Secretaria General <secretaria.general@senado.gov.co>

RV: Hoja de vida doctora Natalia Ángel

1 mensaje

Correspondencia Presidencia Consejo De Estado <correspondencia@consejodeestado.gov.co> 5 de noviembre de 2021, 15:08
Para: "secretaria.general@senado.gov.co" <secretaria.general@senado.gov.co>

Correspondencia Presidencia Consejo De Estado ha compartido un archivo de OneDrive para la Empresa con usted. Para verlo, haga clic en el vínculo siguiente.

Ángel Cabo Natalia.zip

De: Correspondencia Presidencia Consejo De Estado
Enviado: viernes, 5 de noviembre de 2021 1:04 p. m.
Para: presidencia@senado.gov.co <presidencia@senado.gov.co>
Asunto: Hoja de vida doctora Natalia Ángel

Respetuoso saludo:

Adjunto al presente nos permitimos remitir hoja de vida de la doctora Natalia Ángel Cabo, abogada seleccionada para integrar la terna de la cual el Honorable Senado de la República elegirá a un magistrado de la Corte Constitucional.

Cordialmente,

Equipo de Presidencia
Consejo de Estado
Tel: 3506700 Ext: 2051

CONGRESO DE LA REPÚBLICA DE COLOMBIA
SENADO DE LA REPÚBLICA

DIVISIÓN RECURSOS HUMANOS

EL JEFE DE LA DIVISIÓN DE RECURSOS HUMANOS DEL SENADO DE LA REPÚBLICA

C E R T I F I C A :

Que revisada la Historia Laboral de la Señora **NATALIA ANGEL CABO** identificada con la Cédula de Ciudadanía No. 52.620.954 de Usaquén aparece que prestó sus servicios a la Corporación así como **Empleada Pública:**

Que mediante Resolución No. 1826 de fecha 22 de Julio de 2002 emanada por la Dirección Administrativa del Senado de la República fue nombrado para desempeñar el cargo de **ASESOR GRADO VI** de la UTL H. Senador Carlos Gaviria Díaz del Senado de la República y tomo posesión según acta de No.398 del 22 de Julio de 2002.

Que mediante Resolución No. 0995 de fecha 30 de Agosto de 2003 emanada por la Dirección Administrativa del Senado de la República se le acepta la renuncia al cargo de **ASESOR GRADO VI** de la UTL H. Senador Carlos Gaviria Díaz del Senado de la República, a partir de la fecha de la presente resolución.

De conformidad con el reglamento Interno del Congreso que lo recoge la Ley 5 de 1992, Artículo 388 y s.s., se faculta a cada Congresista para el logro de una eficiente labor legislativa, la escogencia de los integrantes de su Unidad de Trabajo Legislativo, por lo que es a él a quien corresponde establecer las funciones a desempeñar por cada uno de ellos y expedir la correspondiente certificación de cumplimiento de labores, lo mismo que el Horario para la jornada laboral.

El Senado de la República tiene asignado el NIT No 899999103-1

Esta Certificación se expide en Bogotá D.C., a los cuatro (04) días del mes de Septiembre de 2014, a solicitud de la interesada.

YURY HELTMHUR GARCIA TORRES
Jefe División de Recursos Humanos

CB
Proyecto y Revisó: Claudia Barrios Malagón

REPÚBLICA DE COLOMBIA

CORTE CONSTITUCIONAL
COORDINACIÓN ADMINISTRATIVA
NIT. 800093816-3

LA COORDINADORA ADMINISTRATIVA
DE LA CORTE CONSTITUCIONAL

CERTIFICA:

Que la doctora ***NATALIA ANGEL CABO,*** identificada con la cédula de ciudadanía No. 52620954, laboró en la Corte Constitucional durante los siguientes periodos:

Del 8 de julio de 1996 al 8 de mayo de 2000.

Del 5 de noviembre de 2008 al 23 de abril de 2009.

Que al momento de su retiro desempeñaba el cargo de Magistrada Auxiliar en propiedad.

La presente certificación se expide a solicitud de la interesada. Dada en Bogotá D. C., a los veinte (20) días del mes de agosto del año dos mil quince (2015).

PATRICIA VARGAS RUBIO
Coordinadora Administrativa

VNIVERSITAS HARVARDIANA

CANTABRIGIAE IN REPVBLICA MASSACHVSETTENSIVM

PRAESES et Socii Collegii Harvardiani consentientibus honorandis ac reverendis Inspectoribus in comitiis sollemnibus

NATALIA ANGEL

ad gradum Magistri in Legibus

admiserunt eique dederunt et concesserunt omnia insignia et iura quae ad hunc gradum spectant.

In cuius rei testimonium litteris Academiae sigillo munitis die VII Iunni anno Domini MMI Collegiique Harvardiani CCCLXV auctoritate rite commissa nomina subscripserunt.

Neil L. Rudenstine
PRAESES

Robert Charles Clark
DECANVS ORDINIS IVRISCONSVLTORVM

NOTARIA 36 - BOGOTA D.C.
Como Notaría 36 del Círculo hago constar que esta copia coincide con el documento original presentado para su autenticación
13 JUN 2005
CARLOS ARTURO SANCHEZ GARCIA
NOTARIO (E) TREINTA Y SEIS DE BOGOTA
ENCARGADO

Universidad de los Andes

LA SUSCRITA JEFE DE LA OFICINA DE REGISTRO DE LA UNIVERSIDAD DE LOS ANDES

APROBADA POR RESOLUCIÓN N° 28 DE FEBRERO 23 DE 1949

NIT. 860.007.386-1

Expide copia de lo pertinente de la siguiente Acta de Grado:

Acta de Grado N° 400 - 96 -Libro 10 - Folio 2- del 16 de marzo de 1996:

"En Santafé de Bogotá, D.C., a 16 de marzo de 1996, se reunieron en la Plazoleta de la Facultad de Ingeniería, el doctor RUDOLF HOMMES R., Rector de la Universidad; el doctor GUSTAVO GONZÁLEZ, Vicerrector de la Universidad; (...) "con el objeto de hacer entrega de los diplomas a los graduandos que cumplieron con los requisitos reglamentarios exigidos por la Universidad para optar al título profesional correspondiente." (...) "Los Decanos de las Facultades de Ingeniería, Ciencias, Economía, Administración, Humanidades y Ciencias Sociales, Arquitectura, Derecho, la Directora de Textiles y Artes Plásticas y el Director del Cider, hicieron entrega de los diplomas a sus graduandos, en el siguiente orden:"

***** ABOGADOS *****

RESOLUCIÓN 2485 DEL 6 DE OCTUBRE DE 1988

487.. NATALIA ANGEL CABO C.C. 52620954 Usaquén (...)*

F I R M A D O

RUDOLF HOMMES R. - Rector

MARIO CASTILLO - Secretario General (...)"

JUANA MARGARITA LOPERA DONCEL
Jefe
Oficina de Registro

BOGOTA 27 de abril de 2010
Andrés L.

Dirección de Admisiones y Registro
Carrera 1 No. 18A -70 Bogotá, Colombia Tels.: [571] 3394949 – 3394999 Exts.: 2210 - 2216 Fax: [571] 3324469 Apartado aéreo: 4976
http://admisiones.uniandes.edu.co - admreg@uniandes.edu.co

OSGOODE HALL LAW SCHOOL
YORK UNIVERSITY

Graduate Program in Law

4700 Keele St.
Toronto ON
Canada M3J 1P3
Tel 416 736 5046
Fax 416 736 5736
gradlaw@osgoode.yorku.ca

July 8th, 2015

Re: Natalia Angel, Student No. 211813219

To Whom It May Concern:

This letter will serve to confirm that Natalia Angel is registered in the Graduate Program in Law as a Ph.D. candidate for the Summer 2015 academic term. Candidates in the Graduate Program in Law are required to maintain continuous registration until completion of the program.

Regulation 13

All candidates must maintain one of the categories of registration as in Regulations 13, 14, 15, and 16 in each term until either graduation or withdrawal from the University subject to the time limits set out in Regulations 22 and 31, and they must pay the appropriate fee. This includes registering for the Summer terms.

Please do not hesitate to contact me at (416) 736-5046 if further information is required.
Sincerely,

Yours sincerely,

Chantel Thompson
Graduate Program Secretary
Graduate Program in Law
Osgoode Hall Law School
York University
4700 Keele Street
Toronto, ON
Phone: 416-736-5046
Email: cthompson@osgoode.yorku.ca

YORK
UNIVERSITÉ
UNIVERSITY

Universidad de los Andes
NIT 860.007.386-1

Gestión Humana y Desarrollo Organizacional de la Universidad de los Andes

Certifica

La Profesora NATALIA ANGEL CABO identificada con CC No. 52620954 de BOGOTA DC, está vinculada a esta institución mediante la suscripción de un contrato de trabajo Término fijo a un año, con dedicación de 47.5 horas semanales, desde el 27/07/2015. Actualmente desempeña el cargo de Profesor Asistente - Director Derecho Público Constitucional en Facultad De Derecho.

Esta certificación se expide a solicitud de la interesada, con destino a CONSEJO DE ESTADO, a los veintisiete (27) días del mes de agosto del año dos mil veintiuno (2021).

SANDRA MILENA ACOSTA GONZALEZ
Jefe Servicios Laborales

Este certificado requiere para su plena validez y confiabilidad que la información aquí consignada sea verificada y convalidada con la Dirección de Gestión Humana y Desarrollo Organizacional a través de los siguientes medios: a) Telefónicamente en la línea 3394949 Ext.:3884, b) A través del Sitio Web http://ghdo.uniandes.edu.co. Si la certificación anterior no es refrendada a través de algunos de los procedimientos mencionados, la misma solo tendrá el valor probatorio que las partes le den, y será equiparada para todos los efectos legales a una prueba sumaria. La Universidad de los Andes no sume ningún tipo de responsabilidad por el contenido y/o por la firma consignada en este tipo de documentos, hasta tanto no sea validado o confirmado por alguno de los medios ya mencionados. APLICACIÓN DE LAS NORMAS VIGENTES SOBRE COMERCIO ELECTRÓNICO: Todas las comunicaciones que ya se expresen vía Mensaje de Datos (Internet, Correo Electrónico, EDI, telex, fax, o telefax), tendrán el mismo alcance, efecto y valor probatorio que las normas vigentes y aplicables sobre el Comercio Electrónico consignadas en la Ley 527 de 1999, Ley 588 de 2000, Decreto Reglamentario 1747 de 2000, y la Resolución 26930 de 2000 y demás que las remplacen o modifiquen, le dan a los documentos materiales.

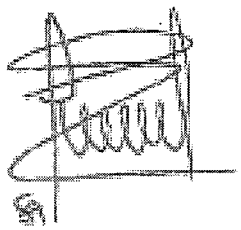
Gestión Humana y Desarrollo Organizaciones – Rectoría
Calle 19 No. 1-11 Edificio Las Monjas, pisos 2 y 3, Bogotá – Colombia. Tels.: [571] 3394949/99 Ext.: 3884
Línea Directa: [571] 3324374

LA DIRECCIÓN DE GESTIÓN HUMANA Y DESARROLLO ORGANIZACIONAL DE LA UNIVERSIDAD DE LOS ANDES

C E R T I F I C A Q U E

La profesora **NATALIA ANGEL CABO**, identificada con cédula de ciudadanía No. 52620954 de Bogotá, está vinculada a esta institución mediante la suscripción de un contrato de trabajo a término fijo a un año, con dedicación de 24 horas semanales, desde el 27 de julio de 2015. Actualmente desempeña el cargo de Profesor Asistente en Facultad de Derecho.

Esta certificación se expide a solicitud de la interesada, con destino a Consejo de Estado, a los tres (3) días del mes de junio del año dos mil veinte (2020).



SANDRA MILENA ACOSTA GONZALEZ
Jefe Servicios Laborales

Universidad de los Andes

LA DIRECCION DE GESTION HUMANA Y DESARROLLO ORGANIZACIONAL DE LA UNIVERSIDAD DE LOS ANDES

C E R T I F I C A Q U E

La profesora **NATALIA ANGEL CABO,** identificada con Cédula de Ciudadanía No. 52.620.954 expedida en Bogotá, ha estado vinculada a esta institución mediante la suscripción de diferentes contratos de trabajo, así:

PERIODO	CARGO DESEMPEÑADO
Del 1 de septiembre de 1997 al 31 de agosto de 1998	Profesora, en la Facultad de Derecho
Del 10 de agosto de 1999 al 9 de diciembre de 1999	Profesora de la cátedra Derecho Constitucional, en la Facultad de Derecho
Del 18 de enero de 2000 al 17 de mayo de 2000	Profesora de la cátedra Derecho Constitucional, en la Facultad de Derecho
Del 6 de agosto de 2002 al 5 de diciembre de 2002	Profesora de la cátedra Derecho Constitucional, en la Facultad de Derecho
Del 14 de enero de 2003 al 13 de mayo de 2003	Profesora de la cátedra Derecho Constitucional, en la Facultad de Derecho
Del 5 de agosto de 2003 al 4 de diciembre de 2003	Profesora de la cátedra Derecho Constitucional, en la Facultad de Derecho
Del 14 de enero de 2004 al 13 de mayo de 2004	Profesora de la cátedra Derecho Constitucional, en la Facultad de Derecho
Del 15 de febrero de 2005 al 17 de mayo de 2005	Profesora de la cátedra Derecho Constitucional, en la Facultad de Derecho
Del 25 de julio de 2005 al 14 de Agosto de 2011	El último cargo desempeñado fue el de Profesor Asistente en Facultad de Derecho
A partir del 27 de julio de 2015	Actualmente desempeña el cargo de Profesor Asistente en Facultad de Derecho.

Durante su vinculación se le han cancelado bonificaciones por los siguientes conceptos:

PERIODO	CONCEPTO
Del 12 de febrero de 2005 al 15 de marzo de 2005	Dictar 12 horas del curso Derecho Constitucional Comparado
El 19 de septiembre de 2005	Jurado preparatorio examen ciclo oral
Del 27 de febrero de 2006 al 27 de marzo de 2006	Dictar 12 horas de conferencia tema: Derecho Constitucional
El 9 de abril de 2007	Jurado de 12 exámenes de ciclo
El 18 de septiembre de 2007	Jurado de 11 exámenes de ciclo
Del 1 de noviembre de 2008 al 31 de julio de 2009	Coordinación del proyecto investigación del manual de pedagogía en derechos de las personas con discapacidad y participación en taller de capacitación (convenio con la Fundación Saldarriaga Concha)
Del 26 de marzo de 2009 al 2 de abril de 2009	Dictar conferencias de la clase teorías de la responsabilidad, módulo responsabilidad empresarial
Del 15 de mayo de 2009 al 31 de mayo de 2009	Jurado evaluador (tribunal) de 16 de exámenes de Facultad parte oral

Universidad de los Andes

Del 1 de julio de 2009 al 31 de Agosto de 2009	Asesoría, recopilar información y elaborar un escrito entre 30 y 40 páginas sobre la globalización del derecho, para ser publicado en un libro al final del proyecto llamado: " Portal es DER" de la GTZ
Del 8 de octubre de 2009 al 29 de octubre de 2009	Dictar conferencias sobre Derecho Constitucional avanzado del módulo Derecho Constitucional Comparado
Del 1 de septiembre de 2009 al 31 de octubre de 2009	Asesoría, recopilar información y elaborar un escrito entre 30 y 40 páginas sobre la globalización del derecho, para ser publicado en un libro al final del proyecto llamado: " Portal es DER" de la GTZ
Del 2 de agosto de 2010 al 30 de noviembre de 2010	Investigación, dirección, recopilación y análisis del proyecto de normatividad y jurisprudencia sobre capacidad legal de las personas con discapacidad psicosocial y cognitiva
Del 14 de febrero de 2011 al 30 de marzo de 2011	Investigación, elaboración del componente transversal del documento amicus curiae para la Corte Constitucional mediante presentación dedos subproductos: subproducto 1: documento de focalización. Subproducto 2: Documento de partida
Del 1 de junio de 2011 al 15 de julio de 2011	Investigación, dirección de la estrategia de acceso a la justicia y protección de derecho de las personas con discapacidad y las personas mayores desarrollada por medio del convenio de cooperación 0267 celebrado entre la Universidad de los Andes y la Fundación Saldarriaga Concha
Del 1 de mayo de 2011 al 31 de mayo de 2011	Investigación, dirección de la estrategia de acceso a la justicia y protección de derecho de las personas con discapacidad y las personas mayores desarrollada por medio del convenio de cooperación 0267 celebrado entre la Universidad de los Andes y la Fundación Saldarriaga Concha
Del 1 de abril de 2011 al 31 de mayo de 2011	Investigación, elaboración del componente transversal del documento amicus curiae para la Corte Constitucional mediante la entrega de informes de avances correspondientes al subproducto2, de acuerdo con los términos de referencia (TORS)

La profesora Natalia Angel Cabo dirigió el Programa de Acción por La Igualdad y la Inclusión Social de la Facultad de Derecho de la Universidad de los Andes, desde el 15 de enero de 2007 hasta el 31 de julio de 2011. Este programa tiene como misión ofrecer conocimiento, experiencia y capacidades de acción para avanzar los derechos de las personas con discapacidad y la implementación de la Convención de Naciones Unidas sobre los Derechos de las Personas con Discapacidad (CDPCD).

Esta certificación se expide a solicitud de la interesada, a los tres (3) días del mes de septiembre del año dos mil quince (2015).

Universidad de los Andes

SANDRA LILIANA CALDERÓN PRIETO
Jefe Bienestar y Administración del Talento Humano

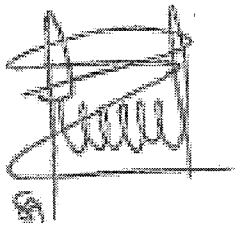
Mireya R.

LA DIRECCIÓN DE GESTIÓN HUMANA Y DESARROLLO ORGANIZACIONAL DE LA UNIVERSIDAD DE LOS ANDES

C E R T I F I C A Q U E

La profesora **NATALIA ANGEL CABO**, identificada con cédula de ciudadanía No. 52620954 de Bogotá, está vinculada a esta institución mediante la suscripción de un contrato de trabajo a término fijo a un año, con dedicación de 24 horas semanales, desde el 27 de julio de 2015. Actualmente desempeña el cargo de Profesor Asistente en Facultad de Derecho.

Esta certificación se expide a solicitud de la interesada, con destino a Consejo de Estado, a los tres (3) días del mes de junio del año dos mil veinte (2020).



SANDRA MILENA ACOSTA GONZALEZ
Jefe Servicios Laborales

Gmail Natalia Angel-Cabo <nangelcabo@gmail.com>

Invitation to Participate in Teleconference Program

1 mensaje

Sara Sandford <ssandford@westernrivers.org> 30 de abril de 2020, 11:52
Para: "nangel@uniandes.edu.co" <nangel@uniandes.edu.co>

Dear Professor Angel:

I am the immediate past Co-Chair of the American Bar Association, International Law Section's International Human Rights Committee, and a former Chair of the Section. We would like to invite you to be one of the speakers for a teleconference the IHR Committee will be hosting regarding attacks on judges, lawyers and other human rights defenders in Colombia. This teleconference is part of a series on such attacks in various countries around the world. Thus far, we have held programs on China, Turkey, Pakistan, and Poland. We also hope next to organize programs on Myanmar and the U.S. Because of your expertise, we would like to invite you to be one of the speakers. There will be two topics: (1) the present situation in Colombia and (2) what international legal organizations like the American Bar Association and individuals can do to support those who are being attacked.

The teleconference will be moderated and each speaker will be given fifteen to twenty minutes to present. We then will open it up to a roundtable among the speakers. All attendees will be invited to e-mail questions but only speaker's lines will be open for all to hear.

The date for this event will be determined based on speaker availability. Please provide a response to this request including your availability for the *last week of May*. We expect that a *12:00-13:30 Eastern* Time slot might make the program accessible to most attendees who wish to hear the conference, but we are open to varying that if needed for our speakers. If the speakers wish to have a planning call, we would arrange that as well. Otherwise, we will correspond regarding logistics via email.

Please let us know if you can join by ***May 4,*** so we can set the program date.

Finally, if there is someone you think would make an excellent speaker to add to this panel, please let us know. (Please do not extend an invitation to the person, but just let us know, so we can properly coordinate matters. We are open to adding one more person and have mentioned this to other speakers we are inviting too.)

Thank you for your time.

Regards,

Sara Sandford

Rama Judicial
Consejo Superior de la Judicatura
República de Colombia

género

Rama Judicial del Poder Público

Bogotá, D.C., 13 de noviembre de 2019

Doctora
NATALIA ÁNGEL CABO
Programa de acción por la igualdad y la inclusión social – PAIIS
Clínica jurídica de la Facultad de Derecho
UNIVERSIDAD DE LOS ANDES
Ciudad

Asunto: Agradecimiento participación Conversatorio Nacional de Género de la Rama Judicial

Apreciada doctora Natalia:

En nombre de la Comisión Nacional de Género de la Rama Judicial quiero expresarle mi más sentido agradecimiento por su participación como expositora del tema "Introducción al Modelo Social de la Discapacidad", dictado en el XVI CONVERSATORIO NACIONAL DE GÉNERO DE LA RAMA JUDICIAL denominado: *"Por la equidad de género y la inclusión social"*, realizado exitosamente en la ciudad de Medellín (Antioquia) durante los días 31 de octubre y 1º de noviembre de 2019.

Su participación pone de manifiesto su compromiso y el de la Entidad que usted representa, con la promoción de la igualdad de género y el enfoque diferencial, como premisa indispensable para avanzar hacia la equidad social.

Cordial saludo,

GLORIA STELLA LÓPEZ JARAMILLO
Magistrada Consejo Superior de la Judicatura
Presidente Comisión Nacional de Género de la Rama Judicial

2

THE JUDGE WHO CRIED: ENFORCING SOCIAL AND ECONOMIC RIGHTS IN SOUTH AFRICA

El Juez que lloró: protegiendo los derechos económicos y sociales en Sudáfrica

ALBI SAC

Activista de derechos humanos
de la Corte Cónstitucional de Su

Viernes 9 noviembre 9/2018

9:00 a.m. / 38-101
Universidad EAFIT

Entrada libre
La conferencia será en inglés con traducción simultánea

COMENTARIOS
Natalia Ángel Cabo · Esteban Hoyos Ceballos · Jc

INFORMES
Teléfono (57) (4) 261 9500, extensión 9727
ehoyosce@eafit.edu.co

Maestría en Derecho
SNIES 102673. Resolución 8904 del 15 julio de 2013 co
de 7 años. Duración 4 semestres

Inspira Crea Transforma Vigilada Mineducación Quiero

Conversa
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al servicio de la ju
en Colo

EL CASO PROMET

El evento busca socializar y visibilizar el impacto de las nuevas tecnologías en la
pública; en especial, el uso de inteligencia artificial en la Corte Constitucional colo

Catalina Botero
Decana, Facultad de Derecho,
Universidad de los Andes.

Natalia Ángel
Profesora, Facultad de Derecho,
Universidad de los Andes.

Greinfieth Sierra
Líder proyecto técnico PROMETEA.
Profesor, Universidad del Rosario.

Martha Sáchica
Secretaria general, Corte Constitucional.

Santiago Pardo Rodrig
Funcionario Corte Constitucio
Profesor, Universidad de los A

Maria Lorena Flórez
Directora Grupo de Investigaci
Comercio Electrónico, Telecomuni
e Informática (GECTI),
Universidad de los Andes

Carlos Álvarez
Miembro GECTI.

Martes 12 de marzo del 2019 | 4:15 a 6:30 p.m.
Edificio Santo Domingo, Sala de conferencias 1003
calle 21 No. 1-20, Uniandes.
(Registro de asistentes: 3:45 a 4:15 p.m.)

Entrada libre - cupo limitado – previa inscripción

derecho.uniandes.edu.co

Transformative Scales:
Towards a method for multi-level legal conflicts

Location:
Munk School of Global Affairs – Room 108N
University of Toronto - Trinity College
1 Devonshire Place

Monday June 11th

09:00 – 09:30 Welcome (coffee & tea)

09:30 – 11:15 Session 1 – **Introducing transformative scales**

Phillip Paiement (Tilburg University) – *Transformative Scales: Rethinking legal method*

Saptarshi Mandal (Jindal University) - *Toward Feminist Global Governance?: International Human Rights Law and the Future of Feminist Interventions on Domestic Violence*

Discussant – **Carolina S. Ruiz-Austria** (University of Toronto / ALPHA Education)

11:15 – 11:45 Session 2(A) – **Global Value Chains & the Global Values of Labor Rights**

Mostafa Haider (Curtin Law School) – *Networked Rules, Transnational Corporations and Legal Responsibility in Global Value Chains*

11:45 – 12:45 Lunch

12:45 – 14:30 Session 2(B) - **Global Value Chains & the Global Value of Labor Rights**

Muhammed Azeem (Lahore University of Management Sciences) – *The Law of Global Supply Chains: Litigating the Ali Enterprise Factory Fire in German and European Courts*

Klaas Hendrik Eller (HU Berlin) – *Scaling Through Alternative Rereadings: How Value Chain Regulation Reformulates Factory-Level Labor Disputes*

Practitioner Intervention - **James Yap** (Goldblatt) - *Modern Slavery Litigation Against Multinational Businesses: Nevsun Resources Ltd. and Eritrea's « National Service » Program*

14:30 – 14:45 Coffee & tea break

14:45 – 16:30 Session 2(C) - **Global Value Chains & the Global Value of Labor Rights**

Jaakko Salminen (University of Turku) – *Global Value Chains, Litigation, and the Move from Corporate Governance to Governance Through Contract*

Practitioner Intervention – **Simon Archer** (Goldblatt; Osgoode Hall) – *Reflections on Attempts to Regulate Work Transnationally*

18:00 – onwards Dinner – **Harvest Kitchen,** 124 Harbord St. (15 min walk)

****

Tuesday June 12th

09:00 – 09:30 Welcome

09:30 – 11:00 Session 4 - **Social & Environmental Justice Under International Economic Law**

Enrique Prieto-Rios (Universidad del Rosario) with co-authors **Mariana Díaz-Chalela** (Universidad del Rosario) & **Andrés Gómez-Rey** (Universidad del Rosario) – *Between the Environment and Foreign Investment Protection: the case of Santurbán in ICISD*

Eleonora Lozano Rodríquez (Universidad de los Andes) – *The need for international tax arbitration*

Discussant - **Phillip Paiement** (Tilburg University)

11:00 – 11:15 Break

11:15 – 13:15 Session 5 - **Legal Geographies & Scalar Governance**

Yenny Carolina Ramírez Suárez (Universidad del Rosario) – *Government, Interlegality and Hybridization in a Latin-American City: A Legal Geography Approach to Library-Parks in Medellin as Public Spaces*

Alexandra Flynn (University of Toronto) & **Clara MacCallum Fraser** (York University) – *Scalar (Il)logics: Indigenous-municipal consultation and planning adjudication*

Natalia Ángel-Cabo (Universidad de los Andes) – *The Constitution and the City: reflections on social and economic rights enforcement in aspiring global cities*

Discussant – **Saptarshi Mandal** (Jindal University)

13:15 – 13:30 Closing

16. Seeing human rights *like* a city: the prospects and perils of the 'urban turn'

Natalia Ángel-Cabo and Luisa Sotomayor

Between September and December of 2019 thousands of people in different Latin American cities took to the streets to protest against their governments. The famous Chilean song of the 1990s, '*El Baile de los que Sobran*' (The Dance of the Left Out), resonated loudly from Santiago to Bogotá. The movements behind the urban protests based their demands in the language of rights, mainly of social and economic rights: the rights to work, to health, to social security and to education. Protesters spoke about rights to illustrate how, despite the economic growth of the region, thousands of people were still in poverty and many of those who recently overcame it, at least in monetary terms, were close to being poor again.

In the previous decade, housing activists in Toronto, Canada invoked a human rights perspective to challenge zoning bylaw restrictions on the placement of group homes. Group homes are a type of housing arrangement where a small number of unrelated people in need of support or supervision reside, such as people with disabilities or mental health issues. The placement bylaw was seen by activists as a form of 'people zoning' because it reproduced urban disadvantages for vulnerable groups by singling them out and reducing their housing choices. Significantly, in 2014 a successful legal challenge by the 'Dream Team', a group of individuals with lived experiences of supportive housing, led the City of Toronto to change their land-use policy for group homes, applying a human rights test to former placement restrictions, distances and parking requirements.[1]

Far from extraordinary, these two examples illustrate important points long identified by commentators: that human rights are a key framework for social movements to formulate their demands and an important resource to reveal the inequities and complexities of the urban context. Furthermore, these cases speak to the vibrancy and highly contested political arena that cities have come to represent around issues of human rights, democracy, citizenship and identity.[2] They bring attention to the city both as an important site for the reclamation of rights and as a scale of government that, in its proximity to the citizen, might be better suited for the implementation of rights.

This chapter reflects on the potential of human rights approaches to poverty reduction from the perspective of the city. We ask what seeing *like* and *from* the city[3] may add to the long-standing debate about the promise of rights to produce social change. Contrary to the fierce

[1] See Sandeep Agrawal, 'Balancing Municipal Planning with Human Rights: A Case Study' (2015) 23 Canadian Journal of Urban Research 1; Carmen McCracken, 'Strategic Litigation and Advancing the Right to Housing in Canada' (Master's thesis York University 2019).

[2] Andrew EG Jonas and Sami Moisio, 'City Regionalism as Geopolitical Processes: A New Framework for Analysis' (2018) 42 Progress in Human Geography 350.

[3] See Warren Magnusson, *Politics of Urbanism: Seeing like a City* (Routledge 2011); Mariana Valverde, 'Seeing Like a City: The Dialectic of Modern and Premodern Ways of Seeing in Urban Governance' 37 L & Soc'y Rev 277.

critiques that dismiss altogether the relevance of human rights to confronting the world's pressing problems, we recognize some of its contributions and identify how a view from the city might abet the global human rights project by politicizing it from the vantage point of urbanization. We also stress several limits on human rights' ability to confront pervasive poverty and rising inequality, particularly given the way neoliberal agendas currently operate *in* and *through* cities.

In the last five decades, cities across the world have emerged as primary sites of innovation, economic growth and political power in a re-scaled capitalist world order characterized by inter-city competition.[4] From Delhi to London to Cape Town to Rio, central districts increasingly become the preferred location for professional and residential elites, while local politicians engage in urban boosterism tactics to attract human capital and investment.[5] But not everyone benefits from such an approach to urban policy. Cities are equal catalysts of privilege and poverty under capitalism.[6] Since the 1970s, national and urban inequality has been on the rise in many countries.[7] The 'urban age' has been shaped by metropolitan fragmentation, precarious jobs for youth and unskilled labor, socio-spatial marginality, gentrification and displacement[8] that all threaten the fulfilment of human rights for the urban poor.

In this chapter, 'seeing like a city' implies a view of a wide range of experiences of the urban. We argue that it is not enough to turn to the city-scale and the local authorities to fulfill the promises of human rights that, as Moyn[9] critically indicates, national governments and international agreements have failed to deliver over decades. In the era of worldwide urbanization, any engagement with the urban will require attention to the fuzzy, fragmented, sprawling and reterritorialized reality of contemporary urban regions; the formal and informal ways of mediating access to resources and power in the city; the struggles over the unequal production of capitalist urban development and the socio-spatial distribution of urban benefits; and the struggles for participation, recognition and inclusion of different voices in democratic processes. Finally, we argue that in order for the global human rights project to produce significant social change, it needs to regain relevance and legitimacy among both citizens and state institutions.

The chapter is organized as follows: The first section describes the rescaling of human rights to the city and brings attention to the multiple challenges of the urban. We address the increasing socio-spatial inequalities and the deepening of poverty that have arisen as a consequence of the dramatic changes of cities in the last decades. We focus on current trends that have deepened conditions of poverty and inequality. In the second section we discuss the potential

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[4] Saskia Sassen, 'Global Cities and Global City-Regions: A Comparison' in Allen J Scott (ed), *Global City-Regions: Trends, Theory, Policy* (OUP 2001); Jonathan Friedman, 'Globalization and Localization' in Jonathan Xavier Inda and Renato Rosaldo (eds), *The Anthropology of Globalization* (Blackwell 2002); Roger Keil, 'The Urban Politics of Roll-with-it Neoliberalization' (2009) 13 City 230.

[5] Jamie Peck and Adam Tickell, 'Neoliberalizing Space' (2002) 34 Antipode 380.

[6] Thomas Piketty, 'Putting Distribution Back at the Center of Economics: Reflections on Capital in the Twenty-First Century' (2015) 29 Journal of Economic Perspectives 67.

[7] Joseph Eugene Stiglitz, 'Macroeconomic Fluctuations, Inequality, and Human Development' (2012) 13 Journal of Human Development and Capabilities 31; Anthony B Atkinson, *Inequality: What can be Done?* (Harvard University Press 2015).

[8] R Alan Walks, 'The Social Ecology of the Post-Fordist/Global City? Economic Restructuring and Socio-Spatial Polarisation in the Toronto Urban Region' (2001) 38 Urban Studies 407.

[9] Samuel Moyn, *Not Enough: Human Rights in an Unequal World* (Harvard University Press 2018).

of localized rights to confront such challenges. By localized rights we mean the attempt to foster the fulfillment of human rights at the local level. We discuss some of the positive contributions of the human rights framework and illustrate how the city may contribute to further them. Yet, by acknowledging the complexities of the urban, we also stress numerous limits of human rights approaches to transform the everyday lives of the urban poor. The final section concludes with an invitation for the global rights project to remain experimental and with a research agenda to better understand the prospects and challenges of localized rights to confront urban poverty.

I. THE 'URBAN TURN' IN HUMAN RIGHTS AGENDAS AND THE CITY

In the last few decades, cities have become central to global development initiatives and international human rights agendas. The shift since the late 1980s towards decentralization gave cities in many countries increased responsibility for a number of new tasks that were previously within the realm of the national governments.[10] Currently, many of the activities of local governments relate in one way or another to the implementation of human rights, such as the provision of water, sanitation, public health, housing or education.[11] Precisely because of the prominence of cities, some proponents of human rights perspectives increasingly devise cities at the center, and local governments as key players, in the promotion and protection of human rights.

The persuasive discourse of the 'urban age' complements these trends and has further brought attention to cities and the problems associated with urbanization as a human rights concern.[12] It is argued that we are approaching a distinctive urban era, as for the first time in history cities are home to much of the world's population. The argument also recognizes that the largest share of future urban growth is expected to occur in low-income regions of the world, where cities lack institutional capacity or the resources to support a growing population. Trends indicate that while a minimum standard of living has been achieved in much of the Global North and in well-off urban areas of the Global South, wealth and access to urban benefits in thriving regions is increasingly mediated by growing income inequalities.[13] In response, international development agendas increasingly promote human rights approaches to urban poverty reduction.

Together, the 're-scaling' of traditional state functions to the city, the urban-age discourse, and the rise of global income inequality have reinvigorated debates about the bearing of the global human rights project on poverty reduction and human development. In discussion over implementation and applicability, proponents of the 'urban turn' have looked at cities with

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[10] Mario Polèse, 'Cities and National Economic Growth: A Reappraisal' (2005) 42 Urban Studies 1429; Luis Eslava, *Local Space, Global Life: The Everyday Operation of International Law and Development* (CUP 2016).

[11] Martha F Davis, 'Scoping the New Urban Human Rights Agenda' (2019) 51 The Journal of Legal Pluralism and Unofficial Law 260.

[12] Clive Barnett and Susan Parnell, 'Ideas, Implementation and Indicators: Epistemologies of the Post-2015 Urban Agenda' (2016) 28 Environment and Urbanization 87.

[13] Vanessa Watson, 'Seeing from the South: Refocusing Urban Planning on the Globe's Central Urban Issues' (2009) 46 Urban Studies 2259.

the hopes of overcoming some of the recurrent critiques of human rights, including claims of irrelevance and concerns over their legitimacy, lack of material effectiveness and poor record of promoting distributive equality.[14]

The growing faith in the city as a privileged space for the realization of rights can be seen through a number of initiatives that have emerged in the past decades. One example is the human right cities' movement, which encourages local or regional governments to explicitly commit to the respect for human rights.[15] At the moment, more than forty cities have declared themselves as a human rights city, although doubts persist on the implementation of their commitments. The 2030 Sustainable Development Goals (SDGs) and the recent New Urban Agenda are also good examples. The SDGs, including SDG 11 to '[m]ake cities and human settlements inclusive, safe, resilient and sustainable',[16] are explicitly grounded in the Universal Declaration of Human Rights and other international human rights treaties.[17] The New Urban Agenda,[18] a political declaration signed by all UN member states and which aimed to provide a vision and a road map for municipalities and cities in the years to come, sets a human rights-based approach to policy-making and service delivery towards an inclusive urban development[19] and explicitly acknowledges local authorities as responsible for the protection, respect and fulfillment of human rights of residents.

Given the amount of 'urban buzz' in international development and human rights communities, the lack of literature seriously connecting scholarship on urban studies, poverty and human rights is surprising. For example, while human geographers have long engaged with the spatial dimensions of injustice,[20] they have largely ignored debates on international human rights discourse and practice.[21] The same applies for urban practitioners, planners, politicians and policymakers who rarely engage with human rights talk on the field.[22]

Conversely, the human rights literature has yet to engage more deeply with urban theory and urban research. Initiatives such as the New Urban Agenda or the Human Rights Cities move-

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[14] Malcolm Langford, 'Critiques of Human Rights' (2018) 14 Annual Review of Law and Social Science 69.

[15] See, for example, Martha F Davis, Thomas Gammeltoft Hansen and Emily Hanna (eds), *Human Rights Cities and Regions: Swedish and International Perspectives* (Raoul Wallenberg Institute 2017); Paul Gready and Liz Lockey, 'Rethinking Human Rights in York as a Human Rights City' (2019) 90 Pol Q 383; Barbara Oomen and Moritz Baumgärtel, 'Human Rights Cities' in Anja Mihr and Mark Gibney (eds), *The SAGE Handbook of Human Rights* (SAGE 2014).

[16] UNGA, Transforming our World: the 2030 Agenda for Sustainable Development (18 September 2015) UN Doc A/70/L.1, 22.

[17] ibid para 10.

[18] United Nations Conference on Housing and Sustainable Urban Development, New Urban Agenda (20 October 2016) UN Doc A/Res/71/256.

[19] Karina Gomes Da Silva, 'The New Urban Agenda and Human Rights Cities: Interconnections between the Global and the Local' (2018) 36 NQHR 290.

[20] See, for example, David Harvey, *Spaces of Hope* (University of California Press 2000); Edward W Soja, *Seeking Spatial Justice* (University of Minnesota Press 2013).

[21] Nicole Laliberté, 'Geographies of Human Rights: Mapping Responsibility' (2015) 9 Geography Compass 57; Jean C Carmalt, 'For Critical Geographies of Human Rights' (2018) 42 Progress in Human Geography 847.

[22] Thijs van Lindert and Doutje Lettinga, 'Introduction.' in Thijs van Lindert and Doutje Lettinga (eds), *The Future of Human Rights in an Urban World* (Amnesty International Netherlands 2014); Carolyn Whitzman, 'Rights Talk, Needs Talk and Money Talk in Affordable Housing Partnerships' [2018] Journal of Planning Education and Research 1.

ment have certainly put a spotlight on cities, but only insofar as the city is understood as a legal jurisdiction, capable of channeling state action to observe and enact human rights within formal city boundaries. While useful to identify state institutions and conceptualize the role of the state in relation to human rights claims, such an approach follows either a municipalist or regionalist perspective to conceptualize the city as a 'territorial fix', without accounting for the worldwide territorial reconfiguration of the urban fabric that has taken place in the past four decades. Such a limited perspective may fail to capture those informal, spontaneous or radical forms of political practice that enable groups of people and movements to organize themselves around human rights and self-identify as collective political actors in the city.[23] More than a discrete geographical category or a type of settlement, as proponents of the planetary urbanization thesis suggest, '[t]oday, the urban represents an increasingly worldwide condition in which political-economic relations are enmeshed'.[24]

In the lines to follow, we aim to enrich the conversation about the potential of localized rights by illuminating urban processes and challenges that go beyond the limited understanding of the city as a local jurisdiction. This description will help us contextualize our later discussions about the potential of rights to transform the everyday lives of the poor. We examine urban development trends and discuss how current urbanization dynamics create challenges for poor households and people to enjoy a dignified quality of life, participate in decision-making affecting their lives, and access all the benefits and opportunities that the city has to offer. With the emergence of a worldwide urbanized society, and a growing share of the world's poverty now located within urban areas,[25] a view to city structures and the social dynamics of exclusion that generate and sustain poverty in cities may further reveal the potential contributions and limits of a human rights approach to poverty reduction.

A. Cities, Poverty and Urban Disadvantage

Cities have been historically central to wealth generation and economic growth, as they provide infrastructures, qualified labour, markets, services and innovation systems that enable people and businesses to thrive. In terms of quality of life, cities have been associated with intergenerational social mobility by providing, for instance, better access to health, education and jobs. The hope for greater individual and collective prosperity has driven much of the world's urbanization[26] and, more recently, global suburbanization.[27] At the same time, it is unfortunately in cities where poverty, racial discrimination and segregation, homelessness, health inequities, unemployment, state abandonment and insecurity become most visible. This

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[23] Magnusson (n 3); Allan Cochrane, 'In and beyond Local Government: Making up New Spaces of Governance' [2019] Local Government Studies 1; James Holston, 'Metropolitan Rebellions and the Politics of Commoning the City' (2019) 19 Anthropological Theory 120.

[24] Neil Brenner and Christian Schmid, 'Planetary Urbanisation' in Matthew Gandy (ed), *Urban Constellations* (Jovis 2012).

[25] David Satterthwaite and Diana Mitlin, *Urban Poverty in the Global South: Scale and Nature* (Routledge 2013).

[26] Oriol Nel-Lo, 'Introduction: The Irresistible Rise of Urbanization' in Oriol Nel-lo and Renata Mele (eds), *Cities in the 21st Century* (Routledge 2016); Julio D Dávila, 'Cities as Innovation: Towards a New Understanding of Population Growth, Social Inequality and Urban Sustainability' in Oriol Nel-lo and Renata Mele (eds), *Cities in the 21st Century* (Routledge 2016).

[27] Keil (n 4).

urban dilemma puts cities under constant scrutiny, with an ongoing need for 'fixing' through policy, planning and service provision, in the hopes that they continue enabling economic growth.[28]

Critical scholars argue that poverty and urban disadvantage are rooted in structural processes of political economy and the cultural systems and social relations that sustain them, with the state and urban policy often reinforcing these trends.[29] The causes of poverty and inequality are inevitably linked to the global system of production, and the social, political, institutional and cultural scaffolding that supports and legitimizes it. In turn, 'different representations and beliefs systems about social inequality ... shape institutions and public policies affecting inequality dynamics',[30] such as policies in education (determining who has access to skills and higher education) or taxation (whose capital is to be exempted).

Systemic intersectional discrimination (based on race, class, ethnicity, ability, gender or sexuality) similarly limits the access of certain groups or identities to scarce resources. Even when there is access to them, a disenfranchised group may face obstacles to utilize them or may lack a level of collective appropriation to act upon these resources and improve their social mobility.[31] The political recognition and participation of marginalized groups can also be suppressed, directly or indirectly, through societal codes, norms or institutions, enabling elites to capture investments and urban benefits through the political system.[32] These economic, political and social dynamics find grounding in the situated practices that take place in the everyday life of the urban.

The spatiality of the city creates conditions for entrenched poverty and inequality, given that 'the spatial distribution of goods, information and people forms dynamic interdependencies with social structures'.[33] In their logic of density and agglomeration, cities crystallize and intensify forms of inequality, which may originate in wider societal relations and spheres of decision-making but come together and find articulation in the concrete spatiality of the city.[34] Considering that we live in a profoundly urbanized society, interrogating (in)justice from a spatial perspective means interrogating the city.[35]

Crucially then, while the causes of poverty are structural and multidimensional, social inequalities are mediated by the built environment: they are produced and experienced in place.[36] Thus, the spatial patterns of a city can seriously block or restrict access to dignified housing, transport networks and public facilities necessary to realize human rights and enjoy a digni-

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[28] Faranak Miraftab, David Wilson and Ken Salo, K (eds), *Cities and Inequalities in a Global and Neoliberal World* (Routledge 2015).

[29] Pier Bourdieu and Alain Accardo (eds), *The Weight of the World: Social Suffering in Contemporary Society* (Polity Press 1999); Mustafa Dikeç, *Badlands of the Republic: Space, Politics and Urban Policy* (Blackwell Pub 2007); Loïc Wacquant, *Urban Outcasts: A Comparative Sociology of Advanced Marginality* (Reprinted, Polity Press 2010).

[30] Piketty (n 6) 73.

[31] Vincent Kaufmann, Manfred Max Bergman and Dominique Joye, 'Motility: Mobility as Capital' (2004) 28 International Journal of Urban and Regional Research 745; Peter Brand and Julio D Dávila, 'Mobility Innovation at the Urban Margins: Medellín's *Metrocables*' (2011) 15 City 647.

[32] Nick Devas, 'Metropolitan Governance and Urban Poverty' (2005) 25 Public Administration and Development 351.

[33] Kauffman, Bergman and Joye (n 31) 745.

[34] Dikeç (n 29).

[35] Soja (n 20) 32.

[36] Peter Marcuse, 'From Critical Urban Theory to the Right to the City' (2009) 13 City 185.

fied life. Land-uses, development patterns, infrastructure networks and associated settlement arrangements can similarly create unequal access to locational benefits, urban services and resources for excluded groups.[37] Lack of urban connectivity and neighborhood seclusion, for instance, can prevent the urban poor from physically reaching healthcare, education services, and jobs. Transit injustices may confine the urban poor to the periphery away from opportunities or leave them to rely on financially unsustainable forms of transportation that consume their valuable time and resources. Racialized and low-income communities can be unfairly burdened with locational externalities, with toxic dumps or highly polluting industries located in close proximity to their neighbourhood[38]. The spatiality of cities is therefore implicated in creating new forms of poverty and racial discrimination through the unequal disposition of urban space.

B. Current Trends in Urban Development, Policy and Governance

Since the late 1970s cities have become a conduit for the expansion of financial markets and mobile capital under globalization, whereas the financialization of the economy, urban assets and built environments are increasingly central to capitalism.[39] With the rise of neoliberalism across the globe, an 'entrepreneurial turn' in urban governance has replaced redistributive territorial goals. In a number of cities, the trend has been for dismantling programs and services that either existed in previous decades or that the urban poor are still demanding in much of the urbanized world, such as public housing, social services, public spaces and infrastructure provision.[40] Current urban policy strategies aim to attract new investment, tourism, highly-skilled professionals and residential elites through strategies such as place marketing, beautification, free trade zones, redevelopment districts, public-private partnerships, privately operated public spaces or large-scale development projects.[41]

Both in the Global North and South, neoliberal urban governance has fragmented city regions and enabled the privatization of communal spaces, fulfilling the desire of middle- and upper-class elites to self-segregate through physical barriers and disconnected infrastructures. Gated communities, shopping centers, golf courses, condominium lifestyles and privatized highways, which characterize affluent North American suburbs, are now common in residential areas and suburbs of African, Asian and Latin American cities.[42] Gated communities often

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[37] Soja (n 20).

[38] Isabelle Anguelovski, 'From Toxic Sites to Parks as (Green) LULUs? New Challenges of Inequity, Privilege, Gentrification, and Exclusion for Urban Environmental Justice' (2016) 31 Journal of Planning Literature 23.

[39] Neil Brenner and Nik Theodore, 'Cities and the Geographies of "Actually Existing Neoliberalism"' (2002) 34 Antipode 349; Keil (n 4).

[40] Peck and Tickell (n 5); Erik Swyngedouw, 'Governance Innovation and the Citizen: The Janus Face of Governance-beyond-the-State' (2005) 42 Urban Studies 1991.

[41] Brenner and Theodore (n 39); Peck and Tickell (n 5).

[42] Teresa Pires do Rio Caldeira, *City of Walls: Crime, Segregation, and Citizenship in São Paulo* (University of California Press 2000); Stephen Graham and Simon Marvin, *Splintering Urbanism: Networked Infrastructures, Technological Mobilities and the Urban Condition* (1st edn, Routledge 2002); Michael A Cohen, 'From Habitat II to Pachamama: A Growing Agenda and Diminishing Expectations for Habitat III' (2016) 28 Environment and Urbanization 35.

have their own sources of water, are designed exclusively for private automobile circulation, and devastate natural resources not always available to other groups.[43]

The outcome of uneven development is splintering urban morphologies, with gentrification and overinvestment in well-off areas and poverty, informality, precarious infrastructure, containment and coercion at the margins of the city. Discourses of privacy, safety and the portrayal of the urban poor as criminals are increasingly common in elites' justification of these spatial exclusions.[44] Local planning policies are equally complicit in exclusionary zoning through projects of gentrification – often under the guise of urban renewal–to keep marginalized communities contained or at a distance.[45]

The repercussions of uneven development are profound. As the majority of urban growth will continue to take place in low-income regions where local economies, institutions and infrastructure are precarious, future growth will likely be characterized by disconnected landscapes and expanding informality.[46] In previous decades, urban informality was often referred to as an exception and as a coping mechanism of the poor in the outskirts of sprawling cities of Latin America, Asia or Africa. Today, informality is seemingly the norm in the majority of the urbanized world.[47] It constitutes a fundamental way of relating to the state and negotiating life in the city, particularly to access income, housing and other resources.[48]

Violence and insecurity are yet another prevalent challenge for cities, predominantly in the so-called ghettos, favelas, projects or banlieues, where poverty, race, state disinvestment, recent immigration, and unemployment or underemployment converge. Often, former working-class neighborhoods–many of which in previous decades were successful examples of social housing projects or informal, self-constructed communities – have turned into derelict urban spaces. In these spaces, gang violence is common, and residents – particularly young men of colour or immigrant status–are stigmatized based on their race and place of residence. Residents often experience violence, including police brutality, or feel insecure in their daily lives.[49] It is in these 'grey zones' of urban exclusion where economic and political changes tend to have the biggest impact.[50]

Currently the right to an adequate standard of living, and the right to housing in particular, seems ever harder to fulfill.[51] In low-income countries, this right has been for decades called 'utopian' given the local scarcity of resources and the limited institutional capacity to implement it. But this limitation is also rising in countries of the Global North, where the right

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[43] Dávila (n 26).

[44] Caldeira (n 42).

[45] Ananya Roy, 'Why India Cannot Plan Its Cities: Informality, Insurgence and the Idiom of Urbanization' (2009) 8 Planning Theory 76.

[46] Watson (n 13).

[47] Ananya Roy, 'Urban Informality: Toward an Epistemology of Planning' (2005) 71 Journal of the American Planning Association 147.

[48] Watson (n 13).

[49] Wacquant (n 29); Dikeç (n 29); Luisa Sotomayor, 'Dealing with Dangerous Spaces: The Construction of Urban Policy in Medellín' (2017) 44 Latin American Perspectives 71; Luisa Sotomayor 'Medellin, Colombia: Social Urbanism to Build Human Security' in Sébastien Darchen and Glen Searle (eds), *Global Planning Innovations for Urban Sustainability* (Earthscan-Routledge 2019).

