lo contencioso administrativo. Sección Segunda, Subsección B. Sentencia del 9 de diciembre de 2012. Radicado número 11001-03-15-000-2010-01181-00(AC). C.P. Gerardo Arenas Monsalve.

las fallas que se presenten dentro de los hogares comunitarios, es contradictorio, pues la falla en el servicio solo le sería imputable si y solo si la madre comunitaria actúa como agente del ICBF⁵⁵.

2.2.3. Análisis de la jurisprudencia en el caso de las madres comunitarias

Lo que se puede abstraer, tanto de la posición de la Corte Constitucional y del Consejo de Estado, es que en ambas partes hay una resistencia injustificada a catalogar la labor de cuidado de las mujeres que trabajan en los hogares comunitarios, como un trabajo digno de ser protegido por la legislación laboral. De hecho, de las consideraciones expuestas por ambos tribunales es posible ver que en el caso de las madres comunitarias se encuentran constituidos todos los elementos exigidos por la legislación. A saber:

- La actividad personal del trabajador: Esta se da a partir del cuidado personal que hacen las madres comunitarias a los niños que llegan a los hogares comunitarios.
- La continuada subordinación o dependencia del trabajador respecto al empleador: Esta se configura a partir de los lineamientos y vigilancia que le establece el ICBF a las madres comunitarias, para el funcionamiento de los hogares, y que de no ser cumplidos son causales para el cierre de éste.
- Finalmente, un salario como contraprestación del servicio: éste se constituye a partir de las bonificaciones que el ICBF le da a la madre comunitaria por el ejercicio de su labor.

Cuando se reúnen estas tres exigencias, de acuerdo al artículo 23 del código sustantivo de trabajo, se deberá entender que existe un contrato de trabajo, y no deja de serlo por razón del nombre que se le dé, o por condiciones adicionales que se impongan.

Que pese a lo anterior, el Estado siga negándose a reconocer el trabajo de las madres comunitarias, de manera formal, resulta completamente discriminatorio con estas mujeres, pues sin argumentos de peso, se le está dando un trato diferenciado que va en perjuicio de sus derechos constitucionales al trabajo y la igualdad. Es más grave aún, si se tiene en cuenta que la discriminación resulta a partir de la reproducción de esquemas históricos de dominación sobre la mujer. El programa de Hogares Comunitarios, al mantener en la informalidad y desregulación la labor que realizan las madres comunitarias, además de estar fomentando un espacio viciado en donde ni los derechos de las mujeres de estratos bajos, ni los derechos de los niños se ven beneficiados, está también invisibilizando y subestimando el trabajo reproductivo que realizan las mujeres. Esto refleja una visión de mundo según la cual solo el trabajo productivo, el que históricamente se le ha atribuido al hombre, es el único que debe ser tomado formalizado y regulado. Mientras que el trabajo

⁵⁵ Ibid.

de cuidado, el que se desarrolla en el ámbito privado, al interior de los hogares, atribuido a la mujer históricamente, continúa sin valor alguno⁵⁶.

3. Violación de los convenios con la OIT

Por disposición expresa del artículo 53 constitucional, los tratados y convenios del trabajo que hayan sido debidamente ratificados, entran a hacer parte de la legislación interna colombiana. Adicionalmente si los convenios y tratados internacionales versasen sobre derechos humanos, por disposición del artículo 93 de la Carta, estos tendrán fuerza de norma constitucional, por lo que tendrán prevalencia en su aplicación e interpretación, por encima de cualquier ley ordinaria.

De acuerdo a lo expuesto a lo largo del documento, existen elementos para concluir que el Estado Colombiano ha actuado en contra de las disposiciones de los convenios 100 y 111 de la OIT, ya ratificados en debida forma. Las vulneraciones a estos convenios se han dado por el trato discriminatorio que da el sistema jurídico colombiano a la labor de las madres comunitarias.

Se considera que el desacato a las normas de los nombrados convenios, no solo significa un irrespeto a lo pactado ante la OIT, ni una violación simple a las normas del ordenamiento, de acuerdo al artículo 53 de la Constitución. Adicional a ello, constituye una violación a las normas constitucionales que rigen el estado Colombiano, y a los principios fundamentales de los derechos humanos, que rigen el orden internacional. Esto toda vez que tanto el convenio 100 como el convenio 111, al proscribir la discriminación en la remuneración de los trabajadores en razón de su género, y la discriminación general en el trato a los trabajadores, está dando desarrollo a las disposiciones 1 y 7 de la declaración universal de los derechos humanos. En efecto al proscribir la discriminación en los citados convenios sobre trabajo, se está buscando materializar el derecho fundamental de la igualdad. En éste sentido, en la medida que estos dos convenios de la OIT tratan sobre derechos humanos, es claro que hacen parte del bloque de constitucionalidad, y por ende tienen una fuerza normativa de carácter fundamental, dentro del ordenamiento colombiano.

2.1 Convenio 111: Convenio sobre la discriminación

Por medio de la adopción de éste convenio los países miembros buscaban establecer disposiciones propendiendo por eliminar la discriminación en materia de empleo y ocupación. Esto buscando darle aplicación material a la Declaración de Filadelfia, y a la

⁵⁶ Benería, L. (2006). Trabajo productivo/reproductivo, pobreza y políticas de conciliación. *Nómadas*, (24), 8–21.

Declaración Universal de los Derechos Humanos, según las cuales la igualdad se erige como un derecho humano y fundamental.

En el artículo primero del Convenio 100 en su literal b, se define discriminación como cualquier distinción, exclusión o preferencia que tenga por efecto anular o alterar la igualdad de oportunidad o de trato en el empleo u ocupación (...). Además, se impone como obligación formular y llevar a cabo políticas nacionales que promuevan las condiciones de igualdad de oportunidades y de trato en materia de empleo y ocupación.

Que las disposiciones anteriores se encuentren aprobadas dentro del ordenamiento interno colombiano, no significa solamente que existe un parámetro lato de interpretación, que de manera opcional guía las actuaciones legislativas. Como lo ha establecido la Corte Constitucional en la sentencia C 401 de 2005 *“algunos convenios deben necesariamente formar parte del bloque de constitucionalidad, puesto que protegen derechos humanos en el ámbito laboral”*⁵⁷. En la misma sentencia se define el bloque de constitucionalidad como:

*“Aquellas normas y principios que, sin aparecer formalmente en el articulado del texto constitucional, son utilizados como parámetros del control de constitucionalidad de las leyes, por cuanto han sido normativamente integrados a la Constitución, por diversas vías y por mandato de la propia Constitución. Son pues verdaderos principios y reglas de valor constitucional, esto es, son normas situadas en el nivel constitucional, a pesar de que puedan a veces contener mecanismos de reforma diversos al de las normas del articulado constitucional stricto sensu”*⁵⁸.