[50] Dirk Kruijt and Kees Koonings 'The Rise of Megacities and the Urbanization of Informality, Exclusion and Violence' in Kees Koonings and Dirk Kruijt (eds), *Mega-Cities: The Politics of Urban Exclusion and Violence in the Global South* (Zed Books 2009).

[51] Samuel Stein, *Capital City: Gentrification and the Real Estate State* (Verso 2019).

to housing and an adequate standard of living are becoming unrealistic.[52] Under the current belief in housing as a means of wealth creation, 'the logic of capital accumulation increasingly trumps the right to housing, with the "exchange" value of housing as a financialized commodity and as a generator of wealth valued above the "use" value of housing as shelter'.[53] As the rise of real estate markets and the speculation of land are now a global phenomenon, low-income – and often racially segregated – communities that previously enjoyed secure housing are losing socio-economic rights through evictions and gentrification.[54]

City-governments often decide to suppress and contain the fall-out of market-driven development and austerity policies through a set of strategies equally detrimental to human rights goals, such as the increased surveillance of public spaces, over-policing of marginalized neighbourhoods and the penalization of the poor through the judiciary system.[55] The overarching goal of such initiatives is to employ urban space 'as an arena both for market-oriented economic growth and for elite consumption practices, while at the same time securing order and control amongst marginalized populations'.[56] Meanwhile, in the cities of the 'majority' world, poor households continue to settle informally at the sprawling margins of the city, where land is typically unserviced and unregulated, and where most of the current urban growth in the world is taking place.[57]

In sum, there are myriad challenges to poverty reduction in the 'urban age', particularly in relation to uneven territorial development, neoliberal austerity, the commoditization of housing, and socio-spatial and political exclusion. Undoubtedly, all people should be able to participate in the construction of the cities in which they live, access their benefits, including public services, and enjoy public spaces, housing, health and education. Given that socio-economic rights are increasingly hard to realize under neoliberalism, the assumption that cities will be able to enact human rights and reduce poverty without a deeper commitment to systemic change seems remote. We strongly agree that cities can and should promote the implementation of human rights, particularly in relation to poverty reduction. We also acknowledge the importance of recognizing the advances of human rights perspectives in the city, and as we elaborate in the following section, we conceive of extended urbanization as a field of possibilities for the advancement of rights. However, we are sceptical about cities being both the problem and the solution to socio-economic exclusions. Instead, we pay attention to the opportunities for political agency that the urban affords: how residents – whether national citizens, undocumented contributors to the city or social movements – may play out their politics and use the urban fora strategically in their struggle to reclaim rights. In looking at the local state, it may be fruitful to examine how municipal and regional authorities, as well

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[52] David J Madden and Peter Marcuse, *In Defense of Housing: The Politics of Crisis* (Verso 2016).

[53] Whitzman (n 22) 1.

[54] Jason Hackworth, 'Postrecession Gentrification in New York City' (2002) 37 Urban Affairs Review 815. Neil Smith, 'New Globalism, New Urbanism: Gentrification as Global Urban Strategy' (2002) 34 Antipode 427; David Harvey, 'The Right to the City' (2003) 27 International Journal of Urban and Regional Research 939; Sharon Zukin and others, 'New Retail Capital and Neighborhood Change: Boutiques and Gentrification in New York City' (2009) 8 City & Community 47.

[55] Löic Wacquant, *Punishing the Poor: The Neoliberal Government of Social Insecurity* (Duke University Press 2009).

[56] Jamie Peck, Nik Theodore and Neil Brenner, 'Neoliberal Urbanism: Models, Moments, Mutations' (2009) 29 SAIS Review of International Affairs 49, 58.

[57] Watson (n 13); Cohen, (n 42).

as other agencies and institutions, can improve their responses and efforts to fulfil localized rights; but we caution against glorifying their efforts or capacities to do so. With these caveats in mind, in the next section we examine the opportunities and limitations of seeing the rights debate with an urban framing.

II. SEEING THE HUMAN RIGHTS DEBATE *LIKE (*AND *FROM)* THE CITY

This handbook invites reflection on the potential of human rights for poverty reduction. In this section we engage with this invitation from the perspective of the city, questioning the relevance of human rights approaches to confront the urban problems that we have just described. We ask to what extent seeing *like* and *from* the city may enrich the long-standing debate about the potential of human rights to produce social change. Certainly, numerous critiques of human rights have emerged with full force in recent years, with authors claiming their irrelevance and demise.[58] It is argued that 'human rights do more harm than good, as it provides an "ideological alibi to a global system whose governance structures sustain persistent unfairness and blatant injustice"'.[59] Furthermore, the relevance of human rights is questioned for not having fulfilled its core promise: the guarantee of equality for all human beings.[60]

It is easy to agree with some of the critical views that have appeared in the past decade, especially with those that stress the unfulfilled promises of human rights for the poor and the marginalised. But contrary to the fierce contenders, we side with those who believe that (although limited) human rights are far from irrelevant and that by looking at rights from the perspective of the city, one can devise some benefits that serve as counter-critiques to the various pessimistic views. Starting with the promises, the fact that around the world human rights are constantly being deployed by social movements and communities to advance their causes is not a minor contribution. The connection between human rights and social movements has been historically stressed, both by authors rooted in liberal traditions and by scholars with more critical views.[61] Upendra Baxi, for example, argues 'that over the last 60 years the oppressed of the world – mobilised in and through social movements – have been the hidden authors of contemporary developments in human rights'.[62]

To a great extent, such social movement mobilization occurs in cities. The city provides for the poor both formal and informal forms of participation. It contributes spaces for the emergence of an 'insurgent citizenship' that strongly claims 'a right to the city and a right to rights'.[63] Cities allow the flourishing of emerging citizen practices seeking to expand the public sphere and to 'to generate "new sources of laws, and new participation in decisions that

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[58] Langford (n 14).

[59] ibid 70 (citing Hopgood, 2014).

[60] Moyn (n 9).

[61] Neil Stammers, *Human Rights and Social Movements* (Palgrave Macmillan 2009); see, as examples, Henry J Steiner and Philip Alston, *International Human Rights in Context: Law, Politics, Morals: Text and Materials* (Clarendon Press and OUP 1996); Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (University of Chicago Press 2006).

[62] Stammers (n 61) 2 (citing Baxi, 2002).

[63] James Holston, 'Insurgent Citizenship in an Era of Global Urban Peripheries: Insurgent Citizenship in an Era of Global Urban Peripheries' (2009) 21 City & Society 245, 245.

bind"'.[64] In short, the reclamation of socio-economic and other human rights is often grounded on urban conditions, which cast cities as the fundamental terrain of social movements and disenfranchised populations in their ongoing fight for social justice.[65]

Besides the deployment of rights by urban social movements, another positive effect of human rights approaches is to displace charity as the way in which the urban poor, especially in low-income countries, access services and resources such as water and sanitation, housing or education. The recognition of human rights brings with it the acceptance that all humans are rights holders and that, upon ratification of human rights instruments, states have binding obligations to respect, promote and fulfill them. In practice, human rights serve to set minimum standards and add value to public policy by legitimizing the interests of the most marginalized in society.[66] Human rights can generate a commitment that substantiates local interventions aimed to improve urban equity and protect the interests of vulnerable residents, in particular when political agendas are not emphatic in their defense or when, as the case of Toronto illustrates, urban planning, zoning bylaws or policy decisions are part of the problem. By endorsing a right to housing, for instance, it is expected that cities will commit to try to solve the underpinning causes of homelessness and protect other rights for which housing is required instead of criminalizing the experience of being homeless that further pushes people into poverty.[67] But as we mentioned before, in the era of extended (sub)urbanization, any engagement with the urban will require attention to the blurry, fragmented and fusing realities of urban regions and the patterns of daily life, which have, in practice, diluted dichotomous assumptions about urban/countryside or city/suburb[68] and which question exclusionary claims to citizenship.[69] It is within this complexity that human rights approaches also prove limited.

One challenge relates to the formal nature of human rights. Rights-based approaches 'may be insufficiently sensitive to the local context as it brings a focus on an established package of rights that are difficult to realise fully'.[70] The formal character of rights and the fact that they reinforce the role of formal systems and processes of urban development not only leaves little possibility for negotiation at the local level but also becomes a constraint for the urban poor that do not fit easily into formality.[71] As Satterthwaite and Mitlin articulate, in a country like South Africa, the right to water may assist the homeowner but offers little to the informal tenant. In this way, these authors conclude, rights approaches, 'are not necessarily pro-poor and may be used to exclude as well as include'.[72]

Also due to their formal nature, attempts to implement human rights are often reduced to a specific geography and a defined set of state actors or international development institutions,

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[64] Faranak Miraftab and Shana Wills, 'Insurgency and Spaces of Active Citizenship: The Story of Western Cape Anti-Eviction Campaign in South Africa' (2005) 25 Journal of Planning Education and Research 200, 208 (citing Holston and Appadurai 1999).

[65] Marcuse (n 36); Holston (n 23).

[66] Caroline Moser and Andrew Norton, *To Claim Our Rights: Livelihood Security, Human Rights and Sustainable Development* (Overseas Development Institute 2001).

[67] Don Mitchell, 'The Annihilation of Space by Law: The Roots and Implications of Anti-Homeless Laws in the United States' (1997) 29 Antipode 303.

[68] Brenner and Schmid (n 24).

[69] Holston (n 23).

[70] Satterthwaite and Mitlin (n 25) 42.

[71] ibid.

[72] ibid.

which ultimately makes the approach inadequate to tackle the diversity of urban experiences and the increasingly globalizing characteristics of urban poverty and inequality. Magnusson describes this phenomenon in terms of the difficulty of exercising sovereignty, as an issue of 'often claimed' but 'infinitely deferred' authority that does not match people's political expectations.[73] The disparate and fragmented landscape of entities that constitute the state similarly obscures responsibilities over the local implementation of human rights claims.

Next to this challenge is the question of institutional capacity. Cities and local governments may have firm commitments to the eradication of poverty and inequality and to the promotion of rights and yet be unable to fulfill them due to institutional capacity problems. As Parnell notes: 'Bizarrely, many cities appear to have made political commitments to distributive justice without ensuring that the requisite institutional arrangements are in place.'[74] Moreover, cities are profoundly diverse and unequally equipped to address the socio-economic challenges that often originate beyond their sphere of influence, in national policies or global processes of production. It would be unfair to expect cities to fix national governments' failures and entrenched legacies, given their very limited capacity. Adding new responsibilities to cities, particularly poor cities of middle and low-income countries, may be unrealistic given how little fiscal and policymaking capacity some of them have.

Given the extent of global urbanization, mainly during the last half of the twentieth century, many cities in the world have grown through peripheral urbanization, predominantly but not only in the Global South. In much of the Global North, generalized gentrification processes have similarly displaced recent immigrants, refugees and racialized residents of historic working-class centralities to low-income suburbs or banlieues. In both cases, the peripheries have emerged as both areas of socio-economic exclusion and promising sites of political action.

In examining how politics play out in the periphery of Sao Paulo, Holston proposes the recognition of a 'contributors right' articulated to Lefebvre's concept of right to the city – a right that recognizes that those residents who make and build the city in their work and in their daily lives have a claim to it, regardless of whether or not they are national citizens, the legality of their residence, or whether they contribute to formal or informal economies.[75] The claim to such a right today is expressed in the Sanctuary City movement, or municipal identity cards, as in some areas of California, which aim to protect broadly the human rights of undocumented residents. In the current right-wing, anti-immigrant populist moment, the realization of such a right seems remote in many places but would be required as part of a serious response to current urban mobilizations happening in a multitude of cities.

Beyond these salient tensions, a number of debates and challenges must be addressed for localized human rights to increase their efficacy in urban poverty reduction efforts. First, in many cities with high levels of urban poverty, the knowledge of rights is limited. The 'illiteracy' of human rights often leads to their violation or denial. Although several attempts have been made to promote knowledge of human rights at the local level, these initiatives are still limited.

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[73] Magnusson (n 3).

[74] Susan Parnell, 'Building Developmental Local Government to Fight Poverty: Institutional Change in the City of Johannesburg' (2004) 26 International Development Planning Review 377, 378.

[75] Holston (n 23).

Second, while it is true that the expansion of the rights catalogue to include social and economic rights influenced the discussion of rights in urban policies,[76] it is also true that a challenge for human rights approaches to respond to urban poverty is the claim that such rights are not enforceable. While this assertion is subject to debate, some governmental officials still assume that civil and political rights must be prioritized, while social and economic rights will depend exclusively on the level of development that a country has achieved. Certainly, civil and political rights are essential but without the fulfillment of social and economic rights it will be difficult (if not impossible) to eradicate urban poverty and inequality.

This leads to a third challenge: in globalized times, cities are under pressure to compete for investment and resources. The ubiquity and worlding aspects of neoliberal urban agendas and the discourses that sustain them as an economic imperative or 'common sense' have recast market-driven urban development as if it were the only alternative for cities to compete globally, and as such, a matter of political consensus inviting little debate. Some even see in this 'post-political' condition the roots for the current re-emergence of right-wing populism[77] and the biggest barrier to realization of socio-economic rights.

Finally, a recurrent critique of human rights discourse and practice has to do with the universality of human rights, which has tended to be interpreted in Eurocentric terms. For decades, social justice movements in the Global South have challenged this prevailing Eurocentric understanding embedded in human rights discourse, interpretation and practice. From an urban theory perspective, the persistence of a narrow understanding of rights often obscures the wide diversity of the urban contexts, experiences and relations to global economic processes, and the specificity of state policies that shape cities and connect them to one another in both the Global North and South.[78] If such narrow understanding could be overcome, a democratized and locally meaningful human rights approach could potentially help to solve the current critique of cities being differently theorized along a first world/third world divide, where poverty is ascribed to a reality of 'third world' or 'developing' countries and studied through an international development framework, while poverty in cities of the rich world is conceived in relation to social policies and the welfare state.

III. CONCLUSION

Cities are fundamental arenas for social and democratic contestations against social injustices. As such, we have seen the growth of popular, professional and academic discourses that exalt cities as the solution to many of the world's intricate problems, from environmental sustainability to global poverty and racial injustice.[79] Such views often miss the point that urban

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[76] Oomen and Baumgärtel (n 15).

[77] Erik Swyngedouw, 'Interrogating Post-Democratization: Reclaiming Egalitarian Political Spaces' (2011) 30 Political Geography 370; Mustafa Dikeç and Erik Swyngedouw, 'Theorizing the Politicizing City' (2017) 41 International Journal of Urban and Regional Research 1; Juan Rivero and others, 'Democratic Public or Populist Rabble: Repositioning the City Amidst Social Fracture' International Journal of Urban and Regional Research (Online First).

[78] Jennifer Robinson, *Ordinary Cities: Between Modernity and Development* (Routledge 2006).

[79] Hilary Angelo and David Wachsmuth, 'Why Does Everyone Think Cities Can Save the Planet?' in Jens Hoff, Quentin Gausset and Simon Lex (eds), *The Role of Non-State Actors in the Green Transition: Building a Sustainable Future* (Routledge 2019).

issues are enmeshed in the very same logic that produce and sustain contemporary cities. Current human rights and development discourses have glorified the city as a suitable scale of intervention for the implementation of poverty reduction initiatives based on a rights perspective. Our intention in this chapter is to offer a more sober view that avoids romanticizing either the city or the localized rights approach while recognizing the gains and opportunities that the local scale can provide to the global human rights project. We warn against throwing the baby out with the bathwater and recognize that it is the legacy and strength of the human rights project that has often provided social movements with a common language, a toolkit and a set of tactics to leverage their cause. However, we also insist that attention be paid to the challenges that remain for the localized rights discourse to hold real purchase globally.

There is still much to say in the matter. Building on the key points of this discussion, we want to propose some lines of inquiry for future research that could aid in better understanding the connection between human rights, cities and urban poverty. One first call is to deepen the scope of interdisciplinary research. Insights from geography, sociology, critical race studies, and urban planning could enrich the view and work of human rights scholars and practitioners who have not necessarily focused their attention on the complexities of the city. The next step in this interdisciplinary effort could be aimed at understanding up close the spatial dimension of rights, considering key questions, such as: (1) How are contemporary geographies of inequality, poverty and social justice restricting human rights in diverse urban contexts?; (2) How can the space of the city be transformed into an environment for the gradual realization of human rights?; and (3) How to integrate human rights to urban innovations and aspirations of globality so that they do not perpetuate inequality and segregation in cities?

Another key line of research to address human rights, poverty and the urban should build on studies of metropolization, immigration and global cities, particularly as distinctions between urban, suburban and regional no longer hold neatly. We believe it is essential to inquire about how to promote collaboration, redistribution and collective capacity among neighbouring jurisdictions so that all residents of a city-region, including those undocumented or at the margins, are not affected by jurisdictional policies or required to stay in one locality in order to overcome poverty and secure rights.

Attention to the New Urban Agenda is also important. So far, we know little about its implementation across countries. Who are the responsible actors? What kind of interventions are being deployed domestically? What practices seem effective? How is progress being measured? Since the Urban Agenda is intended to guide the efforts of nations, cities, regional leaders, and international development agencies towards the achievement of sustainable urban development within a 20-year span, such questions deserve a close and critical look.

In terms of the theoretical grounding, we find hope in returning first, to Lefebvre's radical proposition of the 'right to the city' as an immanent right of marginalized groups to demand the reconstitution of power relations underpinning the production of urban space.[80] The concept of the 'right to the city' signals a way to reimagine a struggle for rights in the city away from capital and state interests towards those who inhabit the city. This entails a double right to participation and appropriation[81] and a right to difference for which minority and marginalized groups must struggle against homogenizing and essentializing policies aimed to manage the

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[80] Henry Lefebvre, *The Urban Revolution* (University of Minnesota Press 2003).

[81] Mark Purcell, 'Excavating Lefebvre: The Right to the City and Its Urban Politics of the Inhabitant' (2002) 58 GeoJournal 99.

poor and the different. Although in practice the concept of the 'right to the city' does not evoke the same implications for all its proponents,[82] it does generate a common discussion, with which further engagement is required, about urban citizenship, rights and their extension, and the possibilities that can be generated in a city so that people can enjoy a more just and democratic society.

An innovative angle through which the urban poverty-human rights nexus should be further explored includes Holston's proposal of recognizing a 'contributor's right'.[83] The struggle for the contributor's right is a definitive fight against a prevalent global form of exclusion from human rights at a time of war and generalized economic violence. Improving cities' capacity to engage with rights requires that all residents and marginalized groups gain the ability and the opportunity to, on the one hand, participate actively and directly in urban, economic and social processes of planning and change in the city and on the other hand, benefit directly from all of the physical, economic, cultural development and growth that is produced by it.

Finally, our invitation is for the global rights project to remain experimental and imaginative beyond the limits of liberal democracies. The challenges for the urban poor in contemporary cities are acute, but we must not only continue to learn from their efforts and innovative solutions to secure equal opportunities, but also, together, we should aim to rethink the meaning of the city for the advancement of rights of all dwellers – an invitation to collectively reimagine more just possible futures.

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[82] ibid; Kafui A Attoh, 'What *Kind* of Right is the Right to the City?' (2011) 35 Progress in Human Geography 669.

[83] Holston (n 23).

Chapter 8
The Constitution and the City: Reflections on Judicial Experimentalism Through an Urban Lens

Natalia Angel-Cabo

Contents

Abstract This chapter invites scholars to pay attention to the role that cities play in the enforcement of social economic rights (SERs), focusing on a type of decisions that some authors have called judicial experimentalism. Experimental justice refers to a judicial approach through which the courts, rather than rendering a final resolution on a case, pursue solutions through the promotion of dialogue and negotiation between governments and affected populations. Gathering insights from socio-legal studies, legal geography and critical urbanism, the chapter proposes an interdisciplinary framework for analysis and a set of research questions that could aid experimental scholars in broadening their research agendas in order to understand the limits and possibilities of SERs structural cases in the global South.

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8.1 Introduction

Do Constitutions constrain? Antanas Mockus, a renowned ex-mayor of Bogota,[1] used this question as the title for an academic paper which, in his own words, sought to discuss the relationship between the constitution and his work as city mayor.[2] In the first lines of his essay, Mockus announces his answer: constitutions do constrain, "usually in good ways but occasionally in bad ways."[3] After a few pages of reflections on how his work in the Town Hall was mediated by different systems of regulation—cultural, moral and legal—, the ex-mayor concluded by affirming that, in his experience, constitutions serve as connections that protect the stability and flexibility of other regulatory systems and act as a guide for the actions of the local governor.

It is not the purpose of this chapter to present an in-depth discussion of Mockus' thinking, even if it could raise different debates. My interest here is to approach a topic that emerges from his question and, in particular, from the way in which he describes the purpose of his essay. A question and a purpose that suggest a scarcely studied relationship in the academic literature: the one between the Constitution and the city, and, if one wants, between courts' decisions interpreting the Constitution and the way in which those decisions are received, discussed and implemented in cities of the global South.

We can approach the study of this relationship from different angles. In this chapter, I approach it through the lens of what has been my object of study in the last years: the adjudication of social and economic rights (SERs), through decisions that some authors have called judicial experimentalism. Broadly speaking, experimental justice refers to a judicial approach through which the courts, rather than rendering a final resolution on a case, pursue solutions through the promotion of dialogue and negotiation between governments and affected populations.

Judicial experimentalism is relevant to examining the relationship between the constitution and the city for a number of reasons. Chief among these is the fact that a good percentage of the cases addressed by experimental judgments emerge in cities. These include cases concerning the right to housing, education, health or access to basic services, whose guarantee is, to a large extent, the responsibility of local authorities. Surprisingly, scholars attentive to the outcomes of experimental justice (henceforth 'experimentalists') seem to pay little attention to the dynamics of cities where cases of this nature emerge. As Baverman expresses: "'[T]he where of law' (...) "are not simply the inert sites of law but are inextricably implicated in how law happens."[4]

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[1]Mayor of Bogotá for two terms (1995–1997 and 2001–2003).

[2]Mockus 2003.

[3]*Ibid.*, p. 1.

[4]Baverman 2014, cited in Bennett and Layard 2015, p. 408.

This chapter is organized as follows. In Sect. 8.2, I present an overview of the academic literature on judicial experimentalism. I highlight the contributions of this literature, but I also emphasize some of its gaps, among others, the tendency to read the scope of impacts of a particular case based on what the court does or fails to do,[5] leaving aside a much-needed inquiry on the challenges for implementation of experimental justice on the ground.

In Sect. 8.3, I invite experimentalists to change their focus and pay more attention to cities in the global South. Changing the focus here means carrying out situated studies, observing the economic, political, and social situation of cities and analyzing: (a) how courts' decisions are inserted into the everyday practices of local governments, (b) how the city is transformed by judicial interventions, and (c) how positive—or not—such interventions in the city can be. This vantage point also invites experimentalists to explore how over time, the everyday practices of cities modify the initial understandings of a particular dispute and of the court's orders.

The situated studies of experimental justice I am advocating might emerge from a dialogue between studies on judicial experimentalism and two bodies of literature that pay attention to cities: legal geography and critical urban studies. In this section of my chapter, Sect. 8.4, I highlight some lines of inquiry in these literatures, which might give rise to relevant research questions for future studies on judicial experimentalism.

In the final part, Sect. 8.6, I revisit a couple of examples from a case study which I carried out as part of my doctoral research, exploring the impacts of a Colombian Constitutional Court case on the situation of waste-pickers in the city of Cali. While I will not present the entire case study in my limited space here, I aim to offer a couple of snapshots of findings to show how turning our attention to cities may shed light on why an experimental judgment may—or may not—fulfil its objectives.

Before beginning one caveat is in order. I focus on experimental justice as it involves dialogical and participatory elements that for long have been relevant for the studies of the urban and because some of the most interesting SERs cases in the South can be described as experimental. But my invitation to examining the relation between the Constitution and the city is not limited to experimental justice. I hope that my discussion will serve academics to gather lessons and insights for future studies of courts and social change in the South related to all types of SERs cases.

8.2 Judicial Experimentalism

In countries of the global South, the courts have become central actors of social policy. In light of the permanent adjudication of SERs, a rich body of academic literature is discussing the possible effects of such an intervention. To a great extent, this body of literature has left aside the traditional question about the '*rights*' of judges to intervene in social policy to discuss, instead, *how* courts can best contribute to improving the lives of marginalized communities.

[5]See Epp 1998 in relation to the North American context.

The classical concerns around the adjudication of SERs remain nonetheless: a concern for the separation of powers, uneasiness for the economic impacts of the rulings, and a concern over the possibility that judicial intervention may demobilize social movements. More recently, a concern over equality and access to justice is increasingly expressed, with scholars worrying that only those who have access to courts end up being the ones who can see their SERs guaranteed.

While it is true that the adjudication of SERs in the global South is mainly a product of individual litigation, based on structural cases in countries such as India, South Africa, Argentina and Colombia, a number of authors have responded to the question of *how* judges should adjudicate SERs, promoting what some refer to as judicial experimentalism. Experimental justice entails a judicial approach in which a court does not dictate a final resolution to the case in question but, instead, issues orders that aim to promote dialogue and negotiation among governments, the affected population, and other stakeholders.

Liebenberg and Young, for example, describe the judicial experimentalist approach as a set of institutional practices that can be used to overcome some of the separation of powers and democracy-based concerns raised by the adjudication of SERs. In their view, what makes democratic experimentalism different from other public accountability models is the incorporation of basic pragmatist goals of reflexivity, problem solving, learning by experience and experimentation.[6]

Gargarella, in turn, considers that the richness of this approach lies in certain novelties or changes that gradually appear within the practice of judicial review: "from subtle changes in the attitude of our judges (more sensitivity towards the opinion of political branches) to the unprecedented organization of public hearings with representatives of social movements, NGOs and the government."[7] Sabel and Simon argue that an approach to litigation that emphasizes broad stakeholder negotiation and continuously revises performances and outcomes helps to "destabilize rights" and "to open up public institutions that have chronically failed to meet their obligations".[8]

The central argument in favour of experimental jurisprudence is that given the special position from which courts can integrate the perspectives of the affected population and give just recognition to the interests of those displaced from the democratic arena, they can strengthen the values of deliberative democracy.[9] In short, its proponents believe that through a dialogical and experimental approach, "judges may help improve the democratic system precisely in those aspects where the democratic system is in more need of help".[10]

Among proponents of experimental or dialogical jurisprudence, there are, of course, multiple focuses and approaches and the debate is far from over. For example, there are disagreements about who the participants in constitutional dialogues should

[6]Liebenberg and Young 2015.

[7]Gargarella 2015a, p. 1.

[8]Sabel and Simon 2004, p. 1020.

[9]Gargarella 2015b.

[10]*Ibid.*, p. 108.

be, and whether or not judges should limit their role in providing a forum for debate and negotiation, without touching upon the content of the SERs in question. For instance, some proponents of experimental justice refer only to institutional dialogues among courts and the other branches of government,[11] privileging what Brand calls a 'binary institutional relation' perspective, one that do not consider in full the voices of affected communities.[12] Others, by contrast, insist that any constitutional dialogue must seriously promote the direct engagement of citizens, arguing that citizens have as much to contribute to the construction of effective solutions as courts and other branches of government.[13]

While all proponents of a dialogical approach to the enforcement of rights reject courts' imposing 'strong judgments'[14] some contend that judges should withdraw from prescribing a particular solution to the problem at hand, deferring solutions entirely to political branches.[15] Still, others maintain that the role of courts in the enforcement of SERs cannot be limited to guaranteeing a forum or process for deliberation, but further, should attempt to foster a substantive concept of democracy.[16] For example, Bilchitz suggests that courts ought to include a minimum definition of the content of social rights (minimum core) in their judgments,[17] while Rodriguez Garavito advocates furnishing a road map for principled decision-making and remedial strategies to contribute to the enforcement of SERs.[18]

The theoretical debate on experimentalism is significant but there are still few empirical studies that examine and analyze its effects in practice.[19] In any event, despite being few, the investigations of this nature that have been undertaken contribute significant insights into both the potential and the limitations of judicial experimentalism.[20] These types of empirical studies have been invaluable in permitting a first look at the possible effects of experimental justice and in making recommendations as to how this judicial approach can be ameliorated in practice. Here, it is worth noting the wealth of experimental studies in offering a comprehensive typology of potential impacts of dialogical judgments.[21] In addition, empirical studies have provided important indications as to why dialogical activism has a better potential to generate positive effects compared to other types of judicial approaches. We

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[11] See, for example, McLean 2009; Dixon 2007.

[12] Brand 2011.

[13] *Ibid.* See also Angel-Cabo and Lovera-Parmo 2015; Liebenberg and Young 2015; Chenwi 2015.

[14] Tushnet 2008.

[15] Tushnet 2008; Sunstein 2001.

[16] Brand 2011; Bilchitz 2013; Liebenberg and Young 2015.

[17] Bilchitz 2013.

[18] Rodríguez Garavito 2011.

[19] Rodríguez Garavito 2011; Gloppen 2009.

[20] See, for example, Rodríguez Garavito and Rodríguez Franco 2010; Lamprea-Montealegre 2015; Cano-Blandón 2017; Yamin and Parra-Vera 2010; Dugard and Langford 2011; Landau 2012; Langford et al. 2014; Birchfield and Corsi 2010.

[21] For a complete typology of effects, see: Rodríguez Garavito and Rodríguez Franco 2010, and Dugard and Langford 2011.

know, for example, that several cases have contributed to strengthening the capacity of social movements, to unlock institutional inertia and to generate changes in public opinion about a particular problem at hand.[22] Existing works also hints at the challenges of experimental justice to produce social change. Some authors, for example, note the difficulty of experimental judgments in placing redistribution squarely on the agenda of public debate and action.[23]

Despite the significance of these contributions, it is still necessary to carry out more empirical research and to propose other lines of inquiry in order to better understand and address the potential and the limits of judicial experimentalism. Of course, with some exceptions,[24] the experimentalist debates have shown a marked tendency to discuss the potential of SERs judgments based exclusively on a court-centred perspective. For example, many of the explanations of which conditions can increase or reduce the impact of experimental SERs judgments revolve around debates on whether or not the courts in question promoted weak or strong remedies,[25] whether the judgments included a minimum core of rights,[26] and whether they incorporated a road map for enforcement or performed intense monitoring through the requirement of reports and public hearings.[27]

Some scholars even offer formulae, which are almost 'mathematical' in nature, in which they determine that the success of an experimental judgment will depend on a sum of factors, largely focused on the behaviour of the court. Consider, for example, the recommendation of Rodríguez Garavito, who by contrasting his reading of judgments of the Colombian Constitutional Court on the cases of prisons, health and forced displacement, suggests that experimental judgments are more likely to be effective if courts: (1) clearly affirm the justiciability of the right in question (strong rights); (2) leave policy decisions to the elected branches of power while laying out a clear roadmap for measuring progress (moderate remedies); and (3) actively monitor the implementation of the court's orders through participatory mechanisms like public hearings, progress reports, and follow-up decisions (strong monitoring).[28]

While I appreciate the merits of these approaches, I agree with Dugard and Langford that SERs litigation "is generally too unpredictable and diffuse for it to be adequately assessed through a formulaic or scientific approach".[29] This marked focus on court actions and in trying to offer explanatory causes of the outcomes of a particular case through procedural formulae, can make us lose sight of the challenges that the local level operation of the law presents for the implementation of experimental

[22] See, for example, Rodríguez Garavito and Rodríguez Franco 2010; Cano-Blandón 2017; Birchfield and Corsi 2010; Langford et al. 2014.

[23] Alviar 2015; Angel-Cabo and Lovera-Parmo 2015.

[24] See, for example, Lamprea-Montealegre 2015; Langford et al. 2014; Gloppen 2009.

[25] See, for example, Tushnet 2008; Landau 2012; Rodríguez Garavito and Rodríguez Franco 2010.

[26] See, for example, Dixon 2007; Bilchitz 2013.

[27] Rodríguez Garavito and Rodríguez Franco 2010.

[28] Rodríguez Garavito 2011, p. 1692. See also Cano-Blandón 2017.

[29] Dugard and Langford 2011, p. 39.

cases. It can also limit our inquiry into possible support structures[30] that might help to potentiate the impacts of these types of cases.

Another trend in the experimental justice literature is the marked emphasis on studying and discussing judicial experimentalism within a 'macro' approach.[31] This approach is expressed in two ways. On the one hand, existing experimental studies tend to focus on the so-called macro decisions[32] or, in other words, on "courts' especially visible and ambitious interventions".[33] There are many other cases of experimental judgments that are less ambitious, but just as important, and these, too, should be a source of investigation.[34]

On the other hand, experimentalists have been inclined to privilege a reading of cases of experimental justice from a national impact perspective. Even when the case emerges in a specific city, the literature presents its outcomes as if they were representative of the effects of an entire country. In the extended conversation on judicial experimentalism we talk about the cases of South Africa, Colombia, Argentina, India, without stopping to think about the different dynamics of the sites and cities in which such cases emerge and seek to influence. Macro approaches are important, but they often conceal profound differences between local jurisdictions within a country.[35]

8.3 The City as a Legal Space[36]

One way of broadening the horizons of our research on the impacts of SERs cases is to change the scale of the investigation, promoting more situated or subnational studies.[37] Detailed studies dedicated to understanding the processes advanced by courts and the challenges of enforcement in the different local jurisdictions in which courts' orders seek to influence, can offer us important insights to better understand the prospects of experimental justice.

For me, the analogy of the camera lens used by Valverde[38] is useful as it refers to inquiries in *zoom out* and *zoom in* perspectives. What we can see when we *zoom in*, could be very different to what we see with a lens open in another focal distance. The scale of our field of vision can be changed in different ways to permit us to see different details that affect our understanding of a case. I propose changing the scale to study how experimental judgments manifest within the scale of the city, that is,

[30] Epp 1998.

[31] Moncada 2016.

[32] Cano-Blandón 2017.

[33] Rodríguez Garavito and Rodríguez Franco 2015, p. 24.

[34] Cano-Blandón 2017.

[35] Moncada 2016.

[36] I am borrowing this subtitle from Blomley 2013.

[37] Moncada 2016.

[38] Valverde 2012.

addressing in detail how judicial decisions travel, disrupt and impact different cities of the global South.

It is true that today we are witnessing in different studies what some authors have called the 'urban turn'.[39] But my invitation to carry out empirical studies on experimental justice in cities of the global South does not follow any particular academic trend. There are a number of reasons that suggest that we should turn to cities to study the challenges of the implementation of SERs cases.

On the one hand, most of the world's population live in cities and it is estimated that the greatest population growth will take place in cities of the global South.[40] On the other hand, cities promote interesting processes of innovation and development while at the same time, exhibiting difficult dynamics of accumulation by dispossession,[41] complex forms of advanced capitalism,[42] and differentiated citizenships.[43] It is in cities where increasingly democratic proposals of deliberation and participation coexist with profound inequities.

The study of cities also helps us to understand that how every city is governed is distinctive and has its own motion. The city and its dynamics do not stop because a Constitutional Court issues a judicial order. In fact, courts' orders disrupt urban governance, such orders have to open a path for themselves, and (to recall the essay by Mockus) promote governors' reflections and actions on how to implement them within the local challenges of the city. In addition, not necessarily all judicial interventions in the city are positive, not even if they have been promoted under dialogue and negotiation with implicated actors.

To focus on cities is far from falling into the localism that some authors criticize. As Moncada notes, "Several scales of power overlap, intersect and interact within cities."[44] Cities are home to parallel and complex relationships that involve what has been understood as the global, the national, the regional and the local.

Finally, to focus on cities is central to understanding the impacts of courts' decisions on SERs. As I pointed out earlier, a large percentage of the cases that lead to these decisions occur on urban soil. Consider, for example, the South African cases of *Grootboom* (2001), *Mazibuko* (2009), *Joseph* (2009) and *Olivia Road* (2008). These are cases of evictions, access to water, and lack of access to public services in cities as markedly different as Cape Town and Johannesburg. Nevertheless, for a foreign reader (like me), who seeks to understand what happened with the intervention of the Constitutional Court in such cases, based on the experimental literature available, there is little I can understand about the differences between these cities, their institutional capacities or the diverse processes of local governance; in other words, in the experimental literature rarely I am able to find a detailed explanation of the particular political, economic and social dynamics of each of these cities and

[39] Parakash 2002, cited in Bhan 2016; Angel-Cabo and Sotomayor 2021.

[40] Watson 2009; Moncada 2016.

[41] Harvey 2012.

[42] Sassen 2014.

[43] Holston 2009.

[44] Moncada 2016, p. 3.

how they may have influenced the implementation of the court's orders. Even more, from this literature one is far from understanding what could have happened with constitutional cases emerging in South African cities that are profoundly different to Cape Town and Johannesburg, as for example the cities of the South African Eastern Cape.

For now, I will use two simple examples to emphasize how changing the scale of our perspective helps to shed light on other aspects of the potential of SERs cases, which may have previously gone unnoticed. A first example has to do with health litigation in Colombia. According to existing data from the Ombudsman's Office, in 2018 the number of *tutela* claims in health in the country was 207,734.[45] This data suggests an alarming litigation explosion in Colombia, in fact, the highest in the world.[46] Nevertheless, when we change the scale, and pay more attention to the different local jurisdictions, we can observe that the bulk of health litigation occurs in specific provinces of the country, mainly in Antioquia, Valle del Cauca and Bogotá. Local jurisdictions such as Chocó and Vaupés have a very low incidence of health litigation (0.36% and 0.07%, respectively), despite the fact that mortality rates in them are high. By changing the scale of our view, more than the high litigiousness, what we see is its absence, which illuminates complicated problems in terms of access to justice that go beyond the noted *middle class bias* in health litigation.[47] What also appears is a worrying and complex socio-spatial inequality in Colombia.

The study by Rodríguez Garavito and Rodríguez Franco on the Colombian Constitutional Court Decision T-025/09, regarding forced displacement, serves as a second example of the value of looking at local jurisdictions in order to better understand the impacts of experimental judgments.[48] This study provides a good illustration of a research carried out through a macro approach, in which the emphasis is given by the effects generated at the national level. Under this approach, one of the findings of such study is that through judicial intervention, the national government exponentially increased the allocation of resources to aid the displaced population, a real effect and an important impact of experimental justice. But if we change the scale and *zoom in,* the panorama is a little less encouraging. As illustrated by one of the few follow-up decisions of the Constitutional Court inquiring about the institutional capacity of local jurisdictions to aid the displaced population (Auto 383/10), a significant number of municipalities were operating under the insolvency law, which prevented them from allocating enough resources for this purpose.

I do not intend to suggest here that macro approaches are not relevant, as, in fact, they help to offer a comprehensive view of what is happening nationally in a specific country. What I try to do is to highlight the importance of complementing these types of studies with others that resist a mechanistic logic that tries to explain the effects of a court case through what the court does or failed to do in order to foster a more detailed review of what it is happening on the ground. As Pérez-Fernández

[45]Defensoría del Pueblo 2019.

[46]Lamprea-Montealegre 2015.

[47]Ferraz 2010; Alviar 2015; Landau 2012.

[48]Rodríguez Garavito and Rodríguez Franco 2010.

rightly expresses, referring to other types of interventions in the city, this means, "understanding the limitations within which urban policymakers operate and the opportunities they have to promote ideals of social justice (...)."[49]

8.4 An Extended Dialogue Between Disciplines

A first invitation to change the scale of analysis is to promote a dialogue between the experimental literature and other disciplines in which cities are relevant. In particular, I believe that socio-legal studies on SERs enforcement in the global South could be enriched by a fluent conversation with legal geography and with a rich urban literature that examines the dynamics of cities of the global South. As socio-legal studies on judicial experimentalism, these literatures are also concerned with matters related to inequality and poverty, issues of power, and the need to extend democratic channels to ensure the meaningful participation to all citizens.

Although in a preliminary and incomplete fashion, what I will do below is to present some ideas and findings of urban literature (mainly from studies concerned with the global South) and legal geography, which I consider to be useful in complementing the perspectives of socio-legal studies on experimental justice in the global South.

8.4.1 City Matters and Differences Among Cities Matters Too

Valverde correctly points out that every act of seeing and representing needs to use a particular scale: "There is no such thing as seeing or representing without scale. And the choice of scale has a close, though not necessarily fixed, relationship with the mode of governance associated or facilitated by that representation."[50] The city provides us a broader view of how social relations, spatial categories, and the possibilities of redistribution of SERs are, to a great extent, mediated and constructed by the law. As I have noted, an exploration into the law and the city has not been broadly developed. Nevertheless, the growing literature on legal geography begins to shed light on the types of reflections and observations that could be carried out to extend the studies on judicial experimentalism.[51]

As it is known, legal geography is a discipline that concerns itself with investigating the constitutive relations between people, space and the law.[52] It is an interdisciplinary project, which aims to explore "how legal practice (...) co-produces places

[49] Pérez-Fernández 2010, p. 78.

[50] Valverde 2015, p. 58.

[51] See, for example, Blomley 2013; Castro 2015; Bennett and Layard 2015.

[52] Bennett and Layard 2015; Castro 2015.

through an attentiveness to, and sometimes an apparent dismissal of, spatiality".[53] Some studies (especially early ones) focus on illustrating how the law negates space or makes it invisible, insisting also on the fact that "geographical ignorance has political consequences".[54] Others emphasize the interdisciplinary enterprise by arguing that space and law are mutually constitutive. For these legal geographers, it is not enough to look at the effects of the law on space, but rather to go beyond to show how legal practices and discourses contain various spatial representations of social and political life and how these representations affect legal reasoning and everyday life.[55] The current effort of many legal geographers is to understand the constitution of the spatial and the legal in a broader sense, as an assemblage of governmentality.[56]

By inviting academics to function as "spatial detectives" Benett and Layar offer a number of suggestions on how to undertake legal geographic research. As they point out, legal geographers prefer to carry out research "from the side up", asking themselves:

> (...) [W]here is this place/event/dispute located? What do we see? How do legal and spatial meanings combine here? (...). These investigations tend to adopt one or more of three conceptual structures and points of concern, namely (1) what is the spatiality of law itself? – how do spatial settings affect legal implementation and drafting, and vice versa?; (2) what is the role of law in constituting place?; and (3) how do lawyers and geographers engage with notions of jurisdiction and scale?[57]

There are different focal points of legal geography studies. For example, quite a number of legal geographers are interested in what happens in the city, focusing their attention on its mundane locations and on everyday spaces and practices.[58] Others start their research on courts' judgements, resorting to a discursive analysis that considers the use (or lack thereof) of spatial categories in judicial decisions. Delaney, for example, presents a method of contextual analysis of cases in which legal decisions are subject to an examination that seeks to identify the 'legal moves' and the 'spatial imaginaries' of the judge.[59] This approach broadens doctrinal legal analysis by inviting an inquiry into 'space-talk' or a lack of 'space-talk' in judgements and to understand that in the presence or absence of this conversation the judge is "doing significant governance work".[60]

For the conversation about judicial experimentalism in Latin America, Castro's study is useful as she presents the works of legal geography in Spanish and invites researchers to relate those works with others on distributive analysis of the law.[61] Reviewing Colombian legal literature, she invites us to consider seriously the law-space-power relationship, which, in her opinion, implies:

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[53] Bennett and Layard 2015, p. 406.

[54] Castro 2015.

[55] *Ibid.*, citing Delaney 2014.

[56] Castro 2015.

[57] Bennett and Layard 2015, p. 410.

[58] Bennett and Layard 2015.

[59] Delaney 2010, cited in Bennett and Layard 2015, p. 412.

[60] Layard 2015, cited in Bennett and Layard 2015, p. 413.

[61] Castro 2015.

> (...) to research how spaces and the ways in which people inhabit them, re-signified and affect the law; (...) to consider the winners and the losers produced by the unequal application of the law in space and the co-construction of the space; to think about the ways in which the law is presented to us as limited, disguised, encapsulated or amplified in certain positions and specific disputes; to ask where the places/events/disputes that we analyse are located and how in these spaces legal meanings and spatial imaginaries are combined.[62]

8.4.2 *Time (Temporality) Matters*

In a thought-provoking book, *Aramis, or the love of technology,*[63] Bruno Latour studies the failure of a project to develop a rapid urban transport system in Paris. The project had begun with high investment and the promise to revolutionize the city's transportation. However, two decades later, the project ended, without *Aramis* (the rapid transport system) ever materializing. In the best style of a detective novel, Latour investigates "who killed *Aramis*". His conclusion is that no one in particular killed *Aramis*. The project died on its own because the interest in it focused on the design of the project, ignoring the 'roads' on which it was supposed to travel. In other words, *Aramis* died because those interested in it did not know how to keep the project alive through time and the changing political and social circumstances.

As illustrated by *Aramis*, time is an important factor through which to understand the effects of interventions in the city. To connect this to our discussion about judicial experimentalism, a court case might be considered the artefact that must travel through the space of the city, be driven by its actors, and be kept alive through time in order to potentiate its results.

This temporal factor has not been alien to socio-legal studies. However, it is deepened in recent writings of legal geography. Valverde, for example, invites academics to take note of the presence of time (temporality) as a decisive factor in socio-spatial life.[64] Appealing to Bakhtin's concept of chronotopes, she invites us to consider the 'rhythms of time' in space: changes, movements, contradictions and, in general, dynamic processes "to better capture the way in which ideas, as weapons in both historical and more micro-level struggles, are constantly shifting in meaning and effectivity, as they are used for different aims".[65]

8.4.3 *Politics Matters*

That politics is relevant in the city is something we already know. However, it is still worth making a call to experimentalists to always ask themselves the question

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[62] Castro 2015, p. 231.

[63] Latour 1996.

[64] Valverde 2015.

[65] *Ibid.*, p. 4.

of how power is located and exercised in the city. This implies, on the one hand, recognizing that a judge is one of several actors that might exercise power but on the other, to note that the judge is not the only one and not even one that can (or should) exercise a predominant role in the resolution of complex problems in the city.

Since the times of Hunter (1990) and Dhal (1961) political scientists have emphasized the importance of locating and analyzing sites of power in the city. Those who study urban politics focus their work on similar issues, such as identifying the actors with power, the relationships between them, the forces that mediate access to public goods and services, the dynamics of local democracies, and the challenges of developmental policies.[66] The frameworks of analysis for these concerns have been dominated by the North American literature, mainly under the guise of the so-called elitist,[67] plural,[68] and political economy theories, which include the theory of growth machines[69] and the urban regimes theory.[70]

Although these theories (especially that of urban regimes) are dominant in the study of urban politics, observations about their limits for the study of cities in the global South are becoming more frequent. Several scholars highlight the need to complement such theories to explore how issues relevant to the global South, such as the role of clientelism, of urban informality and of the agency of subaltern citizens, play in local politics. Moreover, authors criticize the fact that these original theories do not cover the complex power arrangements that emerge from processes of decentralization and neoliberal globalization, which have engendered elaborate transformations on how we think, live and govern contemporary cities.

Regardless of the controversies, my call to experimentalists is to consider politics as a determinant factor. To acknowledge that decisions in cities (including the decision of whether or not to comply with a judicial order) are mediated by a complex set of relations between public and private actors, which often act through political networks or social coalitions. It is necessarily to study social movements, but also to investigate how other interested parties such as businesses, foundations or transnational agencies influence them, and in general, how they affect public decisions. In order to study the role of politics in the enforcement of SERs in the city is essential to constantly change the scale of analysis, as what happens in a city is not observed by looking exclusively at the urban space or the dynamics among local actors. Looking at the city also requires observing the influence of national and regional actors and mandates and of the impact of globalization processes on local decision-making.

To emphasize why politics matters for empirical studies on SERs judicial experimentalism, let us consider the findings by Moncada[71] and Goldfrank,[72] who, like

[66] Moncada 2016.

[67] Hunter 1990.

[68] Dahl 2005.

[69] Logan and Molotch 1987.

[70] Stone 1989.

[71] Moncada 2016.

[72] Goldfrank 2011.

the experimentalists, are interested in participatory enterprises for the resolution of social problems.

Moncada, for example, by examining different participatory political projects to deal with urban violence in different cities of Colombia, concludes that three factors influenced the success or failure of these projects: (1) clientelism, (2) the role of businesses and their relationship with institutional actors and (3) the pressure of armed actors in the city.[73] Goldfrank, by examining three participatory processes promoted by left-wing governments in Porto Alegre, Montevideo and Caracas, concludes that the success or failure of such projects depended on two factors: (1) the level of decentralization, expressed in the degree of intervention by national authorities in the city and the national resources available for the municipality and, (2) the level of institutionalization of the opposition parties in the local arena.[74] According to Goldfrank, these factors "largely defined the ability of progressive governments to design truly participatory institutions and to attract and maintain citizen participation".[75]

8.4.4 Inquiries from the Global South Matter

Those of us who have embarked on the study and discussion of SERs based on cases from South African, Colombian or Indian courts, just to name a few, have joined an extended conversation about courts and social change which has largely been driven by scholars in the global North. But the question of what does it mean "to look from the South"?[76] what does it mean to do "theory from the South"?[77] or, simply, what do we bring forth to the conversation about courts and social change from the South? must persist in our inquiries.

As Bhan rightly notes, thinking from the South cannot mean: "studying cities of the global South, the 'developing world' or the 'Third World' to add greater empirical diversity to our list of global cities".[78] It should mean more than that, and among other things, it should mean maintaining vigilance over the supposed 'universal grammar' of knowledge. Doing inquiry from the South, means prioritizing a set of questions and perspectives that emerge from a specific place and that, even subject to travel, they should not erase their origin and their histories.[79]

Postcolonial theory provides provocative lines of research, useful to the interdisciplinary enterprise of studying the relationship between the constitution and the city through judicial experimentalism. On the one hand, these studies insist on rejecting the description of cities of the global South as apocalyptic, awaiting development

[73] Moncada 2016.

[74] Goldfrank 2011.

[75] *Ibid.*, p. 7.

[76] Watson 2009.

[77] Comaroff and Comaroff 2012.

[78] Bhan 2016, p. 13.

[79] *Ibid.*

or the arrival of modernity, as if they were confined to an "imaginary waiting room of history".[80] Rather, they invite us to understand the global South as a relational geography: as a set of dynamic and changing locations.[81] Postcolonial theory applied to the urban is concerned with revealing the heterogeneity of cities, with restoring the agency and voices of subaltern citizens that claim their 'right to the city'. Who speaks, who is listened to, who can 'inhabit' the city, how subaltern residents build and attribute meaning to urban spaces, and how they participate, are key questions to postcolonial theorists.

The concept of periphery is central. For Caldeira the periphery, more than a specific place, is a concept of inquiry.[82] Roy, in turn, defines it as "is a space produced through the interventions of humanitarianism, urban restructuring, capital flows, policing and control",[83] but also as a space "of innovation and adaptation ... potentially destabilizing of the center".[84] Roy's proposal, like that of other postcolonial scholars, is to do theory from regular cities, from places that are usually considered peripheral: "peripheral of the world economy and politics, peripheral within cities, peripheral knowledge of authority".[85]

In his deep study on the evictions from *bastis* in Delhi, Bhan outlines concerns that have marked the interests of postcolonial studies. These include: (1) the debate to understand urban informality/illegality; (2) the production of space and the regulation of its value; (3) debates on 'good governance', and its intersection with ideas of development of cities; (4) the political field of urban citizenship and the possibilities of substantive rights and belonging to the city; (5) the resistance and capacity of the subordinate residents to fight against the exclusion of the cities they inhabit; (6) the relationship between democracy and inequality in the city.[86]

In addition to these concerns, Bhan proposes a final line of research, that of judicialization specifically as an urban phenomenon,[87] which is worth thinking about given its long absence from studies on cities. To tie it to our discussion, what we observe is that if the city has been invisible for experimentalists, urban scholars, in turn, have forgotten about (or have only just begun to notice) the growing influence of the judge as an urban actor.

The few works that take seriously the role of the judge in cities of the South provoke, nonetheless, relevant sources of exploration. Coggin and Pieterse, for example, embark on the task of relating SERs litigation and adjudication in South Africa with the claims of the Right to the City movement.[88] Through an explanation of a concept proposed by Lefebvre and a presentation of different courts cases on

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[80] Chakrabarty 2009, p. 8.

[81] Bhan 2016; Roy 2011.

[82] Caldeira 2000.

[83] Roy 2011, p. 232.

[84] *Ibid*, citing Simone 2010.

[85] Bhan 2016, p. 14.

[86] Bhan 2016.

[87] *Ibid.*

[88] Coggin and Pieterse 2012.

SERs, they maintain that the recognition and adjudication of rights, "can embody, facilitate and enhance various constituent elements of the right to the city".[89] Their reading, however, is not devoid of issues of concern. On the one hand, they warn of the adverse effects that can follow from SERs adjudication, "especially where judges are not aware of the contexts in which the impact of their judgements are felt, or where those tasked with conceiving or implementing urban policies are unfamiliar with the requirements posed by the constitutional standards to which they must adhere".[90] On the other hand, they are concerned that courts, by adjudicating SERs frustrate important dimensions of the right of the city, that is, to "disrupt or unduly predetermine the continuous balance between competing claims to the city, in either its concrete or aspirational forms".[91]

Their final concern refers to the risk that courts, when deciding SERs cases, align themselves with a neoliberal conception of citizenship, which underlies a good part of the governmental policies related to urban development. Bhan[92] and Gupta,[93] in their investigations, confirm this risk. They both observe the growing judicial intervention in the city though multiple eviction orders from slums in New Delhi. Their concerns are condensed in a series of questions raised by Bhan: "How did this [evictions of vast number of citizens] occur through a judicial innovation [Public Interest Litigation] created precisely to be the 'last resort for the bewildered and the oppressed?" When did the claims of poverty cease to be sufficient to guarantee a right to inhabit the city for numerous residents?[94] Guptha responds to these questions by noting that from the year 2000, different courts' decisions in New Delhi have strengthened a version of the 'modern city' in line with an agenda of neoliberal development that makes it increasingly difficult for marginal populations to claim, through the law, the possibility of inhabiting the space of the city.[95]

8.5 A Tentative Proposal to Begin the Conversation

How can we integrate socio-legal studies on judicial experimentalism gathering contributions from legal geography and the rich literature on urbanism of the South? I think that as experimentalists, we should begin by broadening our repertoire of research questions. As a way to start my proposed interdisciplinary conversation, I present below some questions that may serve as entryways to expand the perspective of SERs studies in the city. I draw from the richness of the typology of effects proposed by experimental authors, and use some of their questions, but I include

[89] *Ibid.*, p. 274.
[90] *Ibid.*
[91] *Ibid.*, p. 275.
[92] Bhan 2016.
[93] Gupta 2014.
[94] Bhan 2016, p. 8.
[95] Gupta 2014.

others that emerge from legal geography and from the rich urban literature referred to above.

8.5.1 Choosing the Case(s)

As the study of experimentalists begins with SERs adjudication, choosing a case for study will depend, largely, on a court's decisions. Nevertheless, we must take seriously the invitation of postcolonial authors to inquire about decisions that will affect 'regular cities' or those that have not been the *locus* of theoretical production. To study the way in which experimental judgements are inserted in these less-studied cities, how they transverse and generate effects in these other cities and in their peripheral spaces, can help us to have other insights about the limits and possibilities of experimental justice. This necessarily implies ethnographic work or detailed case studies that incorporate rich interdisciplinary dialogue.

8.5.2 The Reading of the Case

Delaney is right when he claims that the study of the effects of a judicial decision must begin by the reading and analysing of it.[96] Following Delaney's suggestion, the analysis cannot be confined to legal reasoning expressed in the text, without considering other factors that are relevant in terms of the construction of the case. Questions such as: who intervenes in the elaboration of the decision? Which voices were influential? How are the city and its form of governance represented (or not)? Which are the 'legal movements' and 'spatial imaginations' of the judge and of those that intervene?[97] Does the decision construct socio-spatial categories? Does it explore the capacities of the city to achieve the aims recommended in the decision? How is the beneficiary population represented? How is the social and political life of the city portrayed? What are the discourses and imaginaries regarding poverty, vulnerability and inequality in the city? Do judges acknowledge the different scales of power that have an influence in the city?

8.5.3 Situating the Study in the City

Understanding the city has to be a central starting point: its history and its social and economic composition must be examined in order to understand how its socio-spatial inequalities are created, and to get a sense of the city's institutional capacities

[96] Delaney 2010, cited in Bennett and Layard 2015.

[97] With reference to the method suggested by Delaney.

to comply with the judicial decision. Scholars must inquire into unequal access to "resources, mobility, public services, and production structures" that influence urban spaces.[98] We must observe how imaginaries of citizenship present in the city and how these influence the discussions about who could 'really' be considered an urban citizen.[99] It is important to study the actors and the relationships between them to understand to what extent judicial orders are aligned with the interests of the different actors and with competing local agendas. Scholars must trace how the court's discourses and its imaginaries of poverty, vulnerability, and inequality of the beneficiaries of a case move in the city through time and space.[100] We must consider how the different scales of power overlap, how they cross each other and interact within the city.[101]

8.5.4 The Sphere of Participation

The core of judicial experimentalism lies in the promotion of moments of participation and negotiation between governments and interested parties. Nevertheless, the opening of a participatory forum does not ensure that all the voices are heard with the same level of consideration and recognition. Although their questions do not emerge from the South, Larocque's framework[102] complemented by questions by Papadopoulos and Warin[103] are useful when it comes to looking at participatory forums. I add to these other questions that emerge out of my reading of critical urbanism, especially those that I consider pertinent for analyzing the role of the judge in these 'invited spaces' of participation.[104] If a characteristic of local governance has been to open up spaces for citizens' participation in the decision-making processes, it is essential to ask what changes when courts are the ones who prompt participation in these kinds of spaces (see Table 8.1).

8.5.5 The Expected Effects

One of the most important contributions of the experimental literature is that of offering a rich typology of effects and impacts (direct and indirect) that can be expected from experimental cases. However, if we consider the importance of looking at city dynamics, we should add other questions to this typology of effects. In

[98] Sotomayor 2015.
[99] Bhan 2016.
[100] *Ibid.*
[101] Moncada 2016, p. 3.
[102] Larocque 2011.
[103] Papadopoulos and Warin 2007.
[104] Cornwall 2004, citing Brock et al. 2001.

Table 8.1 Criteria and questions for analysis of deliberative processes

Criteria	Questions
Franchise (openness and Access to the participatory space)	• Who is involved in the process and what is their legitimacy? • Does the participatory space satisfy a criterion of inclusiveness (is it open to all) or is it selective (by invitation)? • Are there any obstacles to participation by women and men and disadvantaged segments of society? (Including socio-spatial obstacles) • Who faces obstacles to participate (e.g. women, indigenous or Afro-descendant persons, marginalized segments of society)? How are these obstacles to participation expressed? • What are the incentives and/or disincentives for different actors to engage in the deliberative process?
Quality of deliberation	• What is the scope of the discussion and how is the style of interaction? • Who establishes the agenda? • Are topics open to change?
Publicity and accountability	• What is the frequency of consultation? • What are the institutional procedures for consultations? • Besides institutional participatory processes, are there any other processes of deliberation taking place? How do they influence institutional participatory processes? • Does the institutional process allow for multiple perspectives to come into the debate? • Does the process contemplate mechanisms to deal with power relations?
Role of courts	• Does the judge succeed in his role as a mediator of the dialogue? • Does the judge help to address the absence of viewpoints? • Does the judge help to balance forces of power within participatory spaces?

Source The author

Table 8.2, I include with minor changes the classification of effects proposed by Rodríguez Garavito and Rodríguez Franco[105] Second, following Scheingold,[106] I add as a variable the possibility of *backlash*. Finally, in Column 2, I include questions previously formulated by the aforementioned authors and by other experimentalists, but I also add questions that emerge from the literature on legal geography and critical urbanism.

[105]Rodríguez Garavito and Rodríguez Franco 2010.

[106]Scheingold 2004, p. xi.

Table 8.2 Criteria and questions for impact analysis

Criteria/typology	Questions
Effects on equality	• Has the case contributed to the amelioration of the socioeconomic situation of the affected population? • Has the case contributed to the efforts and capacity of the beneficiaries in their struggle to deal with exclusion from the cities they inhabit?
Unlocking effects	• Has the case contributed effectively to unblocking institutional inertia? • Have the spaces in which the subaltern citizens can interact with the authorities been broadened?
Effects on coordination	• Has the case helped institutions to collaborate on the design, finance and implementation of appropriate remedies? (National/local authorities; between local authorities; between other authorities)
Effects on public policy?	• Has the case generated changes in policy content? Who do these changes benefit? • Have the results of the participatory process been included in the policy changes? • Have the policy changes helped to improve the equity of access to services and resources for the affected population?
Participatory effects	• Has the case helped to form coalitions of activists to influence the topics under consideration? Who are the activists and what are the agendas they promote? • Has the process influenced changes in activist or social movements' strategies? • What triggered or mobilized broader participation around the case? • Has the case served to develop empowering tools for social movements? • Has the process of implementation of the case led to greater mobilization and participation around the topics in question? (For everyone?)
Effects on public opinion	• Has the case helped to change the views or understandings about the problem at hand? • Has the case helped to change views about the affected population? • Are 'sensitive' or contested topics (e.g., neoliberal policies, dissident voices) made visible?
Backlash	• Has the implementation of the court orders produced negative or undesired effects? (E.g., affecting positive processes in place in the city, generating division in the social movement, producing greater socio-economic and socio-spatial inequality)

Source The author

8.6 The Case of Cali's Recyclers[107]: An Example of Why It Is Worth Changing the Focus

To conclude, and as a way to concretize the discussion, below, I present a couple of findings from a recent case study that I carried out in the Colombian city of Cali, where I examined the impacts of the Constitutional Court Judgment T-291/09. The case emerged after the city's decision to close the municipal garbage dump (Navarro), without considering what would happen to the recyclers who, for decades, had been informally working there to ensure their livelihood. The Court granted the recyclers' *tutelas*[108] and declared that the dump had not been closed under parameters of sustainability. Consequently, it ordered the authorities to guarantee the immediate livelihood of the Navarro recyclers (a minimum core of rights) and to implement a participatory forum to design a public policy aimed at including recyclers in the formal municipal waste management system.[109] The Court also named an NGO as monitor of the implementation of its orders, and established timelines for the authorities to report on progress. In short, this was a decision that, at least in its formulation, seemed to promise a successful enterprise of judicial experimentalism.

Nevertheless, as I describe in detail elsewhere,[110] almost ten years after decision T-291/09 was issued, its effects are not encouraging. A public policy was issued in 2017 but has not been implemented and it is not foreseeable that it will. The court's decision did not lead to changes in public opinion, the recyclers are divided, and they no longer trust the promises of the court to improve their socio-economic situation. In terms of its effects it is not unreasonable to maintain that this is a clear example of a modest judicial experimentalism.

If we were to answer through the proposals of some experimentalists, the conclusion would be that this judicial experimentalism failed because the Court did not carry out a strong monitoring, or because its roadmap was not sufficiently clear. But such answers would be inadequate in describing what happened in this case. Although I cannot present all of the results of these case study here, I will offer three snapshots of findings centred on the city's political situation, on the timing of the judgment and on Cali's institutional capacity to respond to the implementation of the Court orders. I hope that these brief snapshots serve to illustrate why expanding the focus of analysis to consider the specificities of local jurisdictions can provide us with other responses regarding the fate of SERs cases.

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[107] In Colombia waste pickers are also called recyclers.

[108] Writ for the protection of human rights.

[109] Specifically, the Court ordered the creation of a "Committee of Inclusion", composed of Cali's recyclers' organizations, different public entities and organizations from the so-called civil society.

[110] Angel-Cabo N. (n.d) Garbage, Courts and Political Struggles: Socioeconomic rights enforcement in emerging global cities (doctoral dissertation, pending defence).

8.6.1 *Snapshot 1: The Invisibility of the City and the Timing of the Court Orders*

That courts do not see cities, even when cases emerge in them, is something that authors that study local governments have already identified.[111] And, in this case, the invisibility of the city for the Colombian Constitutional Court was evident at different points in time. One of which influenced the participatory process prompted by the Court.

As I mentioned, one of the orders of the Court was the formation of a Committee through which through dialogue and negotiation between different actors, a new policy benefiting Cali's recyclers could be designed. As someone has to take charge of the administrative aspects of participatory spaces, the Court ordered Cali's Mayor, EMSIRVA (the old municipal company responsible for the dump), and the Superintendence of Residential Public Services—SRPS—(a national entity) to organize the meetings and lead the Committee. On first reflection, this could seem reasonable. Nevertheless, if the Court had stopped to look at what was really happening in the city, it would have realized that the order was doomed to fail.

Sometime before the issuing of decision T-291/09, the SRPS had ordered the liquidation of EMSIRVA. This decision generated a political 'earthquake' in the city. First, the liquidation of the municipal company was seen in Cali as an undue intrusion of the national government on its local autonomy. Second, there was great uncertainty regarding the fate of the company's current and retired employees pending liquidation.[112] The situation was even more difficult if we bear in mind the ideological distances between the national and the local governments. The then Colombian president was a right-wing politician, whereas Cali's mayor belonged to the left. The national government favoured the privatization of public services throughout the country, whereas the local government was convinced that municipal companies should be the ones in charge of providing public services. As the Court did not stop to consider the social, political and economic dynamics of the city, it did not recognize that it was ordering two authorities in obvious political confrontation to lead the Committee and to a municipal company in the process of liquidation.

The city's local political situation and the timing of the Court order, explain to a great extent the initial failure of the Committee. Although it met regularly and the recyclers' organizations went to the meetings, the process was mediated by mistrust. After six months of meetings, some of the participants thought they had reached an agreement on the content of the future public policy. But they soon realized that the agreement would not materialize.

The mayor decided to create a new municipal company, insisting that it would ensure compliance with decision T-291/09, as it was supposed to include Cali recyclers as stockholders.[113] Soon after, the Colombian Attorney General dismissed that

[111] Schragger 2014; Azuela 2008.

[112] At the time of the order of liquidation, Emsirva had 500 formal workers, 840 indirect contractors, and more than 930 pensioners.

[113] A solution that had never been discussed in the Inclusion Committee.

mayor and a newly elected mayor, this time, a man of the centre-right, stepped into office deciding to liquidate the municipal company recently created by the previous mayor. The implementation of the Court case would have to begin again.

8.6.2 Snapshot 2: Global Cities, Political Regimes and Competing Discourses

With a new mayor in office, waste pickers' organizations and the NGO appointed as monitor renewed their hopes that the Court orders would be quickly implemented. But again, the disappointment would be high. In the following years, progress in implementation was almost nil. One of the explanations for this inactivity has to do with the implementation's rivalry with other so-called imaginaries of the global city. Around the time of the election of the new mayor, the city entered in intense competition with other cities around the world seeking to acquire global status that would help attract tourism and economic investment. Despite the broad respect accorded to the Constitutional Court, a case on garbage that sought to include waste-pickers in the city's public waste management scheme did not fit easily with the government's efforts to attract foreign investment in the city and to present Cali globally as a clean and modern metropolis.

An interesting episode illustrates the influence of these imaginaries of the global city on the implementation of the Court's orders. Some of my interviewees proudly pointed out that Cali had been nominated by a prestigious international organization as one of the most sustainable cities in the world. One of the reasons that justified the nomination was the closure of the Navarro garbage dump. Ironically, this nomination contradicted the opinion of the Colombian Court, which believed that the closure of Navarro, although necessary, was not performed under sustainable conditions, as it disregarded the livelihoods of the people who used to live and work there. So, perhaps unsurprisingly, for a local administration interested in attracting tourism and foreign investment, the prospect of winning an international award resonated more strongly than the critical view of a local court. The implementation of the Constitutional Court's ruling would have to battle it out with other types of 'discourses', concerns and initiatives circulating in the city, including those of international organizations.

A second factor that explains the inactivity of the administration in implementing the Court's ruling pertains to local politics. As often noted by scholars working in urban political regimes, economic elites, mainly the business community, carry great weight in shaping and sustaining a city's governing arrangements. In the Cali case, a good example of this dynamic can be seen in the influence of a local social corporate responsibility foundation on the municipal government. This was not just any foundation, but rather one tied to one of the largest industries in Cali, owned by a prestigious family from the city.

The local foundation's director opposed the Court's decision right from the start. In his opinion, the Court erred in considering that waste pickers should become entrepreneurs and formally participate in the city's solid waste management scheme. In his view, the only worthy goal was to help recyclers improve their livelihood

even through economic activities unrelated to recycling, such as lawn mowing, hairdressing or product marketing. This was a vision far removed from the one expressed by the Court in Judgment T-291/09, where the tribunal insisted that the municipality should try to preserve the role of recyclers as autonomous recycling entrepreneurs in the local economy.

The view of the corporate responsibility foundation's director ends up being one of the most influential discourses in the city, to the point where the municipal government abandoned its initial course of action towards implementation of the Court's ruling. In fact, the municipal government end up hiring this foundation as a consultant for the development of different workshops and activities for waste pickers, some that were not even connected with the occupation of recycling. The municipal government presented these initiatives as important developments in the implementation of the ruling. This created a profound discomfort among various stakeholders of the Court's ruling, including some waste pickers and the director of the NGO appointed by the Court as monitor. These parties were appalled by the fact that the municipal government was 'delegating' part of the implementation of the ruling to a foundation tied to a multinational company that was one of the main buyers of recycling goods in the city. Paralleling the argument of structuralist scholars,[114] these actors believed that Cali's industry had no interest in changing the pecking order of the recycling chain, where recyclers are the lowest on the economic totem pole, receiving very low prices for recuperated solid wastes. These individuals and groups accused the corporate responsibility foundation of interfering, rather than helping with the implementation of the case, as a way to privilege the economic interests of Cali's industrial sector over those of the waste pickers. However, despite how strong such criticisms were, the voice of the foundation prevailed and influenced the municipal government at the time. Similar to the previous anecdote, here too, the Court's ruling would have to try to compete with other visions and discourses strongly prevalent in the city.

8.6.3 Snapshot 3: The Invisibility of the City and Its Institutional Weaknesses

For almost five years, the NGO appointed as monitor by the Court and the recyclers who had felt deceived by the decisions made by Cali's mayors, sent several communications to the Constitutional Court, warning of non-compliance with its orders and demanding a public hearing in Bogotá. Given that the new composition of the Court is sceptical of centralizing in the tribunal the monitoring processes of structural cases,[115] five years after Judgment T-291/09, it issued a follow-up decision, ordering the reopening of the Committee and assigning to Cali's municipal judge the task of monitoring the case. The follow-up decision had a number of problems, but one of the most evident was the order given to the municipal judge, as the Court did not

[114] See, for example, Portes et al. 1989; Birkbeck 1979.

[115] Angel-Cabo and Lovera-Parmo 2015.

stop to consider whether he knew what was expected in the monitoring of structural cases or whether the judge had the institutional capacity to do so.

In my field study, I went to the courthouse in question to ask how the judge was conducting the monitoring of this case. When I got there, right at the entrance, I saw a poster resembling an obituary, reading: "Colombian justice rests in peace". It was a protest against a legislative proposal to modify various articles of the constitution referring to the judicial branch. For me, the poster anticipated what I then found at the courthouse.

In a small room with three desks piled high with files, I approached a secretary who (to the beat of *regueton*) asked me if I was there to look at the file of T-291/09, as I had previously announced my visit. Once I had access to the file, I was surprised to see that it was tied tightly with a string, as if no one had looked at it. I inquired whether she knew what progress had been made in relation to this case. The secretary spontaneously responded: "No one has opened that file; it has always been there, on that same rack."[116] As I intended to talk to the judge, I insisted that I wanted to interview him. The secretary went into his office and very quickly came back out to tell me: "The judge says that he cannot see you, he has only just taken office and he knows nothing of the case. He started just a few days ago."[117] I asked her for the previous judge's contact details so that I could interview him instead, to which she promptly responded: "Look. Don't waste time. No one has seen the file. This courthouse has changed judges three times over the last year. As soon as a judge takes office they transfer him to another courthouse."[118] I thanked the secretary for her help, left the office, and as I walked down the street I could not stop thinking that, at least in that courthouse, Colombian justice was indeed resting in peace.[119]

8.7 Conclusion

Cities are fundamental arenas for the contestation of rights.[120] It is in cities where most SERs cases emerge and seek recognition. The urban fabric of a good percentage of SERs cases is as yet still invisible for most scholars preoccupied with issues of courts and social change. This paper invites scholars to pay attention to the role that cities play for the enforcement of SERs, focusing on a species of judicial decisions that some authors have called judicial experimentalism. Experimental justice refers to a judicial approach through which courts, rather than rendering a final resolution on a case, pursue collaborative solutions through the promotion of dialogue and negotiation between governments and affected populations. Gathering insights from socio-legal studies, legal geography and critical urbanism, I propose a framework for analysis and a set of questions that could aid experimental scholars in broadening

[116] Field diary, 5 June 2015.

[117] *Ibid.*

[118] *Ibid.*

[119] *Ibid.*

[120] Angel-Cabo and Sotomayor 2021.

their research agendas in order to understand the limits and possibilities of SERs structural cases in the urban landscape.

There is still too much to say about the relations between the Constitution and the city, or between courts' decisions interpreting the Constitution and the way they are received and implemented on the ground. Next steps of the proposed interdisciplinary endeavour should be aimed at developing other case studies that help us to gain comparative insights on the role of courts as mediators of urban conflicts and to evaluate the extent to which court-decided SERs cases are able to counteract prevailing geographies of inequity, poverty and social injustice in different cities of the global South.

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Capítulo 13

El concepto de libertad y el libre desarrollo de la personalidad

Renata Ángel Cabo

Introducción

[illegible] ha sido informado por la directora del colegio de que no puede seguir asistiendo a clase hasta tanto no se corte el pelo. A él le gusta su aspecto y considera tal requerimiento como un atentado a su libertad. El colegio, por su parte, insiste en que tener el pelo corto está establecido como un requisito obligatorio en el manual de convivencia, el cual los estudiantes aceptan cuando de manera voluntaria ingresan a la institución educativa. [illegible] decide entonces interponer una acción de tutela en contra del colegio, argumentando que se ha violado su derecho a la educación y al libre desarrollo de la personalidad.

Este tipo de tutelas es frecuente en nuestro país. De hecho, la exigencia de que los hombres lleven el pelo corto en los colegios fue uno de los primeros temas [illegible] por la Corte Constitucional y, al día de hoy, continúa [illegible] similares. [illegible] qué genera tanta controversia de un requisito como cortarse el pelo? ¿Por qué algunos estudiantes se niegan a hacerlo? ¿Por qué es tan importante para algunas instituciones educativas que sus estudiantes lleven el pelo corto? Básicamente, porque lo que está en juego aquí no es una discusión sobre una tira de queratina que si se corta vuelve a crecer. Lo que está en juego es una controversia sobre los alcances de lo que llamamos libertad.

¿Y qué es la libertad? En definitiva, un valor que apreciamos. Pero como decía Abraham Lincoln, "el problema es que no siempre pensamos lo mismo cuando la palabra sale de nuestros labios"[1]. Este escrito ofrece una primera aproximación al tema de la libertad individual y, en particular, a lo que en nuestro contexto se conoce como el derecho al libre desarrollo de la personalidad. Aunque las discusiones sobre la libertad han sido objeto de innumerables aproximaciones filosóficas y políticas, el capítulo se limita a ofrecer un primer acercamiento a partir de la formulación producida por el pensador inglés Isaiah Berlin, que ha servido como punto de partida para discusiones contemporáneas sobre el concepto de libertad y los alcances y límites a su ejercicio. A partir de dicha formulación, la segunda parte muestra cómo la Corte Constitucional ha interpretado el derecho al libre desarrollo de la personalidad e ilustra diferentes [illegible] y puntos en conflicto cuando enfrenta situaciones concretas en las que está comprometido su ejercicio.

El concepto de libertad

La libertad, como un concepto de derechos humanos, parte de concebir a las personas como individuos que, en principio, gozan de la facultad de elegir, de tener un sentido propio de justicia, de decidir sobre lo que es bueno o malo para ellos y de poder, en consecuencia, elaborar sus propios planes de vida. En esta perspectiva, cobra vital importancia el concepto de dignidad humana, es decir, el principio según el cual la persona se reconoce como un fin en sí mismo y no como un medio para un fin. La dignidad exige que las personas sean tratadas con respeto y reconocimiento y, en otras

1. [illegible] Buenos Aires: Fondo de Cultura Económica, [illegible]

términos, que no sean "convertidos en objetos, para satisfacer las necesidades de otros"[2]. Del principio de dignidad se siguen, en consecuencia, una serie de restricciones y normas de trato, tales como la prohibición de convertir a las personas en esclavas o incurrir en torturas y tratos crueles o degradantes. Así mismo, este principio obliga a reconocer a toda persona como un ser humano con intereses, necesidades y proyectos vitales que debe encontrar un espacio de expresión y desarrollo[3].

Un presupuesto de la libertad es el pluralismo, es decir, la aceptación de que en la sociedad coexisten diferentes formas de ver el mundo. La misión del Estado debe, en consecuencia, estar encaminada a facilitar condiciones que posibiliten la convivencia dentro de la diversidad, sin que pueda privilegiar una particular forma de ver el mundo[4]. La Corte Constitucional colombiana ha expresado estas ideas con claridad al señalar: "El principio de la dignidad de la persona humana, no sería comprensible si el necesario proceso de socialización del individuo se entendiera como una forma de masificación y homogeneización integral de su conducta, reductora de toda traza de originalidad y peculiaridad [...]. Además de miembro de la comunidad, el individuo como persona tiene derecho a ser portador de una diferencia específica"[5].

Los conceptos de libertad negativa y positiva

Como ya se señaló, la noción de libertad que subyace a las ideas mismas de dignidad y de pluralismo no se reduce a un solo concepto. Tal y como lo puso de presente el pensador inglés Isaiah Berlin[6], la libertad puede ser vista de maneras distintas; en su propuesta: como libertad negativa y como libertad positiva[7]. La libertad negativa, según Berlin, responde a la pregunta "cuál es el ámbito en que al

sujeto —una persona o un grupo de personas— se le deja o se le debe dejar hacer o ser lo que es capaz de hacer o ser, sin que en ello interfieran otras personas"[8]. En otros términos, cuál es el campo dentro del cual la persona puede o debe poder actuar sin que se le impongan obstáculos a su actuación. Básicamente, la respuesta a esta pregunta se traduce en la idea de libertad como no coacción. "Ser libre en este sentido quiere decir para mí que otros no se interpongan en mi actividad. Cuanto más amplio sea el ámbito de esta ausencia de interposición, más amplia es mi libertad"[9]. En otras palabras, bajo esta noción, el ser libre significa que podemos "realizar nuestro propio bien a nuestra propia manera"[10], sin mayores obstáculos o interferencias externas. El concepto de libertad negativa no presupone que su ejercicio sea ilimitado, pues puede chocar no solo con las libertades de otros, sino con distintos valores y principios constitucionales[11]. Sin embargo, esta idea de libertad supone que debe haber un ámbito mínimo de libertad individual que no puede ser violado bajo ninguna circunstancia y que en nuestro contexto se

2 Theodor Maunz y Günter Dürig, *Kommentar zum Grundgesetz*, citado en Norman Dorsen et al., *Comparative Constitutionalism: Cases and Materials* (St. Paul, Min: Thomson/West, 2003), 491.
3 Defensoría del Pueblo, *Derechos humanos ¿Qué son los derechos humanos?* (Bogotá: DP, 2001), 23.
4 Ronald Dworkin, *Los derechos en serio* (Barcelona: Ariel, 1984), 109.
5 Corte Constitucional, Sentencia T-090 de 1996. MP Eduardo Cifuentes Muñoz.
6 Isaiah Berlin, *Cuatro ensayos sobre la libertad* (Madrid: Alianza, 2002), 215-280.
7 [illegible]

Gerald C. MacCallum Jr., "Negative and Positive Freedom", *Philosophical Review*, 76 (1967): 320.
8 Berlin, *Cuatro ensayos*, 235.
9 Berlin, *Cuatro ensayos*, 232.
10 Berlin, *Cuatro ensayos*, 236.
11 Dworkin, citando a Berlin, [illegible]

conoce como el núcleo esencial del derecho o el límite a los límites–, pues de traspasarse se desconocería el derecho mismo a la libertad.

Para ilustrar el punto, piénsese en un derecho de libertad como es el derecho a la libertad de expresión, entendido tradicionalmente como libertad negativa[12]. Este derecho, en principio, garantiza la posibilidad de toda persona de expresar libremente sus pensamientos y opiniones, sin condiciones o controles previos sobre el contenido del mensaje que se quiere difundir. Cosa distinta es que se establezcan ciertas restricciones de tiempo y lugar para manifestar o expresar determinadas opiniones o pensamientos, como, por ejemplo, limitar las manifestaciones públicas en las llamadas "horas pico", para evitar el caos vehicular. En dichos eventos entran en juego consideraciones sobre los derechos de terceros sin que con ello se esté anulando o limitando severamente la libertad de expresión. En síntesis, quienes defienden una concepción negativa de la libertad, si bien no afirman su carácter absoluto, exento de limitaciones, hacen énfasis en que la garantía de la libertad implica "la remoción de obstáculos que se opongan al desarrollo individual y el aseguramiento de una esfera de independencia que haga posible tal desarrollo"[13]. Por ende, consideran necesario limitar lo exterior la acción estatal sobre la esfera de acción individual.

La concepción negativa de la libertad se asocia con la idea clásica del Estado liberal de derecho, plasmada por ejemplo en la Constitución estadounidense de 1787[14] y en la Declaración de los Derechos del Hombre y el Ciudadano de 1789. Para el pensamiento liberal el Estado debe ser limitado con respecto tanto a sus poderes como a sus "funciones"[15]. En esa medida, no solo deberán preverse mecanismos constitucionales que pongan freno al ejercicio arbitrario e ilegítimo del poder[16], sino que, en sí mismo, el Estado deberá ser un Estado mínimo, cuya acción no vaya más allá de garantizar una convivencia armónica, sin grandes interferencias en la órbita individual del sujeto.

Distinta de la concepción de libertad negativa, o libertad como no coacción, es la de libertad positiva. Ella, según Berlin, responde a la pregunta "por quién estoy gobernado"[17] o "quién tiene que decir lo que yo tengo y lo que no tengo que ser o hacer"[18]. La concepción positiva de la libertad no designa entonces la idea de "estar libre de algo" –coacción e interferencia–, sino la de "ser libre para algo"[19]. La libertad positiva se centra en la capacidad del agente para autogobernarse, a diferencia de la negativa, que se interesa por las condiciones externas que puedan interferir en la capacidad de actuar. Dicho de otro modo, mientras que la concepción negativa de la libertad se concentra en la ausencia de obstáculos, barreras o interferencias para su ejercicio, la concepción positiva de la libertad enfatiza la presencia de condiciones o capacidades que permitan la realización de determinado proyecto vital, ya sea individual o colectivo. Bajo la noción de libertad positiva, el papel del Estado cambia, pues, a diferencia de la concepción liberal clásica que enfatiza los límites del actuar estatal, la concepción positiva defiende en ciertos eventos la intervención del Estado para potenciar las capacidades del sujeto y su compromiso con fines valiosos. De este modo, el deber del Estado no será simplemente un deber negativo de no intromisión, sino también un deber positivo de protección y mantenimiento de las condiciones que permitan a las personas potenciar sus capacidades para ser, dentro de esta concepción, verdaderamente libres[20].

Esta idea de libertad positiva tiene relación directa con dos principios fundamentales de los Estados sociales y

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12 Sobre "tradicionalmente", pues hoy en día se entiende a la libertad de expresión [illegible] también de la libertad de expresión, como fundamento de un verdadero orden democrático, lo que exige del Estado no solo conductas de abstención, sino actuaciones positivas que hagan efectivo su ejercicio.

13 Alessandro Pizzorusso, "Libertades", La noción de libertad. Una introducción a su teoría política (Barcelona, Ariel, 2001), 23.

14 Véase, por ejemplo, la construcción de la 14 enmienda de la Constitución de los Estados Unidos de Norte América. Véase David P. Currie, "Positive and Negative Constitutional Rights", University of Chicago Law Review, 53 (1986): 864.

15 Norberto Bobbio, Liberalismo y democracia (México, Fondo de Cultura Económica, 1989), 17.

16 Bobbio, Liberalismo y democracia, 19.

17 Berlin, Cuatro ensayos, 231.

18 Berlin, Cuatro ensayos, 231.

19 Berlin, Cuatro ensayos, 231.

20 Un ejemplo que ilustra esta visión positiva de la libertad es la famosa decisión del Tribunal Constitucional alemán BVerfGE 33 (1972), conocida como el caso del numerus clausus. En esa sentencia el Tribunal alemán expresó que la garantía de la libertad de ejercer profesión u oficio no solo tiene que ver con la protección frente a la intervención gubernamental, sino que se requiere también de la existencia y posibilidad de acceso a instituciones educativas.

democráticos de derecho. Por un lado, el de participación, pues en la medida en que la libertad positiva enfatiza en la capacidad de determinar la propia suerte, para ella es esencial que se garanticen condiciones para que las personas puedan potenciar sus capacidades e intervenir efectivamente en las decisiones que las afectan. Por otro lado, se relaciona con el principio de igualdad y, más precisamente, con lo que se conoce como igualdad sustancial, que justifica la acción o intervención estatal para promover y proteger a personas o grupos que ven disminuida su capacidad de autodeterminación por encontrarse en condiciones de marginalidad o sometidas a prácticas de discriminación[21].

Cabe señalar que para Isaiah Berlin la concepción de libertad debería centrarse en la idea de libertad negativa. A su juicio, fortalecer la noción de la libertad positiva podría servir de excusa para el desarrollo de regímenes totalitarios, que en nombre de la libertad terminan por inmiscuirse arbitrariamente en el ámbito privado de los ciudadanos. No obstante, también son múltiples las críticas a la propuesta de Berlin de reducir el concepto de libertad a la idea de no interferencia. Los críticos más duros provienen de tradiciones socialistas y comunitaristas que, a diferencia de los defensores de la postura liberal clásica, no temen una mayor intervención del Estado en ciertas circunstancias[22]. Para estos críticos, por ejemplo, limitar el concepto de libertad a su acepción negativa compromete ideas ideales de la libertad, como la participación o la liberación del hambre como condición necesaria para el ejercicio de la libertad. También sostienen que quienes se concentran en la defensa exclusiva de la libertad negativa terminan por desconocer la verdadera naturaleza del hombre como ser social[23].

El libre desarrollo de la personalidad en la jurisprudencia de la Corte Constitucional: tensiones y conflictos

Una de las manifestaciones de lo que denominamos libertad es el derecho al libre desarrollo de la personalidad. La

Actividad 1
Para reflexionar

El legislador expidió una norma que limita la participación en los llamados juegos de suerte y azar a aquellas personas que comprueben ingresos mayores a un salario mínimo. A juicio del legislador, la medida se justifica para garantizar que personas con escasos recursos no dispersen sus ingresos, sino que los inviertan en garantizar sus necesidades básicas.

1. Usted es un activo defensor de una concepción de libertad negativa. ¿Considera que esta medida es adecuada?
2. Si, por el contrario, usted defiende una concepción positiva de libertad, ¿considera justificada la medida? Fundamente su respuesta apelando a los conceptos de libertad negativa y positiva propuestos por Berlin.

Constitución lo garantiza en el artículo 16 al señalar: "Todas las personas tienen derecho al libre desarrollo de su personalidad sin más limitaciones que las que imponen los derechos de los demás y el orden jurídico". La Corte Constitucional ha definido este derecho como "la capacidad de las personas para definir, en forma autónoma, las opciones vitales que habrán de guiar el curso de su existencia"[24]. También ha dicho que ello implica optar por un plan de vida propio, desarrollando la personalidad conforme a intereses propios, deseos y creencias, siempre y cuando no se afecten derechos de terceros y no se viole el orden constitucional[25]. Nótese que en la definición de la Corte están presentes el concepto de libertad como no coacción (negativa) y el de libertad como capacidad (positiva). En efecto, ella trae consigo la idea de que debe existir un ámbito mínimo de libertad sustraído de toda interferencia, pero también la de que la libertad, más allá de la ausencia de obstáculos, debe consistir en la capacidad del sujeto para autodeterminarse.

21 Sobre la noción de igualdad sustancial, véase en este libro el capítulo 10, "El derecho a la igualdad y a no ser discriminado", por César Rodríguez Garavito.

22 Angelo Papacchini, Los derechos humanos, un desafío a la violencia (Bogotá: Altamir, 1997), 55-66.

23 Papacchini, Los Derechos humanos.

24 Corte Constitucional, Sentencia T-542 de 1992, M.P. Eduardo Cifuentes Muñoz.

25 Corte Constitucional, Sentencia C-309 de 1997, M.P. Alejandro Martínez Caballero.

Chapter 6

HUMAN RIGHTS LEGAL CLINICS IN LATIN AMERICA
Tackling the Implementation of Disability Rights

Natalia Angel-Cabo

INTRODUCTION

Latin American countries were among the first in the world to ratify the Convention on the Rights of Persons with Disabilities (CRPD) (UNEnable, n.d.). Most have also ratified other international human rights instruments, such as the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities, the American Convention on Human Rights, and the International Covenant on Economic, Social and Cultural Rights (ICESCR). National constitutions have provisions ordering local compliance with international commitments and establishing particular obligations for states parties to secure civil, political, and socioeconomic rights for all citizens, including persons with disabilities. However, these legal outcomes stand in stark contrast to the distressing realities faced by persons with disabilities in the region. Latin America is known to have high levels of socioeconomic inequality, poverty, violence, and social exclusion (UNDP, 2010), problems that are compounded significantly for persons with disabilities. According to the World Bank, Latin America has approximately 50 million people living with disabilities. Of these, 82 percent live in poverty and 90 percent are unemployed or outside the mainstream workforce. Most lack access to health services and adequate housing, and less than 30 percent have access to education (World Bank, n.d.). How can this difficult reality be changed?

Although the use of law by itself is limited in its ability to produce significant social change, human rights monitoring and advocacy can play a valuable role in buttressing effective state implementation of international agreements and in empowering persons with disabilities to mobilize and claim their rights (UN, 2010). To be successful, these monitoring and advocacy processes require the active involvement of persons with disabilities and the

DISABILITY, RIGHTS MONITORING, AND SOCIAL CHANGE

Building Power out of Evidence

Edited by

Marcia H. Rioux, Paula C. Pinto, and Gillian Parekh

Canadian Scholars' Press

Toronto

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REPUBLICA DE COLOMBIA
IDENTIFICACION PERSONAL
CEDULA DE CIUDADANIA

NUMERO 52.620.954

ANGEL CABO

APELLIDOS

NATALIA

NOMBRES

FIRMA

FECHA DE NACIMIENTO 28-DIC-1972

BOGOTA D.C
(CUNDINAMARCA)

LUGAR DE NACIMIENTO

1.68 O+ F

ESTATURA G.S. RH SEXO

22-JUL-1991 USAQUEN

FECHA Y LUGAR DE EXPEDICION

REGISTRADOR NACIONAL
CARLOS ARIEL SÁNCHEZ TORRES

INDICE DERECHO

A-8625010-00618253-F-0052620954-20140903 0039841028A 2 40674500

REPUBLICA DE COLOMBIA

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NOMBRES:
NATALIA

APELLIDOS:
ANGEL CABO

PRESIDENTE CONSEJO SUPERIOR DE LA JUDICATURA
JOSE AGUSTIN SUAREZ ALBA

UNIVERSIDAD
DE LOS ANDES

FECHA DE GRADO
16/03/1996

CONSEJO SECCIONAL
BOGOTA

CEDULA
52620954

FECHA DE EXPEDICION
09/09/1997

TARJETA No.
87472

Universidad de los Andes

LA SUSCRITA JEFE DE LA OFICINA DE REGISTRO DE LA UNIVERSIDAD DE LOS ANDES

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NIT. 860.007.386-1

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Acta de Grado N° 400 - 96 -Libro 10 - Folio 2- del 16 de marzo de 1996:

"En Santafé de Bogotá, D.C., a 16 de marzo de 1996, se reunieron en la Plazoleta de la Facultad de Ingeniería, el doctor RUDOLF HOMMES R., Rector de la Universidad; el doctor GUSTAVO GONZÁLEZ, Vicerrector de la Universidad; (...) "con el objeto de hacer entrega de los diplomas a los graduandos que cumplieron con los requisitos reglamentarios exigidos por la Universidad para optar al título profesional correspondiente." (...) "Los Decanos de las Facultades de Ingeniería, Ciencias, Economía, Administración, Humanidades y Ciencias Sociales, Arquitectura, Derecho, la Directora de Textiles y Artes Plásticas y el Director del Cider, hicieron entrega de los diplomas a sus graduandos, en el siguiente orden:"

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487.. NATALIA ANGEL CABO C.C. 52620954 Usaquén (...)*

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Bogotá DC, 27 de agosto del 2021

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Bogotá, agosto 27 de 2021

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CONSEJO DE ESTADO
Ciudad

Ref. Declaración juramentada sobre inexistencia de incompatibilidades e inhabilidades

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Por la presente, manifiesto bajo la gravedad del juramento, que no estoy incursa en conflicto de interés o en causal de incompatibilidad e inhabilidad alguna para ejercer el cargo de magistrada de la Corte Constitucional.

Rindo esta declaración, de acuerdo con los requerimientos de la convocatoria realizada por esta Alta Corporación para la conformación de la terna de candidatos para remplazar al magistrado de la Corte Constitucional Alberto Rojas Ríos.

Cordialmente,

Natalia Ángel Cabo

Natalia Ángel Cabo
CC.52620954 de Bogotá

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DE COLOMBIA

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Universidad de los Andes
NIT 860.007.386-1

Gestión Humana y Desarrollo Organizacional de la Universidad de los Andes

Certifica

La Profesora NATALIA ANGEL CABO identificada con CC No. 52620954 de BOGOTA DC, está vinculada a esta institución mediante la suscripción de un contrato de trabajo Término fijo a un año, con dedicación de 47.5 horas semanales, desde el 27/07/2015. Actualmente desempeña el cargo de Profesor Asistente - Director Derecho Público Constitucional en Facultad De Derecho.

Esta certificación se expide a solicitud de la interesada, con destino a CONSEJO DE ESTADO, a los veintisiete (27) días del mes de agosto del año dos mil veintiuno (2021).

SANDRA MILENA ACOSTA GONZALEZ
Jefe Servicios Laborales

Este certificado requiere para su plena validez y confiabilidad que la información aquí consignada sea verificada y convalidada con la Dirección de Gestión Humana y Desarrollo Organizacional a través de los siguientes medios: a) Telefónicamente en la línea 3394949 Ext.:3884, b) A través del Sitio Web http://ghdo.uniandes.edu.co. Si la certificación anterior no es refrendada a través de algunos de los procedimientos mencionados, la misma solo tendrá el valor probatorio que las partes le den, y será equiparada para todos los efectos legales a una prueba sumaria. La Universidad de los Andes no sume ningún tipo de responsabilidad por el contenido y/o por la firma consignada en este tipo de documentos, hasta tanto no sea validado o confirmado por alguno de los medios ya mencionados. APLICACIÓN DE LAS NORMAS VIGENTES SOBRE COMERCIO ELECTRÓNICO: Todas las comunicaciones que ya se expresen vía Mensaje de Datos (Internet, Correo Electrónico, EDI, telex, fax, o telefax), tendrán el mismo alcance, efecto y valor probatorio que las normas vigentes y aplicables sobre el Comercio Electrónico consignadas en la Ley 527 de 1999, Ley 588 de 2000, Decreto Reglamentario 1747 de 2000, y la Resolución 26930 de 2000 y demás que las remplacen o modifiquen, le dan a los documentos materiales.

Gestión Humana y Desarrollo Organizaciones – Rectoría
Calle 19 No. 1-11 Edificio Las Monjas, pisos 2 y 3, Bogotá – Colombia. Tels.: [571] 3394949/99 Ext.: 3884
Línea Directa: [571] 3324374

Banco Interamericano de Desarrollo

Bogotá, Colombia

Octubre 17, 2018

Srta. Natalia Angel Cabo
Calle 71 A # 0/46 Este
Bogota
Colombia

Estimada Srta. Angel Cabo:

Por medio de la presente, el Banco Interamericano de Desarrollo (BID) ("la Institución") tiene el agrado de ofrecerle un contrato ("Contrato") para prestar servicios como Consultor de Productos y Servicios Externos ("PEC"). Si usted acepta esta propuesta, se compromete a proporcionar los servicios y los productos finales descritos en los términos de referencia adjuntos (Anexo A), sujeto a los siguientes términos y condiciones:

Afinidad:	Nacional de Colombia
Unidad Responsable:	SCL/SCL Social Sector
Servicios a ser prestados:	De acuerdo a los Términos de Referencia adjuntos (Anexo A)
Fecha de inicio:	Octubre 17, 2018
Fecha de expiración:	Noviembre 30, 2018
Lugar(es) donde se han de prestar los servicios:	Bogotá, Colombia, Colombia, External
Total de la remuneración:	COP 21,155,500
Suma alzada:	COP 6,346,650
Suma alzada:	COP 8,462,200
Suma alzada:	COP 6,346,650

REMUNERACION:

Los honorarios por la adecuada prestación de los servicios y/o entrega de los productos descritos en el Anexo A, a satisfacción de la Institución, serán pagados mediante la presentación de la factura correspondiente de acuerdo al calendario de pagos establecido por la Unidad contratante. Dichos honorarios incluirán todos los gastos necesarios para prestar los servicios y/o entregar los productos correspondientes, tales como viáticos y cobertura de seguro.

OTROS TERMINOS Y CONDICIONES:

(1) La Institución no asumirá responsabilidad alguna con respecto (i) al pago o retención de impuestos sobre sus honorarios; ni (ii) a cualquier contribución, de esta u otra naturaleza, que pudiera ser aplicable sobre sus honorarios. Usted es el único responsable de cumplir con dichas obligaciones.

(2) Es una condición para la validez de este Contrato que, en el caso de que usted no sea ciudadano o residente del país en el cual usted estará prestando servicios para la Institución, usted esté habilitado con una visa o permiso de trabajo válido exigido por las autoridades de dicho país. En caso de no

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cumplir con dicha condición, se entenderá que este Contrato carece de validez y que el mismo no producirá ningún efecto ni obligaciones para la Institución.

(3) En el desempeño de sus obligaciones de conformidad con este Contrato, usted podrá tener acceso a información privilegiada y confidencial de la propiedad de la Institución o de terceros, la cual esté en posesión de la Institución. A menos que sea autorizado por escrito por un oficial autorizado de la Institución, o tercero autorizado, usted no podrá revelar a otras personas esta información o utilizarla para ningún propósito fuera del alcance de este Contrato.

(4) Durante la vigencia de este Contrato, usted estará sujeto a los códigos, políticas, reglamentos y procedimientos de la Institución, aplicables a todo Consultor, incluyendo las modificaciones que la Institución pudiere hacer a los mismos durante la vigencia del presente Contrato.

(5) Durante un período de cuatro (4) años después de la expiración o terminación de este Contrato, usted no buscará ni aceptará trabajo relacionado con proyectos u operaciones con los que haya estado involucrado directamente en virtud de este Contrato, salvo con el consentimiento previo de la Institución, obtenido de acuerdo con el Código de Ética y Conducta Profesional.

(6) La Institución tendrá todos y cada uno de los derechos de propiedad intelectual, incluyendo sin limitación los derechos de autor y marcas, de todas y cada una de las obras que usted produzca bajo este Contrato. Estos derechos incluyen el derecho de la Institución de copiar, reproducir, distribuir, diseminar y publicar las obras, por cualquier tipo de medio y en todos los idiomas y en todos los países y territorios, así como de crear obras derivadas de las mismas, y de poner las obras a disposición del público, de conformidad con las políticas definidas por o las decisiones que tome la Institución. Usted por medio del presente Contrato declara, reconoce y acuerda, libre y voluntariamente, que todas y cada una de las obras producidas por usted en virtud de este Contrato son el producto o servicio para el cual usted fue contratado, y renuncia expresa y anticipadamente a todas y cada una de las reclamaciones de derecho de propiedad intelectual relacionadas a que hubiere lugar. Los derechos y obligaciones especificados en esta cláusula permanecerán vigentes luego de la expiración o terminación de este Contrato.

(7) Usted prestará todos los servicios aquí estipulados con prontitud, de una manera que iguale o supere las normas de aptitud profesional y prolijidad comunes en su profesión, con el debido respeto a la naturaleza y los objetivos de la Institución en su carácter de organización internacional pública.

(8) La Institución tendrá la facultad de terminar este Contrato por cualquier razón y en cualquier momento antes de la expiración del mismo o antes de la culminación de la prestación de los servicios o entrega de productos descritos en el Anexo A del presente Contrato, mediante una notificación escrita con catorce (14) días calendario de pre-aviso. La Institución podrá terminar este contrato sin previa notificación escrita si usted ha incurrido en mala conducta. En caso de terminación de sus servicios la Institución efectuará un pago equitativo por los servicios satisfactoriamente prestados a la fecha de su terminación, dentro de los treinta (30) días calendario a partir de la fecha de terminación del presente Contrato y, en su caso, también por gastos autorizados y documentados incurridos hasta el momento de su terminación. El pago equitativo a la terminación de sus servicios no excederá el monto de la suma de los honorarios y beneficios a los que usted fuera elegible conforme al presente contrato y tomará en cuenta todos los pagos que le hayan sido efectuados bajo este Contrato antes de la fecha de terminación.

(9) El presente Contrato podrá serle renovado más allá de la fecha de su expiración. No obstante, la Institución no tiene obligación alguna de extender o renovar dicho Contrato ni de ofrecerle uno nuevo, aun cuando su desempeño haya sido sobresaliente, pero puede hacerlo si así fuese acordado por escrito, al momento de la expiración del Contrato.

(10) Si surgiera algún desacuerdo entre usted, en su condición de Consultor y la Institución en cuanto a la interpretación de este Contrato, o de cualquier asunto o tema relacionado con la prestación de sus servicios a la Institución que no pueda ser resuelto por acuerdo común entre usted y la Institución, el asunto será remitido, de acuerdo con los códigos, políticas, reglamentos y procedimientos aplicables, a los órganos conciliatorios debidamente constituidos y establecidos por la Institución para la solución de desacuerdos entre la Institución y sus funcionarios y Consultores.