La situación irregular en que se ha mantenido la figura de las madres comunitarias en Colombia, claramente implica un desacato al articulado del convenio 111. Esto quiere decir además, que existe una vulneración sistemática por parte del Estado colombiano, en contra de la declaración universal de los derechos humanos, y del orden constitucional interno.

Al mantenerse una regulación informal, ambigua e imprecisa, que ha mantenido a las madres comunitarias en una desventaja palpable con respecto a los trabajadores legalmente reconocidos, se está configurando una diferenciación injustificada, que se configura dentro de la definición de discriminación establecida por el Convenio 111. Tanto de manera administrativa, legislativa y judicial, se han visto los esfuerzos de crear distinciones con respecto a la labor que desarrollan las madres comunitarias que van en perjuicio de sus oportunidades de obtener los mismos y derechos y garantías, de parte de la legislación laboral.

⁵⁷ Corte Constitucional. Sentencia C 104 de 2005. M.P. Manuel José Cepeda.

⁵⁸ Ibid.

Ya se ha mostrado cómo el trabajo de cuidado que realizan las madres comunitarias sí tiene los elementos exigidos para que se constituya un contrato de trabajo. Esto quiere decir que frente a la ley, las madres comunitarias se encuentran en una misma situación con respecto a los trabajadores ordinarios. Sin embargo, sin una justificación válida, el ordenamiento jurídico colombiano se niega a reconocer las garantías propias que por derecho les corresponden a los trabajadores. Pese a que se han conseguido los reconocimientos que ya se vieron en materia de seguridad social, también es posible ver que las recomendaciones de los organismos internacionales de establecer un vínculo de trabajo formal con las madres comunitarias, viene siendo incumplido de manera sistemática. No obstante encontrarse las madres comunitarias en la misma situación material de un trabajador, jurídicamente aún no se le reconoce un salario mínimo, unas prestaciones sociales, y una garantía frente a su empleador, que equilibre las cargas que se dan en razón de la subordinación existente.

Pero la discriminación no es una discriminación ordinaria, sino que tiene un trasfondo patriarcal, según el cual el trabajo de cuidado de la mujer no debe ser considerado como valioso, y por ende, debe ser mantenido en la informalidad y la desregularización. Que el trabajo de las madres comunitarias tenga un trato desigual, no solo implica una simple situación de discriminación contra estas trabajadoras, sino que además es un ejemplo gravísimo de discriminación de género.

2.2. Convenio 100: Sobre la igualdad en la remuneración.

De acuerdo al preámbulo del Convenio 100, éste es adoptado buscando establecer disposiciones tendientes a materializar el principio de igualdad de remuneración entre la mano de obra masculina y la mano de obra femenina por un trabajo de igual valor. La obligación principal que surge de éste convenio tiene que ver con la implementación de las medidas necesarias para conseguir que las tarifas establecidas para remunerar el trabajo no resulten discriminatorias entre hombres y mujeres.

De nuevo, se considera que éste convenio hace parte del bloque de constitucionalidad, en la medida que está buscando eliminar una de las formas de discriminación, propendiendo entonces por la concreción del derecho a la igualdad.

Colombia ha venido violando las disposiciones del Convenio 100 al establecer un pago por debajo del salario mínimo a la labor realizada por las madres comunitarias. Como ya se estableció anteriormente, las madres comunitarias ejercen su oficio bajo las mismas condiciones bajo las cuales labora un trabajador ordinario, por lo que de acuerdo a éste convenio, resulta imperativo que reciban por lo menos el monto mínimo que le es reconocido legalmente a un trabajador.

Ahora, si se trata de darle un valor al trabajo de las madres comunitarias, hay que darse cuenta del papel fundamental que ellas juegan, por un lado en la garantía de los derechos fundamentales de los niños de escasos recursos, y por otro lado en el empoderamiento de la mujer en el mercado laboral.

Las madres comunitarias siendo las principales encargadas de atender las necesidades de alimentación, salud y educación de los niños de escasos recursos, están llevando a cabo una labor reproductiva a escala, de fundamental importancia en el desarrollo económico. En ese sentido, labor de las madres comunitarias se refleja en unos buenos resultados frente a la primera infancia.

Por otra parte, que las madres comunitarias se encarguen del cuidado de los niños, implica además que las madres biológicas o adoptivas de estos niños podrán ocupar el tiempo que normalmente usarían en la crianza de sus hijos, tratando de acceder al mercado laboral. A su vez, que las mujeres de estratos bajos puedan acceder al mercado laboral implica un aumento en su poder adquisitivo, lo que desencadena en una mayor independencia con respecto a su pareja masculina, y consecuentemente una baja en la violencia contra éstas mujeres⁵⁹.

Es claro que el trabajo de las madres comunitarias tiene un alto valor social, que sin embargo no se ve reflejado en la valoración económica que el Estado colombiano se niega a reconocerle. Las madres comunitarias realizan un trabajo, bajo las condiciones y elementos exigidos por la legislación. El trabajo tiene una repercusión social importante, tan importante como el trabajo que ejerce cualquier otro miembro de la sociedad, pero aún así su pago por esto, está muy por debajo del umbral de salario mínimo.

Conclusión

De todo lo dicho anteriormente, solo resta reiterar la necesidad de que se entable una vigilancia internacional directa, que se encargue de velar porque el gobierno colombiano ejecute los cambios prometidos en la regulación interna, de manera que se consiga una situación de igualdad material en la labor que desarrollan las madres comunitarias.

Si bien el gobierno ha hecho la promesa de un salario mínimo y un vínculo laboral en estricto sentido, para las madres comunitarias, a partir del próximo año, lo que se ha visto como constante en la historia del programa HCB, es que el gobierno lleva casi

⁵⁹ Estos resultados fueron los hallazgos de la investigación doctoral “Activismo burocrático- la construcción cotidiana del principio de legalidad. Un estudio de caso de las madres comunitarias y los HCB” desarrollada por la estudiante de Doctorado en derecho Lina Buchely de la Universidad de los Andes.

veinte años incumpliendo las promesas de regularización igualitaria para el trabajo de estas mujeres.

Las repercusiones sociales del trabajo de las madres comunitarias, y la vulneración de derechos fundamentales que han sufrido de manera sistemática, son dos argumentos los suficientemente importantes, como para sustentar una intervención de carácter urgente.

ANNEX IV: POSITION PAPER PRESENTED BEFORE THE REGULATORY COMMISSION FOR DRINKING WATER AND SANITATION (CRA) IN COLOMBIA

Bogotá, D.C., 24 de septiembre de 2013

Señores

Subdirección Técnica

Comisión de Regulación de Agua Potable y Saneamiento Básico – CRA

Ciudad

Asunto: participación ciudadana - Resolución CRA N° 643 del 24 de junio de 2013 sobre el proyecto de nuevo marco regulatorio de aseo.

Carolina Moreno Velásquez, identificada como aparece al pie de mi firma, vinculada al proyecto de investigación “*Global Administrative Law Network - Improving Inter-Institutional Connections to Promote Inclusive Growth: Inter-Institutional Relations in Global and National Regulatory Governance*”, que se lleva a cabo en la Facultad de Derecho de la Universidad de los Andes y dentro del término previsto por la Comisión para la participación ciudadana frente a la resolución del asunto, por medio del presente escrito someto a su consideración algunos comentarios sobre el nuevo marco regulatorio de aseo. Lo anterior, de conformidad con las disposiciones constitucionales que protegen y promueven la democracia participativa y el derecho de petición ante las autoridades públicas.

El presente comentario se orientará a advertir algunos aspectos críticos que encuentro en la resolución frente al componente del aprovechamiento, los que se harán a la luz de su contraste con las consideraciones y órdenes proferidas por la Corte Constitucional mediante decisiones T-724 de 2013 y sus autos de seguimiento (A-268 de 2010 y Auto 275 de 2011). Estas observaciones se referirán a algunos aspectos del “documento de trabajo proyecto general” en el componente de “aprovechamiento y su reconocimiento en la tarifa del servicio público de aseo” (en adelante DTPG – Aprovechamiento) y a la resolución del asunto como tal.

De acuerdo con el documento DTPG – Aprovechamiento:

“En cuanto a la regulación, esta se encarga exclusivamente del servicio público de aseo y reconoce vía tarifa el componente de recolección y transporte de los residuos aprovechables. En ese orden de ideas, el residuo recuperado para aprovechamiento tiene un mercado donde se valoriza y el agente obtiene un ingreso por ello, y por lo tanto no hay razón para incluir actividades comerciales en la remuneración vía tarifa. Teniendo en cuenta lo anterior, la CRA en su propuesta para el nuevo marco tarifario del servicio público de aseo, planteó la remuneración tarifaria de las actividades enunciadas anteriormente, mediante el esquema de costos evitados”. (DTPG – Aprovechamiento, p. 3). (Subrayas fuera de texto).

A pesar de reconocer las condiciones de exclusión y marginalidad bajo las cuales la población recicladora ha venido desarrollado su trabajo durante décadas, el que constituye un típico servicio público, la resolución revela la orientación que caracterizará el nuevo marco regulatorio. En efecto, lo primero que se expresa en el documento señalado es precisamente que no hay razón para la remuneración de los recicladores a través de la tarifa, toda vez que, se asume, ellos tienen acceso a un mercado en el que se comercializa el material recuperado. Lo primero que habría que señalar en este punto es que, un marco regulatorio que no incorpora el componente del aprovechamiento dentro del esquema de prestación del servicio, para que estos prestadores históricamente informales puedan acceder a la remuneración del servicio, como prestadores que son, perpetúa su condición de marginalidad social y económica; asimismo, no estaría atendiendo los parámetros regulatorios de orden constitucional que ha dictado la Corte Constitucional.

Esta propuesta de regulación formaliza y refuerza una dicotomía ampliamente discriminatoria en la que se enfrentan dos agentes: por una parte, los operadores del aseo o prestadores formales; y por otra, los recicladores o prestadores informales. Los primeros son protegidos por el marco regulatorio lo que se traduce, ni más ni menos, en la garantía de la remuneración, vía tarifa, de todos los costos en que incurren para la prestación del servicio, incluida su utilidad. Para los otros no hay tal. De acuerdo con el proyecto de resolución, si al día de hoy los recicladores han podido subsistir con los ingresos que han podido derivar de la comercialización del material recuperado, la situación no tendría por qué ser diferente con la entrada en vigencia de la nueva regulación y sería suficiente con la incorporación de los costos evitados. Así, la pauta que está dando la CRA, a través de la presente propuesta, es precisamente la de perpetuar el trabajo “*con las uñas*” que los recicladores de oficio han venido haciendo hasta ahora. Aquel proyecto que reconoció la Corte en las decisiones mencionadas, en el sentido de incorporar a los recicladores, pierde fuerza con la implementación de la regulación propuesta.

Otro aspecto del documento que llama la atención, y que está muy vinculado con el comentario anterior, es el siguiente:

“Por otro lado, en relación con la viabilidad de la actividad en forma integral, según la normatividad, los proyectos de aprovechamiento deben ser formulados por los municipios y distritos en el Plan de Gestión Integral de Residuos Sólidos, con la participación e inclusión de los recicladores y deben ser viables y autosostenibles. De esta manera, la formalización de los recicladores y el apoyo a estos grupos, con la infraestructura que se requiere para dar valor agregado a los materiales, debe provenir de fuentes diferentes a la tarifa y es ahí donde los entes territoriales deben hacerse partícipes, a través de políticas sociales y económicas”. (DTPG – Aprovechamiento, p. 3). (Subrayas fuera de texto).

Sin duda, hacer depender el cumplimiento de la orden de la Corte Constitucional, en el sentido de incorporar a los recicladores populares o de oficio al esquema de prestación del servicio de aseo, de la autonomía y capacidad de los entes territoriales, reduce muchísimo la capacidad que tiene la regulación que emite la Comisión, en su calidad de agencia técnica del sector en el orden nacional, de incidir en la definición de las condiciones técnicas, jurídicas y financieras que rigen esta actividad o sector del aseo en Colombia. Ésta sería la vía más expedita para que las autoridades locales aduzcan su incapacidad institucional, cualquiera que ésta asea, para no apostarle a la inclusión de los recicladores en sus respectivos modelos de prestación del servicio público.

Al respecto, no sería exagerado vaticinar que esto, lo que promoverá en el futuro cercano, es la agudización de la judicialización de la política pública del aseo. Sin que ello redunde, necesariamente, en la mejora o transformación de la situación actual de esta población históricamente marginalizada. Si bien es cierto, como lo resalta la CRA, hay algunas de las órdenes que emitió la Corte en contra de la Comisión que se encuentran por fuera de sus competencias legales, lo cierto es que la agencia de regulación puede ir más allá en el señalamiento de incentivos que favorezcan la situación de los recicladores y sin escapar su ámbito competencial.