(11) La Institución le asignará a usted un número de identificación de Consultor. Este número le es asignado sólo a efectos de identificación. En consecuencia, si dicho número es idéntico a un número de identificación previo que le haya sido asignado por alguna entidad del Grupo BID en conexión con algún contrato previo, esta reasignación del número no otorga o reconoce ninguna relación de carácter de trabajo, antigüedad, continuación de servicio o cualquier otro derecho que no esté expresamente contenido en este Contrato o en cualquier otra política aplicable.

(12) Usted deberá firmar la Certificación de Elegibilidad adjunta (Anexo B), la cual junto con el presente Contrato, incluyendo los Términos de Referencia adjuntos (Anexo A), forman parte integrante del Contrato. Este Contrato, en el que también se requiere su firma, reemplaza todas las comunicaciones, declaraciones, entendimientos o acuerdos, verbales o escritos, que pudieran haberse intercambiado y/o suscrito entre las partes contratantes con anterioridad.

Le agradeceré indicar su aceptación de los términos y condiciones descritos en los párrafos precedentes mediante la devolución de una copia debidamente firmada del presente Contrato, incluyendo sus Anexos A y B y la Declaración Jurada de Intereses adjunta.

Le saluda atentamente,

Marcelo E. Cabrol
Sector Manager

Aceptado: Natalia Angel Cabo

Fecha: Octubre 17, 2018

NA

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08 de Noviembre de 2018

Srta. Natalia Angel Cabo
Calle 71 A # 0/46 Este
Bogota
Colombia

Estimada Sra.Angel:

El propósito de la presente es enmendar el contrato entre usted y el Banco (las partes) al contrato PEC número 0001, con fecha de inicio de 17 de octubre de 2018 (el "Contrato"). Esta ***Enmienda*** *representa el acuerdo mutuo entre las partes para modificar el Contrato de la siguiente forma:*

Prórroga a la fecha de expiración:

Cambio en la fecha de expiración del Contrato de 30 de noviembre de 2018 para 31 de diciembre de 2018.

Todos los términos y condiciones dispuestos en el Contrato permanecen vigentes excepto la ***Enmienda*** *arriba detallada.*

Le agradeceré indicar su aceptación a esta ***Enmienda*** *firmando esta carta y devolviendo una copia de esta carta a Claudia Cox (claudiacox@iadb.org).*

La validez de esta ***Enmienda*** *está sujeta y condicionada a ser firmada y recibida por el Banco al menos 10 días antes de la expiración del Contrato. De no cumplirse lo anterior, el Contrato se considerará expirado y no será modificado a menos de que se celebre un nuevo contrato entre las Partes.*

Atentamente,

Marcelo E. Cabrol
Sector Manager

Aceptado: Natalia Angel Cabo
Natalia Angel Cabo

Fecha: Noviembre 8, 2018

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THE WORLD BANK
IBRD - IDA | WORLD BANK GROUP

Docid 000805: STC/STT LoA

5 October, 2017

Ms. Natalia Angel Cabo
UPI : 526077 VENDOR:655016 PO: 7952859
Bogotá, Colombia
3008573139
nangel@uniandes.edu.co

Dear Ms. Natalia:

We are pleased to offer you a Short Term Consultant appointment to the staff of the World Bank Group for an assignment with GEN04. Your Task Team Lead (TTL) for this assignment will be Mr. Ismael Fernando Loayza, who is responsible for determining your Terms of Reference and for providing guidance, supervising, and confirming the completion of your work.

Please note that total World Bank Group Short Term Consultant assignments may not exceed 150 days or 1,200 hours per fiscal year.

We expect to need your services for about 10 days from 9 October 2017 to 30 November 2017 in Colombia. Your appointment will terminate accordingly unless it is extended or a new appointment is made. In the event the World Bank Group finds it necessary to cancel the assignment or to shorten its duration, the World Bank Group reserves the right to adjust the terms of the assignment as necessary. Your appointment may also be terminated if the World Bank's office to which you are assigned is closed. The World Bank Group has no obligation to extend the appointment or to offer a new appointment, even if your performance is outstanding, but it may do so if agreed to in writing before the time of the expiration of the appointment. The World Bank will make every effort to give you as much notice as possible of any change to your appointment.

D.R 10.5.17

Your appointment is subject to local recruitment and is subject to the conditions of employment of the World Bank Group. During this assignment you will be considered a World Bank Group staff member and will be subject to the Staff Rules in effect at the time you are appointed and as they may be amended from time to time. Please note that the manager of the unit to which you are assigned for is Mrs. Valerie Hickey.

Please note that it is your responsibility to obtain the appropriate visa or work authorization (if applicable).

D.R 10.5.17

The World Bank will remunerate you of Colombian Pesos $1,892,000 net of tax per day Worked. Please provide complete payment information on your local bank account to Mrs. Margarita Zamudio, who will be handling the administration associated with this appointment, and to whom you may direct any questions you may have.

Natalia Angel Cabo

Please indicate your acceptance of this offer of appointment and your understanding of its terms and conditions by signing and returning all pages of the letter of appointment, not just the signature page to Margarita Zamudio, mzamudiorojas@worldbank.org. By signing your Letter of Appointment, you also acknowledge that you have received, read and understand its enclosures.

Sincerely yours,

Issam A. Abousleiman
Country Manager - Colombia

UPI Number: 508087
P.O Number: 7952859
Email: nangel@uniandes.edu.co

Acceptance:

I certify that, if I am not a citizen of the country of which I am undertaking the assignment, I will obtain a valid visa and valid work authorization which allows me to be employed by the World Bank Group for the duration of this assignment. I will not commence this assignment until I have satisfied this requirement.

I hereby accept my appointment to the staff of the World Bank Group, under the terms and conditions of employment set forth in my letter of appointment and the policies and procedures of the World Bank presently in effect and as may be amended from time to time. I recognize that in the event of a conflict between this Letter of Appointment and the Staff Rules, the Staff Rules will prevail.

I certify that my employment with the World Bank Group under the terms of this letter of appointment and the Terms of Reference does not violate any law or employment regulations or policy to which I am subject. I certify that I will advise the HR Service Center of any close relatives employed by the World Bank Group.

I certify that if I am a United States national, I have so advised the World Bank Group for income tax reporting purposes, even if I am also a national of another country. I understand that as a U.S. citizen, I am responsible for paying federal taxes, state income taxes and payroll taxes (social security and Medicare taxes at the self-employment rate).

Natalia Angel Cabo
NA

Corporación OPCIÓN LEGAL

CONTRATO DE CONSULTORÍA

CONTRATO Nº: 470 – 10

PLAZO DE EJECUCIÓN DEL CONTRATO: Del 01/07/10 al 31/12/10

CONTRATISTA: **NATALIA ANGEL CABO**

PROYECTO: FORTALECIMIENTO INSTITUCIONAL DE LA CORTE CONSTITUCIONAL EN EL MARCO DE LA SENTENCIA T – 025

VALOR: $ 36.000.000

Entre los suscritos, **RAÚL HERNÁNDEZ RODRÍGUEZ**, mayor de edad y vecino de Bogotá D.C., identificado con la cédula de ciudadanía No.14.242.209 de Ibagué, quien obra en calidad Representante Legal de la CORPORACIÓN OPCIÓN LEGAL, identificada con NIT 830.062.507-9, entidad sin ánimo de lucro, registrada ante la Cámara de Comercio de Bogotá, con domicilio principal en la misma ciudad, quien en adelante se denominará EL CONTRATANTE, por una parte y por la otra **NATALIA ANGEL CABO**, mayor de edad, identificada con la cedula de ciudadanía No 52.620.954 de Bogotá, quien para los efectos del presente contrato se denominará LA CONTRATISTA, acuerdan celebrar el presente contrato de consultoría, el cual se regirá por las siguientes cláusulas previa la siguiente consideración: Que LA CORPORACION OPCION LEGAL trabaja a favor de la población vulnerable para contribuir al fortalecimiento del Estado Social de Derecho y la convivencia pacífica. Su labor se fundamenta en el reconocimiento de la diversidad y del respeto de los Derechos Humanos y del Derecho Internacional Humanitario y es en este marco que se desarrollará el objeto y las actividades del presente contrato: **PRIMERA. OBJETO:** Brindar apoyo técnico a la Sala Especial de Seguimiento en el análisis, evaluación y procesamiento de los informes remitidos sobre el avance en la superación del estado de cosas inconstitucional y el goce efectivo de los derechos de la población desplazada **SEGUNDA. VALOR Y FORMA DE PAGO:** EL CONTRATANTE, pagará a LA CONTRATISTA por la prestación de su consultoría, la suma de TREINTA Y SEIS MILLONES DE PESOS M/CTE ($36.000.000), que será cancelado en cinco (5) pagos así: 1. Un primer pago por SIETE MILLONES DOSCIENTOS MIL PESOS M/CTE ($7.200.000), a la entrega de la Valoración, Informe de Gobierno. 2. Un pago de SIETE MILLONES DOSCIENTOS MIL PESOS M/CTE ($7.200.000), a la entrega de la Consolidación, Información Coordinación Nación Territorio. 3. Un pago de SIETE MILLONES DOSCIENTOS MIL PESOS M/CTE ($7.200.000), a la entrega de la valoración y seguimiento de información sobre diferentes componentes. 4. Un pago de SIETE MILLONES DOSCIENTOS MIL PESOS M/CTE ($7.200.000), a la entrega de la valoración y seguimiento de la información sobre diferentes componentes. 5. Un pago por SIETE MILLONES DOSCIENTOS MIL PESOS M/CTE ($7.200.000), a la entrega de la valoración y seguimiento de la información sobre diferentes componentes. **PARÁGRAFO PRIMERO:** Dentro del valor estipulado está incluida la totalidad de los costos que demande LA CONTRATISTA para el cumplimiento del objeto contractual. **PARÁGRAFO SEGUNDO:** Los pagos se harán al cumplimiento de las obligaciones pactadas mediante cuenta de cobro o factura aprobada por la persona autorizada. **PARÁGRAFO TERCERO: SUSPENSIÓN DEL PAGO:** EL CONTRATANTE podrá suspender los pagos a LA CONTRATISTA cuando esta no cumpla con las obligaciones derivadas del objeto contractual. **TERCERA. OBLIGACIONES DE LA**

Corporación OPCIÓN LEGAL

CONTRATISTA: A-. OBLIGACIONES GENERALES: 1. Cumplir a cabalidad con lo establecido en el objeto del presente contrato en forma oportuna, dentro del término establecido y de conformidad con las calidades pactadas. 2. Conocer y respetar el código de conducta. 3. Conocer y contribuir en la ejecución programática, financiera y logística del Proyecto. 4. Garantizar la calidad, oportunidad y suficiencia de los productos contratados. 5. Acreditar y cumplir las condiciones profesionales, técnicas o de experticia requeridas para la ejecución del contrato. 6. Cumplir las obligaciones financieras y administrativas del CONTRATANTE para la ejecución de los recursos del proyecto. B-. OBLIGACIONES ESPECÍFICAS: 1. Hacer la lectura, sistematización, evaluación y análisis de los informes relativos a Atención Humanitaria en emergencias. 2. Hacer la investigación y colaboración en los insumos de requeridos por la sala Especial de Seguimiento para la sustanciación de providencias sobre desplazamiento forzado interno. 3. Participar en seminarios, talleres, conferencias o conversatorios para la capacitación de funcionarios responsables de atender a la población desplazada en materia de GED. 4. Asistir a las reuniones concernientes al avance en la superación del estado de cosas inconstitucional. 5. Elaborar los reportes sobre las evaluaciones remitidas a la Corte Constitucional sobre el cumplimiento de la T – 025 de 2004. 5. Coordinar el equipo, producción de documentos para la sistematización de información. 6. Supervisar y evaluar los trabajos de las consultoras. C-. PRODUCTOS ESPERADOS: 1. Documento que contenga el reporte, valoración, informes sobre tierras y retornos. 2. Reportes sobre las evaluaciones remitidas a la Corte Constitucional sobre el cumplimiento de la T – 025 de 2004. D-. PRESENTACIÓN DE INFORMES: 1. Presentar informes mensuales de actividades. E-. OBLIGACIONES DE GESTIÓN ADMINISTRATIVA: 1. Velar por la buena administración (custodia) de los recursos físicos y económicos destinados para el desarrollo del proyecto. 2. En caso de recibir activos como equipos de comunicaciones, grabadoras, computadores, cámaras fotográficas videobeam, bienes muebles en general, LA CONTRATISTA responderá por la custodia y el buen uso de los mismos. En caso de pérdida deberá dar aviso a la autoridad pertinente y presentar copia de la denuncia al CONTRATANTE, para que este a su vez tome las decisiones correspondientes. PARÁGRAFO: Los computadores, celulares y cámaras de video deberán ser usados exclusivamente para las actividades del contrato, no deberán contener información personal de LA CONTRATISTA. Se prohíbe almacenar información que atente contra los principios del CONTRATANTE y/o del ACNUR. F- OBLIGACIONES DE CONFIDENCIALIDAD: Esta obligación comprende: 1-. Respetar la confidencialidad de la información relativa a las personas incluidos los beneficiarios del proyecto. 2-. Respetar la confidencialidad de la información del CONTRATANTE, los donantes o financiadores y de las entidades que participan en la ejecución del proyecto. 3-. La información recaudada en los equipos de cómputo de LA CORPORACIÓN es en estricto sentido de carácter institucional, por ende pertenece al CONTRATANTE. G-. OBLIGACIONES RELATIVAS A LA SEGURIDAD SOCIAL Y SEGURO DE VIDA: 1. Mantener vigente durante el término del presente contrato la afiliación al Sistema General de Seguridad Social Salud, Pensiones y Administradora de Riesgos profesionales (ARP) y demostrar al CONTRATANTE la vigencia de su afiliación. PARÁGRAFO: De conformidad con el artículo 3 del Decreto 2800 de 2003 LA CONTRATISTA manifestará por escrito al CONTRATANTE que no es su voluntad afiliarse al Sistema General de Riesgos profesionales. 2- SEGURO DE VIDA: Cuando corresponda y existan los recursos, LA CONTRATISTA deberá diligenciar oportunamente la solicitud de inclusión en la Póliza de Seguro Colectivo de Personas del CONTRATANTE. H-. OBLIGACIONES RELATIVAS A LA VISIBILIDAD Y SEGURIDAD DE LA CONTRATISTA: A. VISIBILIDAD: 1. Cuando corresponda y EL CONTRATANTE entregue a LA CONTRATISTA elementos de visibilidad esta se compromete a dar un uso adecuado a los elementos de visibilidad (camet, chaleco, gorra, maletín o morral, pancartas, banners), acorde con la naturaleza del proyecto y el objeto del contrato. 2. Informar al CONTRATANTE sobre cualquier perdida, daño o

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uso inadecuado de los mismos. 3. Retornarlos al momento de terminar el contrato en el estado en que se encuentren. B- SEGURIDAD: 1. Cumplir con las directrices de seguridad relativas a personas, bienes, transporte y comunicaciones formuladas por EL CONTRATANTE. 2. Portar los elementos de visibilidad entregados por EL CONTRATANTE durante la ejecución de las actividades del proyecto. 3. No portar armas durante la ejecución del contrato. 4. Está prohibido a LA CONTRATISTA realizar cualquier clase de proselitismo político en el marco de las actividades del contrato. **CUARTA. OBLIGACIONES DEL CONTRATANTE:** A. OBLIGACIONES GENERALES: 1. Pagar a LA CONTRATISTA la suma previamente acordada como honorarios en las fechas y lugares predefinidos con EL CONTRATANTE, habiendo cumplido las demás obligaciones a su cargo. 2. Proporcionar la orientación e información requeridos por LA CONTRATISTA para la ejecución del contrato. B. OBLIGACIONES ESPECÍFICAS: 1-. Evaluar periódicamente los resultados de las actividades ejecutadas por LA CONTRATISTA. 2-. Dar a conocer las directrices de seguridad de la Corporación a LA CONTRATISTA. 3-. Cuando corresponda incluir en el seguro integral de vida colectivo a LA CONTRATISTA una vez esta haya diligenciado el formato correspondiente. 4-. Cuando corresponda entregar los elementos de visibilidad a LA CONTRATISTA. 5-. Cumplir con las obligaciones legales de reportar a las entidades de seguridad social concernidas el incumplimiento de las obligaciones correspondientes por parte de LA CONTRATISTA. **QUINTA. FACULTADES DE ACNUR.** Las partes de manera consensuada y voluntaria acorde con la naturaleza del proyecto y sin que ello implique ningún tipo de relación contractual con ACNUR acuerdan otorgarle las siguientes facultades: La persona designada por ACNUR podrá 1). Coordinar con LA CONTRATISTA la mejor forma de ejecución del contrato. 2). Dar seguimiento y monitorear las actividades propias del contrato. 3). Recibir y verificar la calidad y la pertinencia de los productos entregados. 4). Recibir y aprobar los informes de avance y el informe final presentados por LA CONTRATISTA. 5). Coordinar con EL CONTRATANTE los aspectos relevante del proyecto y de la ejecución del presente contrato. **SEXTA. REPRESENTACIÓN Y VOCERÍA:** Cuando sea necesario, EL CONTRATANTE autorizará a LA CONTRATISTA para que ejerza vocería y representación de aquel. PARÁGRAFO: Está prohibido a LA CONTRATISTA desarrollar actividades que generen compromisos distintos a los autorizados mediante este contrato. **SEPTIMA. PLAZO Y LUGAR DE LA EJECUCIÓN:** Del 1 de julio al 31 de diciembre de 2010. LA CONTRATISTA prestará su consultoría en la ciudad de Bogotá. **OCTAVA. TERMINACIÓN Y SUSPENSIÓN TEMPORAL:** El presente contrato podrá darse por terminado: 1) Por mutuo acuerdo entre las partes. 2) De manera unilateral por incumplimiento de las obligaciones contractuales. 3) Por vencimiento del plazo pactado. 4) Cuando por causa no imputable al CONTRATANTE y en el marco del convenio de cooperación celebrado entre éste y la oficina de ACNUR en Colombia no exista provisión de fondos para continuar con el proyecto. 5) EL CONTRATANTE podrá dar por terminado anticipadamente el contrato cuando la coordinación considere que no se cumplen con las calidades de lo pactado en este contrato, en este caso se liquidará el contrato proporcionalmente acorde con los productos presentados a la fecha. 6) Cuando ACNUR sugiera la terminación anticipada del contrato. 7) Cuando por razones de orden público sea imposible continuar con el objeto del contrato. B. SUSPENSIÓN TEMPORAL: Si el contrato se suspende temporalmente se levantará un acta indicando la causa de la suspensión y el estado en que se encuentra la ejecución del contrato a la fecha. Las partes acordarán la fecha de reinicio. Es causal de terminación anticipada del contrato el no dar aviso al CONTRATANTE de la intención de suspender temporalmente las actividades como el no reiniciar su ejecución en la fecha pactada. **NOVENA. DERECHOS DE PROPIEDAD INTELECTUAL:** Los derechos de propiedad intelectual que resulten de los productos y/o resultados del presente contrato se regirán por lo dispuesto en el acuerdo suscrito entre ACNUR y LA CORPORACIÓN OPCION LEGAL, acorde con lo previsto en las leyes 23 de 1982 y 44

Corporación OPCIÓN LEGAL

se 1995. **DECIMA. CESIÓN DEL CONTRATO:** LA CONTRATISTA no podrá ceder parcial o totalmente la ejecución del contrato a un tercero, salvo que exista previo acuerdo con EL CONTRATANTE, como tampoco podrá ceder los resultados obtenidos del presente contrato, salvo previa autorización expresa y escrita del CONTRATANTE. **DECIMA PRIMERA. EXCLUSIÓN DE LA RELACIÓN LABORAL:** Los derechos de LA CONTRATISTA se limitarán, de acuerdo con la naturaleza del contrato, a exigir el cumplimiento de las obligaciones del contrato y al pago de los honorarios por la prestación del servicio, ya que no existe relación laboral alguna entre EL CONTRATANTE y LA CONTRATISTA o el personal que ésta utilice en la ejecución del presente contrato, por lo tanto no habrá lugar al pago de prestaciones sociales, ni ninguna otra remuneración de carácter laboral, ni EL CONTRATANTE asumirá ninguna de las responsabilidades derivadas del desarrollo de la actividad profesional aquí contratada. **DECIMA SEGUNDA. INDEPENDENCIA DE LA CONTRATISTA:** LA CONTRATISTA actuará por su propia cuenta, realizará las actividades relacionadas con el objeto de este contrato con independencia técnica, en el marco de las líneas generales de trabajo del Proyecto definidos en los temas conceptuales y metodológicos. No habrá horario de trabajo para el cumplimiento de las obligaciones de LA CONTRATISTA, quien organizará a su manera la disposición de tiempo de las actividades a su cargo, en el marco de la programación pactada y del cumplimiento de las obligaciones acordadas en este contrato. **DECIMA TERCERA. CLÁUSULA COMPROMISORIA:** Las partes convienen que en el evento en que surjan algunas diferencias entre las mismas por razón o con ocasión del presente contrato, agotada la etapa de conciliación directa, estas serán resueltas por un Tribunal de Arbitramento cuyo domicilio será la ciudad de Bogotá, Tribunal conformado por un árbitro y regido por las normas que regulan el Centro de Conciliación y Arbitraje de la Cámara de Comercio de Bogotá, el Decreto 2279 de 1991, la Ley 23 de 1991 y las demás normas que rigen la materia. **DECIMA CUARTA. PERFECCIONAMIENTO.** Para que este contrato se considere perfecto se requiere 1. La firma del mismo. 2. Acreditar el pago de los aportes al sistema general de Seguridad Social. 3. RUT actualizado. **DÉCIMA QUINTA. DOMICILIO CONTRACTUAL:** Para todos los efectos legales, el domicilio contractual será la ciudad de Bogotá y las notificaciones serán recibidas en las siguientes direcciones. Por EL CONTRATANTE en la Calle 43 # 27 – 20 Barrio La Soledad en la ciudad de Bogotá y por LA CONTRATISTA Carrera 6 No 80 – 43 Barrio El Retiro en la ciudad de Bogotá. Las partes se obligan a comunicar por escrito cualquier cambio de dirección. Para constancia se firma en tres ejemplares del mismo tenor y valor, en Bogotá el 1 de julio de 2010. **ANEXOS:** Hacen parte integral del presente contrato y se anexa la copia correspondiente del Código de conducta.

EL CONTRATANTE

RAÚL HERNÁNDEZ RODRÍGUEZ
Representante Legal
CORPORACIÓN OPCIÓN LEGAL

LA CONTRATISTA

Natalia Angel Cabo

NATALIA ANGEL CABO.
C. C. 52.620.954 de Bogotá.

United Nations Nations Unies

CONTRACT FOR THE SERVICES OF A CONSULTANT OR INDIVIDUAL CONTRACTOR

CONTRACT TYPE: HR active: Not Progen Relevant (See Section 2 of ST/AI/2013/4)

CONTRACT NO.: 2500111423	**Status:** Approved	**Revision:** 20/Jun/2017.09.29	**Department:** HR OHCHR No Post
Fund: 10UNA UNGeneralFund **Fund Centre:** 14120 OHCHRDevtEconSocialIssuesBranch		**Index No.:** 10073566	**Nationality:** Colombian

This Contract is entered into between the **United Nations** and **Natalia ANGEL CABO**, hereinafter referred to as the **Contractor**

Address: Calle 71 A No. 0-46 Este
Bogota,,Colombia
Email Address : NANGELCABO@GMAIL.COM Tel. No.: 573008573139

1 TERMS OF REFERENCE OR WORK ASSIGNMENT (See Section 3 of ST/AI/2013/4; use additional pages if necessary)
Please refer to attached TOR for detailed description of objectives, duties and responsibilities.

Travel Details: N/A.
(If authorized)

2 DURATION OF CONTRACT: 2 Months within the period indicated below.

This Contract shall commence on 19/Jun/2017, and shall expire on the satisfactory completion of the services described above, but not later than 19/Aug/2017, unless sooner terminated under the terms of this contract. This Contract is subject to the conditions on the following pages.

3 CONSIDERATION - As full consideration for the services performed by the Contractor under the terms of this Contract, the United Nations shall pay the Contractor, upon certification that the services have been satisfactorily performed in accordance with the requirements of this Contract, as follows:

- A fee of ☐ Daily ☐ Weekly ☒ Monthly ☐ Lump sum Currency: USD Total Fee: 12,800.00

- Where two currencies are involved, the rate of exchange shall be the official rate applied by the United Nations on the day the United Nations instructs its bankers to effect the payment(s);

- The fee is payable on satisfactory completion of contract. For payment in instalments, certification of satisfactory performance at each phase is required.

Service ID	Description	Additional Description	Qty	Units	Rate	AMOUNT
3000463	Consultant Services (Month)	JO-79483 (Payment in 3 Instalments)	2.0	Months	6,400.00	12,800.00 USD

4 WORK LOCATION AND HEALTH CERTIFICATION: The Contractor shall perform the work assignment at the following location or locations: COLOMBIA. In accordance with Sections 4.9 and 4.10 of ST/AI/2013/4:

The Contractor has submitted a certificate of good health

United Nations Nations Unies

CONTRACT FOR THE SERVICES OF A
CONSULTANT OR INDIVIDUAL CONTRACTOR

CONTRACT TYPE: HR active: Not Progen Relevant (See Section 2 of ST/AI/2013/4)

By signing below and initialling to the right, I, the Contractor, acknowledge and agree that I have read and accept the terms of this Contract, including the General Conditions of Contract set forth on the following pages, which form an integral part of this Contract, and that I have been provided with a copy of, have read and understood, and agree to abide by the standards of conduct set forth in the Secretary-General's Bulletin, ST/SGB/2003/13, of 9 October 2003, concerning "Special measures for protection from sexual exploitation and sexual abuse."

CONTRACTOR'S INITIALS: NA

Name: Natalia ANGEL CABO
CONTRACTOR'S SIGNATURE: Natalia Angel Cabo

DATE: June 19, 2017.

AUTHORIZING OFFICER:
On behalf of the United Nations:
(Name and Title) Samira EL GARAH, HUMAN RESOURCES ASSISTANT

DATE:

SIGNATURE: pp

20.6.17

REPÚBLICA DE COLOMBIA

CORTE CONSTITUCIONAL
COORDINACIÓN ADMINISTRATIVA
NIT: 800093816-3

LA COORDINADORA ADMINISTRATIVA
DE LA CORTE CONSTITUCIONAL

CERTIFICA:

Que la doctora ***NATALIA ANGEL CABO,*** identificada con la cédula de ciudadanía No. 52620954, laboró en la Corte Constitucional durante los siguientes periodos:

Del 8 de julio de 1996 al 8 de mayo de 2000.

Del 5 de noviembre de 2008 al 23 de abril de 2009.

Que al momento de su retiro desempeñaba el cargo de Magistrada Auxiliar en propiedad.

La presente certificación se expide a solicitud de la interesada. Dada en Bogotá D. C., a los veinte (20) días del mes de agosto del año dos mil quince (2015).

PATRICIA VARGAS RUBIO
Coordinadora Administrativa

Universidad de los Andes

LA DIRECCION DE GESTION HUMANA Y DESARROLLO ORGANIZACIONAL DE LA UNIVERSIDAD DE LOS ANDES

C E R T I F I C A Q U E

La profesora **NATALIA ANGEL CABO,** identificada con Cédula de Ciudadanía No. 52.620.954 expedida en Bogotá, ha estado vinculada a esta institución mediante la suscripción de diferentes contratos de trabajo, así:

PERIODO	CARGO DESEMPEÑADO
Del 1 de septiembre de 1997 al 31 de agosto de 1998	Profesora, en la Facultad de Derecho
Del 10 de agosto de 1999 al 9 de diciembre de 1999	Profesora de la cátedra Derecho Constitucional, en la Facultad de Derecho
Del 18 de enero de 2000 al 17 de mayo de 2000	Profesora de la cátedra Derecho Constitucional, en la Facultad de Derecho
Del 6 de agosto de 2002 al 5 de diciembre de 2002	Profesora de la cátedra Derecho Constitucional, en la Facultad de Derecho
Del 14 de enero de 2003 al 13 de mayo de 2003	Profesora de la cátedra Derecho Constitucional, en la Facultad de Derecho
Del 5 de agosto de 2003 al 4 de diciembre de 2003	Profesora de la cátedra Derecho Constitucional, en la Facultad de Derecho
Del 14 de enero de 2004 al 13 de mayo de 2004	Profesora de la cátedra Derecho Constitucional, en la Facultad de Derecho
Del 15 de febrero de 2005 al 17 de mayo de 2005	Profesora de la cátedra Derecho Constitucional, en la Facultad de Derecho
Del 25 de julio de 2005 al 14 de Agosto de 2011	El último cargo desempeñado fue el de Profesor Asistente en Facultad de Derecho
A partir del 27 de julio de 2015	Actualmente desempeña el cargo de Profesor Asistente en Facultad de Derecho.

Durante su vinculación se le han cancelado bonificaciones por los siguientes conceptos:

PERIODO	CONCEPTO
Del 12 de febrero de 2005 al 15 de marzo de 2005	Dictar 12 horas del curso Derecho Constitucional Comparado
El 19 de septiembre de 2005	Jurado preparatorio examen ciclo oral
Del 27 de febrero de 2006 al 27 de marzo de 2006	Dictar 12 horas de conferencia tema: Derecho Constitucional
El 9 de abril de 2007	Jurado de 12 exámenes de ciclo
El 18 de septiembre de 2007	Jurado de 11 exámenes de ciclo
Del 1 de noviembre de 2008 al 31 de julio de 2009	Coordinación del proyecto investigación del manual de pedagogia en derechos de las personas con discapacidad y participación en taller de capacitación (convenio con la Fundación Saldarriaga Concha)
Del 26 de marzo de 2009 al 2 de abril de 2009	Dictar conferencias de la clase teorías de la responsabilidad, módulo responsabilidad empresarial
Del 15 de mayo de 2009 al 31 de mayo de 2009	Jurado evaluador (tribunal) de 16 de exámenes de Facultad parte oral

Dirección de Gestión Humana y Desarrollo Organizacional - Rectoría
Calle 19 No 1-11, Edificio Monjas Bogotá – Colombia. Tels.: [571] 3394949/99 Ext.: 3884 Línea directa: [571] 3324374
Fax: [571] 3324384 - http://ghdo.uniandes.edu.co -

Universidad de los Andes

Del 1 de julio de 2009 al 31 de Agosto de 2009	Asesoría, recopilar información y elaborar un escrito entre 30 y 40 páginas sobre la globalización del derecho, para ser publicado en un libro al final del proyecto llamado: " Portal es DER" de la GTZ
Del 8 de octubre de 2009 al 29 de octubre de 2009	Dictar conferencias sobre Derecho Constitucional avanzado del módulo Derecho Constitucional Comparado
Del 1 de septiembre de 2009 al 31 de octubre de 2009	Asesoría, recopilar información y elaborar un escrito entre 30 y 40 páginas sobre la globalización del derecho, para ser publicado en un libro al final del proyecto llamado: " Portal es DER" de la GTZ
Del 2 de agosto de 2010 al 30 de noviembre de 2010	Investigación, dirección, recopilación y análisis del proyecto de normatividad y jurisprudencia sobre capacidad legal de las personas con discapacidad psicosocial y cognitiva
Del 14 de febrero de 2011 al 30 de marzo de 2011	Investigación, elaboración del componente transversal del documento amicus curiae para la Corte Constitucional mediante presentación dedos subproductos: subproducto 1: documento de focalización. Subproducto 2: Documento de partida
Del 1 de junio de 2011 al 15 de julio de 2011	Investigación, dirección de la estrategia de acceso a la justicia y protección de derecho de las personas con discapacidad y las personas mayores desarrollada por medio del convenio de cooperación 0267 celebrado entre la Universidad de los Andes y la Fundación Saldarriaga Concha
Del 1 de mayo de 2011 al 31 de mayo de 2011	Investigación, dirección de la estrategia de acceso a la justicia y protección de derecho de las personas con discapacidad y las personas mayores desarrollada por medio del convenio de cooperación 0267 celebrado entre la Universidad de los Andes y la Fundación Saldarriaga Concha
Del 1 de abril de 2011 al 31 de mayo de 2011	Investigación, elaboración del componente transversal del documento amicus curiae para la Corte Constitucional mediante la entrega de informes de avances correspondientes al subproducto2, de acuerdo con los términos de referencia (TORS)

La profesora Natalia Angel Cabo dirigió el Programa de Acción por La Igualdad y la Inclusión Social de la Facultad de Derecho de la Universidad de los Andes, desde el 15 de enero de 2007 hasta el 31 de julio de 2011. Este programa tiene como misión ofrecer conocimiento, experiencia y capacidades de acción para avanzar los derechos de las personas con discapacidad y la implementación de la Convención de Naciones Unidas sobre los Derechos de las Personas con Discapacidad (CDPCD).

Esta certificación se expide a solicitud de la interesada, a los tres (3) días del mes de septiembre del año dos mil quince (2015).

Universidad de los Andes
DIRECCIÓN DE GESTIÓN HUMANA Y DESARROLLO ORGANIZACIONAL
ADMINISTRACIÓN DEL TALENTO HUMANO

SANDRA LILIANA CALDERON PRIETO
Jefe Bienestar y Administración del Talento Humano

Mireya R.

Cámara de Comercio de Bogotá

NIT. 860.007.322-9

Bogotá, 20 de agosto de 2015

EL JEFE DE CULTURA ORGANIZACIONAL

CERTIFICA:

Que la doctora NATALIA ANGEL CABO, identificada con la cédula de ciudadanía No. 52620954 de Usaquen, laboró en esta Entidad con contrato de trabajo a término indefinido desde el 27 de octubre de 2003 hasta el 13 de julio de 2005, el cargo que desempeñaba al momento de su retiro era el de ASESOR JURÍDICO de VICEPRESIDENCIA JURÍDICA.

Este certificado se expide con destino a quien pueda interesar.

Cámara de Comercio de Bogotá
GERENCIA DE RECURSOS HUMANOS

AGUSTÍN ÁNGEL SALAZAR

Suggested citation: Angel-Cabo, N. (2015) 'Human Rights Legal Clinics in Latin America: Tackling the Implementation of Disability Rights', in M. Rioux, G. Parekh and P. Pinto (eds). Advancing Rights: politics of disability monitoring and social change. Toronto: Canadian Scholars' Press.

Chapter 7

Human Rights Legal Clinics in Latin America: Tackling the Implementation of Disability Rights

Natalia Angel-Cabo<1>

<A>Introduction

Latin American countries were among the first in the world to ratify the Convention on the Rights of Persons with Disabilities (CRPD) (United Nations, Enable, n.d). Most have also ratified other international human rights instruments, such as the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities, the American Convention on Human Rights, and the International Covenant on Economic, Social and Cultural Rights. National constitutions have provisions ordering local compliance with international commitments, and establishing particular obligations to States Parties to secure civil, political, and socio-economic rights for all citizens, including people with disabilities. However, these legal outcomes stand in stark contrast to the distressing realities faced by persons with disabilities in the region. Latin America is known to have high levels of socio-economic inequality, poverty, violence, and social exclusion (United Nations Development Program [UNDP] 2010), problems that are compounded significantly for persons with disabilities. According to the World Bank,

Latin America has approximately 50 million people living with disabilities. Of these, 82% live in poverty, 90% are unemployed or outside the mainstream workforce. Most lack access to health services and adequate housing, and less than 30% have access to education (World Bank, n.d). How can this difficult reality be changed?

Although by itself, the use of law is limited in its ability to produce significant social change, human rights monitoring and advocacy can play a valuable role in buttressing effective state implementation of international agreements and in empowering persons with a disability to mobilize and claim their rights (United Nations, 2010). To be successful, these monitoring and advocacy processes need the active involvement of persons with disabilities and the organizations that represent them. Indeed, the challenges facing persons with disabilities are so vast that the disability movement can also benefit from the contributions of additional actors from different sectors and backgrounds. Partnership is a key component of effective human rights work (United Nations, 2010, pp. 34-35).

The aim of this chapter is to illustrate ways in which Human Rights Legal Clinics (HRLCs) in Latin America can aid the disability movement in their efforts to ensure that the commitments set forth in international agreements and national constitutions will improve the quality of life of persons with disabilities. I will provide concrete examples of disability rights work advanced by HRLCs in Colombia, Chile and Argentina, paying particular attention to their monitoring and advocacy strategies. Although legal clinical work on disability rights in Latin America is still in its infancy and the effects of its efforts still modest, there is potential for increased involvement, especially after the ratification of the CRPD. By working with persons with disabilities and with disability

organizations, HRLCs in Latin America can play a useful role in helping to identify human rights violations, in pushing for suitable legislative reforms and enforcement, in litigating in national and regional courts, and in supporting disability activists in advocating for their own rights.

<A>Human Right Law Clinics and their Development in the Latin American Context

There is no single definition of legal clinics, but they are generally understood as educational settings through which law schools introduce students to the practice of law while simultaneously making a contribution to society. Legal clinical work originated in the 1920s with collaborative work among law students and official legal aid programs (Geraghty, 2006, p.232). At that time, Jerome Frank pioneered the idea of refashioning legal education by incorporating certain aspects of European medical education into legal training (Frank, 1933). European medical schools provided theoretical preparation during the first years, later exposing students to a real practice with real patients under the tutelage of a trained teacher. Frank's vision, however, was ahead of his time. Few legal clinics were established in the following decades. In fact, legal clinics properly developed in North America during the 1960s, initially as settings through which to deliver affordable legal services to the poor. The early clinical programs brought poverty law attorneys into legal education, "and they began to find their way into the structure of law schools" (Trubek, 1994, p. 385). Since then, funding by governments and foundations, accompanied by changes in law schools' accreditation criteria, have resulted in the exponential growth of legal clinics in North America and worldwide (Wilson, 2004).

Not all legal clinics operate in the same way or have the same goals. Most law

school clinics in North America (and elsewhere) provide individual legal services in various areas of the law, including civil and administrative practice, criminal defense and advocacy, negotiation and mediation (Carrillo, 2003, p.7). These are important areas of practice, but HRLCs have a different focus, which emerged later in the clinical education paradigm. A HRLC "predominantly relies on international human rights law and advocacy to teach students lawyering skills and values" (Carrillo, 2003, p.3). It engages in human rights work through taking on cases that can bring structural changes to society. HRLCs usually incorporate both classroom study and hands-on participation in human rights projects and causes. Students collaborate with civil society organizations to support human rights claims in domestic and international fora, investigate and document human rights violations, develop and participate in advocacy initiatives before international, regional, and national human rights bodies, and engage with global and local human rights campaigns (Adapted from University of Texas, School of Law, Human Rights Clinic, n.d). As a result, HRLCs use many different advocacy strategies, legal and non-legal, to achieve their goals. These strategies include litigation, human rights monitoring, fact-finding, reporting, drafting policy and legislation, organization and lobbying, and working with the media. Involvement in this variety of activities helps students to engage critically and practically and to develop different skills while at the same time generating public awareness of social injustices.

The first HRLCs in Latin America were established in the 1990s when the most prestigious universities in the region started to adapt the human rights clinical model to the law curriculum (Carrillo & Espejo Yaksic, 2011; Wilson, 2004).<2> The fall of dictatorships and the expansion of the democratic project throughout the region provided

universities with an opportunity to think of new ways to transform legal education while simultaneously contributing to society. Most of the first HRLCs were founded by law professors who had studied in the United States and who brought their legal clinical experience back to their home countries (Carrillo & Espejo Yaksic, 2011). Despite these North American origins, as Carrillo and Espejo Yaksic (2011) rightly emphasize, HRLCs in Latin America have a "distinctly local flavor and focus"(p. 85), which helps to explain the types of cases they seek to advance.

Unlike their North American counterparts, Latin American HRLCs do most of their work locally due, of course, to the unfortunate abundance of acute human rights violations found in the region (Carrillo & Espejo Yaksic, 2011, p. 104). By working locally, HRLCs can achieve long-term and fluid relationships with the groups they represent. Latin American HRLCs "view human rights law issues first and foremost as those affecting their communities and their country. And they do something about it by thinking globally but acting locally" (Carrillo & Espejo Yaksic, 2011, p. 104). For example, the Inter-American Court of Justice is an important setting for some of the region's HRLCs. Latin American legal clinics value networking with both regional counterparts and international legal clinics. Additionally, HLRCs value collaborative work. In fact, the formation of the first Latin American HRLCs was accompanied by the foundation of the *Red Lationamericana de Clínicas Jurídicas* (Latin American Network of Legal Clinics)**<3>** – a model for a new network of Law schools working on disability rights.

Another characteristic specific to Latin American HRLCs is their emphasis on litigation (Carrillo & Espejo Yaksic, 2011). New constitutions in Latin American

countries established a variety of mechanisms for the judicial protection of rights. Latin Americans began to see the courts as a forum in which they could pose new demands to redress social inequalities (Angel-Cabo & Lovera Parmo 2014). Consequently, it is not uncommon for Latin American HRLCs to choose litigation over other strategies to enforce the protection not only of civil and political rights, but also of social and economic rights, such as the right to health, food and access to education<4> (Carrillo & Espejo Yaksic, 2001; Angel Cabo & Lovera Parmo 2014). This point is particularly relevant to the project of the advancement of rights for persons with disabilities, because the positive intervention of the state is often a precondition for the exercise of fundamental liberties. Observers from outside the region are sometimes puzzled by the extent of the activism of Latin American courts in the adjudication of socio-economic rights. HRLCs take advantage of the willingness of courts to enforce social and economic rights advocating for health, education, and housing for disenfranchised individuals and groups.

Many studies have focused on the work of the HRLCs in Latin America (cf: Carrillo & Espejo Yaksic, 2011; Gonzalez & Viveros, 1999; Kestenbaum, Hoyos-Ceballos & Aguilar Talvadkar, 2011). However, few have explored how they can contribute to the advancement of rights for persons with disabilities. The following concrete examples illustrate some ways in which HRLCs can serve as key allies for disability activists in Latin America, raising public awareness of some of the most pressing concerns for persons with disabilities, and simultaneously advocating for improved governmental response to address these issues.

<A>Latin American Human Right Law Clinics: Advancing Disability Rights in Colombia, Chile, and Argentina

Colombia, Chile and Argentina are the countries in which the majority of legal clinical work on disability rights has taken place in Latin America. Although disability law is not a consolidated and permanent area of practice for most HRLCs in the region, the disability law cases I present exemplify some of the best practices of legal clinical work in the area. These examples are by no means exhaustive,<5> but they help to clarify the types of cases that HRLCs have advanced, the strategies they have used, and their contributions to the disability movement. Among other contributions, legal clinical work has helped to (1) promote public knowledge of disability rights, (2) empower disability activists and organizations to advocate for themselves, (3) advance successful strategic litigations and (4) monitor complex human rights violations.

<B>Promoting Disability Rights Knowledge

Activists and disability rights organizations trying to advance human rights in Latin American countries continually face the reality that many people with disabilities in this region do not see themselves as having rights. There is an entrenched view in the region that persons with disability should be the subject of charity and (over)protection, rather than rights-bearing individuals. It is not uncommon to hear false statements that persons with disabilities are not entitled, for example, to access health care or education. Even individuals who are aware of their rights may not know how to gain access to the available legal mechanisms through which they could defend themselves.

HRLCs can help promote public knowledge about rights (including different ways

to access justice). The academic expertise of HRLCs and their knowledge about national and international law can help in this enterprise. The clinics have considerable experience using various mechanisms to aid rights education. For example, they periodically organize workshops, seminars, and academic events to disseminate knowledge about national and international human rights instruments, such as the CRPD. They are also now using technology to reach a broader audience: educational events are available through video-conferencing, live streaming, or via YouTube and other Internet sites (see, for example: RedCRPD, 2011; Fundación Saldarriaga Concha & PAIIS, 2011a; PAIIS, 2008).

Some HRLCs are also aware of the need to engage in more direct dialogue with persons with disabilities and disability rights organizations. One example is a collaborative project currently underway in Colombia, financed by *Fundación Saldarriga Concha* (Saldarriaga Concha Foundation), and coordinated by *Programa de Acción por la Igualdad e Inclusión Social* (PAIIS), Universidad de los Andes [Action Program for Equality and Social Inclusion – PAIIS, Los Andes University].<**6**> The project, *Legal Action: Equality and Rights for Everyone,* seeks to promote awareness of human rights for persons with disabilities, to ensure access to justice, and to help expand capacity-building and partnerships between disability rights organizations and universities at the local level (Fundación Saldarriaga Concha & PAIIS, 2011b). The project began by forging alliances with universities outside the country's capital, which, in turn, work with disability rights organizations in their own local municipalities. PAIIS gives initial training on human rights and national and international legislation, and offers recommendations to help these organizations to provide adequate individual legal

services to people with disabilities. Next, each municipal disability rights organization, in partnership with its local university, organizes what is termed a *Street Law* event, where people with disabilities and their families can receive individual legal services, and attend workshops and seminars about human rights and access to justice. Generally, these *Street Law* events are held in accessible public locations such as parks or community centers. The project is still ongoing; in the final stage, the goal is to gather comprehensive information to identify structural problems and institutional barriers that prevent persons with disabilities from exercising their rights. Next steps will include advancing legal and extra-legal strategies to overcome these structural barriers. (Fundación Saldarriaga Concha & PAIIS, 2011c). To date, the project has helped raise public awareness about the rights of persons with disabilities, has facilitated access to justice for such persons in various regions of Colombia, and has led to the formation of strong alliances between universities and social justice organizations that will enable further work in this area.

<B>Helping to Build Coalitions and Mobilize Around Rights

Latin America has many disability rights organizations, but most are devoted entirely to day-to-day concerns and lack the time to work with other disability rights organizations or to be involved in activities related to the promotion and monitoring of human rights for all persons with disabilities. Without dismissing the importance of disability rights organizations and their pressing concerns, a key finding from the CRPD was the advantage of disability rights organizations working together toward a common goal. Unity leads to strength, and changing the challenging realities faced by persons with disabilities in Latin America requires creative forces to join together. HRLCs can help by

coordinating collaborative efforts. The next two examples illustrate how this can be done.

Continuing the work begun in Colombia, PAIIS-Universidad de los Andes played a key role in the state's ratification of the CRPD. This legal clinic coordinated more than 200 disabilities rights organizations and publicly requested that the government conclude its ratification without further delay (Petition to Ratify the CRPD, 2010). The process helped give voice to disability rights organizations and raised public awareness about the CRPD, while simultaneously disseminating knowledge and helping disability rights organizations to better understand the implications of this international instrument. For example, the clinic combined its advocacy work with several academic seminars (PAIIS 2008, 2009) about what the CRPD means and the importance of its ratification by the Colombian government. It also used more unconventional methods to push for the State's ratification, advertising the symbolic relevance of Colombia becoming the 100th country worldwide to ratify the CRPD (which actually did come to pass).

In Argentina, the *Centro de Estudios Legales y Sociales* (CELS – Center for Social and Legal Studies)<7> is among the members of a coalition that seeks to promote the right to vote among "users of mental health services" (CELS, 2011a). Other coalition members include several disabilities rights organizations and government agencies. The CELS provides legal expertise based on its ongoing work promoting the rights of persons with psychosocial disabilities and coordinates several of the project's activities. The campaign is working toward a national plan to ensure the right to political participation among persons who, for various reasons, cannot easily leave public hospitals, private clinics, criminal psychiatric units, therapeutic communities, or other institutions (CELS 2012). In the first phase of the project, mental health care institutions agreed to identify

individuals who met the requirements to vote and agreed to provide reasonable accommodations to support their right to vote for persons with psychosocial disabilities. Additionally, the participant institutions provided training to mental health care workers and internees about political rights, emphasizing the State's obligation under international law, to allow users of mental health care services to exercise their right to vote (CELS, 2012, pp. 368-369). While this initial attempt did not result in many internees actually being able to vote (slightly more than 100), CELS argued that the project brought several positive outcomes: it brought to the attention of public officials the urgency of restoring the legal documents of several internees and of revising judicial declarations of interdiction impeding the right to vote to a high number of persons with disabilities. It also helped to initiate a necessary debate about the State's obligation to provide support measures to guarantee political rights for persons with psychosocial disabilities (CELS 2012, pp.368-369).

<B>Advancing Successful Strategic Litigations

Litigation strategies are central to HRLCs in Latin America. In this region, courts tend to be more receptive to concerns about human rights issues than are either the executive or legislative branches of government (Cepeda-Espinosa 2004, Landau 2010, Restrepo-Saldarriaga 2011, Carrillo & Espejo Yaksic, 2011). Legal clinics focus on what is known as 'strategic litigation,' a method that seeks significant changes in law, legal practice, and public awareness through the litigation of carefully selected cases. As the examples below will illustrate, strategic litigation is not always initiated for the sole purpose of winning the case. Other goals include making audible the voices of persons with

disabilities, raising public awareness about disability rights, and pushing the court to align its jurisprudence with a human rights model of disability.

In Chile, the *Clínica de Interés Publico y Derechos Humanos* (Public Interest Law and Human Rights Clinic) at Diego Portales University (DPU Clinic)<8> advanced an important strategic litigation to ensure access to information for people with hearing disabilities. The plaintiffs, three deaf women, argued that various TV stations had infringed on their right to be informed by failing to comply with a regulation that required them to adopt adequate accessibility mechanisms. Although the case was ultimately unsuccessful, the fact that it was designed as a strategic litigation, and received considerable attention in the media, influenced the end result (D. Lovera, personal communication, May 12, 2012). While not compelled by the courts to offer accessible programming, in the end the TV stations opted to do so voluntarily, putting into place mechanisms to make their news programming accessible to persons with hearing disabilities.<9>

In a second case about accessibility in Chile, the same legal clinic designed a strategic litigation against a major airline. The airline had refused to allow a blind woman to board a plane, arguing that blind passengers can only travel if accompanied by another person or by a guide dog. A so-called *acción de protección* (protection action) was filed in response to this act of discrimination. The court refused to hear the case, claiming that it was a matter between private actors. The legal clinic brought the case to the attention of the Inter-American Commission on Human Rights, alleging that the state had neglected to protect persons with disabilities against unfair discrimination. Ultimately, faced with the possibility of being held responsible internationally, the Chilean government agreed

to enact a comprehensive regulation guaranteeing access to air travel for persons with disabilities (D. Lovera, personal communication, May 12, 2012).

Legal clinics in Argentina also provide examples about successful disability rights litigation. The Public Interest Law Clinic at Universidad de Palermo Law School<**10**> in collaboration with the Rights Network of Persons with Disabilities (REDI) filed an *acción de amparo* (amparo injunction) against a waste and recycling public service concessionaire for failing to comply with a provision of the Buenos Aires Constitution, that requires that 5% of a public service company's workforce be composed of persons with disabilities (Caso Cupos, 2009). The lawsuit argued that the company failed to comply with the constitutional quota, and therefore infringed upon the right to work, the right to autonomy, access to equality of opportunity, and the right to non-discrimination for persons with disabilities. The case was successful and the court ordered a 60-day period for the government and the public concessionary to develop a plan to hire people with disabilities in this public sector company.

In 2008, *PAIIS-Universidad de los Andes*, in conjunction with the Masters Program on Disability Studies at *Universidad Nacional de Colombia* and the Norwegian Refugee Council (NRC), promoted a public hearing before the Colombian Constitutional Court to address the systematic violation of rights of people with disabilities in situations of internal forced displacement. At the time, very little information about the intersection of disability and forced displacement was available, so one of the purposes of addressing the court was to introduce this pressing issue to the consciousness of public institutions and NGOs. The organizers decided to provide the court with concrete examples. During several months, they documented cases to show how forced displacement affects persons

with disabilities. As part of the preparation for the public hearing, the coalition helped several persons with disabilities who had been subjected to forced displacement to speak in front of the Constitutional Court (for a description of this process, see: Angel Cabo, Castro, Correa & Mériau, 2014). The outcome was the first comprehensive constitutional decision in the world about disability rights and forced displacement. In *Auto 06/2009*, the Colombian Constitutional Court ordered the state to adopt various proactive measures to meet its international and constitutional obligations, including the creation of a specific governmental program aimed at protecting and assisting persons with disabilities in situations of internal forced displacement.

The same Colombian clinic filed an *acción pública de inconstitucionalidad* (constitutional public action) against the City of Bogota for failing to comply with its obligation to have an accessible public transportation system. Although this case has not yet been decided, it is an important example because it has already helped to strengthen the mobilizing capacity of disability rights organizations. The clinic worked with a Colombian network of disability rights organizations to document the day-to-day experiences of persons with disabilities in their attempts to access a public bus. As part of the strategy, several people with disabilities wrote *amicus briefs;* although these briefs usually deal with legal or technical matters, the clinic wanted the voices of persons with disabilities to be heard, even if the writers were not familiar with legal technicalities. They correctly believed that one person's expression of her or his day-to-day experiences is sometimes a more powerful argument than a technical or legal contention.

<B>Documenting Human Rights Violations

HRLCs also use various non-litigation mechanisms, especially by producing human rights reports to push for state compliance with national and international human rights standards.

The *Diego Portales' Center on Human Rights* publishes the *Annual Report on Human Rights*, which frequently includes a chapter on persons with disabilities in Chile. Among other topics, the *Annual Report* has documented the obstacles to implementing the main disability act in Chile (*Ley de Integración Social*), and the barriers faced by persons with disabilities as they try to exercise their right to vote (Centro de Derechos Humanos, Universidad Diego Portales [CDH-UDP], 2010) and to access education and labor opportunities (CDH-UDP, 2010). Women with disabilities have also been a major focus of attention (CDH-UDP, 2007). The inclusion of disability concerns in this respected annual Human Rights report not only exposes the challenges faced by people with disabilities in Chile, it also reminds the public that these are, above all, human rights issues.

In Argentina, the *CELS'* Human Rights Reports are also extremely influential. In 2008, CELS along with Mental Disabilities Rights International (MDRI) published an extensive document illustrating the serious violations of human rights of persons detained in psychiatric institutions in the country (MDRI & CELS, 2007). The report documented cases of violent death among people with disabilities in these institutions, which had not been properly investigated by the state. The report also denounced situations of extreme isolation, sexual and physical abuse, and unsanitary conditions facing people with disabilities in psychiatric institutions. An important aspect of the report was its analysis of the existing legislation: it concluded that the legislation allowed for the arbitrary

deprivation of fundamental rights of mental health service users who were, in fact, able to live in the community.

This report illustrated to the public the necessity of urgent reforms of mental health laws. The Argentinean Congress responded by enacting the 2011 National Law on Mental Health (*Ley Nacional de Salud Mental*) after an interesting dialogue among legislators, governmental officials, NGOs and, most importantly, people with psychosocial disabilities. The CELS helped disability rights organizations to navigate the legislative debates, giving input and reminding the government about its obligations under international treaties such as the CRPD and the UN Convention against Torture (CELS 2011). Currently, CELS is closely following the regulation and implementation of the National Mental Health Law, and it submitted a proposal to regulate the new law in collaboration with 12 other organizations, including some disabilities rights organizations. Through its annual report, CELS has also condemned the unwillingness of government officials to guarantee full participation of persons with disabilities in the process of regulating the Mental Health Law. CELS is currently developing monitoring strategies to measure progress in the law's implementation (p. 364).

<B>Network Strategies to Advance Regional Knowledge about Disability

In addition to the work being done by individual HRLCs, another important project is taking place in the region: the *Ibero-American Network of Experts on the United Nations Convention on the Rights of Persons with Disabilities* (RedCRPD) which is coordinated by the Center for Research and Human Rights Education "Alicia Moreau" - National University of Mar del Plata, Argentina. The RedCRPD mission is to "facilitate

interaction, cooperation and exchange of knowledge and good practices between groups of experts from different regions with the aim of achieving national recognition and compliance of the rights enshrined in the CRPD." (RedCRPD, paragraph 1.)

This network is currently working on two important projects. The first is the study, implementation and monitoring in domestic legal systems (of Ibero-American States) of Article 12 of the CRPD about the right to exercise legal capacity (RedCRPD, n.d.). In the first stage of this project, the network developed a common understanding among its members about the reach of the CRPD's Article 12, identified existing laws on legal capacity in each country, and produced various proposals and recommendations for legal capacity reform.<11> In the second stage, currently underway, the network is working with disability rights organizations to develop strategies for implementing these proposals, such as presenting legislative reforms or advancing strategic litigations.

The second project of the *RedCRPD* is still in its early stages, but it is relevant here because it concerns the establishment of a network of Latin American legal clinics working on disability rights. The network has several objectives. First, members will support each other when advancing rights for persons with disabilities in their home countries (e.g., filing *amicus briefs*). Second, members will act as consulting partners for other universities trying to advance legal clinical disability rights work. Third, members will promote the creation of disability rights legal clinics throughout the region (Red CRPD-Clínicas, 2011).

Most importantly, the network seeks to bring human rights cases involving persons with disabilities to the attention of the Inter-American Court of Human Rights. Although in its early stages, this project clearly illustrates how legal clinical work on

disability rights can have an effect at the national and regional levels. Active interaction of disability organizations with regional courts is just starting. With a few exceptions, such as the recently decided *Furlan* case (Furlan and Family v. Argentina, 2012), the Inter-American Court has not handled many cases involving persons with disabilities. This project will be a good opportunity to bring more cases and concerns to the attention of the regional human rights tribunal.

<A>Conclusion

This chapter has summarized many of the activities advanced by HRLCs in Latin America with respect to disability rights. Issues dealt with by HRLCs in the region include access to employment, services and education for persons with disabilities; the recurrent violation of rights of persons in mental health institutions; the challenges faced by persons with disability to exercise legal capacity; and the intersection between disability and forced displacement. The clinics, in partnership with persons with disabilities and disability rights organizations, have strongly denounced human rights violations. They have also raised social awareness and have forced the State to take action to guarantee disability rights. Some of the many resources used by the legal clinics include individual and systemic monitoring of human rights violations, strategic litigation, public hearings, and human rights reports. Together with media coverage, these collaborative projects have aided in the enforcement of national and international laws, while simultaneously exposing the challenges faced by persons with disabilities in the region.

The human rights cases and projects described in this chapter took their course

over long periods of time. This allowed HRLCs and their partners to design appropriate legal strategies while providing forums for people with disabilities to identify and claim their rights. Many people with disabilities in Latin America are not familiar with the concept of rights and international human rights treatises. The HRLCs took the time to clarify human rights concepts, and to build each case along with persons with disabilities and disability support organizations. This process has allowed the clinics to develop a good understanding of several complex issues surrounding disability. The examples presented here illustrate a common learning process that can be used as a model for developing future actions. For example, in addition to contributing to a particular case, HRLCs are working to train law students to become ethical and responsible advocates. Many students at the clinics will become future advocates of the disability movement's cause.

Compared with the magnitude of the challenges facing people with disabilities in Latin America, the contributions of HRLCs are modest. Still, their activities are important and more legal clinical work on disability rights is expected in the near future. In particular, the ratification of the CRPD is generating considerable interest. A good example is the creation of a network of HRLCs aiming to inform the Inter-American Commission about violations of the human rights of persons with disabilities and to monitor closely the implementation of the CRPD. This is a step forward as, to date, human right tribunals in the region have heard few cases of this nature. As noted by Steiner and Alston (2000) (as cited in Carrillo 2003, p.538), network activities are important elements for the proper interaction, interpretation, and internalization of international commitments, which will ultimately help to ensure state compliance.

The clinical work described above also focuses on the implementation of the CRPD and other related international instruments. This helps to unite efforts around the new paradigm. One difficulty that often appears as disability support organizations, public officials, and individuals focus on disability is the lack of unity and clear focus about how best to promote disability rights. International agreements have the power to create a common language and to direct action toward shared objectives. HRLCs facilitate work around the implementation of the CRPD and other international instruments by coordinating various actors with differing goals, and ensuring appropriate state interpretation of relevant international agreements.

One characteristic of the clinical work I have described is the combination of strategies to achieve multiple goals. Monitoring and advocacy activities are designed and advanced with several goals in mind. For example, the process of documenting human rights violations or to litigating is usually accompanied by activities that empower disability organizations, provide human rights training and raise public awareness of disability rights. In these projects, the clinics and their partners have understood that they need to be flexible and creative to respond to the multiple challenges of a case at hand. The HRLCs have shown "potential for reflection, innovation and interdisciplinary work," (Kestenbaum et al., 2011, p. 9) and have proven to be strategic when advancing human rights cases. Even when they lose a case, their careful strategy often brings about positive outcomes – to the groups they represent and to students at the clinics.

To a great extent, the success of these projects rely on the process of partnership between persons with disabilities and the HRLCs. Partnership is an important step for those engaged in human rights monitoring and advocacy strategies (United Nations,

2010, pp. 34-35). Persons with disabilities and the organizations that represent them bring the most important asset: experience. Persons with disabilities are the experts on their own situation and hence, their participation is essential to successfully address issues of discrimination, prejudice and ignorance, and to help confront the recurrent stereotypical portrayals of their situation (United Nations, Enable, n.d.). Some of the lawyers involved in the legal clinical work are themselves persons with disabilities, and their perspectives and experiences also help to remind law students that their legal work cannot disregard the lived realities and the stories of injustice faced by many persons with disabilities in the region.

HRLCs' involvement benefits the outcome of the cases in several ways. Most human rights work is framed in statutes, laws, or other legal instruments, so legal knowledge is an asset. HRLCs can help persons with disabilities and disability support organizations to understand legal instruments, statutory laws, and the legal implications concerning human rights. They can "provide technical assistance, national and international legal expertise and access to resources" (Kestenbaum et al., 2011, p. 485). Constitutions in Latin America offer several mechanisms for citizens to challenge legislation and the government actions on constitutional grounds. Although several of these are public actions, with few standing requirements, they still involve the legal formalities of addressing a court. Again, HRLCs can serve as facilitators for persons with disabilities in this process.

Additionally, the particular nature of HRLCs allows them to engage with considerable liberty in the advancement of human rights strategies. Overall, HRLCs enable a distinctive combination of pedagogy and practice that can contribute to the

empowerment of disability support organizations and of the disability rights movement at large. Law students have time to reflect and to innovate on topics without having the routine constraints of the day-to-day tasks and even compromises that NGOs sometimes face (Carrillo, 2003, p.572). Their critical reflections and the time they can devote to thinking about their cases allow them to refine their strategies and practices, to consider different approaches, and to incorporate what was learned from other cases into new initiatives (Carrillo, 2003, p. 571). The fact that these legal clinics are located in a university setting is also helpful for encouraging interdisciplinary approaches, as support can come from professors from various faculties.

Human rights clinical work, however, does not come without challenges. For example, clinics might have the tendency to over-legalize human rights, delegitimizing other forms of grassroots advocacy (Kestenbaum et al., 2011, p.472). As illustrated by the discussed cases, the success of a project often comes from a combination of strategies, legal and extra-legal, rather than from an exclusive focus on legal-centered alternatives.

When a clinical project involves litigation, HRLCs must bear in mind that winning a case in court is only the beginning of what can be a long process. Implementation of the judgment of successful human rights litigation is usually a task at least as challenging or even more challenging than winning the case itself. HRLCs must temper the expectations of the organizations that they represent, and must assist them in the monitoring phases to ensure compliance. The challenges of translating a legal victory into widespread compliance can generate disappointment and demoralization within the involved individuals and organizations. Hence HLRCs must recognize that they must continue to provide assistance even after a successful court judgment.

An additional challenge for HRLCs is the selection of cases. Most HRLCs in the region have limited human and economic resources. They can only engage in few cases at a time. Latin American HRLCs forming in the region must carefully consider the kind of cases to advance. HRLCs working on disability rights could play a greater role in disability human rights work, by introducing novel topics into the agenda of governments, NGOs and the public at large. For example, in the region there is a lack of knowledge and understanding about the intersections between disability and other conditions such as gender and ethnicity. Nor have there been extensive discussions about the relation of poverty and disability. Legal clinical work can serve as a valuable resource for shedding light on human rights problems that are frequently overlooked or neglected in Latin America. HRLCs must always make an attempt to be as inclusive as possible. As the United Nations rightly recommends, human rights work on disability should have a cross-disability and cross-society focus. That is, it "must involve women, men, girls and boys with the full spectrum of type of disabilities –including those with physical, mental, intellectual or sensory impairments- and from all socio-economic and ethnic backgrounds, age groups and walks of life" (United Nations, 2010, p. 34).

There is always the risk that clinics may end up retaining control and power of their projects rather than empowering their partners. HRLCs should not try to replace the disability rights social movement or to impose their own views about disability rights. HRLCs must always remember the motto of the disability movement, "nothing about us without us". New clinics forming in the region or beginning to engage in disability rights work need to learn from the experiences of others. The role of HRLCs is to support, not replace, the voices of persons with disabilities.

<A>Notes

1. Professor of Law at Universidad de los Andes (Bogotá, Colombia). Founder and former director of Action Program for Equality and Social Inclusion (PAIIS), Universidad de los Andes, a human rights legal clinic focused on Disability Rights. Natalia Angel-Cabo holds a JD from Universidad de los Andes, and an LL.M form Harvard University (Cambridge, USA). She is currently a PhD candidate at Osgoode Hall Law School, York University (Toronto, Canada).

2. It is important to distinguish between the different types of legal clinics. Most legal clinics in Latin America (often referred as *Consultorios Jurídicos*) are dedicated to providing individual services to the poor in different areas of the law. This type of clinical work is usually mandatory for every law student in the final years of instruction. HRLCs, on the contrary, are voluntary and their objective is to tackle structural and systemic human rights problems rather than to offer individual legal services.

3. This network is coordinated by the University Diego Portales in Chile. Members include the University of Palermo, University of Buenos Aires (in partnership with the CELS), University of Cordoba, University of Tucuman in Argentina, Catholic University of Peru, Universidad del Rosario, Universidad de Medellin, and Universidad de los Andes in Colombia. The network's goal is to strengthen clinical training and to intervene to serve the public interest and to support human rights using strategic litigation as a tool (www.clinicasjuridicas.org).

4. Most Latin American constitutions incorporate social and economic rights as enforceable rights rather than as mere political guidelines.

5. The selection of cases and my remarks are, in part, based on my own engagement with disability rights legal clinical work in the region.

6. *Programa de Acción por la Igualdad y la Inclusion Social* (PAIIS – Action Program for Equality and Social Inclusion), Universidad de los Andes, is the only legal clinic in the region whose primary focus is on disability rights. PAIIS's mission is to "offer knowledge, experience and capacity for action to advance the rights of people with disability and the implementation of the UN Convention (CDPCD)"

7. The *Centro de Estudios Legales y Sociales* (CELS – Center for Socio-Legal Studies) is a non-governmental organization working since 1979 for the promotion and protection of human rights and the strengthening of democracy in Argentina. We have included the work of CELS in this chapter because the Center works hand-in-hand with law students from Universidad de Buenos Aires.

8. The mission of the *Clinica de Interes Público y Derechos Humanos* – Universidad de Diego Portales (Public Interest Law Clinic at Diego Portales University) is to promote and monitor fundamental rights through actions before national courts and other national and international human rights tribunals. The program works in areas such as monitoring police abuses, monitoring international cases, monitoring the living conditions of prisoners, and protecting socio-economic rights, children's rights, and freedom of expression and preventing discrimination.

9. The networks made their news programming accessible to TV viewers with hearing disabilities by including sign language during the afternoon and evening news programs. They have yet to extend accessibility measures to the remainder of their TV programming.

10. The *Clinica de Interés Público* (Public Interest Law Clinic) at Universidad de Palermo Law School, works on public interest law cases related to the following topics: discrimination and protection of minorities, environmental protection, freedom of expression, protection of consumers and users, human rights, and public accountability.

11. These proposals were initially shared with different leaders of disability rights organizations at a workshop in Madrid, Spain and are in the process of consultations with disability support organizations at the local level (personal notes)

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Latin America Social Constitutionalism: Courts and Popular Participation

Natalia Angel-Cabo and Domingo Lovera Parmo

INTRODUCTION

A distinctive form of constitutionalism – some call it "Latin American Social Constitutionalism" (LASC) (Arango 2010) – is spreading throughout the region in the wake of many transitions from authoritarian rule to democracy. The earlier, "liberal" constitutional tradition reflected a compromise among elites (the "liberal-conservative pact"). It featured a powerful executive, weak legislative authority, and a strong, independent, but typically conservative judiciary. Ideologically, constitutions during this period were oriented toward small, non-interventionist government, individual rights, and an over-arching commitment to private property. By contrast, the common features of LASC are constitutional incorporation of social and economic rights (SER) that are, with a few exceptions, judicially enforceable, the opening of domestic legal systems to international human rights law and norms, and a promise of reinvigorated democracy based on direct popular participation. Judicial review is not new in Latin America, but the new social constitutionalism expands the courts' power and role in reviewing and assessing social and economic policy. Whereas rights-protection was previously confined

almost exclusively to the political branches, it is now in part the business of courts.

It remains to be seen whether LASC delivers effectively on its aspirational, transformative, and strongly egalitarian promises. This chapter examines the experiences to date in Colombia and Chile, looking at how those jurisdictions have attempted to enforce SER and to navigate tensions present in LASC constitutions. We evaluate the prospects of SER litigation and the processes of deliberation and popular participation set in motion by courts, focusing on cases that define the content and enforcement of SER. We address whether two seemingly conflicting commitments – inclusive citizen participation at the grassroots level and new forms of judicial activism – can be reconciled. Are SER enforcement processes in which unelected judges wield considerable power compatible with participatory and deliberative democracy? We conclude that Colombian and Chilean courts are most effective in the role of dialogue igniters, shaking up the political process directly (as in Colombia) or indirectly (as in Chile). A key precondition for their success is effective inclusion of citizens at the grassroots level, as opposed to simple promotion of inter-branch dialogue.

LATIN AMERICAN SOCIAL CONSTITUTIONALISM: COMMON TRENDS AND PARADOXES

Despite differences, the many common features of recent Latin American constitutions support the claim that the region is developing a distinct type of constitutionalism (Arango 2010). The reforms signal broad commitments to addressing pervasive poverty

and inequality, the historical exclusion of marginalized groups, and the political instability caused by unrepresentative governments, weak political parties and blocked channels for citizen participation.

Recognition of SER is at the heart of the Latin American constitutional project, both as a desirable political goal and as a matter of societal survival. With few exceptions, SER are enshrined and protected as enforceable rights rather than as mere political guidelines (Uprimny 2011: 1592; Arango 2010: 8-10). As a result, the traditional prioritization of civil and political rights over SER "has been tempered to a much greater extent than in Europe and the U.S., and the view that all forms of human rights are interdependent and indivisible has found its way into the region's constitutions" (Nolte and Schilling-Vacaflor 2012: 21). This resulted in part from two intertwined trends. The first is the propensity to strengthen the role of the judiciary and, in some countries, to establish European-style constitutional tribunals. Courts are widely perceived as institutions that can help advance the constitutional project and reconfigure the deteriorated relationship between governments and citizens. Second, central to the region's constitutional reforms is the incorporation of new mechanisms for the judicial protection of rights. As Nolte and Schilling-Vacaflor (2012: 26) argue, advocates of LASC agree that some of the rights incorporated in the constitutions could only be considered aspirational at best if they stood alone, but new methods of judicial implementation offer ways to turn them into reality.

The combination of rights-expansion and new mechanisms for their judicial protection has led to what many call a "judicialization of politics" in Latin America (Couso et al. 2010: 8). While the prominence of courts is not new to the region, courts have emerged from these reforms with reinvigorated powers. In massive numbers, people have turned to courts seeking realization of their rights, and courts have energetically responded, assuming a more significant role in matters that were traditionally left to the elected branches (ibid.).

The constitutional reforms are not exclusively directed at reconfiguring the relationships between institutions and branches of government. They also aim to give the people themselves a central role in decision making. Social mobilization and bottom-up processes prompted many of the regional constitutional reforms (Nolte and Schilling-Vacaflor 2012: 19). Consequently, direct involvement of citizens in making the decisions that affect their lives was among the central demands of social movements. Many regional constitutions now express a commitment to expand *participatory* as well as representative democracy and include channels of direct citizen participation at the national and local levels – such as public consultations, referendums, and citizen-bodies to control public affairs (Uprimny 2011: 159).[1]

Numerous tensions emerged in implementing LASC's ambitious commitments, including the following.

First, Latin American constitutions are "transformative" as opposed to "preservative." They commit to transitioning society to a robust democracy and guaranteeing basic rights and welfare for all (García-Villegas 2002; see also Klare 1998). But transformative constitutions seem to appear in countries that face what some authors call "the paradox of social states (*estados sociales de derecho*)" (de Sousa Santos et al., cited in Barreto 1999: 94). Developing countries that adopt constitutions committed to realizing democracy and social justice through law are invariably those with the widest inequality gaps and the least resources to fulfill these promises. Despite recent improvements, poverty and inequality remain critical problems in Latin America: 168 million people live below the poverty line, and the gap between rich and poor remains the highest in the world (Cepal 2012).

A second paradox derives from a structural problem in Latin America: its institutional weakness and political instability. Gargarella rightly describes "[t]he 'mismatch' between [the] progressive 21st century commitments concerning SER" (this volume, p.105) and the highly imperfect character of Latin American institutions and political practice.[2] He argues that a great challenge is to strengthen the effectiveness of Latin American political institutions so that they become able to do what their constitutions' bill of rights mandate.

A third looming contradiction highlighted by many law and development scholars is the clash between the promise of LASC to make the existence of poverty and gross economic inequality prima facie unconstitutional or at least constitutionally suspect, on the one hand, and, on the other, the spread of neo-liberal economic policies and trend towards

aggressive privatization of social services (Trubek 2009; Uprimny 2011; Alviar, this volume). These latter developments have been encouraged in part by the new constitutions' recognition of "private enterprise initiative rights."

Finally, at the heart of LASC lies a tension between the reinvigorated role of courts in SER adjudication and the democratic ideal of inclusive citizen participation (Uprimny 2011:1606-8). While the new constitutional schemes are intended to provide citizens with meaningful avenues of direct political intervention regarding issues that concern them, they also grant significant decision making power over the same range of issues to the unelected and unaccountable judicial branch. Participatory democracy would seem to require decentralization and diffusion of power, not the reverse (Gargarella 2012: 152), and the new Latin American constitutions contain ringing promises of authentic grassroots participation. Participation is valued not only for its own sake, as a component of democracy in LASC, but also in light of a political imperative (Arango 2010: 11). The drafters assumed that a militant, active population is needed to make these robust, rights-rich constitutions work. t the same time, these constitutions assume the need for vigorous rights-enforcement by an empowered and independent judiciary, even after and potentially in conflict with the outcomes of citizen participation. Indeed, LASC sees judicial rights-enforcement as itself a component of constitutional democracy. In light of these tensions, Uprimny optimistically observes, "it seems difficult, yet not impossible to achieve strong constitutionalism along with both strong democratic deliberation and participation" (2011: 1608).

We agree with Uprimny that scholars should attempt to reflect on ways to resolve these tensions. Taking into account that experiences in the region are diverse, we analyze two very different legal systems in which citizens have resorted to courts and in which this process has sparked broad political dialogue about SER enforcement. The Colombian Constitutional Court is regarded as the paradigmatic example of judicial activism[3] in the region, while the Chilean Court has the opposite reputation. We explore how SER litigation in courts has opened space for the democratic definition and implementation of SER.

COLOMBIA: FROM INDIVIDUAL LITIGATION TO DIALOGICAL JUSTICE

The Colombian Constitutional Court (CCC) has played a surprising role in advancing the 1991 Constitution given the level of the country's violence, economic inequality, and institutional weakness. The CCC has become a point of reference for constitutional debates in Latin America and more recently in the world (Angel-Cabo 2012b). As in other countries (Ferraz, this volume), inconsistencies appear in the CCC's SER jurisprudence due to temporal changes in the Court's composition and the political and economic context. Yet the inconsistencies deserve close examination as they illustrate interesting experiments with mechanisms for SER enforcement. We first sketch the CCC's evolving SER jurisprudence, after which we focus on two landmark cases: the forced displacement case (T-025/04), and the health systems case (T-760/08), offering some reflections on the possibilities and limits of dialogical justice in Colombia.

Developments in SER jurisprudence

Most SER cases in Colombia are brought through a judicial mechanism called *tutela*, a writ seeking immediate protection of a fundamental right that any citizen may bring before a judge. Conventional standing rules do not apply, although a case or controversy is required. The process is flexible and expeditious, requiring lower court judges to reach a decision within ten days. The CCC receives all cases on appeal and chooses some for review. *Tutela* decisions are key to understanding the development of the CCC's SER jurisprudence. One of the first topics addressed by the CCC was whether judges may adjudicate SER via *tutela*, since the concept of "fundamental rights" was traditionally understood to include only civil and political rights. The Court soon changed that understanding.

In T-406/92, a notable decision issued shortly after enactment of the 1991 Constitution, the Court first articulated a particular view of the judge's role insisting that the framers envision "a new strategy for the effectiveness of rights, which consists in giving primarily to the judge – and not to the executive or the legislature – the responsibility for effective enforcement of fundamental rights." The decision also enlarged the potential of *tutela* by announcing that the Constitution did not exhaustively determine which rights are fundamental. For the Court, any attempt to define the nature of a right *a priori* is "inappropriate": "this task must be conducted by the judge, since the proper scope of rights derives from the facts (via *tutela*)."

The CCC began expanding the scope of *tutela* to address SER cases through two doctrines: "*connectivity*" and "*mínimo vital.*" "*Connectivity*" doctrine holds that while SER are not inherently fundamental rights subject to immediate *tutela* protection, they can become so whenever their protection is necessary to safeguard a right that is undisputably fundamental. For many years this doctrine informed right to health cases where the lack of treatment or appropriate medicines was necessary to protect the right to life (understood broadly to include the right to a "life with dignity" as well as mere physical survival). According to the "*mímimo vital*" doctrine, on the other hand, the constitution guarantees a non-textual, fundamental right to survival derived from a "systematic interpretation" of the constitution, including its principles of dignity, equality and solidarity (see Arango and Lemaitre 2002).

The CCC was initially cautious about using the *tutela* to protect SER, restricting it to cases of extreme vulnerability (García-Villegas 2002: 445-64; Rueda 2010: 39; Landau 2012: 213). By the mid-1990s, however, the CCC expanded the *connectivity* and *mínimo vital* doctrines to a wider range of areas including paid maternity-leave salaries and medical and service treatments not expressly contemplated by the law or health plan (such as HIV drugs and palliative care) (Rueda 2010: 39; see also Arango and Lemaitre 2002; Landau 2012). Paradoxically, the expansion of *tutela* occurred at a time of profound economic crisis (ibid.). Executive and legislative branch inaction in the face of regulatory failures in social policies led many citizens to seek SER-redress through *tutelas*. In health cases the number of *tutelas* progressively increased, from 24 per cent of all *tutelas* filed in 1999 to 41.5 per cent in 2008 (Landau 2012: 211). By 2008 the CCC

was deciding far more cases involving SER than traditional civil and political rights (Saffon and García-Villegas 2011: sect. 3.2.3). Today Colombia has the highest volume of health litigation in the world (Mastad et al. 2011: 281-2).

Expansion of *tutela* cases generated friction and lively debates regarding the proper scope of the judicial role. For example, Justice Cifuentes authored a 1997 decision that attempted to severely restrict *tutela* actions on the right to health.[4] While this decision did not gain much support, it was now obvious that the explosion of *tutelas,* especially regarding the right to health, needed to be addressed. One key concern was that if legions of *tutelas* were dealt with only on an individual basis, disenfranchised people with limited access to courts would be frozen out of the process. As Acting Justice Uprimny wrote in a famous concurring opinion:

> ....I share the humanist drive of this Court's jurisprudence that seeks to effectively realize social rights, so that they do not remain on paper. However, I am also aware of the legal and political weakness of the actual constitutional doctrine...; these weaknesses have been highlighted by several critics.... However, despite those criticisms, I have decided to support the present decision for a simple reason: I don't know at this time, nor am I able to offer a constitutional doctrine that is substantially better than the one elaborated by the Court[.][5]

During the ensuing decade, concerns and criticisms emerged regarding the equity of individual injunctions, the practical exclusion of marginal communities from the

litigation process, separation of powers, and the institutional limitations on courts' capacity to make and implement decisions regarding complex social and economic problems.

Birth of CCC dialogical activism

Partly in response to criticism, the CCC began to experiment with new approaches to SER enforcement (Landau 2012: 223). Most prominent was its development of the doctrine of "unconstitutional state of affairs" (*estado de cosas inconstitutucional* (ECI)) which attempted to tackle the equity problems presented by individualized SER enforcement. ECI doctrine allows the Court to adopt remedies to protect not only those who file *tutelas* but all others similarly situated when there are: (i) "repeated and constant violations of fundamental rights, (ii) affecting a multitude of persons, due to problems of a structural nature, (iii) requiring the intervention of several state authorities."[6] The CCC has applied this doctrine on several occasions, including cases dealing with failure to receive social security (SU-090/00) and massive prison overcrowding (T-153/98). Initially, the Court delivered complex orders without any meaningful monitoring mechanism (Rodriguez Garavito 2011: 1675). Minimal progress resulted from the prison decision, highlighting the need to develop strategies to promote compliance. In subsequent cases, particularly T-025/04 (forced displacement) and T-760/08 (right to health), the Court decided to address structural problems but to balance its judicial activism with a novel consultation process.

Decision T-025/04 (forced displacement case)

Due to the long-standing armed conflict, Colombia has one of the largest populations of internally displaced persons (IDPs)--almost four million people. Despite an exponential increase in IDPs, the situation remained largely invisible to the general public. Congress enacted a Public Policy to Protect and Assist IDPs, Law 387 of 1997, but the policy was not effectively implemented. In time, IDPs resorted to *tutelas* to seek assistance and protection.

In T-025/04, the CCC aggregated thousands of IDP complaints and handed down one of its largest-scale judgments. It declared the IDP situation to be an "unconstitutional state of affairs" and a "humanitarian tragedy" requiring immediate action from different state agencies. Among many inadequacies in the state's response to IDPs, the Court found, were failure to appropriate sufficient resources to assist IDPs, weak institutional capacity, and lack of coordinated strategies among state agencies. The Court ordered the state to (i) design a plan of action, (ii) calculate the resources necessary to implement the plan of action, increase the budget accordingly, and explore all possible avenues to actually invest the calculated amount in IDP programs, and (iii) deliver immediate provision of the most basic rights such as food, education, health care, and housing at least at survival or "minimum core" level.

The IDP decision evidenced robust judicial activism but also a genuine (not merely rhetorical) sensitivity to separation-of-powers concerns (Arango 2009; Cepeda 2009). But rather than viewing separation of powers as a bar to judicial action, the CCC developed new procedures and remedies designed to accommodate the two competing concerns of

urgent need for judicial action due to consistent legislature and executive default and the constitutional commitment to foster democratic dialogue and debate about grave problems. The Court ordered the government to provide minimum levels of protection on a stringent timetable, but it did not impose fixed parameters on the government's long-run policies (ibid.). The government was given a "regression" option; under certain circumstances it may remove items from the minimum core, but only if it publicly explains this departure from the constitutional guarantee (Arango 2009: 127-130). Moreover, the Court insisted that the authorities grant organizations representing the displaced population "effective participatory opportunities" in designing and implementing appropriate remedial measures.

Perhaps the most novel aspect of T-025/04 was that the Court retained jurisdiction to monitor implementation of the judgment. The CCC created a permanent monitoring chamber that provided an important space for dialogue and debate among state institutions and between government and civil society. The Court organized public hearings and informal meetings. It developed a process in which government reported on its actions, and other institutions such as the Ombudsman, international refugee organizations, and civil society groups, responded. For each issue-area, the Court renders a follow-up decision (*Auto de Seguimiento*) that analyzes the different views and enters orders to correct problems that are identified in the process. The monitoring exercise is not solely driven by the judiciary. Public hearings have been organized by civil society organizations and social movements interested in highlighting particular problems faced by the displaced population, including ones that unique plight of women, ethnic groups

and persons with disabilities (Angel-Cabo 2012a).

T-760/08 (health systems case)

The Court adopted a similar model in addressing the crisis of the health system and bringing the growing number of right to health *tutelas* under control. In T-760/08 the Court aggregated cases into groups exemplifying the most prominent failures of the health system[7] with the goal of devising structural remedies. Although the Court did not resort to the doctrine of "unconstitutional state of affairs," it crafted a modulated judgment similar in fashion to T-025/04 (Yamin and Parra-Vera 2010: 446). First, the Court re-affirmed the justiciability of the right to health, but instead of invoking the "connectivity" doctrine, it declared the right to health a fundamental right giving rise to immediate minimum-core enforcement in some cases and imposing progressive realization obligations on government in others (ibid.). The Court designated as subject to immediate *tutela* enforcement the benefits already contained in the existing health benefit plan as well as other essential services it specified (e.g., HIV treatments). It left to the legislature implementation of those aspects of the right to health subject to progressive realization. The Court also ordered the government to (i) to design a plan to correct regulatory problems, (ii) obtain resources to implement it, (iii) merge the existing, two-tiers of the benefit scheme (contributory and subsidized) into a unified system thereby eliminating a pervasive source of inequality between those who are and those who are not in wage work (the latter receiving half of the benefits of the former), and (iv) create participatory mechanisms to discuss reforms to the health system and its adequate implementation. The Court's ruling was dramatic in some respects, notably unification of

the two tiers of health benefit plans. In other respects, the decision was moderate and attentive to separation-of-powers concerns.

Most of the CCC's complex orders aimed to establish structures for a public dialogue about the health care system. Following the course of the displacement case, new justices of the Court (some of whom were perceived as more conservative) decided to establish a strong monitoring process including a second monitoring chamber to assess compliance through reports, public hearings and informal meetings. However, the follow-up process here has been more modest than in the IDP case. How to balance stakeholder voices in the debate on the health system has challenged the Court. Several participants in the debate until now have been interest groups with clear economic agendas. The Court has recognized this and experimented with methods to balance the dialogue. For example, in the follow-up order Auto 316/10, the CCC created working groups with diverse stakeholder composition – members of public and private actors, the academy, NGOs and civic organizations – that periodically meet to discuss a concrete health system problem. The working groups present reports setting forth points of agreement and disagreement. Although the process does not guarantee that the government takes a particular course of action, it has been useful in bringing different interests, perspectives and reform proposals into the public debate and in promoting a more robust deliberation on the future of the Colombian health system.

Outcomes

Noting that people's incapacity to fight injustice is one of the main causes of disagreement and violence between Colombians, a former CCC Justice referred to the *tutela* as a "treaty of peace" (Gaviria Díaz 1996). Indeed, *tutela* became an important form of expression in a country where legislative and political channels are frequently blocked, and other means of social mobilization such as social protest are inhibited by threats of violence.

What are the lessons of 20 years of SER litigation in Colombia? SER enforcement has ameliorated the situation of thousands of claimants and helped to identify structural problems in public policy. Especially in the early years, it was symbolically important in maintaining hope in the constitutional project. But individual *tutelas* do not place economic redistribution squarely on the agenda of public debate and action, and they have shown limited ability to correct market deficiencies (as seen in the right to health cases).

The "dialogical" judicial activism recently promoted by the CCC is more promising (Landau 2012: 201; Yamin and Parra-Vera 2010: 105). Many commentators agree that constitutional judges should prefer solutions that have the potential to stimulate vigorous democratic debate about political and social questions. SER adjudication can contribute to the process of democratic deliberation by "unsettl[ing] and open[ing] up public institutions that have chronically failed to meet their obligations" (Sabel & Simon 2004: 1020, see also Arango 2010: 11), and by promoting more reflective and better informed decisions. And dialogical judicial activism offers a path toward reconciling a magnified

judicial role with LASC's simultaneous commitment that the content of constitutional rights be informed by popular involvement and input. From this perspective, T-025/04 and T-760/08 had considerable impact. The displacement case focused the government's and the public's attention on the IDP tragedy. According to a comprehensive study by Rodriguez and Rodriguez (2010), T-025/04 contributed to (i) strengthening state institutional capacities, (ii) pushing the government to allocate substantially increased funds to implement IDP policy, and (iii) generating the formation of coalitions of IDPs and NGOs. We must acknowledge that Colombia will continue to face internal forced displacement until the armed conflict ends; however, combined with concrete assistance to displaced people, these are remarkable results.

The Uribe administration resisted implementation of T-760/08, claiming lack of resources to unify the health plan. The administration's attempt to declare a state of emergency, an action subsequently declared unconstitutional, provoked massive mobilization and social protest claiming health as a fundamental right (Yamin and Parra-Vera 2010: 121). Ironically, this aided the Court in implementing the judgment (Arrieta, A. 2013, pers. comm., 20 December), and the health system underwent significant changes. One immediate result of T-760/08 was a decrease in individualized litigation. While in 2008 constitutional judges decided 142,957 *tutelas,* by 2009 the number decreased to 100,490 and by 2010 to 94,502 (Defensoría del Pueblo 2011: 16). The case had important "unlocking effects": after years of reluctance, Congress adopted reforms that unified the system of benefits, among other steps.[8] The government issued a decree in 2013 regulating drug prices thereby achieving significant savings.[9] This development

can be traced to T-760/08, in which the CCC insisted that the earlier drug-price deregulation – not the proliferation of *tutelas* – was at the root of the health crisis. Although the efficacy of these reforms remains to be seen, it is promising that the Minister of Health promoted regulatory reform as a limitation on the "exaggerated" market-oriented model for medicines (Gaviria 2013).

These cases also illustrate the contours and limits of dialogical judicial activism. According to an influential Colombian scholar, dialogical judgments are likely to be more effective when courts:

> clearly affirm the justiciability of the right in question (*strong rights*); leave policy decisions to the elected branches of power while laying out a clear roadmap for measuring progress (*moderate remedies*); and actively monitor the implementation of the court's orders through participatory mechanisms like public hearings, progress reports, and follow-up decisions (*strong monitoring*).
>
> (Rodriguez-Garavito, 2011: 1692, italics added)

We agree that this combination of factors best explains the broad effects of the displacement case as compared with other structural injunctions issued by the CCC. But in addition to those he cites, factors outside the Court's control also contributed to the powerful impact of the displacement case (Landau 2012: 227-228). First, the case only required the Court to address government failures, not horizontal effects that pose

additional challenges to courts. Second, despite initial reluctance, the government was willing to engage in the dialogue on IDPs as this enabled it to address its international commitments regarding forced displacement (Landau 2012: 227). Third, the Comisión de Seguimiento (roughly, Follow-Up Commission), a prestigious civil society organization that has played a key role in monitoring T-025, secured international funding to conduct research and aid in the monitoring process. Both the Court and the government respect the Commission, so the dialogue process has been relatively smooth (Landau 2012: 227). Fourth, the process has been strongly supported by international refugee organizations that supply the Court with real-world information and also funding to staff the monitoring chamber. This combination of factors is simply not found in other cases. Central issues of social justice in Colombia have not received comparable international support, and many deserving social movements have difficulty securing funding to monitor relief obtained from courts.

A second challenge facing dialogical justice concerns how to engage the affected population in meaningful participation. IDPs at the grassroots level were empowered by the process, but the degree of their participation in decision-making remains low. As the monitoring chamber takes on additional topics, the level of discussion becomes more "technical," progressively excluding IDP voices. The same has happened with respect to the right to health. As Yamin and Parra-Vera (2010: 458) point out, due to the differences in economic and social power among stakeholders in the healthcare context, it is difficult to promote a dialogue that can be held on equal terms.

Finally, the impact on the CCC's resources and workload of the monitoring processes in T-025/04 and T-760/08 illustrates another limitation of dialogical judicial activism. These cases overwhelmed the Court (Landau 2012: 225). Newer justices are skeptical about maintaining the monitoring process and creating new follow-up chambers. In T-291/09, one of the CCC's last structural injunctions, the Court addressed the critical situation of thousands of waste pickers, informal recyclers who collect and sort garbage for recyclable materials. In response to rights violations caused by the city of Cali's closure of a major dump, the Court ordered revision of the waste management system to include the informal workers as legitimate entrepreneurs and ensure decision making participation by the waste-pickers' organizations. But the judgment has not been implemented and despite several petitions by activists supporting the waste-pickers' claims, the Court has been unwilling to establish a monitoring process. As the acting Justice who drafted the decision told us, the Court simply cannot handle another follow-up chamber at this time (Reales, C. 2013, pers. comm., 6 March).

CHILE: SER BETWEEN THE MARKET AND THE STATE

Constitutional context

Chilean Constitutions have never really been 'emanations from the heart of the society' (Bello 1884: 133). In Chile, constitutions were imposed from above by those who triumphed during one of the many episodes of social unrest (Lovera 2011: 126-32). The most recent constitutional text was privately drafted by a commission directly appointed

by the dictator General Pinochet. Unlike the case in other jurisdictions, the transition to democracy in Chile was not accompanied by a constitutional convention or other process to draft a new charter. Only some minor changes were agreed between the military and the democratic forces. Amendments introduced in 2005 removed some authoritarian holdovers (e.g., the security council, presidential appointment of senators), so that the text now reads like a "normal" democratic constitution. The rights provisions remained unchanged. Thus, the constitution lacks the bold, transformative ambitions of the Colombian and South African texts, while systemic economic inequality continues in Chile.[10]

The 1980 Pinochet constitution guaranteed both civil and political rights and, social rights of a kind, although this did not mean much during the military regime. However, observing developments in the region, litigants have sought to build on these foundations since the transition to democracy. Progress in this uphill battle has been slower than in Colombia, but affinities with LASC can be identified.

Rather than containing a declaration of universal guarantees, the Chilean constitutional scheme establishes a two-tier system for accessing social goods. On paper, citizens have a constitutional right to "choose" between the private-sector system or government provision; in reality, those without means are channeled into the minimalist public system. The private system provides good health benefits and education. In the context of structural inequality, there are wide gaps in health and education between the public and private systems and the government provides almost nothing for retirement except certain

exceedingly paltry "emergency pensions." The government's role in social-goods provision is so subordinate that it is sometimes thought to be merely a regulatory function (Couso et al. 2011: 39).[11] Ironically, recognition of a right to choose between private and public systems increased constitutional protection (in addition to beyond the already existing property-rights protection) for business investments in industries that provide social goods to the consumer.

Constitutional practice

Moreover, the constitutional scheme distinguished between civil/political rights and SER in that the former, but not the latter, were judicially enforceable by emergency order.[12] Akin to the Colombian *tutela*, the *Recurso de Protección* (hereinafter "*recurso*") is an emergency injunction filed directly before a Court of Appeal, with review powers in the Supreme Court. It is frequently used to protect property rights and other civil and political rights (Gómez 2005: 41), but has had limited effect regarding SER. On occasion litigants have successfully invoked *recurso* by recasting a SER case as one involving a civil or political right (Jordán 2006: 169 ff; see also Gómez 2005). This has been done, e.g., in cases involving legal regulation of the private provision of social goods. However, when they seek to realize SER by this or other mechanisms, reluctant courts claim that separation of powers prevents them from entertaining matters that the Constitution defines as political questions or that the matter should be resolved through private action (as when citizens litigate against their private providers). Moreover, the constitutional jurisprudence that unfolded around the *recurso* limited its scope to review

of administrative acts or omissions or official applications of general laws, but excludes from its ambit review of judicial decisions and legislation.[13] In the legalist culture of Chile, the exclusion of SER from the *recurso* symbolized that these rights were considered second-rate or, indeed, not rights at all but mere "policy guidelines" despite language to the contrary in the constitutional text. The upshot was that SER enforcement was placed beyond the reach of ordinary courts in Chile, and this is still the case today.

Some changes have occurred since 2005. Constitutional amendments centralized the control of constitutionality and review of legislative powers in the Constitutional Court, an autonomous body not subordinate to the Supreme Court. The Constitutional Court was established in 1970 as a conservative precaution against the then-anticipated accession to power of an Allende government.[14] It played little role during the Allende years and was dissolved in the coup. Reinstated in 1980, it meant little during the military regime and for years after until rebirth in 2005. Now finding a more robust Constitutional Court, the legal community is using new techniques to take almost every type of dispute including SER matters to the constitutional forum. The *Recurso de Inaplicabilidad* (hereinafter "*inaplicabilidad*") allows a litigant to challenge the application of a law (if not the law itself); such challenges are not limited to issues of civil and political rights but include SER matters as well. Prior to 2005, the Supreme Court had powers of constitutional review through *inaplicabilidad* but rarely utilized them. Now *inaplicabilidad* falls under Constitutional Court jurisdiction.

Barely five years after the amendments, the Constitutional Court began to decide cases implicating SER. Countless litigants filed *inaplicabilidades* asking the Court to declare it unconstitutional for private health providers (*Instituciones de Salud Previsional* or Isapres) to unilaterally raise basic plan premiums. The Isapres cited their legally established authority to raise fees for women and/or aging clients. After granting several *inaplicabilidades* requiring Isapres to reverse fee increases, the Court decided *sua sponte* that the legal provision entitling Isapres to raise fees was unconstitutional.[15] The Court provided several different rationales.[16] The Court declared that SER are enforceable rights like other rights, held that the existing legal regulations discriminated unreasonably between men and women, and ruled that unaffordable premium increases would render meaningless the citizen's right to "choose" between a private and public health-care provision.

This is an auspicious development, yet we should be alert to its limitations. First, *inaplicabilidad* writs are individual decisions. Despite grandiose declarations about the importance of SER in a democracy and their justiciability, in reality SER are only enforceable by citizens who have sufficient resources to obtain lawyers and litigate before the Constitutional Court (Marshall 2010: 263-4). Second, while the unconstitutionality finding had some general effects, only those enrolled in the private health insurance system – the wealthiest 17 per cent – can benefit from it. Third, the political implications of the decision are unclear and cannot be deduced from the Court's lofty references to SER.[17] A skeptical reading would emphasize that the decision is not really about access to health care; rather, it concerns constitutional limits on what may

occur in the private contractual relationship between provider and client. Strictly speaking, the decision protects paying customers from being forced to emigrate to the public health system in violation of their "social right" to opt into the private system.

Social mobilization and SER

We turn now to emerging constitutional practices in the ordinary courts (not yet the Constitutional Court) that point toward paths for navigating the tension between the LASC vision of the judicial role in SER enforcement and the simultaneous commitment to participatory democracy. Citizen mobilization plays a crucial role in the expansion of social rights delivery in Chile where, unlike Colombia, the courts appear to be unwilling to engage in overly progressive human rights enforcement. Yet the cases show that courts can and have helped to spark political processes that eventually address citizen concerns.

A set of early 2000s Chilean courts of appeals cases brought by people living with HIV/AIDS is instructive.[18] An influential NGO (*Vivo Positivo*) joined with a public interest law clinic to develop a strategy to address what was then an unanswered and pressing need to provide access to medical treatment for people living with HIV/AIDS (Zúñiga 2002). The court claims, which were accompanied by significant political lobbying and media coverage, asserted that there was no comprehensive public policy to ensure that people living with HIV/AIDS could access medical treatment. Existing public policies combined inadequate resources with conservative cultural and social attitudes (Ibáñez 1999: 81-3). Those in economic need lacked reasonable access. The few

available retro-viral therapies were allocated on a first-come first-served basis, triggering a black market in information about patient-deaths that opened new treatment spots in public health facilities.

The first set of claims was filed in 1999 before the Santiago Court of Appeals through *recursos*. Petitioners argued that government maladministration of medical treatment violated their right to life. The court declared that the claims "exceed[ed] the bounds of the protection procedure" (Contesse and Lovera 2008: 148). A second set of claimants also asserted that government threatened their right to life by failing to perform its legal duties. A Pinochet era decree had established a governmental duty to provide "full and free treatment to patients with sexually transmitted diseases" explicitly including HIV/AIDS (ibid.: 148-9). However, the Santiago Court of Appeals treated the claim as invoking the right to health and therefore dismissed the cases on the grounds that SER are excluded from *recurso* coverage. According to the court, the right to life only protects individuals against direct governmental interference (*but see* Eide 2001: 27-31); in these cases, "the claimants' threat comes from the disease they sadly suffer, but not from health authorities."[19] The court also qualified the government's legal obligation and thereby undermined SER by ruling that even when a decree ordered the free and full provision of medical treatment, any such obligation was qualified by the availability of state resources.[20]

A third set of cases advanced similar arguments, but this time the claimants involved were in an advanced stage of AIDS; for them, treatment access was a matter of life and

death. This time the Court went to the other extreme, agreeing with the claimants and granting them judicial relief on the basis of the violation of their right to life. It held that "the right to life is absolute and hence it may not be subject to any economic bargain."[21] The Court also responded to governmental authorities (which had invoked their legal authority to determine the technical and economic viability of health care measures) by stating that a legal norm may not be invoked to impede the force of the Constitution; and that, contrary to previous findings, the state's referenced authority related to health care provision, whereas the claims invoked the right to life.[22]

This was the only victory these claimants scored in court, and it was later reversed by the Supreme Court. In a two-page decision, that Court found that the claims were related to the right to health care and not the right to life. It also asserted that public health policies are within the province of the Ministry of Health and its technical staff; these authorities, rather than judges, "are to consider different factors, among others, as it is self-evident, the costs the state must incur in and the available funds to cover them."[23]

Strikingly, however, these claims combined with citizen mobilization helped to bring a previously invisible issue into the political forum. Soon after the cases were resolved, a series of political negotiations began, and *Vivo Positivo* and other organizations were invited to engage in discussion with government. This was a huge change in the previously existing approach that had been designed and executed by the central government without citizen participation. According to one activist:

> we [a group of people living with HIV/AIDS] were placed at the table with our [then] most immediate counterparts associated with the Ministry of Health, that is to say, CONASIDA, directors of hospitals, officials in charge of HIV programs .... Beforehand, we were not sitting at the same table, in fact we were not even sitting.
>
> (Contesse and Lovera, 2008: 151)

This sparked changes in government policies. CONASIDA, the governmental body in charge of overseeing public policy on HIV/AIDS, began negotiations with pharmaceutical companies that resulted in a significant decrease in the price of anti-retroviral therapies (Lara and Hofbauer 2004: 29). Increased resources were allocated for HIV/AIDS prevention and treatment, with a very significant increase in the governmental share (from 37.6 per cent in 1999 to 70.3 per cent in 2002) (ibid.: 31-2). Together with a coalition of NGOs, the government applied for help to the Global Fund to Fight AIDS, Tuberculosis and Malaria and eventually secured new resources that helped the private sector to cover 100 per cent of anti-retroviral therapies (ibid.: 34). Most importantly, *Vivo Positivo* – which had sued the government – was now in charge of one section of the project proposed to the Global Fund and later executed by installing branches in public hospitals to promote participation (Contesse and Lovera 2008: 151). By 2005, CONASIDA and the Ministry of Health passed a comprehensive (although not problem-free) public policy on HIV/AIDS after due consultation with *Vivo Positivo* and other NGOs (CONASIDA et al.: 2005).[24]

In contrast to Colombia, SER realization in Chile has thus far been more a matter of politics than litigation. The Constitutional Court has recently begun to take a more aggressive approach to enforcing SER, but this process is still in its infancy. Despite this difference, we can now identify some commonalities in Colombian and Chilean constitutional practices responsive to the judicial involvement/participatory democracy dilemma.