Esto se halla sensiblemente vinculado con el artículo 8 de la resolución en comento, que viene formulada en los siguientes términos:

ARTÍCULO 8. Coordinación del municipio y/o distrito. En virtud de lo señalado en el artículo 5 de la Ley 142 de 1994 y en concordancia con lo previsto en las normas que reglamentan el Plan de Gestión Integral de Residuos Sólidos (PGIRS), será el municipio o distrito como garante de la prestación eficiente del servicio público de aseo, el responsable de incluir en dicho plan los proyectos y planes en relación con la prestación de este servicio, y asegurar en la medida de lo posible la participación de los recicladores debidamente organizados como prestadores del servicio público de aseo en las actividades de aprovechamiento de los residuos sólidos. Una vez se formulen, implementen y entren en ejecución los programas de aprovechamiento evaluados como viables y sostenibles en el PGIRS, se entenderá

que el aprovechamiento deberá ser ejecutado en el marco de dichos programas.

Parágrafo. El Alcalde podrá incluir en el PGIRS, con cargo a sus recursos y dentro del marco legal la constitución de encargos fiduciarios como uno de los posibles mecanismos que permitan la efectividad de los objetivos en materia de residuos sólidos aprovechables. (Subrayas fuera del texto original).

Nadie duda de que son las autoridades territoriales las encargadas de asegurar que los servicios públicos efectivamente se presten, bien sea a través de personas públicas, privadas o mixtas; éste tópico hoy, parece bastante pacífico y claro. Lo que sí genera muchas dudas, es que la regulación que parecería orientarse al cumplimiento de las órdenes de la Corte, que también funge en este caso como una típica autoridad regulatoria del sector, se limite a señalar a las autoridades del orden territorial “la potestad” de tomar las medidas encaminadas a incluir a los recicladores de oficio en sus respectivos esquemas de aseo. Está claro que si esto no es señalado como un mandato de obligatorio cumplimiento, las autoridades locales no tendrán ningún incentivo para hacerlo, dado los costos que ello representa y que por supuesto no desconozco tampoco. Nadie dijo que transformar el modelo de prestación del servicio de aseo en el país fuera fácil; pero no por eso hay que dejar de hacerlo. Ésta es una transformación que hay que tomarse en serio, si, como lo dijo la Corte, hay que hacer de los recicladores verdaderos empresarios del aseo.

Al respecto, entiendo que las consideraciones y órdenes del juez constitucional dan respaldo suficiente para que el mentado artículo 8 esté redactado en términos de “deberá” y no de “podrá en la medida de lo posible”. Los fallos de la Corte que protegieron la población recicladora, aunque se produjeron dentro de un proceso judicial iniciado, principalmente por la ARB y la ANR y sus representantes, contra las licitaciones del servicio que se pretendía prestar en la ciudad de Bogotá, lo cierto es que concluyeron en la emisión de sendas órdenes que protegieron a la población recicladora de todo el país. Población que hoy se está jugando parte importantísima en la definición de la nueva regulación del aseo que entrará a regir desde el próximo mes. A partir de dichos fallos, se emitieron órdenes que cobijaron a las autoridades de regulación en sentido amplio, o dicho de otro modo, que tienen que ver con el diseño de las reglas de juego que rigen el sector del aseo. Ello, por supuesto, involucró a la agencia experta del orden nacional como lo es la CRA, pero también a las autoridades locales que tienen a su cargo el diseño de la prestación del servicio y/o su prestación misma.

Si la agencia de regulación del sector de aseo del orden nacional, la CRA, no se aventura a emitir estas órdenes con carácter mandatorio, no es muy difícil adivinar que las autoridades territoriales tampoco lo harán, pues la decisión administrativa que tendrán que cumplir y ejecutar (la resolución de la CRA), así no lo está disponiendo. Qué fácil resultará entonces declinar la tarea de incorporación de la población recicladora, argumentando el estricto cumplimiento del principio de legalidad, en este caso, de la regulación de la CRA; y que

sean los afectados o los inconformes, recicladores de las calles, los abogados a controvertir el diseño del esquema de prestación ante las autoridades judiciales. Tal como lo señalé, esto sólo va a agudizar más la controversia, en el escenario judicial, sin que ello se traduzca en una transformación favorable y significativa de la situación de los recicladores.

Finalmente, no basta con señalar que el sector del reciclaje pertenece a los recicladores y que en manos de ellos mismos debe permanecer esta actividad. Más allá de ese reconocimiento, valioso por demás, que hizo la Corte y que ratifica la CRA en su documento de trabajo y en la resolución en discusión, deben adoptarse las medidas adecuadas y suficientes para garantizar que ello efectivamente ocurra. Está bien proteger a los operadores quienes prestan el servicio público de aseo y garantizar su justa remuneración; eso es algo que no está en discusión aquí. Lo que resulta cuestionable, es blindar un esquema que, por una parte, le impone obligaciones a los recicladores, en tanto prestadores de un servicio público domiciliario, pero no les ofrece las garantías económicas suficientes para efectivamente insertarse en el modelo de prestación. Lo que los recicladores reciben por concepto de la comercialización del material que recuperan y “el costo evitado” que trae la propuesta de regulación, no remuneran lo que ellos tienen que hacer desde que acceden a la fuente del material hasta que lo comercializan.

Es cierto que la Corte Constitucional, mediante Auto 084 de 2012 resolvió “Declarar que la CRA remitió dentro del término exigido por el Auto 275 de 2011 un esquema de las actuaciones que ha adelantado y continuará desarrollando conforme con sus competencias legales”. Pero también lo es que, punto seguido, la Corte insta a la Comisión para que “(...) contin[úe] con el proceso, siguiendo los postulados de la colaboración armónica entre entes públicos para la materialización de los derechos del referido grupo sujeto de especial protección constitucional (...)”. Bajo el entendido de que este es un proceso de construcción de un nuevo marco regulatorio, el que señalará las pautas para el diseño de los modelos de prestación del servicio de aseo en todo el país, para los próximos cinco años, espero que la Comisión considere las anteriores razones con el fin de decidir una regulación que, además de los objetivos del nuevo marco tarifario, también se oriente, de manera decidida y comprometida, hacia la incorporación real de los recicladores de oficio. Mejoramiento continuo y permanente de los estándares del servicio; costos diferenciados por tamaño de mercado; garantía de la suficiencia financiera con costos eficientes; protección de fuentes hídricas mediante el tratamiento de lixiviados e incentivo para esquemas regionales eficientes, son por supuesto fines imperiosos de un Estado que debe asegurar y garantizar la permanente y eficiente prestación de los servicios públicos. Sin embargo, también debe ser y lo es, la protección de una población vulnerable, cuya inclusión en el negocio del aseo hoy no es una potestad, sino una obligación de rango constitucional, la que las autoridades no puede desconocer, eludir ni aplazar.