COURTS AS DIALOGUE IGNITERS

Why are individuals and groups turning to courts rather than directly seeking political realization of SER? Some observers cite regional factors. First, public attitudes toward law have changed, in part because those who resisted authoritative governments were sometimes able to gain assistance from the courts. Once seen as an obstacle to social change, law is now widely perceived as a tool to promote change (Couso 2006).[25] A "reconceptualization of the function and role of law" has occurred in post-conflict, democratic societies (Carrillo and Espejo 2011:103). Latin Americans began to see the courts as a forum in which they could pose new demands to redress material and social inequality.

The turn to the courts can also be related to the political climate. Citizens may be reluctant to advance egalitarian claims directly before political branches because these branches historically refused or were unable to address such demands (Carrillo and Espejo 2011:85; Couso 2006: 61). In a context of general distrust toward governmental power, marginalized communities learned by trial and error to use the tools that become

available to them. Judicial involvement appears promising in the face of the chronic weakness, corruption and inattention of the political process. Thus, courts find themselves adjudicating key social policies not necessarily because they are an ideal forum to address these matters, but because the people have called upon them to do so (Saffon 2006-7: 542-3).

This trend has not precluded debate regarding the legitimacy of the courts playing a major role in SER enforcement. A flourishing Latin American case law on SER has triggered sharp disagreement on the justiciability of SER (Ferraz 2011: 1644-5). As Ferraz argues, there is still "no a priori legitimate role for courts in a democracy" (ibid.: 1647-8). Consequently, that legitimacy must be assessed in terms of how judicial power is exercised (ibid.: 1650). We approach the debate in that spirit.

Formal recognition of rights plays an important role in the legalistic cultures of Latin America. That constitutions have enshrined SER helps movements become aware of the rights they have been granted (Gargarella 2011: 1554; Dugard et al., this volume). However, transformative constitutions must not be seen as external facts but rather as resources that shape and at the same time are shaped by their contexts and human agency. Scholars generally agree that grandiose judicial decisions on SER have little, if any effect unless these decisions are accompanied by vigorous political mobilization. Decisions are more likely to be successful if they encourage citizen intervention, especially among those affected and encourage intervention by other political actors needed to design and implement politically and technically sound social policies. That is, courts perform best

when they seek to "provoke and [/or] moderate" (Rodríguez-Garavito 2011: 1693-6). This is the key to understanding the new Latin American SER jurisprudence:[26] litigation before courts is a useful tool, but secondary when compared to social mobilization. Social movements can make maximum headway by using focused, strategically crafted litigation "for raising the profile of particular agendas" rather than by conceiving the courts as a forum to contest general questions about the justiciability of SER rights (Cavallaro and Brewer 2008: 87-92). Human rights in Latin America are usually "dormant clauses" until previously marginalized sectors gain an amount of political power through political mobilization (Couso 2006: 62). Put another way, marginalized groups and social movements pursue their goals in alternating political and judicial stages. Sometimes marginalized groups distrust courts and advance their demands by political mobilization, and they turn to the courts in other phases when the political authorities are unresponsive or immobilized (ibid.: 61-3).

If, as we believe, the LASC experience to date suggests that courts function best as dialogue igniters -- either explicitly summoning the parties (Colombia) or when used strategically to attract attention from authorities (Chile) -- then a cautionary note is warranted. Recent writing in comparative constitutional law often highlights the importance of dialogue between the branches. But the key to success in the approach discussed here is the inclusion of those directly affected in the dialogue. Without their involvement in the process, we risk exchanging one elitist and unrepresentative definition of social policies with another (Hutchinson 2004:282-3). In theory, legislatures and executives have more democratic credentials than courts, but in the Latin American

socio-political context this must not be taken for granted; the opposite often holds true. Only non-elitist approaches can radicalize democracy. The courts' main objective must be to democratize political processes, to open them to input from the people. As Hutchinson has put it, if the democratic credentials of institutions are in doubt, the solution is to "engage citizens directly in more imaginative and participatory ways ..." (2008:64).

The fragmentary and ambiguous evidence thus far available from the two jurisdictions offers glimpses of a new form of constitutional practice that departs from traditional understandings. The overriding lesson of LASC is that defining the scope of SER and bringing them into the lived reality of people's lives must be understood as collaborative, politically-driven rather than purely judicial or purely legal processes. To succeed, the model demands new responsibilities and openness to compromise from all actors and participants.

The courts have an important role to play but cannot be relied on exclusively to bring SER to realization on the ground. It is vital to transcend a purely legal approach and to seek compromise from all actors (Saffon and García-Villegas 2011:81-5). Decisions must not be made, as is still often the case, in a normative vacuum (Gauri and Brinks 2008: 13-4; Bergallo 2011: 1631-8). Courts must respect and work as partners with the political branches but must also reach out, listen, and speak openly to the citizenry. Courts must not imagine that it is their job to wholly define social policies. Nor indeed is that the province of the political branches in isolation from direct dialogue with and

participation by the citizenry. The political branches will be obliged to submit to judicially driven interventions on some occasions, and both branches must see themselves as ultimately under citizen supervision. In Colombia, the CCC has sometimes called the government to deliberate with grassroots organizations. In Chile, courts opened avenues for deliberation between the political branches and civil society by shaking government through legal decisions.

A successful model for realizing SER also requires commitment from citizens. They must organize and remain active, must have realistic expectations about what can be achieved in the judicial forum, and must use multidimensional approaches. Some observers claim social movements focus on the political branches due to lack of confidence in courts or doubts among marginalized groups about whether they have any rights at all (Courtis 2006:179); we are skeptical, and prefer to see activism in the political arena as reflecting a belief that social rights should not be exclusively defined by the judiciary. Still, courts can play a sensible and intermediate role, provided that actors (most notably, social and popular movements) are aware their strategies should "transcend[ ] the legal sphere" and target political branches as well (Saffon 2006-7:535-6). Massive mobilizations in the region for SER delivery provide an encouraging sign. For example, Chile and Colombia have recently witnessed large protests regarding the right to education.

This model provides several advantages. It encourages (and expects to function under) active citizen participation, which enhances its democratic credentials. Because it acknowledges that rights-realization is ultimately embedded in political developments,

this model for giving effect to SER is beginning to transcend the boundaries, individualism, and randomness of case-by-case litigation (see Waldron 2008). Dialogue with the political branches enhances the creativity and effectiveness of remedies and generates more stable and community oriented outcomes. Finally, the model is sensitive to the fact that rights-realization depends on processes engaging multiple actors' participation and contribution.

CONCLUSIONS

The Colombian and the Chilean cases are not precise parallels. The CCC has acted robustly on an understanding that SER are judicially enforceable, whereas its Chilean counterpart either does not regard SER as justiciable or perhaps is just beginning to do so. We have tried to show that despite national differences, evolving Latin American constitutional practice may assuage fears that enshrining SER gives courts too paramount a decision making role. Latin American social constitutionalism is best understood as a process that is heavily reliant on courts at times but in the end is largely defined politically. Courts are only one part of the process of SER realization, which involves broad political activity by the other branches and, above all, by citizens themselves.

losses caused by their inability to raise fees, thus diverting funds that could be used to cover public services.

[18] This draws on an analysis of these cases in Contesse and Lovera (2008). Part of that reading is used here.

[19] Corte de Apelaciones de Santiago, 2000: para. 14.

[20] Ibid.: paras. 14-5.

[21] Corte de Apelaciones de Santiago, 2001: para. 13.

[22] Ibid.

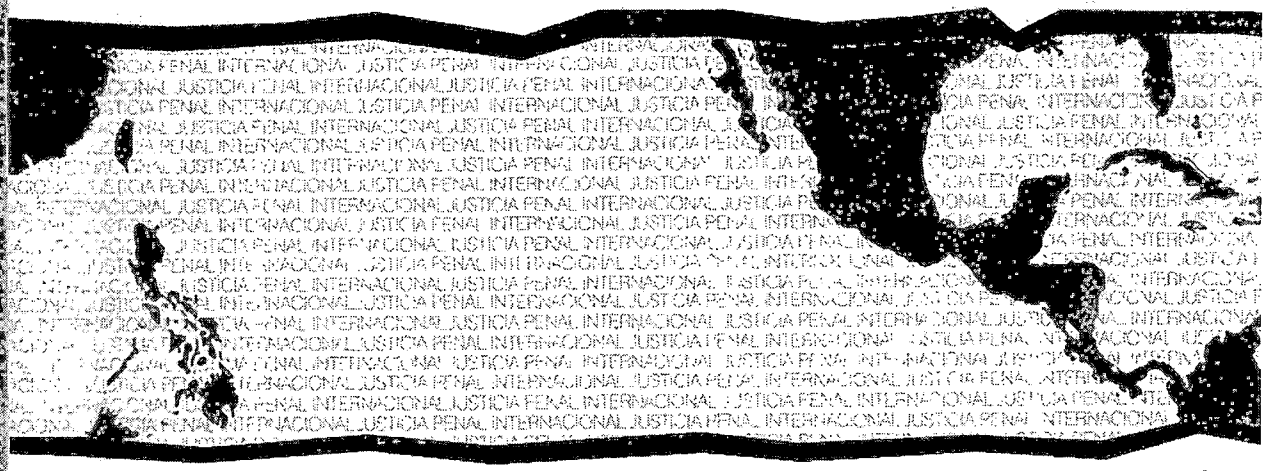
[23] Corte Suprema de Chile, 2001: para. 3.

[24] Other consequences followed. Congress passed a law that, while focused on HIV/AIDS discrimination, also contained a provision assigning the state a duty to "ensure treatment for people who are carriers or sick with the virus." That duty must be fulfilled in line with the health law regulations (Contesse and Lovera 2008: 152-3).

[25] In Argentina, Brazil, Chile, and Uruguay, human rights litigators are using strategies they employed during dictatorships when courts were overflowing with *habeas corpus* cases (ibid.:64-5).

[26] *But see*, Saffon 2006-7: 537.

[1] Developments of this kind have also been implemented at a statutory or administrative level.
[2] However, a striking contradiction of Latin American constitutional reform is that despite the attempt to temper hyper-presidentialism, flexibility in the reform process has allowed several presidents to seek immediate reelection.
[3] "Judicial activism" is often used to refer to a tendency or willingness to reverse the outcomes of the legislative process and/or the market (see Klare, this volume: xx). In its Latin American inflection, "activism" also connotes judicial vigor in merely enforcing rights-based law.
[4] SU-111/97.
[5] T-1207/01.
[6] T-025/04
[7] For example, the system generated huge inequalities in the benefits provided to participants inserted in the market (contributive) regime as compared to those in the subsidized regime. The system's financing became increasingly precarious given the reduction of formal employment and the liberalization of prices for pharmaceutical companies (Yamin and Parra-Vera 2010: 433-6).
[8] Proyecto de Ley Estatutaria 209-13 Senado; T-267/2013 Cámara. A source of skepticism about the reform is a clause providing that health care is subject to "financial sustainability."
[9] Circular 03 de 2013.
[10] A small but significant number of voters (8 per cent in the first round; 10 per cent in the final voting) informally marked their 2013 national election ballots to show support for a citizens' proposal to convene a constitutional assembly enabling Chileans to write their own Constitution for the first time. Michelle Bachelet, who becomes president in March 2014, included in her program the proposal to draft and adopt a new Constitution with robust citizen participation.
[11] Some scholars argue that nothing in the Constitution confines the state to this subsidiary role; rather, this understanding derives from an ideologically-driven interpretation pushed by business interests and right-wing parties (Vallejo and Pardow 2008). The two-tier system has been central in privileging private actors as SER providers.
[12] SER were not excluded from protection by another emergency action, the *Recurso de Inaplicabilidad.* This is a writ through which litigants may ask the Supreme Court (since 2005, the Constitutional Court) to declare a particular application of a law invalid on constitutional grounds. However, *inaplicabilidad* leaves the challenged law untouched as applied to all other cases than the precise controversy adjudicated; it could not be used to challenge the state's failure to act (e.g., failure to give effect to a right); and it was rarely granted (Couso 2011: 1534-5).
[13] When courts are asked to assess statutes through the *recurso*, they routinely respond that constitution leaves the matter in the hands of the Supreme Court (since 2005, the Constitutional Court) by means of the *Recurso de Inaplicabilidad*, which the Supreme Court rarely granted (Couso et al. 2011: 177).
[14] As Cazor has noted, in its brief existence before the 1973 coup d' etat, the Court rendered 17 decisions, all of which concerned controversies between the executive and Congress (2001: 102, n. 53).
[15] The authority to do this was introduced in 2005 constitutional reforms. Whereas under *inaplicabilidad*, the Constitutional Court assesses the potential unconstitutionality of legislation *as applied*, this procedure allows the Court to explore the constitutionality of a statute *on its face.*
[16] Tribunal Constitucional de Chile, 2010. Besides finding that SER are enforceable rights, the Court also developed a complex thesis according to which even private agreements between citizens such as private health contracts may be assessed on constitutional grounds. As these providers deliver important social security services, the court argued, these contracts are linked closely to social security. Some commentators suggest that this view turns every controversy into a constitutional dispute (Couso & Coddou 2010: 399-401).
[17] Although the Court held SER are enforceable rights, it left ample margin for political powers to respond (Marshall 2010: 263). Some fear that the state may in the end provide resources to compensate Isapres for



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COERCIVE CARE

RIGHTS, LAW AND POLICY

EDITED BY
BERNADETTE McSHERRY
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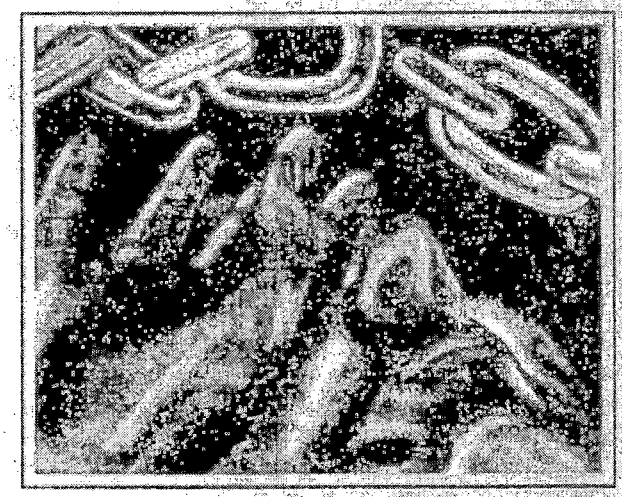

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4 Negotiating capacity

Legally constructed entitlement and protection

Marvin Rioux, Jean Gilmour and Natalia Angel-Cabo

Introduction

In *R v J (D)* (2006), the Crown alleged that the complainant, a 15-year-old woman with the mental age of a three to six-year-old, had been repeatedly sexually assaulted by her mother's partner during the four years that he lived in the home. The Crown sought to call the complainant to testify about the alleged assaults. After a *voir dire* (a hearing held in the absence of the jury) the trial judge (*R v J (D)* 2006) found that she lacked capacity to testify because she had failed to show that she understood the duty to speak the truth. In a separate *voir dire*, the trial judge also excluded out-of-court statements made by the complainant to the police and her mother on the grounds that the statements were unreliable and would compromise the accused's right to a fair trial. While the remainder of the evidence raised some serious suspicions about the accused's conduct, the case collapsed and the accused was acquitted. The Ontario Court of Appeal affirmed this result (*R v J (D)* 2008).

In an appeal to the Supreme Court of Canada, a majority of the court (six justices to three) set aside the acquittal and a new trial was ordered. Based on the argument that the complainant, as an adult with 'mental handicaps' fairly could testify, that questioning her required consideration and accommodation of her particular needs, and that 'questions should be phrased patiently in a clear, simple manner' (2012: para 78). The majority also noted that preventing a witness from testifying could have significant consequences, preventing the truth from being told and making it impossible to prosecute crimes committed against members of a historically vulnerable population. The majority interpreted section 16 of the Canada Evidence Act 1985 to mean that a witness with mental disabilities who cannot understand the nature of an oath is still competent to testify in court if she can communicate the evidence and promise to tell the truth (2012: para 74).

This case demonstrates an assumption that often operates in law and most generally: legal capacity is presumed for individuals who *are not* labelled as disabled, while capacity must be negotiated by those with intellectual, significant psychosocial and communicative disabilities. These individuals are presumed to lack legal and decision-making capacity and consequently

CHAPTER FOUR

Negotiating Capacity: Legally Constructed Entitlement and Protection

Marcia Rioux, Joan Gilmour, Natalia Angel-Cabo

Introduction

In *R v I (D)* (2008), the Crown alleged that the complainant, a 23-year-old woman with the mental age of a three- to six-year-old, had been repeatedly sexually assaulted by her mother's partner during the four years that he lived in the home. The Crown sought to call the complainant to testify about the alleged assaults. After a *voir dire* (a hearing held in the absence of the jury) the trial judge (*R v I (D)* 2008) found that she lacked capacity to testify because she had failed to show that she understood the duty to speak the truth. In a separate *voir dire*, the trial judge also excluded out-of-court statements made by the complainant to the police and her teacher on the grounds that the statements were unreliable and would compromise the accused's right to a fair trial. While the remainder of the evidence raised some serious suspicions about the accused's conduct, the case collapsed and the accused was acquitted. The Ontario Court of Appeal affirmed this result (*R v I (D)* 2010).

In an appeal to the Supreme Court of Canada, a majority of the Court (six justices to three) set aside the acquittal and a new trial was ordered, based on the argument that the complainant, an adult with "mental handicaps" (sic), could testify, that questioning her required consideration and accommodation of her particular needs, and that "questions should be phrased patiently in a clear, simple manner" (2012: para78). The majority also noted that preventing a witness from testifying could have significant consequences, preventing the truth from being told and making it impossible to prosecute crimes committed against members of

a historically vulnerable population. The majority interpreted section 16 of the Canada Evidence Act (1985) to mean that a witness with mental disabilities who cannot understand the nature of an oath is still competent to testify in court if she can communicate the evidence and promise to tell the truth (2012: para 74).

This case demonstrates an assumption that often operates in law and more generally: legal capacity is presumed for individuals who are not labeled as disabled, while capacity must be negotiated by those with intellectual, significant psychosocial, and communication disabilities. These individuals are presumed to lack legal and decision-making capacity and consequently must negotiate their capacity to access justice, select appropriate support and care, and choose treatment or care protocols. As Genevra Richardson (2011:146) has argued: "[s]pecialised legislation commonly provides for the involuntary treatment of people with mental disorder of the required severity and rarely stipulates that lack of capacity must be established before any such powers are used." The consequences are important: presumptions about disability often lead to a failure to recognize individual capacity to exercise entitlements to choice, autonomy, equality, and participation – key rights that are guaranteed by international treaties and state law. Determining incapacity based only on a person's status as a disabled person, or on functional incapacity based on impairment, shifts the burden of proof to individuals to show they have the capacity to exercise their right to autonomy.

Commonly, values of beneficence and social protection outweigh the rights to exercise autonomy and equality and the expectation of reasonable accommodation. These rights are limited by presumptions about risk and the complexity of decisions of which persons with intellectual and psychosocial disabilities are presumed capable. The element of choice, which is essential to exercising rights, is proscribed by the way in which capacity and incapacity have

been determined in law. Involuntary treatment and substitute decision-making have therefore become commonplace in medicine and personal care, limiting legal entitlement for persons with complex and multiple needs.

This chapter explores international treaties and guarantees of rights that affect the exercise of legal capacity. It addresses a number of critical areas at the intersection of legal capacity and individuals with multiple and complex needs. In particular, it focuses on domestic law in Colombia and Canada in order to assess how each of those countries have recently addressed issues of competence and incompetence in complex decision-making cases and the limitations on the exercise of legal capacity. Colombia and Canada have been selected because they represent two distinct legal systems, common law (with the exception of Quebec in Canada) and civil law, and because both have progressive courts that have made advances in human rights. This chapter will examine how Colombia and Canada justify limitations on the rights of persons with complex and multiple needs, including reliance on the rationales of protecting the public (including harm to self and others), entitlement to services, and protection of individual rights.

The chapter addresses ideas that have become so dominant that they are often assumed to be "natural," rather than constructed. The normative standards in law to establish first incapacity, and second appropriate treatment options, act as inherent barriers to the exercise of rights and dignity by persons with disabilities, which mandates respecting their choices and preferences. The chapter will analyze the implied and explicit rationales for beneficence and social protection within the limits of law and the ways in which capacity gets negotiated (that is, the conditions for involuntary treatments or for not extending legal capacity) using historical precedents, legislative frameworks, and case law. Both Colombia and Canada have attempted to address issues of competency in dealing with persons with disabilities, providing a useful basis for comparative

analysis and a helpful perspective on how to construct entitlements and protections in a way that respects rights and choice within a framework of respecting difference and diversity.

After exploring the current Colombian and Canadian laws, the chapter will outline and assess the potential that supported decision-making presents for recognizing fundamental rights. Finally, whether and to what extent the requirement to ensure reasonable accommodation could entail a positive obligation to facilitate supported decision-making for persons with psychosocial and intellectual disabilities who need and want it will be considered.

Conceptual Issues

The acceptance of difference is fundamental to being able to exercise rights. Building social justice and rights into the social order mandates taking into account difference and recognizing social diversity and social choice. The realization of rights depends on more than the formal recognition of rights – it requires the promotion of autonomy through economic, social, cultural, and civil and political environments, as well as the access and support that individuals need to exercise those rights. This also requires consideration of the barriers that impede the exercise of those rights, including unequal and implied presumptions about the capacity of a person.

The first issue is the social presumptions underlying the construction of incapacity, or competing conceptions of capacity. The early grounding of capacity in notions of intellect and rationality (or capacity to reason) provided an apolitical scientific (Goddard 1917; Binet 1915) foundation for the legal system's ideology underpinning incapacity and incompetence of persons with significant disabilities. Historically, rational capacity and intellect have provided the basis

for legal competence. For individuals with an unknown or presumed limited capacity, risk to self or others has been used as a legitimate justification for imposing legal incapacity.

Successive eugenicists have provided "scientific" justifications for restrictions that found their way into statute; all were based on widely held assumptions about the unchangeable nature of intellectual ability (Goddard and Spencer 1882; Goddard 1912). Social controls, such as the determination of incompetence and restrictions on activity, were needed to ensure that capitalist society could operate efficiently (Evans and Waits 1981). Partially grounded in the history of scientific positivism and biological determinism, as well as the conceptualization of an "efficient" society, individuals were classified as mentally incompetent and innate ability was viewed as unidimensional, leading to a binary legal assessment of incompetence versus competence.

This one-dimensional characterization has rationalized the perceived need for society to protect itself from persons with significant disabilities. It has also served to justify measures adopted to protect individuals with disabilities from harm because of their inability to participate in expected ways socially (for example, medical treatment, admission to an institution, testimony in court, marriage, and parenthood) and in economic transactions (for example, managing property, entering into a contract, and making a will). It has enabled legislation regarding mental competence to presuppose unilinear innate ability (Evans and Waites 1981; Faber 1968; Gould 1981). This has led to the attribution of the status of incapacity based on functional capacity – that is, if an individual has a specific impairment, or once an individual has been identified with a particular functional incapacity, he or she is presumed to lack capacity.

This scientific justification of legal disentitlement to exercise the right to autonomy and equality needs to be recognized in order to develop new models for decision-making that

acknowledge the span of capacity and the types of decisions that need to be made by individuals who are legally categorized as incompetent.

A second conceptual issue that needs to be addressed is that of choice. Choice, or autonomy, is arguably an essential element to quality of life. Amartya Sen (1995, 1999) and Martha Nussbaum (2006) have argued that quality of life should be measured in terms of actual available opportunities and the ability (based on either structural or individual constraints or freedoms) an individual has in exercising choice over his or her state of being.

The illusion of the isolated self, and the conception of the autonomous thinking self, have led to a narrow and limiting perception of the individual, and have restricted a broader exploration of capacity as a flexible notion.

Capacity has been addressed in many ways. Some authors have questioned the binary of capacity and incapacity. In some cases, where capacity is considered to be present, law and legal arguments have concentrated on defining it. However, disability is not the same as incapacity. The presumption of incapacity for all persons with psychosocial disabilities or intellectual disabilities is based on a paternalistic approach that views persons with disabilities as needing care and charity.

Individuals who are deemed capable of making autonomous choices will have their decisions respected. Decisions made in the absence of capacity will not be recognized as autonomous choices in law. Many countries have laws or processes for determining capacity and then for determining who makes the decision if an individual is unable to make autonomous choices. The flaw in this kind of model is while it recognizes autonomy, there is little incentive to assess how decisions are made or how support could be provided for decision-making, and it presumes that capacity is static over time in those functional areas. In other words, it does not

meet a more expansive reading of Article 12 of the Convention on the Rights of Persons with Disabilities (CRPD), as we explain below.

Legal Capacity under International Rights Guarantees

The United Nations adopted the Convention on the Rights of Persons with Disabilities (CRPD) in 2006, and supported decision-making has since gained acceptance as the preferred decision-making model within the disability movement and the legal community who work in this field. Colombia and Canada have ratified the Convention and assumed obligations to implement the rights detailed therein. International human rights law and the values reflected therein can and should assist in informing the interpretation of domestic law and courts' understanding and judgment. Article 12.2 of the Convention states that "State parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life," and Article 12.3 states that "State parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity." Colombia ratified the Convention without reservations, but Canada has declared that to the extent Article 12 may be interpreted as requiring the elimination of all substitute decision-making, Canada reserves the right to continue to use substitute decision-making in appropriate circumstances (Devi et al. 2011).

The legitimation of supported decision-making related to disability is an underlying principle of the CRPD and in Article 3 (general principles), the rights that may have been provided for those with disabilities, but were often ignored under other treaties are clearly set out. The CRPD also opens up areas of affirmative choice for persons with disabilities. The key principles of Article 3 include:

(a) respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons

(b) non-discrimination

(c) full and effective participation and inclusion in society

(d) respect for difference and acceptance of persons with disabilities as part of human diversity and humanity

(e) equality of opportunity

(f) accessibility.

Importantly, Article 12(2) of the CRPD recognizes the equal entitlement to legal capacity and Article 13(3) recognizes the potential need for supported decision-making, thus proscribing the legitimation of coercion in decision-making. The right to autonomous decision-making is clearly recognized, although the qualification in Article 12(4) of the CRPD is potentially troublesome, with its reference to setting up a mechanism for 'proportional and tailored [exemptions] to prevent abuse'– a phrase that is left open-ended.

Article 12 of the CRPD provides a framework for recognizing the legal capacity of persons with disabilities, and the principles for operationalizing it. A framework for a new legal construction can be developed using the six principles as the baselines against which involuntary treatment can be measured, along with the specific guarantees of legal capacity provided in Article 12 of the CRPD. The CRPD in this way addresses both the subjugation of persons to a limitation of legal capacity through legal standards or procedures for depriving them of legal capacity, compulsory treatment or forced institutionalization or hospitalization (see for example, Article 17 (respect for physical and mental integrity), Article 25(d) (free and informed consent in health care), Article 5 (reasonable accommodation) and Article 14 (liberty)), and the extension of

supportive measures that respect the autonomy, integrity, and equality of persons with disabilities.

Other international agreements also support this right of legal capacity or specifically prohibit denying entitlement, although they are more categorical. These include the International Covenant on Civil and Political Rights (ICCPR), which guarantees the right to be recognized as a person before the law (Article 16) and to be equal before the law (Article 26). In General Comment 8 of the ICCPR (UN Office of the High Commissioner for Human Rights 1982), the Human Rights Committee held that Article 9 applies to deprivations of liberty owing to mental illness, including in criminal cases and detention in a private facility. General Comment 21 (UN Office of the High Commissioner for Human Rights 1992) makes it clear that this applies to psychiatric hospitals, and particularly prohibits subjecting persons who are deprived of their liberty to any medical or scientific experimentation.

The International Covenant on Economic, Social, and Cultural Rights (ICESCR) incorporates the right to the highest attainable standard of mental and physical health. The ICESCR includes two elements: the first specifies access to goods and services, and that health services are available, accessible, acceptable, and of good quality. The second specifies the right to be free from interference, including non-consensual medical treatment and experimentation. However, the ICESCR exempts coercive treatment of mental illness subject to the conditions of the UN Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care 1991 (MI Principles). The MI Principles, while not formally binding, have also been influential in issues around capacity. They are significantly more limiting than the CRPD in presuming that "mental illness" may lead to incapacity, and consequently they provide for the appointment of a personal representative. Generally, the goal of the MI Principles is to

protect individuals from coercion in decision-making and to structure provisions to ensure the protection of their interests, but they do not address the exercise of affirmative or supported decision-making. Thus, they do not relieve the need for individuals to negotiate capacity to make decisions and exercise rights, nor do they provide guidelines for supported decision-making. They state:

> Principle 1(16): Any decision that, by reason of his or her mental illness, a person lacks legal capacity, and any decision that, in consequence of such incapacity, a personal representative shall be appointed, shall be made only after a fair hearing by an independent and impartial tribunal established by domestic law. The person whose capacity is at issue shall be entitled to be represented by a counsel.
>
> Principle 1(7): Where a court or other competent tribunal finds that a person with mental illness is unable to manage his or her own affairs, measures shall be taken, so far as is necessary and appropriate to that person's condition, to ensure the protection of his or her interest.
>
> Principle 9(4): . The treatment of every patient shall be directed towards preserving and enhancing personal autonomy.

However, the MI Principles have been extensively criticized with respect to informed consent on the basis that they are paternalistic, provide only a minimum standard of protection, and have substantive limitations (Rosenthal and Rubenstein 1993-94; Gendreau 1997; Jones 2005; Dhir 2005; Hunt and Mesquita 2006).

In addressing "mental" disability, the Special Rapporteur on the Right to Health (2005) criticized human rights violations concerning intellectual disability, persons in segregated service settings, and residential institutions. He (2005: para. 15) singled out the administration of treatment to psychiatric patients without their informed consent:

> People once thought incapable of making decisions for themselves have shattered stereotypes by showing that they are capable of living independently if provided with appropriate legal protections and supportive services. Moreover, many people once thought permanently or inherently limited by a diagnosis of major mental illness have demonstrated that full recovery is possible.

A number of authors have concluded that legal capacity is at the core of all other rights, making it fundamental to the exercise of rights for persons with disabilities. As the Ontario Law Commission working paper by Michael Bach and Lana Kerzner argues (2010: 30) citing Tina Minkowitz: '[t]he language of Article 12 represents a shift from the traditional dualistic model of [mental] capacity versus [mental] incapacity and is viewed as an equality-based approach to legal capacity'. It has been recognized as a major breakthrough in view of the many prevailing legal systems that are based on determinations of mental incapacity and guardianship/substitute decision-making regimes.

This chapter turns now to the challenges entailed in negotiating capacity at the national level, by considering how Colombia and Canada have approached these issues. Have legislators examined affirmative choice for persons with disabilities? How is it possible to restrict substitute decision-making or the making of decisions on another's behalf? What social and legal conditions would allow this to occur?

Negotiating Legal Capacity in Colombia

The tension between a strong codification tradition

and a progressive constitutional order

Colombia serves as an interesting case study for analyzing how capacity gets negotiated, and the challenges and opportunities faced by persons with disabilities at the local level when promoting the implementation of international human rights norms. Colombia's legal reforms frequently serve as models for other countries in the region. Recently, the right to legal capacity for persons with intellectual and psychosocial disabilities has been widely discussed in the country; among other developments, the Colombian Congress recently adopted a major reform to the Civil Code concerning legal capacity (Law 1306 of 2009) .Disability organizations have publicly demanded supported decision-making alternatives for persons with intellectual and psychosocial disabilities (Asdown Colombia, and FundaMental Colombia 2010), and some constitutional challenges are currently underway against several provisions of the new law (Universidad de los Andes 2011).

The Colombian case is interesting because it reveals a tension that is not uncommon in other countries – the coexistence of two legal traditions: one conservative, based on legal formalism and another more progressive tradition that uses different means to try to guarantee human rights at the local level (see Restrepo-Saldarriaga 2011: 4-7; Cepeda-Espinosa 2004: 179, describing the tension of legal traditions in Latin America). In Colombia, this tension is exemplified by the contrast between the power of the Codes, which were written in the 19th century and the progressive Colombian Constitution, which was enacted in 1991 and is defended by an activist constitutional court.

This section will illustrate this tension and highlight the importance of acknowledging it

when devising strategies to implement the CRPD at the local level. Legal capacity under Colombian law is mainly regulated under the Civil Code, which informs the interpretation of all other related norms. Thus, judges refer to the Civil Code when faced with problems of interpretation or with situations that are not governed by other legislative areas. Special emphasis is placed on the meaning of the *Code* for the Latin American legal tradition and how it has served to exclude groups of people from the enjoyment of fundamental rights. This section will then go on to contrast the existing statutory law with the provisions of the Constitution and the jurisprudence of the Colombian Constitutional Court regarding legal capacity and consent to treatment. Although most of the cases presented are not related to persons with disabilities, they illustrate how the Constitutional Court decides issues of autonomy and decision-making in complex cases. Finally, this section will explore how the Colombian Constitutional Court has addressed matters of support in decision-making and clarify how these relate to the concepts of equality and reasonable accommodation.

Legal capacity and consent to treatment under Colombian Statutory Law

A common feature of the Latin American legal tradition is the adoption of the Codes in the 19th century. In particular, the French Code, known as the Code Napoleon, provided many of the core concepts and methodologies of private law in Latin America (Mirrow 2010: 845). The codification of private law was one consequence of the struggle for independence in the region, meeting the need of those who framed the law to have clear legal rules that promoted national identity and a formal equality of all citizens. The Code encompassed the ideals of liberal thinkers of the time, and depicted the individual as a rational independent being. Any individual who did not conform to this depiction was treated by the Code as an 'outsider' with limited recognition as

a citizen.

The definition of legal capacity used in the Colombian Civil Code of 1887 is a good example of how the codification of private law ended up excluding individuals from the recognition and guarantee of their rights. With respect to the right to legal capacity, the original drafting of the Civil Code was as follows:

> Article 1503. Presumption of Capacity. Every person is legally capable, except those that the law declares incapable.
>
> Article 1504. Absolute and Relative Incapability: Are deemed absolutely incapable the insane, the prepubescent and the deaf and mute, who cannot be implied in writing. Their actions do not produce any obligations, not even natural obligations, and do not admit support bond.
>
> Are also unable, adult minors who have not obtained authorization, the spendthrift under interdiction to administer their own affairs, married women and legal entities. But the inability of these four classes of people is not absolute and their actions may have value in certain circumstances and under certain respects prescribed by law (Law 57 of 1887).

These articles about capacity were based on two legal institutions in Roman law: the Marital Potestas (*Potestad Marital*) and the Patria Potestas (*Patria Potestad*). The first relates to the body of rights that the law confers on the husband over the person and property of his wife. The second concerns the group of rights that the law grants parents over their children. These legal

institutions were justified by the presumption of incapacity of some individuals to dispose freely of their persons and their property, under the assumption that they were not responsible for their acts. Protection of the person and of society was the central argument for justifying the figure of Potestas (authority).

In the case of persons with disabilities, presumed by the Code to be absolutely incapable, the result was (and still is) the declaration of nullity of all their acts and contracts. In general, after a person has been judicially declared interdict, this presumption makes it impossible for him/her to exercise or participate in basic decisions, such as the decision to sign a working contract, to marry, to have children, or to decide a place of residence. According to the law, a guardian or a curator should make those decisions on the individual's behalf (see Colombian Civil Code 1887, Articles 428 and 432). The law also commonly allows for guardians to obtain judicial permission to sterilize persons with disabilities, to subject them to medical procedures, or to force them to be institutionalized. The derogatory terms with which the Code refers to persons with disabilities illustrate the lack of recognition and the denial of dignity: until very recently, civil legislation used the terms 'furious mad,' 'fools', 'imbeciles', 'idiots,' and persons with 'raving madness' to refer to persons with disabilities (see for example, Colombian Civil Code 1887: Articles 140, 545, 554).

Some reforms were eventually made to the original drafting of the Code. Mainly, these changes eliminated restrictions on women's legal capacity from the Colombian legal system. Among other legal reforms, Law 1328, enacted in 1932, granted civil status to women, allowing them to manage and dispose of their property. Decree 2820, enacted in 1974, abolished the Marital Potestas.

In contrast to the achievements of women, reforms to the Civil Code and other provisions

regarding legal capacity of persons with disabilities were almost nonexistent in the 20th century. Market interests helped boost reforms with regard to women's legal capacity (Velásquez 1989), but the same logic did not apply to persons with disabilities.

Some reforms have taken place in recent years. In 2003, the Constitutional Court declared several of the derogatory terms with which the Code referred to persons with disabilities to be partially unconstitutional (Corte Constitutional 2003: Decision C-478/03). In its judgment, the Court devoted several pages to explain how those terms reflected the 'lexicon of the medical profession' at the time of the enactment of the Code Napoléon. For the Colombian Constitutional Court, to sustain such an 'archaic terminology' with respect to persons with disabilities would amount to promoting prejudice against them and to denying their inherent dignity. However, unfortunately, the Court also affirmed the extreme importance of guardianships and curatorship in protecting the person with a disability, despite the fact that they 'impose a severe restriction on the exercise of patrimonial rights, and in general, of their civil capacity' (Corte Constitutional 2003: Decision C-478/03).

In 2009, the Civil Code underwent a major reform related to issues of legal capacity. Law 1306, '[By] which norms for the protection of people with mental disabilities are dictated and norms for legal representation of incapable emancipated persons are established', amended more than 100 articles of the Civil Code concerning legal capacity. Among other reforms, the Act introduced substantive changes to the process of interdiction, appointment of tutors and institutionalization of persons with disabilities in psychiatric facilities.

Although Law 1306 has had some positive outcomes compared with the original drafting of the Code, it continues to reinforce the Roman civil tradition according to which the main goal of a system of legal capacity is the protection of property and the security of legal transactions,

rather than the promotion of independence, equality, and participation of persons with disability in all respects of social life. Law 1306 also portrays a suffering being and reinforces an ideal of normality, which has been used frequently to restrict minority rights (see for example, Law 1306/09, Articles 1-2).

Finally, in its overall impact, the Law is far removed from the intent of the CRPD with respect to legal capacity. Rather than presuming the capacity of persons with disability, it operates under a model of incapacity, assuming that some individuals, because of their disability, are incapable of making decisions by themselves. For example, the law makes an unfortunate classification between what it calls 'persons with absolute disabilities' and 'persons with relative disabilities'. The first, according to the Law, would be those persons 'suffering from a severe or deep affection or pathology regarding learning, behavior or mental deterioration' (Law 1306 of 2009: Article 17). The second would be those with 'behavioral deficiencies, wasteful administration conduct, or business immaturity who may put their property under risk' (Law 1306 of 2009: Article 32). Furthermore Law 1306, instead of implementing supported decision-making mechanisms to allow individuals to live independently and to be self-determining, is concerned mainly with amending the interdiction process and the appointment of guardians (Articles 16-18). As opposed to prohibiting involuntary institutionalization, the Law continues to permit it if a 'medical expert' considers it to be "necessary for the health and therapeutic treatment of the person or to protect the general public's safety and peace" (Articles 20-24). Moreover, Law 1306 establishes a public registry of persons who have been interdicted – that is, whose legal capacity has been fully removed (Article 19), in clear violation of the right to privacy and the right to equality, among other rights. In summary, this Law exemplifies the

importance of clarifying the core concepts with respect to legal capacity, as advanced by international instruments such as the CRPD.

Legal Capacity and consent to treatment under the jurisprudence of the Colombian Constitutional Court

Although Law 1306 is an example of an unfortunate outcome of recent legal capacity reform, the Colombian legal system can also provide important insights about ways to move forward in recognizing legal capacity and encouraging supported decision-making for persons with disabilities. A progressive transformation has evolved since the Constitution of 1991, especially in the doctrine of the Colombian Constitutional Court. The Court, which is known as one of the most activist Courts worldwide (Landau 2010), 'has embraced the protection of fundamental rights as its driving force behind its institutional role. The protection of human dignity, freedom, substantive equality and solidarity has become a primary agenda, allowing disadvantaged social groups to seek judicial redress' (Restrepo Saldarriaga 2012: 7).

The jurisprudence of the Court regarding autonomy and consent to treatment provides interesting precedents to ensure that persons with intellectual and psychosocial disabilities can exercise their legal capacity. As in Canada, the general rule is the right of patients to decide freely about medical treatment. The Court has placed important emphasis on the fact that consent to treatment must be informed and free. Thus, a person has the right to receive all the information necessary to be able to appreciate the consequences of a particular medical treatment. Several cases involving adults refusing medical treatments have led the Court to reinforce its jurisprudence with respect to autonomy. In one case, an adult woman refused chemotherapy for her diagnosed cancer. In decision T-492/93, the Court denied the *tutela,* holding that under the

'right to free development of personality' (Art. 16), a person is entitled to decide for him/herself if he/she wants to receive treatment. This was a short and uncontroversial ruling, but served as a foundation for future jurisprudence in more complex cases dealing with decision-making.

For example, in 1994 the Court declared as unconstitutional a legal provision which criminalized the possession and use of narcotic drugs, and which imposed penalties such as arrest and mandatory psychiatric treatment (Corte Constitucional 1994: Decision C-221/94). The Court ruled that the right to free development of an individual's personality can only be constitutionally restricted when it affects others, and struck down the criminalization of the possession and use of drugs. It noted that if the State wants to reduce drug consumption, it should use education, rather than criminalization, to avoid compromising personal autonomy. In this decision, the Court (Corte Constitucional 1994: Decision C-221/94) emphatically rejected forced treatment and institutionalization as an attack on human dignity:

> With the excuse of treatment of certain behaviors that are deemed deviant or assimilated to diseases, hides a ferocious State's repressive power. It is a power even more censurable when it is presented as a paternal attitude (almost a loving one) against the dissident. Seclusion in psychiatric facilities or similar measures is, since a long time ago, an abominable mechanism used by totalitarian regimes to 'cure' the unorthodox …

Furthermore, the Court (Corte Constitucional: Decision 1994, C-221/94) explicitly referred to persons with disabilities, arguing that institutionalization of these individuals should be also an act of free will, rather than imposed:

> the protection of the persons with 'physical, sensory and psychical' disabilities referred to in Article 47 of the Constitution, must be understood as an obligation of the State in favor of those who, being in one of those situations, request it; thus creating an advantageous situation for them, who have then, the ***power*** to require such assistance and ***not the obligation*** to stand decisions of the State against their autonomy. The State, the Court insists, cannot regard itself as the owner of the will and life of individuals. (emphasis added)

These legal cases also highlighted other important issues. First, they clearly showed that vague considerations about the protection of public interest and society no longer trump the exercise of autonomy. The High Tribunal ruled that it is not reasonable to limit an individual's autonomy under the sole argument that she or he might endanger others or engage in undesirable actions or behaviors. The Court stated that, within the Colombian legal system, 'a person cannot be punished for what she or he presumably will do but for what she or he does' (Corte Constitucional 1994; Decision C-221/94). Secondly, the Court ruled that, although understandable, suffering or fear among family members is not a reasonable rationale for significantly limiting the possibilities of decision-making. Third, the Court ruled 'that it is not legitimate for the state to interfere in a citizen's decision to harm him or herself' (Cepeda-Espinosa 2004: 579). As controversial as this decision might be, it challenges the overprotective rationales of most legal capacity regimes.

The Colombian Court has also ruled that the State may not fulfill its duty to protect life by disregarding an individual's autonomy and dignity. In a 1997 ruling, (Corte Constitucional 1997: Decision C-239/97) the Court decriminalized euthanasia when it is performed on a

terminal ill patient who has expressly and freely requested assistance to die. According to the Court, from a pluralist perspective, the assertion of an absolute duty to live is not sustainable, because life must not be understood as merely tenable, but instead as life with dignity. Therefore, the state should respect the informed consent of a patient who wishes to die a dignified death.

The 1997 ruling illustrates how the right to live protected (Article 11) is not only about survival: it is also about living a life with dignity. For the Court to deny a person the possibility for a meaningful existence, or the ability to decide what is 'good' or 'bad' violates not only personal liberty, but also the right to live. The Court acknowledged that a person with a terminal illness could be in a state of great vulnerability, so it mandated that some protective measures should be taken to ensure that the individual provides free and informed consent. The important issue here is the Court's ruling that protective measures should not include denying the possibility of the individual making decisions.

Several other cases deal with the issue of involuntary treatment. For example, the Court has addressed the issue of whether or not minors can make decisions by themselves concerning medical treatment. The Court has ruled that in these cases, the fiction of age as a criterion for consent established by the Civil Code is not applicable. These cases illustrate how the Court's jurisprudence emphasizes autonomy with respect to medical treatment, even going so far as to disregard traditional rules established by the Civil Code about legal capacity. In all of these cases, the Court placed a strong emphasis on informing and supporting individuals to make free and informed decisions.

However, when confronted with cases dealing with decision-making possibilities for persons with intellectual or psychosocial disabilities, the Court has not applied these rules consistently. Most of these cases have relied on civil law provisions regarding legal capacity for

persons with disability, without noting that these rules may interfere with the exercise of autonomy rights (see for example, Corte Constitucional, Decisions T-560A/07, C-478/03, T-507/07, T-867/08). The Court seems to favour the idea that ensuring human rights for persons with disabilities requires overprotection. This is evident even in the Court's continual references to persons with disabilities as being extremely vulnerable and in need of protection. Moreover, in contrast to its approach in other cases in which medical opinions are only one of several aspects of determining decision-making capacity (for example, in the so-called hermaphrodite case, Decision T-585/2000, the Court relied on evidence from a multidisciplinary group), the Court regards a medical diagnosis as sufficient if the person in question has an intellectual or a psychosocial disability.

One exception, however, should be highlighted. A 2002 case (Corte Constitucional 2002: Decision T-850/02) involved the sexual and reproductive autonomy of a woman with a 'slight mental disability' who had expressed the desire to become a mother on several occasions. Through a *tutela* action, her mother had requested public health officials to sterilize her to prevent pregnancy. Although a psychiatric expert testified that the petitioner's daughter lacked the capacity to fully understand the responsibilities stemming from motherhood, the Constitutional Court saw this testimony as introducing the possibility that her capacity could be enhanced with appropriate information and support. Instead of ordering the sterilization, the Court ordered the daughter's healthcare provider to enroll her in a special comprehensive educational program in accordance with her capacities and needs, providing her with appropriate education for an individual with her intellectual capacity to enable the autonomous and responsible exercise of her sexuality and maternity.

Supported decision-making as an alternative to negotiating capacity: the Colombian Experience

Some of the cases discussed above illustrate how the Colombian Constitutional Court has regarded support to be an important element in guaranteeing an individual's autonomy and dignity. In addition to the cases dealing with autonomy, several decisions regarding the equality clause (Colombian Constitution: Article 13) provide a solid framework for supported decision-making for persons with disability. 'Support' is closely linked with the concept of 'reasonable accommodation'. The Colombian Constitution imposes on the State not only negative duties (to abstain from arbitrarily discriminating), but also positive obligations to adopt the measures necessary to guarantee conditions of substantial equality. Paragraphs 2 and 3 of Article 13 state:

> The State shall promote conditions for the guarantee of a real and effective equality and shall adopt actions in favor of groups that have been discriminated or marginalized.
>
> The State shall provide special protection to those people that due to their economic physical or mental status are in vulnerable circumstances and will punish any abuse or mistreatment perpetrated against them.

Under the equality provision, the Court has ruled that the state has a positive obligation to take measures to remove barriers that impede persons with disabilities from being able to exercise their rights as others do. For the Court, lack of compliance with this obligation is equivalent to a form of arbitrary discrimination and, to this end, it has ordered reasonable accommodations on

several occasions to guarantee that a person with disability can exercise his or her rights. For example:

- The Court demanded that the State provide interpreters to guarantee the right to education for minors with hearing disabilities (Corte Constitutucional 2011: Decision T-051/2011).
- The Court guaranteed the right to vote for persons with visual disabilities by ordering the State to provide ballots in Braille (Corte Constitucional 2003: Decision T-487/03).
- In 2007, the Court ordered City Hall to provide ramps in its historical building, to guarantee persons with a physical disability the right to work (Corte Constitucional 2003: Decision T-576/03).
- In one of the most relevant cases concerning the right to health, the Court ruled that the health system must provide free transportation for persons with disabilities, when needed, to guarantee access to medical treatment (Corte Constitucional 2008. Decision T-760/08).

In short, reasonable accommodation, which is a form of support, has been at the centre of the Court's equality jurisprudence.

It is important to note that, contrary to the jurisprudence of Canadian courts, the Colombian Constitutional Court does not resort to distinctions between positive or negative rights in order to intervene. Especially in cases concerning substantive equality and socio-economic rights, the Colombian Constitutional Court has expressly stated that this distinction is irrelevant with regard to whether the Court should intervene to guarantee rights (see for example, Corte Constitucional: Decision T-760/08).

Beyond negotiation: supported decision-making

gaining recognition in Colombia

A number of issues need to be addressed in the Colombian context to ensure supported decision-making gains recognition. The challenge is devising strategies for replacing the ideas put forward in the 19th century, so that it is possible to achieve the aims expressed in recent international instruments such as the CRPD. In the Colombian context, the increasing importance of constitutional case law and the progressive Constitutional Court could help introduce new paradigms into the legal system. However, the Court also needs to understand what the 'paradigm shift' is all about. One important way to do this is to show the Court that its jurisprudence already encompasses the core ideas of the CRPD and other international instruments that encourage the recognition of decision-making abilities among persons with intellectual and psychosocial disabilities. Disability organizations are preparing a *constitutional public action* against several provisions of the 2009 Law 1306, which will provide an interesting opportunity to move the Court's jurisprudence a step closer to guaranteeing autonomy, equality, and dignity for all.

Legal Capacity and Consent to Treatment in Canada

In Canada, persons with intellectual and psychosocial disabilities have faced pervasive and persistent marginalization and exclusion. Yet human rights legislation and more recently, constitutionally protected equality rights promise otherwise. We focus on decision-making about health care to examine the reality that people with serious psychosocial and intellectual disabilities face despite these protections.

Justice Cardozo has stated that "[e]very human being of adult years and sound mind has the right to determine what shall be done with his own body"(*Schloendorff v Society of New York Hospital* 1914: 93). This precept has guided Canadian judicial decisions about medical decision-making and treatment for decades. It gives substance to the respect for bodily integrity and autonomy that is basic to common law, and is now reflected in the *Canadian Charter of Rights and Freedoms*. It finds expression in the legal presumption that prevails in common law and has frequently been codified in statute: all adults are presumed capable of making decisions about treatment, and healthcare providers are required to obtain informed consent prior to treatment (*Reibl v Hughes* 1980; in Ontario, see for example section 4 of the Health Care Consent Act 1996). Persons with intellectual and psychosocial disabilities have been recognized as rights holders too. In *Fleming v Reid*, the Ontario Court of Appeal held that statutory provisions in the provincial *Mental Health Act,* which deprived involuntary patients of any right to have their prior competent decisions about psychiatric treatment even be considered in a later period of incompetence, breached the patients' constitutional right to security of the person under section 7 of the *Charter*. The Court stated: (*Fleming v Reid* 1991: 88 ; see also *Rodriguez v British Columbia (Attorney General)*1993: 587–89)

> The common law right to bodily integrity and personal autonomy is so entrenched in the traditions of our law to be ranked as fundamental and deserving of the highest order of protection. This right forms an essential part of an individual's security of the person and must be included in the liberty interests protected by s.7. Indeed, in my view the common law right to determine what shall be done with one's own body and

> the constitutional right to security of the person, both of which are founded on the belief in the dignity and autonomy of each individual, can be treated as co-extensive.

The law recognizes that individuals can be decisionally capable for some purposes and not others – for example, someone might be able to decide to marry or to testify in legal proceedings, but not to give instructions to a lawyer or make a will (see for example *Calvert (Litigation Guardian of) v Calvert* 1997 *R. v D.A.I.* 2012). Capacity can come and go over time, and can vary depending on the complexity of the decision.

Negotiating Legal Capacity in Canada

With respect to medical treatment, the legal test for capacity requires that the person be able to understand the information relevant to making a decision about the treatment, and able to appreciate the reasonably foreseeable consequences of a decision or lack of decision (see, for example Ontario's Health Care Consent Act 1996 section4). However, the law's strong support for an individual's right to autonomy in the healthcare context is dependent on his/her legal capacity to accept or reject a treatment. In *Fleming v Reid*, the applicants' *prior* wishes about treatment *expressed when they were still considered competent* had to be taken into account, not their views when they could not meet that legal test. This poses considerable risk for individuals with disabilities. Often, 'even people with disabilities who do not have diminished levels of capacity are…inaccurately perceived to be not mentally capable' (Kerzner 2006: 338, quoting Kaiser in Downie et al 1999) merely because of their disability. David Weisstub (1990: 116) has noted that '…the tendency to conflate mental illness with lack of capacity…occurs to an even greater extent when involuntary commitment is involved….'. Thus, persons with psychosocial

disabilities who face involuntary commitment and/or involuntary treatment must often face formidable barriers to assert their right to decide what treatment they will accept.

In assessing the current state of Canadian mental health law generally, Kaiser has argued (2009:143) persuasively that, contrary to what might have been expected after the passage of the Charter and with increasing recognition of the harmful effects of segregation and stigma:

> ...the early twenty-first century substantive legislative regime emerges as more paternalistic and interventionist than its predecessors of the previous three decades. While offering some modest procedural protections, there are virtually no guarantees of supports and services to minimize the risk of disabling crises and to maximize the likelihood of optimal social functioning...The typical mental health statute evinces almost complete silence on human rights protections, equality rights and discrimination, health promotion, crisis prevention and positive rights to supports and services based upon a broad conception of health determinants.

The challenges facing people with psycho-social disabilities wanting to decide for themselves about treatment were at the fore in the Supreme Court of Canada's decision in *Starson v Swayze* (2003). The following facts are taken from the Supreme Court judgment and from Sheila Wildeman's overview of this case (2012: 257). Starson had been charged criminally, tried and found not criminally responsible by reason of mental disorder for uttering threats in the course of an altercation at his rented premises. The Ontario Review Board (the body that supervises persons deemed not criminally responsible under the Criminal Code) determined that he would remain involuntarily in psychiatric hospital, subject to the Board's mandatory annual reviews.

Starson had a history of frequent involuntary hospitalization and treatment and, during the same period, a record of notable accomplishments in theoretical physics, despite a lack of formal training in that discipline. Starson's psychiatrists proposed treatment with anti-psychotics, anti-anxiety medications, and mood stabilizers, which Starson refused, although he was willing to continue psychotherapy. When his treating psychiatrist concluded he was not decisionally capable, meaning that under Ontario law, a substitute decision-maker would decide for him whether to consent to or refuse this treatment, Starson challenged this determination before the Consent and Capacity Board (CCB). He argued that psychiatric medications had not been helpful in the past and would not be helpful in the future, asserting that they had been 'the most horrible experiences of [his] life' (*Starson v Swayze* 2003: para. 98) and left him unable to continue his work in physics and struggling even to communicate. He would not characterize his condition as mental illness, although he did acknowledge he had some mental problems.

Starson was unsuccessful initially, but appealed further to the Divisional Court, where he succeeded in having the CCB's decision overturned. His physician's appeal to the Ontario Court of Appeal and then to the Supreme Court of Canada was unsuccessful. A majority of the Supreme Court concluded that the CCB had erred by substituting its own view of Starson's best interests, rather than first determining whether he met the statutory test of decisional capacity and could make the decision for himself. The Court concluded the evidence established that Starson (*Starson v Swayze* 2003: para. 79) was able to understand and appreciate information relevant to deciding about the proposed treatment and the possible consequences

> A patient is not required to describe his mental condition as an 'illness', or to otherwise characterize the condition in negative terms. Nor is the patient required to agree with the

> psychiatrist's opinion regarding the cause of that condition. Nonetheless, if the patient's condition results in him being unable to recognize that he is affected by its manifestations, he will be unable to apply the relevant information to his circumstances, and unable to appreciate the consequences of his decision.

While this decision generated considerable controversy, others have canvassed those issues extensively, and they will not be addressed further in this chapter (Wildeman 2012, n. 71; McSherry 2008; Carver 2008: 228–30; *Starson v Pearce* 2009).

The law with respect to whether involuntary patients capable of making treatment decisions can refuse treatment varies across Canada. Peter Carver (2008: 357-8; see also Wildeman 2012: 256-57) has identified four general approaches to consent to treatment:

(a) a right to refuse treatment (Ontario)

(b) no right to refuse treatment (British Columbia)

(c) a right to refuse, subject to a "best interests" override (Alberta, Manitoba) and

(d) excluding capable individuals from committal (Saskatchewan, Nova Scotia).

Treatment for purposes unrelated to the person's mental disorder is subject to the generally applicable rules regarding consent to treatment: consent is required, either from the patient, or if he or she lacks decisional capacity with respect to that treatment, from a substitute decision-maker (Carver 2008: 364).

Supported decision-making as an alternative to negotiated capacity: The Canadian Experience

In *Starson v Swayze* (2003), the Court had to determine whether Starson was decisionally capable; the question of supported decision-making did not arise. However, supported decision-making is beginning to gain recognition in legislation in several Canadian jurisdictions. Nandini Devi and colleagues (2011: 254-5) have noted that the supported decision-making model:

> ...is predicated on the basic principle that all people are autonomous beings who develop and maintain capacity as they engage in the process of their own decision-making even if at some level support is needed...In the supported decision-making paradigm, the individual receives support from a trusted individual, network of individuals or entity to make personal, financial and legal decisions that must be followed by third parties such as financial institutions, business, health professionals and service providers.

Although supported decision-making is rarely the subject of judicial consideration, courts have recognized its utility in assisting individuals to exercise capacity. For example, in *Re Koch,* a woman with multiple sclerosis challenged her assessors' determination that she lacked capacity to manage her own financial affairs, and to decide whether to continue to live independently or in a care facility (*Re Koch* 1997). These assessors had become involved at the instance of the woman's husband, from whom she was separated and engaged in litigation. As the presiding judge remarked, '...in the vernacular, her cry is 'my husband had me committed!''(*Re Koch* 1997: 485). Justice Quinn concluded the assessors had been unfair in conducting their

assessments, and the evidence did not support their conclusion that she lacked capacity. He added, 'It is to be remembered that mental capacity exists if the appellant is able to carry out her decisions with the help of others', referencing the services and supports available to her in the building where she lived, which was operated by a community-based rehabilitation and advocacy charity for people with physical disabilities (*Re Koch* 1997: 513).

British Columbia's Representation Agreement Act 1996 provides an example of legislation recognizing supported decision-making: adults can enter into a "representation agreement" with trusted persons or support services, and authorize them either (i) to help the individual make decisions about personal care, routine financial management, health care, and other listed matters; or (ii) to make those decisions on behalf of the individual. This agreement does not require the individual to have 'legal capacity' in the conventional sense. Factors taken into account in determining capability to make such an agreement include: whether the person communicates a desire to have the representative help to make, in fact make or stop making decisions; whether the person demonstrates choices or preferences and can express feelings of approval or disapproval of others; whether the person has a relationship with the representative characterized by trust; and whether the person is aware that making or changing the agreement can affect the representative's role in decision-making. Other British Columbia statutes also incorporate provisions related to assisted decision-making. Section 2 of the Adult Guardianship Act 1996, for example, states that guardianship should not be sought or granted unless alternatives, such as providing support and assistance, have been attempted or carefully considered (see also, for example, the Health Care (Consent) and Care Facility (Admission) Act 1996).

In Manitoba, the Vulnerable Persons Living with a Mental Disability Act 1993 is meant to protect the rights of 'vulnerable persons', including any adult who lives with a mental disability and requires assistance with basic needs of personal care or property management. While the legislation promotes supported decision-making over substitute decision-making, it does so for a limited class of persons. Section 1 defines 'mental disability' solely in terms of intellectual disability, and excludes 'mental disorders', limiting the statute's reach. Section 6(2) states that "[s]upported decision-making by a vulnerable person with members of his or her support network should be respected and recognized as an important means of enhancing the self-determination, independence and dignity of a vulnerable person". Section 6(1) defines 'supported decision-making' as '...the process whereby a vulnerable person is enabled to make and communicate decisions with respect to personal care or his or her property and in which advice, support or assistance is provided to the vulnerable person by members of his or her support network'.

Manitoba Family Services and Labour (2012) describes the role of a support network as including involvement in individual planning; supporting the person making choices and decisions; helping the person understand, communicate, and carry out functions they may not be able to do alone; and linking the person to a larger community to strengthen the circle of support. Prince Edward Island and the Yukon also have legislation that provides for assistance in decision-making, the former with respect to health care, and the latter more generally (Consent to Treatment and Health Care Directives Act 1988 (PEI); Adult Protection and Decision-Making Act 2003 (Yukon)).

In contrast, substitute decision-making, which is the norm in much guardianship law, allows others to make decisions on behalf of a person who cannot meet the legal test for

decisional capacity. Leslie Salzman (2010: 165) has noted that '[w]hen it comes to the obligation to assist persons with a diminished ability to make decisions...we generally accept the notion of supplanting, rather than assisting, the decision-making process'. While there has been some openness to supported decision-making, substitute decision-making remains the prevalent model in Canada.

Robert Gordon (2000: 65) has argued that '...the concept simply recognizes the way in which most adults function in their everyday lives' (see also Bach and Kerzner 2010; Devi et al. 2011). Rather than accepting the sharp distinction drawn in law between those who meet the legal test for decisional capacity and those who do not, they emphasize that many individuals seek help with decisions – from family, friends, lawyers, physicians, accountants, mechanics, and others. Thus, they stress our similarities as decision-makers, rather than our differences, and argue that needing assistance should not automatically disqualify an individual as an autonomous decision-maker. Instead, appropriate supports must be made available, enabling the person concerned to retain power and authority.

The provision of appropriate supports is consistent with obligations under human rights legislation and the Canadian Charter. Individuals have a right to access services (including health care) without discrimination on the basis of disability. They have a right to equality before and under the law, and to the equal protection and benefit of the law, without discrimination because of disability. As rights holders, they are entitled to reasonable accommodation so they can exercise those rights. Further, as Gwen Brodsky, Shelagh Day and Yvonne Peters (2012:9) pointed out in their recent analysis of developments in human rights and Charter jurisprudence, *Accommodation in the 21st Century*, the Supreme Court of Canada's decisions in *British Columbia (Public Service Employee Relations Commission) v British Columbia Government*

Service Employees' Union (1999) (*Meiorin*) and *British Columbia (Superintendent of Motor Vehicles) v British Columbia (Council of Human Rights)* (1999) (*Grismer*) have made it clear that the duty to accommodate is not limited to '...a duty only to make individual after-the-fact exceptions', but extends to changing the standards employed from the outset (Brodsky, Day and Peters 2012: 9; see also Pothier 1999-2001; Schucher 2000: 338.). Speaking about employment-related discrimination on the basis of gender in *Meiorin* (1999: para 68), Chief Justice McLachlin stated:

> To the extent that a standard unnecessarily fails to reflect the differences among individuals, it runs afoul of the prohibitions contained in the various human rights statutes and must be replaced. The standard itself is required to provide for individual accommodation, if reasonably possible.

The Court's reasoning was not limited to employment: *Grismer* was a case of discrimination on the basis of disability in the criteria used to determine eligibility for a driver's license, and the Court took the same analytical approach. Brodsky, Day, and Peters (2012: 10) have concluded that "[a]ccommodation is not only tinkering, for individuals; it is systemic. It is not only after the fact, it is proactive'. This understanding of reasonable accommodation meshes well with frameworks that would enable supported decision-making.

Beyond Negotiating: Supported Decision-making gaining Recognition

Consistent with the decisions in *Meiorin* and *Grismer*, when negotiating capacity it is important to broaden the standard for determining capacity to accommodate persons with disabilities. More particularly, we argue there is an obligation to ensure reasonable accommodation to enable persons with psychosocial and intellectual disabilities to exercise their capacity to make decisions. Such accommodation could include forms of supported decision-making that the individual concerned needs and wants (see examples in Bach and Kerzner 2010: 24). This may entail imposing positive obligations on the state or on service providers, to ensure needed supports are made available.

Canadian courts have been notably reluctant to recognize that the State may be subject to positive obligations to remedy a breach of individuals' constitutional rights. The Supreme Court of Canada's decision in *Eldridge v British Columbia (Attorney General)* (1997) is a rare exception, one which arose in the context of disability (see also *Canadian Association of the Deaf v Canada* (2006) regarding access to government by people with impaired hearing). The Court concluded that, in refusing to fund sign language interpreters to allow individuals with hearing impairments to communicate effectively with physicians when receiving publicly insured health services (a benefit to which all Canadians are entitled by law), hospitals and the provincial public health insurance plan had discriminated on the basis of disability and breached the Charter right to equality. In reality, the Supreme Court of Canada's judgment has not been widely implemented in practice (Flood and Chen 2010: 494). The more common judicial response to claims that the State is constitutionally obligated to take positive steps to avoid breaching citizens' Charter rights is evident in the Supreme Court of Canada's decision in *Gosselin v Quebec (Attorney General)* (2002), a challenge to the Quebec government's decision to reduce welfare payments to younger recipients unless they participated in approved training

programs. The Court concluded that the State had not breached individuals' rights to life, liberty, and security of the person under section 7 of the Charter, or their equality rights under section 15, even though it had reduced the welfare payments in question to levels grossly inadequate to support life. The Court declined to interfere with the government's decision, essentially holding that whether or not welfare recipients received sufficient support to survive was a policy decision for the government to make, and not a matter of positive obligation on the state.

Human rights legislation and statute-based human rights protections, however, have often provided the basis for imposing positive obligations. For example, in *Council of Canadians with Disabilities v Via Rail Canada Inc.* (2007), the Supreme Court of Canada confirmed that service providers must utilize inclusive standards in designing services, such that Via Rail had to ensure the rail cars it had purchased secondhand met accessibility standards for passengers with mobility restrictions.

Relying on this decision and others, Gwen Brodsky, Shelagh Day and Yvonne Peters (2012: 43) argue that '[i]f access to an institution or service is fundamental to the equality of people with disabilities and the sought-after accommodation is integral to it, denial of the accommodation should be understood as prima facie discrimination'. Deciding about how to live one's life certainly fits this description, making retaining decision-making power and authority vital to achieving equality, and triggering the obligation to provide reasonable accommodation tailored to an individual's circumstances.

Recognizing the duty of the State and service providers to provide reasonable accommodation could serve as a counterweight to courts' reluctance to impose positive obligations on the State. As Justice Sopinka noted in *Eaton v Brant County Board of Education*: (1997: para 67)

> Exclusion from the mainstream of society results from the construction of a society based solely on "mainstream" attributes to which disabled persons will never be able to gain access...Rather, it is the failure to make reasonable accommodation, to fine-tune society so that its structures and assumptions do not result in the relegation and banishment of disabled persons from participation, which results in discrimination against them...It is recognition of the actual characteristics, and reasonable accommodation of these characteristics which is the central purpose of s.15(1) in relation to disability.

Arguments that an expansive understanding of 'reasonable accommodation' is needed to enable decision-making by persons with psychosocial and intellectual disabilities will likely be met with the response that because of 'real differences', these individuals cannot make their own decisions, whether about treatment or other matters. In other words, borrowing from language used in *Eaton*, the "true characteristics of this group" preclude them from this role, and require instead that others assume authority over their lives. Tied to this will be arguments that the courts' *parens patriae* powers mean the judiciary has an obligation to protect those who are not able to care for themselves. However, this kind of blanket conclusion, made without seriously considering how supports could enhance individuals' ability to understand, appreciate, and make decisions, falls short of meeting the requirements of human rights law. Considerations of reasonable accommodation must be built into the standard from the outset. With regard to the courts' *parens patriae* responsibilities, its powers are meant to protect persons who are not decisionally capable (Peppin 1989-90: 65). If supports can enable a person to meet that threshold, then the court's jurisdiction would not be triggered.

CONCLUSIONS

Concerns about the context and content of a decision-making model will, and should, persist. Supported decision-making can easily slide into substituted decision-making, such that an individual's decision is effectively made by his or her support network instead of by the person concerned. The individual may be also vulnerable to exploitation and abuse. Further, supported decision-making could be imposed too readily and applied to individuals who do not need it, thereby subjecting them to unjustified intrusion.

Historically, some classes of people have had to negotiate their legal capacity. Some issues, such as those related to involuntary treatment, are constructed in law and then individually negotiated. Although some groups have made progress in affirming their decisional capacity, others, particularly persons with psychosocial and intellectual disabilities, have faced greater barriers in asserting their rights to legal capacity. The CRPD is a step forward in this respect, in that it presents an interpretation of decision-making that is not categorical but can be supported.

Framed within questions that arise at the interface of medical treatment, legal protection, and community care, this chapter has argued that dignity, equality, non-discrimination, autonomy, and inclusion are inherent to every individual, whatever his or her condition. Within these parameters, individuals are presumed to have the legal capacity to act or to make their own decisions. The need for support or accommodation should be proportional to a person's capability and the nature of the disability should determine what support or supports need to be provided. The effectiveness of support provided (an outcome measure) should determine whether the support is adequate and appropriate. Every individual's dignity, equality, and decision-

making capacity must be recognized along with an acknowledgement that the latter (may vary under different circumstances and over time.

The challenge now is to implement the CRPD domestically. Here, we have focused on two countries to explore some of the local challenges faced by persons with disabilities in gaining recognition of their legal capacity. Canadian and Colombian courts both take human rights seriously, but the cases from both countries demonstrate entrenched and grounded notions of substituted decision-making, and reveal the presumptions about persons with disabilities that have led to legal constructions of (in)capacity. To remove these legal blinkers, we need to re-think capacity, beginning with a presumption of ability with support. The concept of support needs to be central, rather than individual ability; the idea of reasonable accommodation is a first step. In any case, the legal framing of support needs to be addressed. An expansive model of supported decision-making in the context of reasonable accommodation will draw on concepts of equality that fall outside the traditional notion of equal treatment, and beyond the neo- liberal notion of equal opportunity to recognize equal outcome (Rioux and Valentine 2005: 47–69; Rioux 2003: 287–317).

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Desplazamiento forzado

Reflexiones para salir de la encrucijada

Compilador: Manuel José Cepeda Espinosa

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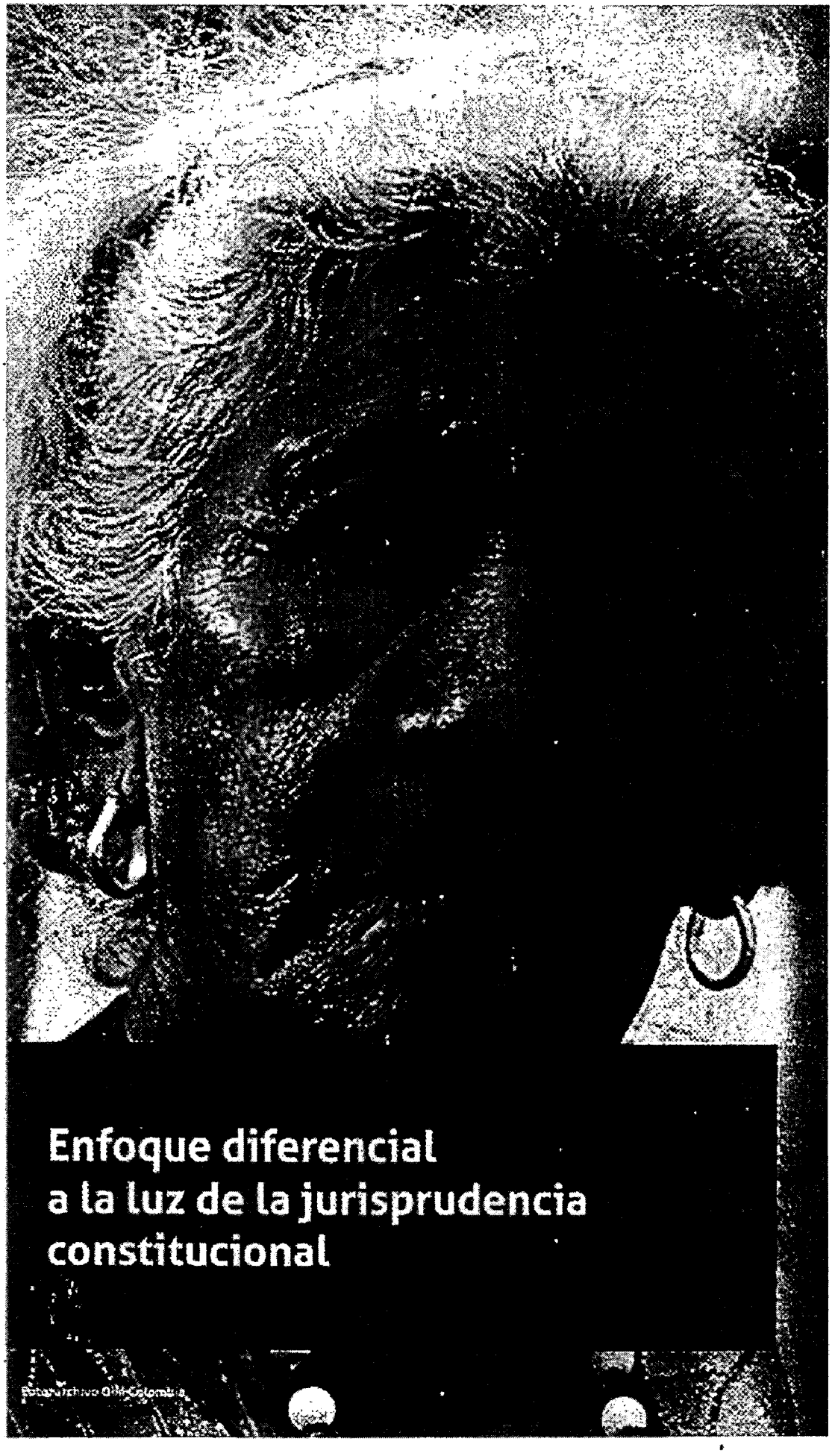

Enfoque diferencial a la luz de la jurisprudencia constitucional

Natalia Ángel Cabo
Bogotá D.C., enero de 2012

Introducción

Este escrito aborda el concepto de enfoque diferencial a la luz de la jurisprudencia de la Corte Constitucional, analiza la respuesta del gobierno en los informes del 1 de julio de 2010 y de marzo 16 de 2011, y hace recomendaciones generales tanto para funcionarios encargados del tema como para la Corte en su proceso de evaluación. Específicamente, responde a las siguientes preguntas: (1) ¿Qué ha entendido la Corte Constitucional por enfoque diferencial y qué indicaciones ha dado para que dicho enfoque se incorpore a la política pública de desplazamiento forzado? (2) ¿Qué entiende el gobierno por enfoque diferencial y cómo está presente en los informes del gobierno del 1 de julio de 2010 y de marzo 16 de 2011? (3) ¿Qué pasos se deben seguir para avanzar en la incorporación de enfoques diferenciales en la política de prevención y atención al desplazamiento forzado?

Debe advertirse, que más que un escrito teórico, el propósito principal de este informe es, por un lado, brindar un panorama general para aquellos funcionarios y personas interesadas en conocer cómo la Corte ha abordado el tema de enfoque diferencial y, por el otro lado, servir de apoyo a los diferentes grupos consultores de este proyecto para que sean ellos quienes incorporen un análisis diferencial a la hora hacer recomendaciones puntuales para avanzar un derecho específico, como en este caso, el derecho a la vivienda, generación de ingresos y tierra. Otro aspecto que se debe resaltar es que en este escrito se hace un barrido general en materia de enfoque diferencial, sin que se haga una evaluación individual de la situación de un grupo específico (como por ejemplo, los afrodescendientes o las personas con discapacidad) o de los avances del gobierno en relación con las

MANUAL DE CONSTITUCIÓN Y DEMOCRACIA

Volumen II

Del Estado y la protección de los derechos

Henrik López Sterup
(coordinador)

Universidad de los Andes

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A quienes confían en la institucionalidad
como medio para lograr el goce efectivo de los derechos,
y a los jueces que luchan por esta causa.

CAPÍTULO XI

EL TIEMPO DE LA GENTE: LA DEMOCRACIA PARTICIPATIVA Y LOS MECANISMOS DE PARTICIPACIÓN POPULAR A LA LUZ DE LA CONSTITUCIÓN DE 1991

Natalia Ángel Cabo

1. Introducción

"Bienvenidos al futuro". Con esta expresión, el entonces presidente César Gaviria (1990-1994) terminó su presentación de la Constitución de 1991. Pero quizás el lema político utilizado en una campaña política posterior, "El tiempo de la gente",[1] habría caído "como anillo al dedo" para indicar uno de los propósitos centrales del constituyente de 1991: poner en el centro del espectro político a los ciudadanos, mediante el reconocimiento de Colombia como una democracia participativa y la ampliación de los llamados mecanismos de participación popular. Estos propósitos se anuncian desde los primeros tres artículos constitucionales:

> Colombia es un Estado social de derecho organizado en forma de república unitaria [...] democrática, participativa y pluralista [...].
> Son fines esenciales del Estado: [...] facilitar la participación de todos en las decisiones que los afectan [...].
> La soberanía reside exclusivamente en el pueblo, del cual emana el poder público. El pueblo la ejercerá en forma directa o por medio de sus representantes, en los términos que la Constitución establece.

[1] Parte de la campaña presidencial de Ernesto Samper en 1994.

de entrada en vigencia de la Constitución de 1991, es posible sostener que aún queda mucho por hacer en términos del fortalecimiento de las instituciones democráticas y de la garantía de mayor representación y participación ciudadana. En realidad, basta leer noticias recientes para darse cuenta de que el balance es crítico en muchos frentes: altos índices de abstención, un Congreso cuestionado, denuncias sobre prácticas ilegales alrededor de las elecciones e influencias de grupos al margen de la ley, entre otros problemas.

Ante tal panorama, no pocos terminan afirmando que una de las promesas aún incumplidas de la Constitución es precisamente la construcción de una nueva democracia.[4] Y no les falta razón. Pero la desilusión no puede llevar al conformismo: la discusión de cómo corregir estas deficiencias, cómo profundizar los canales democráticos y construir una ciudadanía más activa y participativa, más respetuosa del pluralismo, más comprometida con la justicia social, debe ser una constante en nuestro país e, incluso, es muy necesario que el ciudadano común participe de estas discusiones.

No obstante, para poder formar parte de las propuestas de cambio, para reivindicar la idea de que "es el tiempo de la gente", es importante tener un conocimiento, siquiera mínimo, de cómo funciona nuestra democracia. El propósito de este capítulo es brindar entonces al lector una aproximación al modelo de democracia participativa que adoptó el constituyente de 1991 y acercarlo a los mecanismos de participación popular que consagra la Carta Política. Se empezará por explicar en qué consiste el cambio en el modelo democrático para luego presentar los mecanismos de participación popular consagrados por la Constitución: iniciativa legislativa, plebiscito, referendo, consulta popular, revocatoria del mandato y cabildo abierto. Más allá de explicar formalmente el desarrollo de estos mecanismos, el presente escrito dará cuenta de algunos ejemplos prácticos que permiten evaluar los aciertos y las fallas de las fórmulas elegidas por el constituyente y de su posterior desarrollo legal.

2. El tránsito hacia una democracia participativa

Como ya se señaló, la Constitución de 1991 apostó por el cambio de modelo democrático. Esto es, transitar de una democracia representativa hacia una

[4] Cf., por ejemplo, Uribe, María Teresa. "Las promesas incumplidas de la democracia participativa", en: Montoya, Víctor Manuel (ed.). *El debate a la Constitución*, Bogotá, Unibiblos-Publicaciones ILSA, 2002.

Transitar hacia una democracia más vigorosa, inclusiva y participativa fue un compromiso central de los constituyentes de 1991 y una de las mayores aspiraciones de la nueva Carta Política. Para dar una idea del espíritu que reinó durante la expedición de la Constitución de 1991 y de las expectativas creadas, vale la pena volver a las palabras del presidente de la época al clausurar las sesiones de la Asamblea Constituyente:

> Este nuevo país que tenemos por delante, basado en una Constitución bien distinta a [sic] la de 1886, se expresará por medio de una democracia participativa, será gobernado con instituciones sólidas y eficaces y estará habitado por ciudadanos activos, interesados en decidir su porvenir [...].
>
> Millones de colombianos que nunca se habían interesado —con razón— en las teorías constitucionales, hoy se identifican con la Carta de 1991 y están dispuestos a exigir que se cumpla, que sea un instrumento para transformar la realidad [...]. Los inspiradores de la democracia participativa han desafiado las instituciones tradicionales no para destruirlas, sino para tomar como pilares de un nuevo orden político más legítimo; más respetuoso de la autonomía, de los derechos y de la libertad; menos desigual y más justo, abierto a la convivencia pacífica de los grupos que conforman una comunidad [...].
>
> Una nueva Carta. Una nueva democracia. Y nuevas instituciones sólidas y eficaces [...] se vislumbra un Congreso de la República diferente, donde todos los colombianos se sentirán representados. Con asiento para las diversas fuerzas políticas y sociales [...]. Deputado de las vistas que, como los auxilios y el carisma parlamentario, empañaron sus logros ante la opinión pública [...]. Un elevado foro de la democracia, como lo ha sido esta Asamblea [...]. Dotado de mecanismos para hacer más responsables a los funcionarios y convertirse en caja de resonancia de los grandes problemas nacionales. Y con la misión histórica de impulsar el desarrollo de la nueva Constitución, expidiendo las leyes que sean necesarias.[2]

Pasado el "momento constitucional",[3] el lector de hoy notará que estas palabras están lejos de ser una realidad y que, con la experiencia de casi 20 años

[2] Gaviria Trujillo, César. *Palabras del señor Presidente de la República, César Gaviria Trujillo, al clausurar las sesiones de la Asamblea Constituyente: julio 4 de 1991*, Bogotá, Imprenta Nacional, 1991.

[3] Adopto el término de Ackerman, Bruce. *We the People: Foundations*, Cambridge, Harvard University Press, 1991.

democracia participativa que, si bien no abandona la idea de la representación, resalta la importancia de la participación ciudadana en todas las esferas de la vida pública. Aunque la teoría democrática es extensa y compleja, para entender el cambio de modelo se empezará por definir la democracia representativa, en oposición a la democracia directa; para luego subrayar algunos de los argumentos por los cuales el constituyente prefirió transitar hacia el modelo de democracia participativa. Veamos:

Demos significa 'pueblo' en griego, y 'democracia', por extensión, el 'gobierno del pueblo'. De su misma acepción se entiende que un sistema democrático se opone a una monarquía o una tiranía, en la medida en que no gobierna una sola persona ni es el gobierno de unos pocos. Es, en esencia, el gobierno de todos, del pueblo. Pero ¿cómo lograr que el pueblo gobierne? Ésta ha sido la cuestión central del debate democrático. Las respuestas tradicionales a dicha pregunta se han manifestado, principalmente, mediante dos fórmulas en principio excluyentes: la democracia directa y la democracia representativa.

La democracia directa, defendida con gran pasión por Rousseau, insiste en que la democracia no puede ser otra cosa que una unidad entre el sujeto y el objeto de poder político.[3] Es decir, si la democracia es el gobierno del pueblo, sus decisiones se deben dar de manera directa, sin intermediarios, para que valgan como expresión de la soberanía popular. Bajo el modelo de democracia directa, el pueblo debe entonces debatir y dictarse sus leyes, sin lugar a la representación. En palabras de Rousseau: "[l]a soberanía no puede ser representada, por la misma razón que no puede ser enajenada; consiste esencialmente en la voluntad general, y la voluntad general no se representa: es ella misma o es otra, no hay término medio".[4]

El ideal de Rousseau de que toda decisión pública fuera tomada directamente por los ciudadanos no fue acogido por las democracias contemporáneas —entre otras razones, por consideraciones prácticas— y, por el contrario, el modelo extendido fue, y sigue siendo, el modelo de la democracia representativa, aquel según el cual el pueblo ejerce su poder por medio de representantes. En la democracia representativa, también llamada 'indirecta' para distinguirla de la defendida por Rousseau, el pueblo elige libremente a sus representantes, pero, a diferencia de la democracia directa, son esos representantes y no los ciudadanos quienes toman las decisiones que serán expresadas en leyes.

[3] García-Pelayo, Manuel. *Derecho constitucional comparado*, Madrid, Alianza, 1993, p. 175.

[4] Rousseau, Jean Jacques. *Du Contrat social*, citado por García-Pelayo, *óp. cit.*, p. 176.

Aunque la fórmula de la democracia representativa ha encontrado variaciones, la de corte liberal ha sido la predominante desde mediados del siglo XX.[7] Como explica Boaventura de Sousa Santos,[8] grosso modo esta visión insiste en los siguientes presupuestos:

- La democracia se debe entender, ante todo, como un procedimiento de formación de gobiernos y de toma de decisiones. Así se privilegia la idea democrática como un conjunto de reglas para la formación de mayorías, dentro de las cuales cabría resaltar el peso igual de los votos y la ausencia de distinciones, económicas, sociales, religiosas y étnicas en la constitución del electorado.[9]
- La democracia representativa se necesita por la complejidad del aparato estatal. Ante tal complejidad, las decisiones públicas se deben canalizar mediante representantes autorizados, para que sean ellos quienes encuentren soluciones consensuadas a los múltiples problemas sociales.[10]
- La representación constituye la única solución posible en democracias de gran escala.[11] En términos de Robert Dahl:

> Cuanto menor sea una unidad democrática [es decir, cuantas menos personas haya], mayor será el potencial para la participación ciudadana y menor la necesidad de los ciudadanos de delegar las decisiones de gobierno a sus representantes. Cuanto mayor sea la unidad, mayor será la capacidad de lidiar con problemas relevantes para los ciudadanos y mayor la necesidad de los ciudadanos.[12]

- Las formas de representación pueden expresar los distintos pensamientos y manifestaciones de la sociedad. Tal como lo expuso Stuart Mill,

[7] Santos, Boaventura de Sousa y Avritzer, Leonardo, "Introducción: para ampliar el canon democrático", en: Santos, Boaventura de Sousa (coord.), *Democratizar la democracia. Los caminos de la democracia participativa*, México, Fondo de Cultura Económica, 2004.

[8] Idem.

[9] Bobbio, Norberto. *Marxismo y Estado*, citado por Santos y Avritzer, *ibid.*, pp. 40-41.

[10] García-Pelayo, *óp. cit.*, p. 177.

[11] Santos y Avritzer, *óp. cit.*, p. 43.

[12] Dahl, Robert. *A Preface to Democratic Theory*, citado por Santos y Avritzer, *id.*

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Salud

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Número 5
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Universidad de los Andes

La Convención de Naciones Unidas sobre los derechos de las personas con discapacidad: dejando atrás el modelo médico

Natalia Ángel Cabo*

Las cifras de discapacidad en Colombia son preocupantes y las acciones que se adoptan a nivel estatal para incluir a este grupo poblacional no son más alentadoras. La reciente Convención de Naciones Unidas sobre los derechos de las personas con discapacidad es una importante herramienta que, de ser aplicada con seriedad, promete mejorar significativamente la calidad de vida de estas personas. Todavía, sin embargo, queda mucho por hacer.

Las personas con discapacidad en Colombia enfrentan una dramática situación: según el censo de 2005, la mayor parte de esta población vive en situación de pobreza, por lo menos el 30% no ha accedido a nivel educativo, cerca del 70% de las personas con discapacidad en edad de trabajar se encuentra desempleada, más del 30% no está afiliada al sistema de salud, y un número significativo reporta ser víctima de atentados en contra de su integridad personal por parte de familiares, vecinos o extraños. Se trata de miles de colombianos con discapacidad que encuentran comprometida la garantía y ejercicio de sus derechos humanos.[1]

Estas cifras ilustran bien el grado de marginamiento y de exclusión que viven las personas con discapacidad en el país e invitan a pensar en el rol que, tanto el Estado como la sociedad en general, han jugado, y deberán jugar, para garantizar el ejercicio pleno de los derechos de esta población. Porque no nos engañemos: Colombia no se ha caracterizado por brindar una atención particularmente importante a las personas con discapacidad, a pesar de que la Constitución exige que se les otorgue una especial protección.

Ahora bien, Colombia se dispone a culminar la ratificación de un nuevo instrumento internacional en esta materia: la Convención de Naciones Unidas sobre los derechos de las personas con discapacidad. Este instrumento ha generado un enorme entusiasmo por parte de las personas con discapacidad y de las organizaciones que defienden sus derechos, por distintas razones. Por un lado, porque a diferencia de otros instrumentos internacionales sobre el tema, la Convención es producto directo del activismo y amplia participación de las personas con discapacidad. En últimas, ella hace honor al lema del movimiento asociativo que reza "nada sobre nosotros, sin nosotros". Por otro lado, la Convención constituye uno de los instrumentos más ambiciosos para poner la discapacidad en el centro del discurso de los derechos humanos. Aunque difícilmente en estas pocas líneas se podría exponer la riqueza de este instrumento internacional, digamos simplemente que la Convención incorpora un significativo cambio de paradigma en la compresión de la discapacidad. Mientras que, tradicionalmente, ésta ha sido abordada a la luz de un modelo médico/rehabilitador, la Convención insiste en mirar la discapacidad a la luz de un enfoque social y de derechos humanos.

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1 El censo de 2005 señala que, en Colombia, el 6,3% de la población se encuentra en condición de discapacidad. Dicha cifra, sin embargo, ha sido cuestionada por diferentes organizaciones que utilizan como referente las estimativas de la OMS. Según dicha organización, el 10% de la población mundial sufre alguna discapacidad y esta cifra aumenta en países que se encuentran en conflicto armado.

Para que el lector tenga una mayor claridad de qué implica este cambio de paradigma, en este escrito se hará una breve introducción a los diferentes modelos que han signado el trato frente a las personas con discapacidad, para luego hacer unas cuantas reflexiones sobre los cambios fundamentales que se deben seguir en el país, para garantizar condiciones de inclusión social de dicha población.

Del modelo de prescindencia al modelo médico en la comprensión de la discapacidad

La comprensión sobre la discapacidad ha pasado, alrededor del mundo, por diferentes facetas. En el pasado, no pocas culturas entendían a la discapacidad como un castigo divino, como un embrujo o posesión demoniaca. La consecuencia clara era aislar, e incluso exterminar, a aquellas personas que manifestaran algún tipo de limitación física, sensorial, mental o intelectual. De la mano de estos prejuicios surgieron entonces diferentes modelos de tratamiento y comprensión frente a la discapacidad.[2] Por un lado, un modelo que se podría denominar de prescindencia, que descansa principalmente sobre la idea de que las personas con discapacidad no tienen nada que aportar a la sociedad, que no merecen vivir y que, en últimas, la sociedad estaría mejor sin ellas. Cuando algo de compasión se debiera expresar frente a dichas personas, tendría que venir de la mano de una idea de sujetos-objetos de caridad o de asistencia.[3]

Como respuesta a estos enfoques, bajo el apogeo de la ilustración, se empieza a cambiar la visión sobre la discapacidad. Ella ya no se presenta como un castigo divino, sino como una enfermedad que debe intentar ser *curada* o por lo menos *rehabilitada* por la ciencia médica, de manera que la persona con discapacidad pueda asemejarse a una persona *normal*. Así, una constante referencia a *la normalidad* va adquiriendo arraigo como parámetro de comparación frente a aquellas personas que puedan tener una limitación funcional. Esto es lo que tradicionalmente se ha denominado el enfoque médico/rehabilitador, que ha sido prevalente durante buena parte del siglo XIX y XX, y que, sin duda, sigue arraigado en nuestros días. En este modelo, el llamado 'problema' es ubicado en el cuerpo del individuo con discapacidad y el único llamado a ofrecer una solución será el profesional de la salud. Como lo señala la profesora Catherine D. Seelman:[4]

> *El contexto del modelo médico es la clínica o la institución. Las personas con discapacidad asumen el papel de pacientes (...) La autoridad la tienen las y los profesionales de la salud. El sesgo del modelo médico es la percepción biológica y médica de normalidad y la estrecha banda de conocimientos legítimos, que usualmente sólo se relaciona con lo médico y la salud. Así, la discapacidad queda reducida al nivel de deficiencia. La perspectiva de la persona con una discapacidad y los factores sociales, usualmente, no forman parte de la base de conocimientos del modelo médico.*

No debe sorprender que distintos activistas alrededor del mundo hayan cuestionado el modelo médico como forma de entender y dar respuesta social a la discapacidad. Parte del cuestionamiento radica en insistir que debe existir una comprensión más amplia que asuma a las personas con discapacidad como verdaderos sujetos de derechos.

El modelo social y de derechos humanos: un paso en la dirección correcta

No debe sorprender que distintos activistas alrededor del mundo hayan cuestionado el modelo médico como forma de entender y dar respuesta social a la discapacidad. Parte del cuestionamiento radica en insistir que debe existir una comprensión más amplia que, por un lado, asuma a las personas con discapacidad como verdaderos sujetos de derechos y, por el otro, entienda que las causas de la discapacidad van más allá de una determinada limitación física, sensorial, mental o intelectual. Estas críticas han confluido en la defensa de lo que se ha denominado el modelo social de discapacidad, a la luz del cual ésta no será determinada tanto por las deficiencias funcionales, como por

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[2] PALACIO, A. El modelo social de discapacidad: orígenes, caracterización y plasmación en la Convención Internacional sobre los Derechos de las Personas con Discapacidad.
[3] Ibid.
[4] Consultado el 1 de agosto de 2010 en: http://www.disabilityworld.org/01-03_04/spanish/proceso/rehabmenos1.shtml

las barreras y obstáculos que están presentes en la sociedad. En otras palabras, parte de la premisa sobre la cual descansa el enfoque social es que la discapacidad es en parte una construcción y el resultado de una sociedad que no considera ni tiene presente a las personas con discapacidad.[5] El enfoque social invita a que la atención en discapacidad no se centre exclusivamente en el individuo con discapacidad, sino también en las barreras sociales —tanto barreras físicas como de actitud— que le impiden desarrollarse en igualdad de condiciones con las demás personas.

Varios aspectos son claves en el enfoque social. Por un lado, la insistencia en que las personas con discapacidad, a diferencia de las perspectivas anteriores, son sujetos que tienen mucho que aportarle a la sociedad. Así, el enfoque social invita a centrarse en el análisis de las capacidades de las personas, más que en una evaluación sobre sus deficiencias. Concentra su atención en la interacción de la persona con su entorno social, más que limitarse a brindar un determinado diagnóstico del estado de su salud. El modelo social invita a entender la discapacidad como parte de la diversidad humana, y no como la tradición la había signado, como una desviación de un supuesto parámetro de normalidad. Finalmente, este enfoque reivindica valores centrales a los derechos humanos, como la dignidad humana, la igualdad, la libertad personal y la inclusión social. El propósito central de quienes defienden un modelo social es lograr que las personas con discapacidad puedan llevar una vida independiente, que sean libres de opresión y discriminación y que, ante todo, puedan decidir sobre su propia vida.[6]

El propósito central de quienes defienden un modelo social es lograr que las personas con discapacidad puedan llevar una vida independiente, que sean libres de opresión y discriminación y que, ante todo, puedan decidir sobre su propia vida.

La necesidad de que en el país se incorpore el modelo social en discapacidad

Como ya se mencionó, el enfoque social es el que adopta la Convención de Naciones Unidas sobre los derechos de las personas con discapacidad —y, de hecho, en esta misma vía también están los análisis más recientes de discapacidad que se hacen desde el área de la salud—.[7] Diferentes organizaciones de personas con discapacidad o que defienden sus derechos vienen insistiendo en que la Convención se ratifique con prontitud en el país, pues es un instrumento que ayudaría a poner la discapacidad de nuevo en el radar y a dar impulso al reconocimiento social de las personas con discapacidad como plenos ciudadanos, sujetos de derechos, con un rol importante que jugar en la sociedad. Obviamente, la ratificación de una Convención por sí sola no cambia mucho, si no se trabaja decididamente por hacerla efectiva. Pero si aceptamos a lo que nos invita, a identificar las barreras sociales y actuar en consecuencia para removerlas, estaríamos entrando en el camino correcto.

Una primera tarea, cuando entre en vigencia la Convención, será modificar las normas contrarias a sus preceptos. Tarea que no es sencilla si se tiene en cuenta que buena parte de las normas que afectan a las personas con discapacidad son moldeadas bajo un enfoque médico/rehabilitador, donde buena parte del goce de prerrogativas sociales y de ejercicio de sus derechos va a depender del concepto del médico tratante. De hecho, no son pocas las referencias al concepto de normalidad por oposición a la discapacidad; ésta es, incluso, la idea que plasma la política pública expresada en el CONPES 80, que afirma que la discapacidad es un "riesgo social".

Cambios en la legislación en un sentido más acorde con la Convención son necesarios. Al igual que lo será apostarle a conceptos centrales de ésta como el diseño universal y los ajustes razonables. Sin embargo, como bien lo señala la Alta Comisionada de los derechos humanos,[8] para hacer realidad las apuestas de la Convención, es necesario comenzar por un cambio central en las actitudes. Las actitudes y los prejuicios son, en buena parte, las principales barreras con las que se enfrentan las personas con discapacidad y son éstas las que un enfoque social busca remover. La expresión de Chris Sullivan dice mucho sobre el cambio de paradigma al que invita la Convención: "Se debe mirar a la persona no a la limitación. Eso requiere un cambio tremendo en las percepciones de todo el mundo".[9]

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5 Palacios. Op cit. p. 27
6 Ibid. p. 27
7 Ver la Clasificación Internacional del Funcionamiento, (CIF) sobre la discapacidad y la salud.
8 Consultado en agosto 4 de 2010 en: http://www.un.org/disabilities/default.asp?id=476
9 Ibid.

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LA DISCUSIÓN EN TORNO A LAS SOLUCIONES DE *SOFT LAW* EN MATERIA DE RESPONSABILIDAD SOCIAL EMPRESARIAL

NATALIA ÁNGEL CABO

Contenido

LA DISCUSIÓN EN TORNO A LAS SOLUCIONES DE SOFT LAW EN MATERIA DE RESPONSABILIDAD SOCIAL EMPRESARIAL*

*Natalia Ángel Cabo*** ***

RESUMEN

La globalización ha promovido la expansión de poderosas empresas transnacionales cuyas actividades tienen repercusiones sociales y ambientales alrededor del mundo, a tal punto que su influencia socioeconómica en el contexto local y global ha sido descrita como un "cambio de poder", y ha llevado incluso a cuestionar el rol tradicional y capacidad de los estados en la defensa y protección de sus ciudadanos. Ante este panorama son preguntas centrales en la agenda global el cómo mitigar el riesgo social asociado a las actividades de las empresas, principalmente en países en desarrollo, y cómo potenciar un compromiso decidido con el desarrollo sostenible. Las respuestas son variadas, pero en el centro de la discusión está lo que se conoce como el debate entre soluciones de hard law y soft law en materia de Responsabilidad Social Empresarial. El debate responde a una pregunta central: ¿Para fortalecer la responsabilidad de las empresas en materia social, laboral, ambiental, se deben ampliar las respuestas de tipo 'legal', de regulación obligatoria (hard law), tanto a nivel nacional e internacional o, por el contrario, lo que se debe impulsar son soluciones voluntarias, de autorregulación por parte de las empresas (soft law), como las que hasta hoy han imperado en la llamada RSE? Este escrito presenta los argumentos principales que han marcado la discusión, con el fin de invitar a que en el país, teniendo en cuenta nuestro propio contexto, se dé un análisis similar. En especial, a lo que invita el debate es a reflexionar sobre las tensiones que pueden presentarse entre regulaciones obligatorias y soluciones voluntarias, las fortalezas de uno y otro sistema, y el necesario balance que tanto en el contexto internacional, como en el local, se debe dar a unas y otras.

Palabras Claves: derecho duro, derecho blando, Responsabilidad Social Empresarial.

ABSTRACT

Globalization has favored expansion of powerful transnational corporations whose activities have had profound social and environmental repercussions throughout the world. Their social and economic influence both in local and global contexts, has been described as a "shift of power" to the point that it has even led some to question the traditional role and capacity of States to protect their own citizens. How to mitigate the social risk associated with their activities, mainly in developing countries, and how to promote a genuine commitment to sustainable development are key questions of the global economic agenda. Answers are multiple but the debate around hard law and soft law solutions is in the spotlight of the so called Corporate Social Responsibility. In order to strengthen the responsibility of corporations towards society, the environment and human rights, among other concerns, mandatory regulations both at national and international level (hard law) should be favored or, on the contrary, is it better to appeal to soft law instruments which establish voluntary commitments? This article presents the main arguments surrounding the hard law / soft law debate in order to encourage a similar discussion in Colombia. In particular, the debate invites to make a reflection about the tensions and conflicts between mandatory regulations and voluntary solutions, the advantages and downfalls of each system, and the need of a balance between the two.

Key Words: soft law, hard law, Corporate Social Responsibility.

* En este artículo he decidido mantener la expresión en inglés soft law y hard law teniendo en cuenta su extendida utilización, incluso por autores de habla hispana. No obstante, no sobra señalar que preferiría utilizar expresiones castizas. Pero la traducción literal de soft law, como "derecho blando" y de hard law como "derecho duro", al no ser utilizadas con frecuencia en la literatura de habla hispana, no permite, a mi juicio, tener un referente cercano sobre su significado.