Atentamente,

CAROLINA MORENO VELÁSQUEZ

C.C.: 43.867.114.

camoreno@uniandes.edu.co

Cel.: 310.8254699

ANNEX V CONFERENCES OF COMPONENT I

Law and Society Conference 2013: Panel “Relations between National Courts and Regulatory Institutions in ‘The Regulatory State of the South’ (sponsored by IDRC)”

The panel on the “Relations between National Courts and Regulatory Institutions in ‘The Regulatory State of the South’” highlighted the distinctive role that the judiciary plays in the Regulatory State of the Global South. Despite the fact that national and international courts have become deeply immersed in regulatory regimes, current academic work has given little attention to the courts’ regulatory role. The papers that were discussed in this panel aim at filling this gap by answering some of the following questions: How do courts affect regulatory policy? How do existing adjudicatory structures deal with challenges to regulatory agencies? How do courts adapt to changes made at the regulatory level? Is there an identifiable pattern to how courts adjudicate challenges to regulatory agencies? To what extent the outcomes of judicial processes can be used to evaluate the performance of a regulatory agency?

In mapping these complex interactions, the panel focused on three case studies in South America: Colombia, Argentina and Brazil. Each case study was centered on a specific regulatory regime, and analyzed the complex interactions that take place between courts and regulatory agencies. Vertical relations between national and international institutions, especially international courts, were also examined by some of these papers that propose the existence of a triangle of interaction among domestic courts, international institutions, and domestic regulatory agencies.



Session Participants:

Florencia Delia Lebensohn
(Universidad de Buenos Aires)

Carolina Moreno (Los Andes
University)

Fernando Mussa Abujamra Aith
(University of So Paulo)

Maria A. Prada (Universidad de los
Andes) and Santiago Rojas
(Universidad de los Andes)

Paulo Furquim de Azevedo (Sao
Paulo School of Economics - FGV)

Discussant: Mariana M Prado
(University of Toronto)

Chair: Rene Uruena (Universidad
de Los Andes)

IGLP Conference Panel: Experts v. Judges? Courts and Regulatory Governance in Latin America



Session Participants:

Rene Urueña (Universidad de los Andes)
Moderator

Fernando Aith (University of Sao Paulo)

Florencia Delia Lebensohn (University of Buenos Aires)

Carolina Moreno (Universidad de los Andes)

Maria Prada (Universidad de los Andes)

Santiago Rojas (Universidad de los Andes)



Law and Justice Week 2013: Courts and the Science of Delivery in Latin America

In November 2013 Rene Urueña presented the project at the Law and Justice Week organized by the World Bank in Washington D.C. The panel presented the general framework of the investigation and three case studies on Argentina, Brazil and Colombia. Judge Felipe Viaro from the Justice Tribunal of Sao Paulo was invited to comment on the case studies based on his experience as a judge. The panel was successful, especially for

the interest that it produced on other Brazilian judges that were present at the Conference. The following is the information on the panel:

Summary of the panel:

This session is part of a broader research project, the “Global Administrative Law Network – Improving Inter-Institutional Connections to Promote Inclusive Growth: Inter-Institutional Relations in Global and National Regulatory Governance”, which is sponsored by the International Development Research Centre. The panel used three cases studies to explore: 1) the interaction between Courts and regulatory agents and 2) the judiciary’s role in the complex process of service and development delivery. The Argentinean case study analyzed the role of the Supreme Court of Argentina in the environmental dispute on the Matanza-Riachuelo River Basin; the Colombian case study explored the Constitutional Court’s role in regulating Colombia’s healthcare system; and the Brazilian case study investigated the reasons behind the high levels of litigation between clients and financial institutions. These cases demonstrate that courts have become a platform for experimentation where trial and error characterize the interaction between Courts and regulatory agents.



For further information on the conference visit:

<http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTICE/0,,contentMDK:23384728~menuPK:2644004~pagePK:64020865~piPK:51164185~theSitePK:445634,00.html>

a. Project implementation and management until the final technical report

Final workshop in at the Getulio Vargas Foundation Law School in São Paulo, Brazil

In August 2014, a second workshop was held in the same venue. By the end of September 2014, authors submitted the final version of their papers, incorporating the feedback received.

As was the case with the first meeting at FGV, IDRC's resources covered airplane tickets, hotels and meals for the participants of the workshop. Getulio Vargas Foundation Law School has provided the space for the event, the organizational staff, and the coffee breaks.

Presentation of one of the new case studies in a Conference at Universidad de los Andes called “Latin American Week for the Protection of Minorities”

The European Union, the Network for Human Rights and Higher Education, and Universidad de los Andes organized several conference for the “Latin American Week for the Protection of Minorities”. Two of our researchers, Maria Cecilia Ibáñez and Robinson Sánchez, presented their research at the conference regarding “Comparative approaches and challenges for the right to prior consultation” on October 2, 2014.

Semana de la protección de grupos étnicos en América Latina

Conferencia descentralizada Red DHES



Entrada libre | cupo limitado

Miércoles 1 de octubre | 5:00 a 7:30 p.m. | salón 513 edificio Mario Laserna

Documental: Un país errante

Comentarista: Joaquín Garzón, Centro Internacional de Toledo para la Paz.

Presentación de los materiales de la RED ALPHA, a cargo de René Urueña, director del Área de Derecho Internacional de la Facultad de Derecho de la Universidad de los Andes.

Inscripción: sf.vasquez21@uniandes.edu.co

* Agenda sujeta a cambios

Jueves 2 de octubre | 10:00 a 11:30 a.m. y 2:00 a 3:30 p.m.

Foro: Protección nacional e internacional de minorías

10:00 a 11:30 a.m. | Salón: Hemiciclo - 001

Panel 1: Perspectivas y retos de la consulta previa

- **Carlos Baquero**, Dejusticia.
- **Nicolás Montoya**, Université de Paris 1 Panthéon-Sorbonne.
- **Robinson Sánchez y María Cecilia Ibáñez**, Universidad de los Andes. Portal de Consulta Previa

2:00 a 3:30 p.m. | Salón: LL - 304

Panel 2: Protección de minorías en América Latina

- **José Aylwin**, Universidad Austral de Chile.
- **Renata Bregaglio**, Universidad Católica del Perú.
- **Andrée Viana**, exdirectora de Consulta Previa, Ministerio del Interior.

Inscripción: <http://eventos.uniandes.edu.co/proteccionminorias1>

* Agenda sujeta a cambios

Viernes 3 de octubre | 10:00 a 11:30 a.m. y 2:00 a 3:30 p.m. | Salón: AU - 310

Foro: Medio ambiente, sociedad y minorías

10:00 a 11:30 a.m.

Panel 3: Medio ambiente y minorías étnicas

- **Carolina García**, WWF Colombia
- **Sebastián Rubiano**, Universidad de los Andes.
- **Catalina Vallejo**, Universidad de los Andes.

2:00 a 3:30 p.m.

Panel 4: Perspectivas sociales y jurídicas

- **Belkis Izquierdo**, magistrada auxiliar de la Sala Administrativa del Consejo Superior de la Judicatura.
- **Douna Tongrongou**, Universidad Nacional de Colombia.
- Programa para Afrodescendientes e Indígenas – USAID (por confirmar).

Inscripción: <http://eventos.uniandes.edu.co/proteccionminorias2>

* Agenda sujeta a cambios

Intensive course on Critical Approaches to International Investment Law: Challenges for the Regulatory State of the Global South

Part of the conclusions of all of the case studies, that had primarily an emphasis on the role of national courts in the Regulatory State in Latin America, is that an important international variable that is affecting the sectors they studied is the international investment regime. In order to respond to this concern, the team organized a three days conference where the researchers presented their work, and discussed this new variable with experts on international investment law.

This conference sought to have a wider policy impact in Latin America. For that reason, the event hosted researchers and experts on regulation and investment law that discussed the issues surrounding investment arbitration and its impact in the Regulatory State in Latin America. In August 2014, the team opened a call for applications, and received an unprecedented amount of submissions from all around Latin America. Since most of the researchers were located in Bogota, the team used the budget for the conference to pay for the travel expenses of regulation scholars and policy makers in other countries of Latin America. The following image corresponds to the call for application that was disseminated by Universidad de los Andes:

Curso intensivo: APROXIMACIONES CRÍTICAS AL DERECHO INTERNACIONAL DE LA INVERSIÓN EXTRANJERA Desafíos para el Estado regulador en América Latina

9, 10 y 11 de octubre de 2014

Académicos y expertos han advertido sobre la expansión del derecho internacional de la inversión extranjera y su poderoso impacto en el poder regulatorio del Estado, el cual – muchas veces – se ve limitado por los compromisos adquiridos por los países a través de tratados internacionales.

Objetivo

Ofrecer un espacio para la construcción de conocimiento sobre los efectos reguladores de los tratados internacionales de protección de la inversión extranjera en América Latina y su modelo de desarrollo.

Dirigido a

Estudiantes avanzados de pregrado, de posgrado, académicos y profesionales del sector público o privado interesados en profundizar su conocimiento sobre el arbitraje internacional de inversión (AIE) y su impacto en el desarrollo de sistemas jurídicos de América Latina.

Postulaciones

Fecha límite: hasta el 20 de septiembre de 2014. Quienes estén interesados deben diligenciar en su totalidad el formulario de postulación que se encuentra en <http://derecho.uniandes.edu.co> y enviarlo al correo electrónico ma.prada644@uniandes.edu.co.

Publicación lista de admitidos: 24 de septiembre de 2014, en <http://derecho.uniandes.edu.co>.

Becas

Gracias al apoyo del Centro de Investigación para el Desarrollo Internacional (CRDI) de Canadá, el curso será gratuito para todos(as) los(as) seleccionados(as). Además, existe un número limitado de becas para cubrir los pasajes y estadía de los(as) estudiantes provenientes de otros países o ciudades de Colombia. Quienes deseen aplicar a esta beca extendida deben indicarlo en el formulario de postulación.

Director

René Fernando Urueña Hernández
 Profesor asociado de la Facultad de Derecho de la Universidad de los Andes

Mecánica

Durante tres días, quienes resulten seleccionados(as) participarán en conferencias, charlas y seminarios dictados por académicos y profesionales expertos en derecho internacional de la inversión extranjera, con el objetivo de adquirir herramientas conceptuales y metodológicas para entender y enfrentar los retos regulatorios que se presentan como resultado de la ratificación de tratados bilaterales de inversión en la región. La mayor parte de sesiones será en español; la restante, en inglés, con acceso a traducción simultánea.

Temas

- Conceptos y debates clásicos de la inversión extranjera I: admisibilidad y jurisdicción de los tribunales de arbitraje de inversión.
- Conceptos y debates clásicos de la inversión extranjera II: obligaciones de los Estados frente a los inversionistas extranjeros.
- Nuevos desarrollos jurisprudenciales en el arbitraje de inversión extranjera.
- Aproximaciones críticas al derecho internacional de la inversión extranjera.
- Derechos humanos, derecho ambiental y el derecho internacional de la inversión extranjera.
- Desarrollo e inversión extranjera en América Latina.

Contacto

María Angélica Prada (ma.prada644@uniandes.edu.co)
 Profesora de cátedra de Derecho Internacional de la Facultad de Derecho de la Universidad de los Andes

The objective of the three days conference was twofold. On the one side, it sought to open a space in which the researchers could present their case studies and discuss the possible relations that exist between the regulatory regimes studied and international investment law. On the other side, the conference also sought to provide participants with a basic training on the concepts and theory of the Regulatory State of the South and international investment law. For that reason the program included in its first part introductory lectures on the Regulatory State of the South and international investment law, while it focused in the second part on the discussion of the case studies. A part from the case studies developed for this project, other regulatory case studies were discussed during the conference.

PROGRAMME

THURSDAY OCTOBER 9 2014

7 a.m. to 7:50 a.m. – Registration

8 a.m. to 9 a.m. – Professors René Urueña (Universidad de los Andes) - Introduction: The Regulatory State in Latin America and the Role played by Courts

9 a.m. to 10:30 a.m. – Professors Sebastián Machado (Office of the Attorney General, Colombia) - The Public policy to attract foreign direct investment as a dual problem of international and domestic law

11:00 a.m. to 1:00 p.m. – Professors Rafael Rincón (Law firm Gómez, Pinzón, Zuleta) – Introduction to international investment law arbitration I

1:00 to 2:30 p.m. – Lunch

2:30 p.m. to 4:30 p.m. – Professor María Angélica Prada (Universidad de los Andes) - Introduction to international investment law arbitration II

5 p.m. to 7 p.m. – Professors Markus Wagner (Universidad de Miami) – International Investment Law as Public Law (simultaneous translation to Spanish)

FRIDAY OCTOBER 10 2014

9:00 to 11:00 a.m. – Professors Markus Wagner (Universidad de Miami) – Case Study: Tabaco regulation in Australia and international investment law (simultaneous translation to Spanish)

11:30 to 12:30 – Professors René Urueña – International investment law as global governance

LUNCH		
02:00 to 3:30 p.m.	Professors Rafael Tamayo (Universidad de los Andes) – International investment law and environmental regulation	Profesor Florencia Lebensohn (Universidad de Buenos Aires) – The Matanza Riachuelo River Case: how could it be affected by international investment law?
10:00 Coffee break		
04:00 to 05: 30 p.m.	Professors Mario Osorio (DIAN) – International Investment Law and tax regulation	Professor Carolina Moreno (Universidad de los Andes) – Waste management regulation and human rights: A case study on the constitutional protection of waste pickers’ rights in Colombia

SATURDAY OCTOBER 11

08:00 to 10:00	Professors Álvaro Amaya (Universidad Javeriana) – International Investment Law and Human Rights	Professors Florencia Lebensohn (Universidad de Buenos Aires) – Challenges to the Argentinean Regulatory State by international investment law	
10:00 Coffee Break			
10:30 to 12:30	Professors Markus Wagner (Universidad de Miami) – The regulatory space between investment and commercial law	Professors María Angélica Prada and Santiago Rojas (Universidad de los Andes)– Regulating in the Shadow of the Courts: Healthcare Regulation and the Inter-American System of Human Rights	
12:30 -14:00 LUNCH			
14:00 to 16:00	Professor Rafael Tamayo (Universidad de los Andes) – Water regulation and international investment law	Professors María Cecilia Ibáñez and Robinson Sánchez (Universidad de los Andes)– The right to prior consultation and international investment law	Professor Estefanía Ponce (law firm Gómez, Pinzón, Zuleta) – Is it possible to have an Appellate Body in international investment law?
16:00 Coffee break			
16:30 to 18:00	Conclusions– René Urueña (Universidad delos Andes)		



Discussion with Professor Markus Wagner (University of Miami) on the role of international investment law as a form of public law



Rene Urueña discussing the objective of the project and the basic notions used in the Regulatory State of the South literature



Florencia Lebensohn discussing the case study of the Matanza Riachuelo River in Argentina



Carolina Moreno discussing the case study of the waste management regulation in Bogota

ANNEX VI CONFERENCES OF COMPONENT III

Law and Society Conference 2013: Panel “Inter-Institutional Evaluation through the Use of Indicators” (sponsored by IDRC)



Session Participants:

Lina Maria Cespedes-Baez (Temple University)

Rene Uruena (Universidad de Los Andes)

Lina Buchely (Universidad de los Andes)

Stephania Yate (Universidad de los Andes)

Gloria Marcela Abadia (Los Andes University Bogota Colombia)

Chair/Discussant: Benedict Kingsbury (New York University)

Abstract of the panel:

This panel sought to explore the way in which indicators are used by national and transnational actors to shift power relations, and to achieve social or legal change within a society in the Global South.

Indicators have been criticized for their inability to accurately represent complex social phenomena into numerical data; however less has been said about their ability to construct new categories or to fill with content contesting legal concepts. In many cases, calling an indicator by a name such as the “rule of law index” asserts a claim that there is such a phenomenon and that it can be measured using a numerical representation. Thus, indicators are an important discursive tool, which generate knowledge by submerging complex social phenomena and local particularities into universal categories. Furthermore, indicators can have a regulatory effect, by enabling comparison and ranking among different actors, indicators help their users to exert pressure for “improvement” on indicator targets. However, although indicators sound as a power governance tool that could empower different actors, in reality their production is so expensive that in many cases they can only be afforded by powerful actors, such as International Financial Institutions. Therefore, as was studied in this panel, indicators also have limits as a tool for social justice or social emancipation.

IGLP Conference Panel: Indicators as Political Spaces

The panel at the IGLP Conference at Harvard University had as special guests Tor Krever (as moderator), and Jothie Rajah.

Session Participants:

Tor Krever (London School of Economics and Political Science) Moderator

Marcel Abadia (Universidad de los Andes)

Lina Buchely (Universidad de los Andes)

Lina Cespedes (Temple University)

Jothie Rajah (American Bar Foundation)

Rene Urueña (Universidad de los Andes)

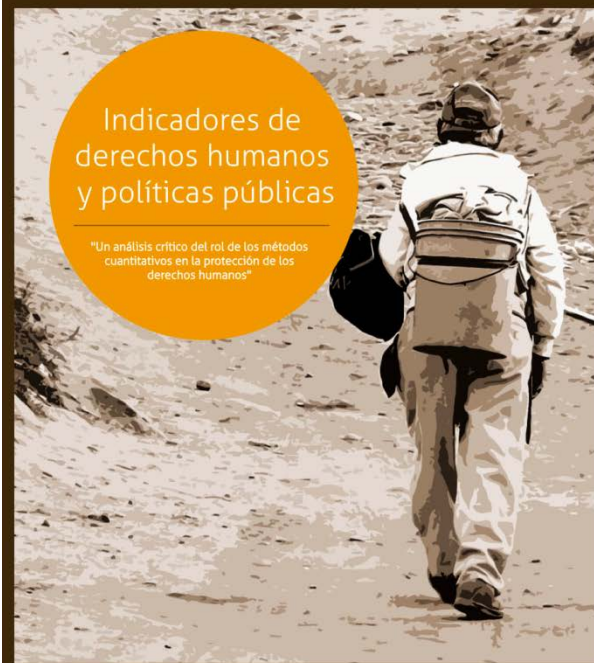
This conference was very fruitful for the research project, since it awoke the interest of several young scholars. Jothie Rajah approached René Urueña to propose the expansion of the component to include new case studies. As a result of this first approach René and Jothie contacted new researchers that had expressed their interest in joining the project.

b. Activities undertaken before the second technical report between April 2013 and April 2014

Conference on Human Rights Indicators and Public Policy at Universidad de los Andes, Bogota

On Friday December 13 2013, Universidad de los Andes offered an open Conference on “Human Rights Indicators and Public Policy”. The objective of this Conference was to discuss role played by quantitative methods in the protection of human rights. The following researchers, from different Universities in the world, participated in the panel:

- René Urueña (panel discussant), Universidad de los Andes
- Rosmerlin Estupiñan-Silva y Nicolás Montoya, Université Paris 1, Panthéon-Sorbonne
- Mario Mayorga, Universidad del Rosario
- Carlos Alza, Pontificia Universidad Católica de Perú
- Stephania Yate, Universidad de los Andes
- Sergio Anzola, Universidad de los Andes



Indicadores de
derechos humanos
y políticas públicas

"Un análisis crítico del rol de los métodos
cuantitativos en la protección de los
derechos humanos"

13
Diciembre




11:30 a.m. a
1:00 p.m.

RGC 218 | Facultad de Derecho
Universidad de los Andes

Invita: Área de Derecho Internacional
Más Información: Luisa Amarillo | lf.amarillo@unlandes.edu.co | Ext. 2295

Panelistas:

- René Urueña, *Universidad de los Andes*
- Rosmerlin Estupiñán-Silva y Nicolás Montoya, *Université Paris 1, Panthéon-Sorbonne*
- Mario Mayorga, *Universidad del Rosario*
- Carlos Alza, *Pontificia Universidad Católica de Perú*
- Stephania Yate, *Universidad de los Andes*
- Sergio Anzola, *Universidad de los Andes*



c. Activities undertaken before the final technical report between April and December 2014

d) IGLP workshop June 2014

IGLP workshop in June 2014

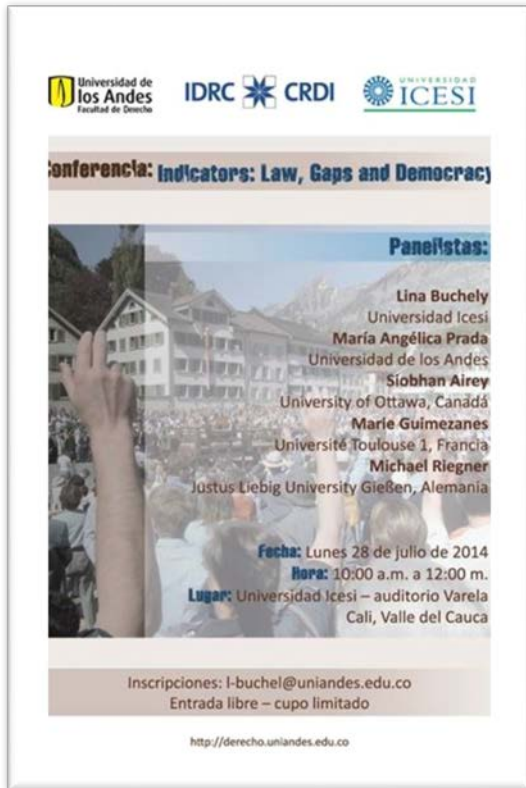
The new research group of the component met in June 2014 at the IGLP Conference at a closed workshop, the objective of this meeting was to present and discuss the main research ideas and preliminary findings. In order to have a fruitful discussion researchers were required to circulate before the meeting a short note (around 4.000 words) that included their research question and the relevance of their case study.

In order to do that, all researchers circulated a short note (around 4.000 words) before the meeting. The discussion of these short notes helped researchers to further develop their research and to find common themes that could be discussed in the case studies. Each researcher was assigned the paper of another peer to comment, guaranteeing the active participation of everyone. The workshop at the IGLP Conference was partially funded by Harvard (IGLP), this grant was possible as a result of the initial funding provided by IDRC at the 2013 IGLP Conference. This is an example of how this project allowed the research network to grow, creating new opportunities for further research.



The team of the new case studies, meeting at Harvard Law School, June 2014

- a) Conference "Indicators: Law, Gaps, and Democracy" at Universidad ICESI in Cali, Colombia, August 2014



Lina Fernand Buchely, one of the researchers of the project and professor at Universidad Icesi, organized a conference in Cali where the final drafts of the project were presented to the academic community in Cali. The conference was held in both Spanish and English, and it raised a large interest from the academic community, which had not been exposed to this kind of literature. The conference was not attended by all researchers due to work restrictions, but five out of seven case studies were presented in the conference. Lina Buchely took the opportunity to explain the project to the professors and students at the University, and presented the theoretical framework that had been developed by the researchers.

- a) Workshop "Indicators: Law, Gaps, and Democracy" at Universidad de los Andes, Bogota. August 2014.

The objective of the workshop in Bogota was to discuss the complete drafts of the articles, building on the momentum from the June 2013 sessions at Harvard's IGLP in Cambridge. This workshop had as commentators Kerry Rittich (University of Toronto), Andrea Ballesteros (Rice University), Ramses A. Wessel (University of Twente), Helena Alviar (Universidad de los Andes) and Rene Urueña (Universidad de los Andes). The methodology of the workshop was the one used in IGLP, where each case study was presented by a researcher that was not its original author, who also had to offer commentaries to improve the paper. Each guest commentator was assigned one or two case studies to comment, however all researchers had to read all papers and comment on their content. The workshop was held during two days and the discussion was very fruitful. Finally, Professor Ramses A. Wessel invited Rene Urueña and the researchers to present their papers for publication at the International Organizations Law Review.

The seven case studies produced by this second part of the project are the following:

1. The Taming of the Shriek - From Indicators to Indicatorisation, by Siobhán Airey
2. Measuring the effectiveness of aid effectiveness: indicators from the Paris Declaration to the Busan Partnership, by Marie
3. International Organizations and Human Rights Indicators: Exploring Pluralism across Institutional Regimes, by Marta Infantino
4. The Conflict of the Indicators. A case study on the implementation of the Victims' and Land Restitution Law in Cali, Valle del Cauca, Colombia, by Lina Buchely
5. International Institutional Law of Information, by Michael Riegner
6. Indicators and Islamic Constitutions, by Dawood Ahmed
7. Unveiling indicators: the power of governance through the ROL notion, by María Angélica Prada Uribe
8. Concept Note: Indicators as political spaces: Law, international organizations, and the quantitative challenge in global governance, Rene Urueña

Workshop: Indicators: Law, Gaps and Democracy

Day 1: 1st of August, 2014 | 9:00 a.m. to 2:00 p.m.

Day 2: 2nd of August, 2014 | 9:00 a.m. to 12:30 p.m.

Place: Faculty of Law - Building and Room: Rcg 213 - 214
Universidad de los Andes | Bogotá - Colombia

Panelists:

Dawood Ahmed

University of Chicago – USA & Philipps University Marburg Germany

Siobhan Airey

University of Ottawa, Canada

Lina Buchely

Universidad Icesi, Colombia

Marie Guimezanes

Université Toulouse 1, France

Marta Infantino

University of Trieste, Italy

María Angélica Prada

Universidad de los Andes, Colombia

Michael Riegner

Justus Liebig University Gießen, Germany, and New York University, USA

Commentators:

Helena Alviar

Dean of the Law School, Universidad de los Andes

Kerry Rittich

University of Toronto, Canada

Andrea Ballesterio

Rice University

Ramses A. Wessel

University of Twente, Netherlands

René Urueña

Universidad de los Andes, Colombia

Registration: ma.prada644@uniandes.edu.co