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En mayo de 2004 la compañía transnacional Chiquita Brands confesó haber entregado más de un millón y medio de dólares a las Autodefensas Campesinas de Córdoba y Urabá, en el periodo comprendido entre 1997 y 2004. No se trató de una acción aislada de una de sus sucursales en Colombia, sino un pago conocido y de hecho autorizado por los altos directivos de la Compañía. Por esta acción un juez federal de los Estados Unidos ordenó pagar a Chiquita una multa de tan sólo 25 millones de dólares[2], suma irrisoria si se contrasta con la violación de derechos humanos que dicho acto terminó por fomentar.

La indignación causada por el actuar de Chiquita, y de hecho por la modesta condena judicial, llevaron a que el Estado colombiano anunciara que intentaría extraditar a los altos ejecutivos de la Compañía para que comparecieran ante las autoridades nacionales y eventualmente respondieran en el país[3]. Sin embargo, el anuncio no llegó a buen término: al poco tiempo el Fiscal General de la Nación expresó que el proceso estaba a punto de precluir, pues a pesar de utilizar todos los canales diplomáticos y de cooperación judicial, había sido imposible lograr que las autoridades de Estados Unidos suministraran los nombres de quienes durante el 2000 y el 2004 dirigieron la empresa[4].

Este panorama que ilustra el caso de Chiquita no es nuevo, ni excepcional, en una era de globalización enmarcada por el surgimiento de nuevos mercados, nuevos actores, nuevas reglas. De hecho, entre muchas otras transformaciones, la globalización ha promovido la expansión de poderosas compañías transnacionales cuyas actividades tienen repercusiones sociales y ambientales alrededor del mundo, a tal punto que su influencia socioeconómica en el contexto local y global ha sido descrita como un "cambio de poder"[5], y ha llevado incluso a cuestionar el rol tradicional y capacidad de los estados en la defensa y protección de sus ciudadanos.[6] Se afirma por ejemplo que la globalización ha generado un vacío de regulación que ha dejado a las compañías transnacionales libres, en muchos aspectos, para fijar sus propias reglas de conducta para el logro de sus intereses económicos.[7] Esto en parte se atribuye a la incapacidad de los Estados de regular la actividad de las empresas transnacionales más allá de sus fronteras[8] y al impacto de

2 Esta no era la primera acción legal en contra de Chiquita por actos irregulares en Colombia. De hecho, en el 2001 la Comisión de Cambios y Valores de los Estados Unidos le había impuesto una multa de 100.000 dólares, por haber sobornado a un funcionario de la DIAN para la expedición de una licencia aduanera y portuaria.

3 En Extradición serían pedidos los ejecutivos de Chiquita Brands, dice el Fiscal General. En: eltiempo.com. [en línea]. (20, marzo, 2007). Consultado el 1 de julio de 2008 en: http://www.eltiempo.com/archivo/documento/CMS-3484943#

4 RESTREPO, Juan Camilo. ¿Más operaciones 'apagayo'? En:. Portafolio.com.co. [en línea]. (20, mayo, 2008). Consultado el 1 de julio de 2008 en: http://www.portafolio.com.co/opinion/columnistas/juancamilorestrepo/ARTICULO-WEB-NOTA_INTERIOR_PORTA-4175186.html

5 WORLD COMMISSION ON THE SOCIAL DIMENSION OF GLOBALIZATION. A Fair Globalization: Creating Opportunities for All, International Labour Office, Geneva 2004, p. 3. Citado por: ROSEMANN, Nils. The UN Norms on Corporate Human Rights Responsibilities. An Innovating Instrument to Strengthen Business' Human Rights Performance. En: FES Occasional Papers, [en línea]. N° 20 (2005), p.7 Consultado en julio de 2008 en: http://library.fes.de/pdf-files/iez/global/04669.pdf

6 Sobre el debate acerca del impacto de la globalización en el rol tradicional de los Estados, vid., entre otros: STRANGE, Susan. The Erosion of the State. En: Current History, vol. 96 (Nov. 1997). HIRST. Paul y THOMSON Grahame. Globalization in Question: The International Economy and the Possibilities of Governance. Cambridge: Blackwell, 1999. 317 p. GÖKSEL, Nilüfer Karacasulu. Globalisation and the State. En: Perceptions. Journal of International Affairs. [en línea]. Vol. 9, N°.1 (2004). Consultado en julio de 2008 en: http://www.sam.gov.tr/perceptions/Volume9/March-May2004/1Nil%C3%BCferKaracasulu.pdf

7 CRAGG, Wesley. Multinational Corporations, Globalisation, and the Challenge of Self-Regulation. En: KIRTON, John J. y TREBILCOCK, Michel J. (Eds.). Hard Choices, Soft Law. Voluntary Standards in Global Trade, Environment and Social Governance, Aldershot, Ashgate, 2007, p. 222.

8 JAGERS, Nicola. Corporate Human Rights Obligations: In Search of Accountability Intersentia,(2002), p.11. Citado por: AMAO, Olufemi O. Corporate Social Responsibili-

los acuerdos internacionales que buscan remover barreras para el libre comercio. Pero también, se debe a la tendencia de no pocos países de bajar sus estándares en materia ambiental, laboral, o de derechos humanos, con tal de no quedar por fuera del mercado global[9].

En efecto, un debate recurrente frente a la globalización tiene que ver con la situación de países pobres y en vía de desarrollo que con frecuencia no tiene la capacidad o incluso la voluntad para contrastar los abusos de algunas compañías transnacionales, bien por debilidad institucional, carencia de recursos, o por el interés (o necesidad) de atraer a toda costa inversión extranjera.[10] El poder de las compañías transnacionales es tal que muchas de ellas incluso superan el producto interno bruto de los países en los que operan.[11] Y si bien, ante este poder económico, no se duda que la participación de las empresas transnacionales contribuiría a facilitar y estimular el desarrollo de países pobres, la experiencia ha demostrado que tampoco se puede minimizar el impacto negativo que muchas de sus actividades generan en términos sociales o ambientales. El caso de Chiquita es sólo uno más de abusos conocidos, que se suman a muchos otros como el de Nike[12] y Gap[13] en el Asia, Shell en Nigeria[14], Unocal en Miramar[15], sólo por brindar algunos ejemplos.

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ty, Multinational Corporations and the Law in Nigeria: Controlling Multinationals in Host States. En: Journal of African Law. [en línea]. Vol. 52, No. 1 (2008), p.96. Consultado en Julio de 2008 en la base de datos SSRN: http://ssrn.com/abstract=1128237

9 WILLIAMS, Cynthia. Civil Society initiatives and "soft law" in the oil and gas industry. New York University Journal of International Law and Politics [en línea]. 36: 457 (2003), pp. 458-459. Consultado en Julio de 2008 en la base de datos: Hein on Line. De acuerdo con Ronen Shamir. *"Tanto en los países ricos como en los pobres, aunque no de la misma manera, las empresas multinacionales gozan a menudo de poderes de decisión que les permiten "configurar las políticas públicas, promocionar con fuerzas medidas legislativa, impulsar o desalentar reformas sociales e influenciar la acción gubernamental en áreas esenciales, entre las que se encuentran el empleo, el medio ambiente, y los derechos civiles y sociales"*. Vid: SHAMIR, Ronen. La Responsabilidad social empresarial: un caso de hegemonía y contrahegemonía. En: SANTOS, Boaventura de Sousa y RODRIGUEZ GARAVITO, César. (Eds.) El derecho y la globalización desde abajo. Hacia una legalidad cosmopolita Barcelona: Anthropos, 2007, p.86

10 Lodge y Stirton identifican cuatro factores que caracterizan la capacidad y autonomía regulatoria de los Estados frente a los procesos de globalización: *"1) Corporaciones transnacionales, que dominan sectores estratégicos en países en desarrollo y que influencian desproporcionadamente a los gobiernos y legisladores nacionales. 2) Organizaciones internacionales y Estados 'hegemónicos' que presionan a países débiles para que adopten políticas que los beneficien. 3) La tendencia de los gobiernos nacionales de adoptar formulas diseñadas en otros países en cambio de innovar políticas 'a la medida'. 4) El impacto de la 'ideología y política de la globalización' en las políticas públicas domésticas, inclinando la balanza en favor de las élites domésticas"*. LODGE, Martin y STIRTON, Lindsay. Globalisation and Regulatory autonomy in small developing states: the case of Jamaican Telecommunications reform. Center on Regulation and Competition, Institute for Development Policy and Management, University of Manchester [en línea]. Working Paper Series N°15. (2002), p. 4. Consultado en julio de 2008 en: http://www.competition-regulation.org.uk/publications/working_papers/wp15.pdf

11 Mary Robinson pone de presente que las 200 empresas más grandes, representan un cuarto del producto doméstico del mundo. ROBINSON, Mary. Human Rights, Development and Business – An Introduction. International Symposium on Human Rights and the Private Sector, Novartis Foundation for Sustainable Development, Basel (2003). Consultado en agosto de 2008 en: http://www.business-humanrights.org/Links/Repository/507392/link_page_view. Un ejemplo diciente lo ilustra Marina Ottaway al poner de presente que los ingresos de Exxon Mobil en 1999 fueron cuatro veces mayores que los de Nigeria y Chad, dos de los países en los que operan. OTTAWAY, Marina. Reluctant Missionaries, Foreing Pol'y, July-Aug. 2001, p.44.

12 Vid: Global Exchange. Nike Campaingn. Consultado en junio de 2008 en: http://www.globalexchange.org/campaigns/sweatshops/nike/

13 SINGH, M. Gap Threatens India's Clothing Boom. En: Time. com [en línea] (Oct. 29, 2007). Consultado en junio de 2008 en: http://www.time.com/time/world/article/0,8599,1677385,00.html?imw=Y

14 Vid. http://en.wikipedia.org/wiki/Ken_Saro-Wiwa. Consultado el 8 de junio de 2008.

15 Vid: Unocal Settles Rights Suit in Myanmar. En: The New York Times [en línea] (Dec. 14, 2004). Consultado el 8 de junio de: http://www.nytimes.com/2004/12/14/business/14unocal.html

Como lo señala el director de UNIDO[16]; *"Las corporaciones transnacionales están dentro de los principales motores del proceso de la globalización (...) Con sus estrategias de inversión, ellas pueden co-determinar los prospectos económicos de regiones y países enteros. Sus objetivos y prácticas pueden inclinarse hacia el logro rápido de ingresos o ser unos ciudadanos corporativos responsables. Hay suficiente evidencia en ambos sentidos".*

Este panorama de las empresas transnacionales, que no deja de ser preocupante, ha impulsado, sin embargo, una renovada discusión sobre el rol de las empresas frente a la sociedad y su entorno y un emergente consenso de que liberalización económica y financiera no debe profundizarse si no se garantiza la protección y la promoción de valores sociales y ecológicos[17]. La famosa afirmación de Milton Friedman (1970)[18] en el sentido de que la única responsabilidad social de las empresas es la de maximizar utilidades –aunque aún vehementemente defendida–, contrasta con el impulso de gobiernos, organizaciones de la sociedad civil y organismos internacionales por hacer que las empresas se comprometan con un desarrollo sostenible[19] y garanticen con su actuar por lo menos un compromiso mínimo con valores y principios compartidos en áreas como los derechos humanos, estándares laborales, el ambiente, la transparencia o la anticorrupción. No es un llamado a la filantropía es un llamado a la responsabilidad.[20] Es un llamado a que las empresas, como actores económicos y sociales, que gozan de un poder sin precedente, asuman nuevos compromisos no sólo con sus accionistas, sino con las personas y con el planeta.

¿Pero cómo garantizar un 'buen' comportamiento de las empresas, un compromiso decidido con el desarrollo sostenible, ante las nuevas dinámicas de intercambio e inversión? ¿Cómo lograr que se mitigue el riesgo social asociado a las actividades de las empresas transnacionales, principalmente en países en desarrollo? ¿Qué mecanismos sirven para *"inspirar a las empresas a promover los derechos humanos, la justicia económica, la responsabilidad ambiental, teniendo en cuenta que tradicionalmente el logro de estas metas no ha sido el principal interés de las empresas, y que de hecho existen dificultades para avanzar estas metas en países que carecen de fuertes estados de derecho, gobiernos*

16 MAGARIÑOS, Carlos. Forward by Carlos Magariños-Director General of Unido. En: United Nations Industrial Development Organization –UNIDO–. Corporate Social Responsibility implications for small and medium enterprises in developing countries, Viena, 2003, p.iii. (Traducción personal de la autora).

17 KIRTON, John J. y TREBILCOCK. Introduction: Hard Choices and Soft Law in Sustainable Global Governance. En: KIRTON, John J. y TREBILCOCK, Michel J. (Eds.). Hard Choices, Soft Law. Voluntary Standards in Global Trade, Environment and Social Governance, Aldershot, Ashgate, 2007, p.1.

18 FRIEDMAN, Milton. The social responsibility of business is to increase its profits, New York Times Magazine. (13 sept., 1970).

19 El desarrollo sostenible ha sido definido como el *"desarrollo que satisface las necesidades del presente sin comprometer la habilidad de generaciones futuras de satisfacer sus propias necesidades."* Aún cuando el concepto se ha enmarcado principalmente en cuestiones ambientales, en épocas recientes se ha considerado que este concepto debe involucrar también consideraciones sobre la influencia del crecimiento económico en las estructuras sociales, tales como el impacto en las tensiones étnicas o raciales, la violencia urbana o en los cambios en la calidad de vida. Vid en general: CYPHER, James. M. y DIETZ, James. L. *The Processo f Economic Development.* New York, NY: Routledge, 1997, p. 40

20 Como lo pone de presente Leonardo Schvarstein, el idioma inglés tiene dos palabras diferentes para aludir a las dimensiones que están involucradas en la palabra "responsabilidad". Por un lado "responsibility" se refiere a aquello por lo cual uno se siente internamente responsable, es decir una especie de compromiso moral o ético. "Accountability", por su parte alude a la rendición de cuentas que uno debe hacer ante otro debido a una obligación o compromiso asumido. SCHVARSTEIN, Leonardo. "Responsabilidad Social" [en línea]. Consultado en junio de 2008 en: http://www.ulagrancolombia.edu.co/nuevosite/divisioninvestigaciones/documentos/responsabilidadsocialleorsch.pdf Por su parte, Adela Cortina añade que no se invita a "cualquier responsabilidad, sino a una responsabilidad interiorizada, convencida". CORTINA, Adela. Responsabilidad Social Empresarial. Conferencia pronunciada el 29 de septiembre de 2008. Corporación Club el Nogal-Fundación el Nogal, Bogotá.

poco transparentes, o inestables circunstancias sociales, políticas o económicas"?[21] Estas son sin duda preguntas centrales del debate en torno a la llamada Responsabilidad Social de las Empresas (en adelante RSE). Si bien poco a poco hay acuerdo respecto a los valores y principios que se buscan garantizar, que como sugieren algunos autores ha surgido de un amplio diálogo y debate entre diferentes sectores[22], en lo que no hay acuerdo es en el *cómo* lograr que se integren esos valores y principios en la actividad empresarial y el *cómo* hacerlos efectivos.

Este debate sobre el *cómo* no es un debate menor. De hecho es la discusión que enmarca actualmente gran parte de la literatura internacional sobre la RSE. Aunque la misma es altamente compleja y se mira desde distintas perspectivas y disciplinas, en el centro del debate sobre la RSE está lo que se conoce como la discusión entre las soluciones de *hard law* y de *soft law*. Aún cuando más adelante se profundizará sobre estos conceptos, señalemos por ahora que la discusión se concentra en una pregunta central: ¿Para fortalecer la responsabilidad de las empresas en materia social, laboral, ambiental, se deben ampliar las respuestas de tipo 'legal', de regulación obligatoria (*hard law*), tanto a nivel nacional e internacional o, por el contrario, lo que se debe impulsar son soluciones voluntarias, de autorregulación por parte de las empresas (*soft law*), como las que hasta hoy han imperado en la llamada RSE?

Debe advertirse que hoy en día, por lo menos en el campo internacional, la balanza parece inclinarse hacia la promoción de soluciones voluntarias, de autorregulación[23]. De ello dan cuenta diferentes instrumentos internacionales que establecen recomendaciones y estándares para que las empresas voluntariamente encaminen su actuar, o la creación de sistemas de certificación en materias laborales, ambientales o de derechos humanos. A estos mecanismos se suma la proliferación en la última década de códigos de conducta adoptados internamente por las empresas. Todos estos instrumentos comparten características del llamado *soft law*, principalmente porque son adoptados de manera voluntaria, y su contenido no es formalmente obligatorio.

Pero a medida que se incrementa el cuerpo de *soft law* en materia de RSE, también crece la controversia: ¿Hasta qué punto medidas voluntarias, que no pueden ser exigibles, por lo menos legalmente, pueden garantizar la responsabilidad de las empresas[24]? ¿Qué tan efectivas pueden ser estas medidas frente a la regulación? ¿Son estrategias de compromiso genuino de las empresas con el desarrollo sostenible, o simplemente una estrategia para desplazar regulaciones que exigirían estándares más altos de comportamiento empresarial? ¿Debe el derecho internacional establecer un marco jurídico obligatorio para las empresas transnacionales en materia de RSE o se deben seguir promoviendo soluciones voluntarias? Estas son tan sólo algunas de las preguntas que rodean la discusión.

Lo que busca este escrito es presentar los argumentos principales que han marcado el debate alrededor de las soluciones de *soft law* en materia de RSE (en adelante el debate *hard law/soft law)*, con el fin de invitar a que en el país, teniendo en cuenta nuestro propio contexto, se dé una discusión similar. A mi juicio, el impulso que ha adquirido en Colombia el discurso de la RSE

21 Cito textualmente la pregunta que hace Cynthia Williams, pues considero que de manera precisa resume el contexto del debate. WILLIAMS, Op cit. p. 47 (Traducción personal de la autora).

22 CRAGG, Op. cit. p. 215-216.

23 Para Cynthia A. Williams y Ruth V. Aguilera no es si quiera que se incline la balanza, sino que "en la práctica es inexistente una regulación dura internacional para encausar la actuación de las empresas". WILLIAMS, Cynthia y AGUILERA, Ruth. Corporate Social Responsibility in Comparative Perspective. En: CRANE, Andrew, et al. (Eds.), *Oxford Handbook of Corporate Social Responsibility*. Oxford: Oxford University Press, 2007, p.22.

24 En términos no sólo de compromiso, sino también de lo que en inglés se designa como *accountability*.

no ha venido acompañado de una mirada crítica frente a sus reales efectos y potencialidades. La mayor parte de la literatura da por descontado los efectos positivos de las soluciones voluntarias y de autorregulación propios de la RSE, pero son pocas las personas que responden a las diferentes críticas que sobre estas soluciones se han planteado. En especial, a lo que invita este debate es a reflexionar sobre las tensiones que pueden presentarse entre regulaciones obligatorias y soluciones voluntarias, las fortalezas de uno y otro sistema, y el adecuado balance que tanto en el contexto internacional, como en el local, se debe dar a unas y otras.

Para estos efectos, el esquema del artículo es el siguiente. En la primera parte se hará una aproximación general a los conceptos de *hard law* y *soft law*. Aunque sobre el significado mismo de estos términos no hay unanimidad, se presentarán algunas definiciones que permitan contextualizar la discusión. En la segunda parte se mirarán algunas de las iniciativas internacionales en materia de Responsabilidad Social Empresarial, con el fin de ilustrar el impulso que ha adquirido las soluciones de *soft law* para minimizar los efectos negativos del actuar de las empresas, en materias sociales y ambientales, y para potenciar sus contribuciones en el desarrollo sostenible. El recuento de instrumentos internacionales es además importante, pues gran parte de la controversia alrededor de soluciones voluntarias y de autorregulación en materia de RSE gira alrededor de estos instrumentos.

La tercera parte dará cuenta de una serie de argumentos en favor y en contra de las soluciones de *soft law*. Si bien esta parte presentará los argumentos en *blanco y negro*, debe advertirse que un buen número de autores considera que no es una discusión que pueda plantearse en términos de alternativas o dicotomías, sino que se debe apuntar a encontrar la mejor forma de interacción de estas dos aproximaciones de gobernanza. A manera de conclusión, la última parte resumirá los planteamientos que surgen del debate y formulará algunos interrogantes para ser tenidos en cuenta en la discusión local.

APROXIMACIÓN A LOS CONCEPTOS DE *HARD LAW* Y *SOFT LAW*

Como se expresó, una de las discusiones centrales en torno a la RSE es el llamado debate entre las opciones de *hard law* y *soft law*. Si bien esta es una discusión que se presenta principalmente en el ámbito del derecho internacional, poco a poco empieza a cobrar vigencia en las discusiones a nivel local[25]. Así pues, para aproximarse al debate, es preciso aclarar qué se entiende por estos conceptos.[26]

En general se habla de *hard law* para hacer referencia a normas o regulaciones que tienen carácter obligatorio. En términos de Kirton y Trebilcock[27] el *hard law* designa *"un régimen cuya construcción, implementación y garantía de cumplimiento, recae principalmente en la autoridad y el poder del Estado –en su control legítimo de los medios de coerción."* Por consiguiente, el *hard law* involucra una serie de obligaciones sustantivas y procedimentales y mecanismos es-

25 TOLLEFSON, Chris. Indigenous Rights and Forest Certification in British Columbia. En: KIRTON, John J. y TREBILCOCK, Michel J. (Eds.). Hard Choices, Soft Law. Voluntary Standards in Global Trade, Environment and Social Governance, Aldershot, Ashgate, 2007, p. 93

26 En la literatura internacional de todas formas hay una disputa sobre el correcto significado de los términos soft y hard law. No es la intención de este escrito analizar dicha polémica, sino simplemente ofrecer algunas definiciones que sirvan de partida para entender la discusión sobre soluciones voluntarias y de autorregulación en materia de RSE. No obstante, para entender las diferentes visiones en torno al significado mismo de las expresiones hard y soft law puede consultarse: TRUBEK, David M; COTRELL, Patrick y NANCE, Mark. "Soft Law", "Hard Law" and European Integration: Toward a Theory of Hybridity. En: Univ. of Wisconsin Legal Studies [en línea]. Research Paper No. 100 (2005). Consultado en agosto de 2008 en: Social Science Research Network: http://ssrn.com/abstract=855447

27 KIRTON, John J. y TREBILCOCK, Michel J. Op cit., p. 9.

pecíficos para hacerlas cumplir, como sanciones formales de tipo legal o económicas, impuestas por los Estados bien sea unilateralmente o multilateralmente.[28]

Desde una visión un tanto formalista, pero que es útil para aproximarse al concepto, Abbot y Snidal[29] señalan que las disposiciones de *hard law* deben reunir al menos tres requisitos: *"precisión, obligatoriedad y delegación"*. En otras palabras, que una norma *'dura'* impone obligaciones de aplicación general, que son articuladas con un relativo grado de precisión -es decir que definen claramente la conducta que se autoriza o proscribe-, y pueden interpretarse y hacerse cumplir por autoridades competentes (entre otras en las cortes o tribunales especializados)[30]. En materia internacional, la expresión *hard law* se utiliza generalmente para designar, entre otros, tratados o acuerdos internacionales que resultan en obligaciones precisas para los países u otros sujetos internacionales. A nivel nacional, podría decirse que el derecho duro hace referencia en general a normas de derecho positivo, cuyas prescripciones son claras y de obligatorio cumplimiento, lo que lleva a la posibilidad de sanción en caso de inobservancia.

El *soft law*, a *contrario sensu*, designa una serie de fenómenos que se caracterizan por la ausencia de fuerza vinculante, aunque no carentes de cierta relevancia jurídica.[31] Trubeck, Cotrell y Nance[32], por ejemplo, describen el *soft law* como *"nuevos arreglos de gobernanza"*, que si bien tienen carácter normativo, carecen de rasgos tales como obligatoriedad, uniformidad, justiciabilidad, sanciones y/o autoridades que los hagan cumplir. Snyder[33], por su parte, lo designa como *"reglas de conducta que en principio no tienen fuerza legal obligatoria pero que de todas formas pueden tener efectos prácticos."*

Ahora bien, aunque el término *soft law* ha sido utilizado en la doctrina de diferentes maneras, y se apela a él para referirse a diferentes procesos, es posible identificar ciertas características[34], a saber:

1. El diseño e implementación de un régimen de *soft law* no depende de la potestad regulatoria de los Estados[35].

2. Hay una participación voluntaria en la construcción, operación e incluso continuación del mismo. Los participantes son libres de adherir al régimen o no, de no continuar su aplicación, sin que esto implique invocar el poder sancionatorio de los Estados.

3. Idealmente se busca que las decisiones para actuar se tomen en consenso, y como el resultado de un diálogo entre diferentes actores, como gobiernos, firmas y actores de la sociedad civil, que permitan una cierta fuente de legitimidad y obligatoriedad institucional.

28 TREBILCOCK, Michel. Trade Policy and Labour Standars. Objectives, Instruments and Institutions. En: KIRTON, John J. y TREBILCOCK, Michel J. (Eds.). Hard Choices, Soft Law. Voluntary Standards in Global Trade, Environment and Social Governance, Aldershot, Ashgate, 2007, p. 177.

29 ABBOTT, Kenneth y SNIDAL, Duncan, Hard and Soft Law in International Governance. En: International Organization. MIT Press. [en línea]. Vol. 54(3), (2000). Consultado en agosto de 2008, en: http://www.accessmylibrary.com/coms2/summary_0286-651632_ITM Julio 14 de 2008.

30 TOLLEFSON. Op cit., p. 93

31 TORO HUERTA del, Mauricio Iván. El fenómeno del soft law y las nuevas perspectivas del derecho internacional. En: Anuario Mexicano de Derecho Internacional. Volumen VI, 2006, p. 519

32 TRUBEK, David M; COTRELL, Patrick y NANCE, Mark. Op cit., p. 1

33 SNYDER, Francis. The Effectivness of EC Law. En: Daintith, T. (Ed), Implementing EC Law in the UK (1995). Citado por TRUBEK, David M; COTRELL, Patrick y NANCE, Mark, Op cit, p. 1-2.

34 Recojo las características esbozadas por Kirton y Trebilcok a lo largo de su texto. Vid. KIRTON, John J. y TREBILCOCK, Op cit., p. 2-29.

35 Esto no quiere decir que los gobiernos no puedan participar en la construcción de un régimen de *soft law*; pero un punto central es que su presencia y recursos no dominan la definición del mismo. Ibid., p. 9.

4. Hay una ausencia del poder sancionatorio del Estado – poder de policía para garantizar consenso y cumplimiento-.

El espectro de mecanismos de *soft law* es sin duda variado[36]. Por ejemplo, se consideran instrumentos de *soft law* las resoluciones y declaraciones de los organismos internacionales, las guías y estándares o los planes de acción. Igualmente, y para centrarnos en el tema objeto de este artículo, se entienden como mecanismos de *soft law* los esquemas de certificación, los códigos de responsabilidad corporativa o los mecanismos de reporte para las empresas.

Es importante resaltar, que la ausencia de obligatoriedad, por lo menos en el sentido legal tradicional, no hace que los instrumentos de *soft law* se piensen como simples declaraciones políticas sin mayor pretensión de cumplimiento. Muchos de los instrumentos de *soft law*, por lo menos en el campo internacional, son negociados con la expectativa de que los compromisos que de allí surjan serán cumplidos - aunque no haya una sanción formal atada a su incumplimiento[37]- o, por lo menos, con la aspiración de sentar las bases para que en el futuro dichos compromisos sean incluidos como políticas públicas.

LA RESPONSABILIDAD SOCIAL EMPRESARIAL: INSTRUMENTOS PROPIOS DEL *SOFT LAW*

No es el objeto de este artículo centrarnos en la controversia sobre qué se debe entender por RSE. Digamos simplemente que aún no hay acuerdo sobre el concepto mismo de RSE y mucho menos acuerdo sobre lo que debe implicar para las empresas el ser socialmente responsables. No obstante, y a pesar de que no existe unanimidad frente al concepto, varias organizaciones han ofrecido definiciones que buscan precisar el término, y que para efectos de este escrito sirven para ilustrar el carácter 'blando' de las medidas que tienden a acompañar la llamada RSE. Entre muchas otras definiciones, se han dado las siguientes:

> *"El compromiso de las empresas de contribuir al desarrollo económico sostenible, trabajando con los empleados, sus familias, la comunidad local y la sociedad en general, para mejorar su calidad de vida" (World Business Council on Sustainable Development (WBCSD)*[38]

> *"Forma de operar una empresa de forma tal que cumpla o exceda las expectativas éticas y legales, comerciales y públicas, que la sociedad tiene frente a la empresa" (Business for Social Responsibility)*[39]

> *"Concepto en el cual las empresas integran los aspectos sociales y de medio ambiente en sus negocios y en su relación con las partes interesadas (stakeholders) de una manera voluntaria" (International Organization of Employers-IOE)*[40]

36 De hecho Abbot y Snidal sugieren que el campo del *soft law "empieza cuando los arreglos legales han sido debilitados en una o varias de las dimensiones de obligación, precisión y delegación"*, lo que invita a pensar que el *soft law* puede cubrir un amplio terreno. Vid. ABBOTT, Kenneth y SNIDAL, Duncan. Op cit., p. 1.

37 Por ello, como instrumentos para fomentar el cumplimiento, se han impulsado otros mecanismos, diferentes a las sanciones propias del *hard law*, tales como los reportes públicos, las investigaciones, e incluso la asistencia técnica. KIRTON, John J. y TREBILCOCK, Op cit. p., 23.

38 Definición citada en: KERCHER, Kim. Corporate Social Responsibility: Impact of globalisation and international business. Bond University. Corporate Governance eJournal, [en línea] (2007). Consultado en junio de 2008 en: http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1003&context=cgej (Traducción personal de la autora).

39 Definición citada en: KERCHER, Kim. Ibid. (Traducción personal de la autora).

40 Definición citada en: ICONTEC. Responsabilidad social y género en gestión de las organizaciones. [presentación de power point- en línea]. Consultado en julio de 2008 en: http://www.wim-network.org/proyectos%20wim/presentacion%20adrianaalonso.pps#257,1,Diapositiva 1

"Conjunto de prácticas gerenciales que asegura el que la empresa minimice los impactos negativos de sus operaciones y maximice los impactos positivos"(Canadian Council of Productivity-CCP)[41]

"El respaldo o apoyo que las empresas se comprometen a dar a un conjunto de valores y principios compartidos en áreas como los derechos humanos, estándares laborales, el ambiente y la anticorrupción (Global Compact-Naciones Unidas)[42]

Como se ve en estas definiciones, el concepto mismo de RSE admite varias acepciones. Sin embargo, parece existir acuerdo en que la RSE implica deberes y obligaciones, pero deberes y obligaciones que no surgen propiamente de requerimientos legales, sino del "compromiso", "respaldo" y "apoyo" de las empresas. En últimas, estas definiciones enfatizan el carácter voluntario[43] y de autorregulación de las empresas que se comprometen con la RSE. Ello se ve con más claridad en la creciente tendencia de insistir en que la RSE lo que implica es el 'ir más allá de los requerimientos legales' o, en otras palabras, que una empresa no es socialmente responsable porque cumpla con las normas legales en materia por ejemplo laboral o ambiental, sino que lo es en la medida en que se extienda en su compromiso laboral y ambiental, más allá de dichos requerimientos[44]; extensión que, claro está, dependerá del "compromiso", "respaldo" y "apoyo" de las empresas.

Como lo señala Christine Parker[45] *"idealmente la RSC incluye el cumplimiento de las responsabilidades legales de las empresas, pero va más allá de este cumplimiento al involucrar expectativas de la sociedad* **económicas** *(para producir bienes y servicios que la sociedad quiere y venderlos obteniendo ganancia),* **éticas** *(comportamientos y actividades adicionales de las empresas que no necesariamente están establecidas en leyes, pero que de todas maneras son esperadas por los miembros de la sociedad), y hasta* **discrecionales** *(aquellas frente a las cuales la sociedad no ha mandado un mensaje claro a las empresas, pero que de todas maneras espera que asuman un rol discrecional, como por ejemplo hacer contribuciones filantrópicas).*

Esta conceptualización de la RSE como 'ir más allá' plantea entonces una relación clara (y a la vez distancia) entre regulación y autorregulación. La base para iniciativas de responsabilidad social empresarial dependerá de la normatividad o regulación existente, que por regla general se expresa a través de normas de *hard law*, pero se espera que la empresa, además de asumir un conjunto de prácticas obligatorias, también asuma otras voluntarias orientadas a promover la satisfacción de

41 Definición citada en: KERCHER, Kim. Op cit. (Traducción personal de la autora)

42 Vid: http://www.unglobalcompact.org/ (Traducción personal de la autora). El Global Compact no habla de RSE sino de "ciudadania corporativa".

43 Algunos autores cuestionan sin embargo la caracterización de la RSE como voluntaria. Señalan que si bien no hay una exigencia legal obligatoria, esto no significa que las empresas sean completamente libres para involucrarse o no en temas de RSE. Vid. DASHWOOD, Hervina. Corporate Social Responsibility and the Evolution of International Norms. En: KIRTON, John J. y TREBILCOCK, Michel J. (Eds.). Hard Choices, Soft Law. Voluntary Standards in Global Trade, Environment and Social Governance, Aldershot, Ashgate, 2007, p. 191.

44 Para hacer un paralelo con Colombia, se podria decir entonces que aquellas personas que cumplen con la función social de la empresa (art. 333 C.N) , que tal como lo ha expresado la Corte Constitucional implica el cumplimiento de las normas establecidas por el Estado para el logro de dicho fin, no conlleva necesariamente asumir prácticas de RSE. Sin embargo, una empresa socialmente responsable será aquella que además de cumplir con la función social de la empresa, es decir con las normas establecidas por el Estado, busca ir más allá en beneficio de la sociedad y de su entorno.

45 PARKER, Christine. Meta-Regulation: Legal Accountability for Corporate Social Responsibility. University of Melbourne Legal Studies [en linea]. Research Paper No. 191. p. 1-2. Consultado en agosto de 2008 en: SSRN: http://ssrn.com/abstract=942157 (Traducción personal de la autora)

las necesidades sociales de sus integrantes y de los demás miembros de la comunidad.[46] Ese 'más allá' –aunque en ocasiones también las obligaciones legales - se consigna generalmente en códigos de ética o de conducta, que hacen parte del cuerpo de iniciativas de *soft law* en materia de RSE.

Difícilmente podrían consignarse en un escrito las diferentes iniciativas expresadas a través de códigos de conducta. Sin embargo, para ilustrar el carácter blando de estos instrumentos, y de hecho también para adelantar algunas de los puntos sobre los cuales recae el debate *hard law/ soft law* en materia de RSE, vale la pena citar lo expresado por Wesley Cragg[47], tras analizar las temáticas de diferentes códigos de conducta. En relación con los códigos de ética de las empresas privadas, su estudio concluyó:

> *[Los códigos de ética] establecen principios y estándares de conducta. Su forma y contenido son (...) determinados por las asociaciones que conforman una determinada industria o por corporaciones individuales que buscan guiar las actividades de la misma;* **la responsabilidad para asegurar el respeto del código es una materia voluntaria que debe ser adelantada por cualquiera que acepte de manera voluntaria ser guiado por él.**
>
> *No es aventurado sostener que la mayor parte de los códigos de conducta existentes tienen este carácter. Los códigos de las compañías son el mejor ejemplo. Ellos son, en su gran mayoría, creados en casa, con frecuencia por la oficina jurídica de la compañía, e interpretados, implementados y hechos cumplir internamente. En algunos casos, los códigos de conducta no son documentos públicos y su implementación y cumplimiento son tratados como un asunto confidencial.*
>
> *Los códigos promulgados por una industria comparten algunas, pero no todas, de estas características. En general, son documentos públicos. En general, son adoptados después de alguna forma de consulta pública. Y, en general,* **son ofrecidos como puras guías voluntarias, para ser implementados de manera voluntaria, y monitoreados internamente.** *Así, es frecuente que los códigos modelos, a pesar de la colaboración en su desarrollo, explícitamente señalen que el código modelo en cuestión* **"no tiene intención de convertirse en legislación"**[48]*. (Subrayas fuera de texto)*

INSTRUMENTOS INTERNACIONALES EN MATERIA DE RESPONSABILIDAD SOCIAL CORPORATIVA: OTRA EXPRESIÓN DE DERECHO BLANDO

Ahora bien, sumado al conjunto de códigos de conducta que pueden adoptar las empresas internamente, hay un conjunto de instrumentos internacionales que buscan guiar el comportamiento de las empresas. En especial, a nivel internacional, la atención se ha centrado en la actividad de las compañías trasnacionales, en respuesta a grandes escándalos en relación con la degradación ambiental, violaciones de derechos de grupos minoritarios, trabajo de niños, violación de derechos de los consumidores, entre otras conductas. Como señalamos anteriormente este cuerpo de iniciativas internacionales apunta a promover soluciones voluntarias, de autorregulación, soluciones que han estado en el centro de las grandes controversias en materia de RSE. Las razones para este tipo de iniciativas 'blandas' en materia de RSE son múltiples: desde la presión de los países poderosos y de las mismas empresas que se oponen a respuestas

46 SCHVARSTEIN, Leonardo. Op cit., p. 3.

47 CRAGG, Wesley. Op cit., p. 217-218 (Traducción personal de la autora)

48 Cragg pone de presente que la cita es del Model of Business Principles (United States Department of Commerce 1996). Ibid., p. 218.

regulatorias[49], como la idea tradicional de la que la comunidad internacional sólo puede comprometer a los Estados, pero no puede imponer obligaciones directas a las empresas[50].

No obstante, y al margen de las razones por las cuales se ha desarrollado el *soft law* en materia de RSE, lo cierto es que estas iniciativas en el marco internacional han florecido, y de hecho han sido las grandes promotoras del interés que ha adquirido la RSE en la agenda global. Las iniciativas son variadas[51]: por un lado, se encuentran códigos de ética o documentos de principios y valores expedidos por organizaciones que representan los intereses de las empresas, como el de la Cámara de Comercio Internacional. En otros casos, la entidad que los expide es una organización no gubernamental, como por ejemplo Amnistía Internacional o Pax Christi Internacional[52]. Con más frecuencia, organizaciones que representan gobiernos nacionales, como la OECD[53], el Banco Mundial[54] y el Fondo Monetario Internacional[55], buscan articular estándares de conducta para el comercio internacional. A estos se suman los bien conocidos instrumentos impulsados por las Naciones Unidas[56]. Algunas iniciativas se enfocan en países específicos. Otras en un determinado sector económico, o en un tema o área de interés. En fin, todo un caleidoscopio de iniciativas para guiar el comportamiento empresarial, que cada día se extiende más.

A continuación se resumen algunos de los instrumentos más relevantes que incorporan estándares y principios internacionales sobre RSE.

El Pacto Mundial (Global Compact)[57]

Este instrumento de las Naciones Unidas es uno de los más conocidos, entre otras por el impulso que desde su presentación, en el año 2000, le dio el el Secretario General Kofi Annan. Su finalidad es la de promover el desarrollo sostenible y la responsabilidad social, buscando la adhesión de empresas líderes. El Global Compact, desde sus primeras páginas insiste en que no se trata de un instrumento regulador, sino instrumento que permite a las empresas adherirse voluntariamente para avanzar diez principios que se nutre de tres normativas fundamentales: la Declaración Universal de Derechos Humanos, la Declaración sobre principios de orden laboral de la OIT y la Declaración de Río sobre Medio Ambiente y Desarrollo Sostenible. Los principios son:

49 McInerney por ejemplo señala que el desarrollo del cuerpo de *soft law* en materia de RSE tiene como consecuencia directa los procesos de desregulación económica iniciados a partir de los 70, principalmente en países en desarrollo. McINERNEY, Thomas F. Putting Regulation before Responsibility: Towards Binding Norms of Corporate Social Responsibility. bepress Legal Series [en línea] Working Paper 1029 (2006). Consultado en junio de 2008 en: http://law.bepress.com/expresso/eps/1029

50 Un buen recuento de la controversia acerca de que el derecho internacional imponga obligaciones directas a las empresas, se encuentra en: DURUIGBO, Emeka. Corporate Accountability and Liability for International Human Rights Abuses: Recent Changes and Recurring Challenges. 6 Nw. U.J. Int'l Hum.Rts. [en línea] 222 (2008). Consultado en Julio de 2008 en: http://www.law.northwestern.edu/journals/jihr/v6/n2/2

51 Apelo a los ejemplos señalados por Cragg. Vid. CRAGG, Wesley. Op. cit., p.214

52 AMNESTY INTERNATIONAL AND PAX CHRISTI. Multinational Enterprises and Human Rights, Utrecht, 1998. Citado en CRAGG. Ibid.

53 Directrices de la Organización para la Cooperación y el Desarrollo Económico (OCDE) para las Empresas Multinacionales. Las Directrices pueden consultarse en: www.oecd.org

54 Vid: http://www.bancomundial.org/temas/resenas/principios_ecuador.htm

55 http://www.imf.org/external/index.htm

56 UN Global Compact, disponible en: http://www.unglobalcompact.org/docs/news_events/8.1/GC_brochure_FINAL.pdf. Otra iniciativa importante es: The United Nations Norms on the Responsibilities of Transnational Corporations and other business enterprises with Regard to Human Rights, disponible en: http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.Sub.2.2003.12.Rev.2.

57 UN Global Compact, disponible en: http://www.unglobalcompact.org/docs/news_events/8.1/GC_brochure_FINAL.pdf

1. Las empresas deben apoyar y respetar la protección de los derechos humanos proclamados a nivel internacional.
2. Evitar verse involucradas en abusos de los derechos humanos.
3. Las empresas deben respetar la libertad de asociación y el reconocimiento efectivo del derecho a la negociación colectiva.
4. La eliminación de todas las formas de trabajo forzoso y obligatorio.
5. La abolición efectiva del trabajo infantil.
6. La eliminación de la discriminación respecto del empleo y la ocupación.
7. Las empresas deben apoyar la aplicación de un criterio de precaución respecto de los problemas ambientales.
8. Adoptar iniciativas para promover una mayor responsabilidad ambiental.
9. Alentar el desarrollo y la difusión de tecnologías inocuas para el medio ambiente.
10. Las empresas deben trabajar en contra de la corrupción en todas sus formas, incluyendo la extorsión y el soborno.

The Global Reporting Intitiative (G.R.I)[58]

Esta iniciativa se inició en 1997 y se constituye como una institución independiente y no gubernamental, pero en la que participan las Naciones Unidas a través de su programa de medio ambiente. Su objetivo principal es proporcionar elementos de soporte para la elaboración de memorias y directrices en materia de RSE. Además ayuda a elaborar complementos sectoriales y protocolos técnicos.

58 El G.R.I puede consultarse en: www.globalreporting.org

Directrices de la Organización para la Cooperación y el Desarrollo Económico (OCDE) para las Empresas Multinacionales[59]

Las Directrices de la OCDE para Empresas Multinacionales (EMNs), promulgadas en 1976 y revisadas luego de las fracasadas negociaciones sobre los Acuerdos Multilaterales de Inversión en la OECD en 1999, son recomendaciones dirigidas por los gobiernos a las empresas multinacionales. Su objetivo principal es el de garantizar que las actividades de las empresas multinacionales se desarrollen en armonía con las políticas nacionales de los países de la OCDE, así como el de fortalecer la base de la confianza mutua entre las empresas y las autoridades gubernamentales. Las Directrices comprometen a los gobiernos signatarios, para hacer recomendaciones a sus compañías multinacionales o aquellas que operan en sus territorios. A estas directrices se encuentran adheridas los 30 miembros que constituyen la organización, más ocho países que no son miembros[60]. En tanto que recomendaciones gubernamentales para guiar un buen comportamiento de las empresas, el lenguaje de las Directrices está dirigido directamente a las Corporaciones. No obstante, no son obligatorias en estricto sentido, pues su aplicación no depende de las empresas, sino de la forma en que los gobiernos las hacen cumplir.

Las directrices involucran un amplio campo de actividades empresariales. Incluyen desde principios generales, hasta normas sobre transpa-

59 Las directrices fueron adoptadas en 1976 y revisadas en el 2000. Las directrices pueden consultarse en www.oecd.org

60 Los miembros de la OECD son: Australia, Austria, Bélgica, Canadá, República Checa, Dinamarca, Finlandia, Francia, Alemania, Grecia, Hungría, Islandia, Irlanda, Italia, Japón, Korea, Luxemburgo, México, Holanda, Nueva Zelandia, Noruega, Polonia, Portugal, Eslovaquia, España, Suecia, Suiza, Turquía, Reino Unido. Los ocho países que nos son miembros, pero han adherido a las Directrices de la OCDE son: Argentina, Brasil, Chile, Estonia, Israel, Latvia, Lithuania y Eslovenia.

rencia en la información, trabajo y relaciones laborales, recomendaciones en materia ambiental, lucha contra la corrupción, intereses de los consumidores, ciencia y tecnología, competencia y obligaciones tributarias.

Declaración tripartita de principios sobre las empresas multinacionales y la política social (Declaración tripartita) de la OIT.[61]

Las Declaración Tripartita fue adoptada por el Cuerpo Ejecutivo de la OIT en 1977 y enmendada en el año 2000. Esta Declaración apunta a promover la contribución positiva de las empresas multinacionales y a minimizar y resolver las dificultades que sus actividades puedan causar en el progreso económico y social. La Declaración está soportada en distintas Convenciones y Recomendaciones de la OIT que definen derechos y obligaciones en términos más específicos.

La Declaración Tripartita contiene cinco secciones principales. La primera se dedica a políticas generales y exige el respeto a la soberanía nacional, leyes y objetivos políticos del país anfitrión. Se aboga por la igualdad de trato por parte del gobierno hacia las compañías multinacionales y las compañías nacionales y la consulta tripartita (consulta entre trabajo, negocio y gobierno). La segunda sección llama a las compañías multinacionales a jugar un rol clave en la generación y expansión de oportunidades para un empleo seguro y estable, a usar tecnologías apropiadas y a prestar atención a las políticas de empleo. La tercera sección se encarga de la capacitación, recapacitación y promoción de los trabajadores en todas las categorías ocupacionales. La cuarta sección recomienda la provisión de índices salariales, beneficios y condiciones de trabajo con énfasis especial en la importancia de establecer y mantener altos niveles de salud y seguridad ocupacional. En la quinta sección, se exige a los negocios y gobiernos que respeten la libertad de asociación y el derecho a organizar y negociar colectivamente, como los principios que guíen sus acciones en todos los asuntos relativos a las relaciones industriales.

La Declaración no posee fuerza legal internacional. Mientras los estados miembros están obligados a asegurar el cumplimiento de la Declaración *"en la medida de lo posible, dadas las condiciones nacionales"*, el Comité que interviene en las disputas no tiene autoridad para obligar al acatamiento. Se dice entonces, que el Comité debe confiar en el poder de persuasión y el uso público de la exposición y la vergüenza para cambiar las prácticas comerciales y gubernamentales. No hay compromiso formal de las empresas. Ellas no firman o adhieren a la Declaración, y no están obligadas a informar sobre su cumplimiento o progreso[62].

Sistemas de Certificación: SA8000 y ISO14000

Tanto la SA8000[63] y el ISO14000[64] son sistemas de certificación sobre el cumplimiento de normas en materias de derechos humanos, de las directivas de la OIT, así como de otras convenciones de derechos. Estos sistemas se concentran en los procesos de manejo de las corporaciones que voluntariamente se adscriben a ellos.

61 La Declaración Tripartita puede consultarse en: http://www.ilo.org/public/english/employment/multi/download/spanish.pdf

62 No obstante lo anterior, las Directrices Tripartitas contienen varios mecanismos de supervisión para examinar el cumplimiento de los estándares, a saber: "encuestas tripartitas para evaluar adelantos, estudios sobre temas, sectores, países o regiones específicos, actividades de diálogo y asesoría nacionales y regionales, procedimiento de interpretación para resolver conflictos." Ibid.

63 El contenido y proceso de acreditación de la SA8000 puede consultarse en: http://www.sa-intl.org/index.cfm?fuseaction=Page.viewPage&pageId=617&parentID=473&stopRedirect=1

64 El ISO14000 se puede consultar en: http://www.icontec.org/BancoConocimiento/I/informacion_internacional/informacion_internacional.asp?CodIdioma=ESP

Aunque algunos tratadistas ubican estos sistemas de certificación como instrumentos de *soft law* en materia de RSE, otros por el contrario señalan que no poseen las características para considerarse hoy en día como tales[65]. Si embargo, insisten en que estos instrumentos en el futuro pueden ser adoptados o promocionados por las legislaciones nacionales, como una forma de estandarizar la manera en que las empresas presentan sus reportes, evaluar las responsabilidades, e incluso para ser incorporados en los contratos de inversión.

EL DEBATE *HARD LAW/SOFT LAW* EN MATERIAL DE RSC

En la parte anterior de este artículo, se ha insistido en la creciente preocupación por controlar la actividad de las empresas, de manera que participen en la promoción de un desarrollo sostenible y garanticen con su actuar un compromiso mínimo con principios y valores compartidos en materias sociales, ambientales, de derechos humanos. Se ha mostrado, como de tiempo atrás se han gestado diversas iniciativas globales que establecen una serie de recomendaciones para que las empresas encaminen su actuar. Iniciativas que si bien tienen pretensión de ser cumplidas, hacen parte de los llamados instrumentos de *soft law*, por carecer, entre otras razones, de carácter obligatorio, por lo menos desde un sentido formal. Estas iniciativas, llámese directrices internacionales, códigos de ética o de conducta, o sistemas de certificación, si bien han prosperado en los últimos años, y han puesto en el centro de atención al discurso de la RSE, también han generado un intenso debate sobre su conveniencia y efectividad. Es, como señalamos, una discusión que de ordinario se nombra como el debate *hard law/soft law* en materia de RSE.

Lo que se hará a continuación es recoger una serie de argumentos que han mediado el debate, para mostrar al lector que la discusión sobre la RSE involucra una serie de consideraciones mucho más interesantes y complejas que las que ordinariamente se utilizan en el país para caracterizarla. Empecemos por señalar que el debate *hard/soft law* en materia de RSE no se soluciona, como con frecuencia se sugiere, con el argumento de que no hay tensión entre la respuesta estatal y la de las empresas, en tanto la RSE significa "ir más allá" de las normas legales. Ello, por varias razones principales: en primer lugar, porque así las iniciativas en materia de RSE sean distintas a las consagradas por la legislación, de todas maneras la RSE entra a ocupar áreas que tradicionalmente han sido del resorte de los Estados, como los temas ambientales, laborales o de derechos humanos. Es decir, que sigue siendo objeto de discusión qué de esas materias debería ser regulado por los Estados o por la comunidad internacional a través de imposiciones directas a las empresas, y qué debe dejarse al ámbito de iniciativas voluntarias. En segundo lugar, porque precisamente se ha insistido en que la RSE es la respuesta a un vacío de legislación, lo que deja aún vigente la discusión sobre si la solución debe ser la de fortalecer los mecanismos regulatorios o profundizar aún más las soluciones voluntarias y de autorregulación. Y, en tercer lugar, porque está sobre la mesa el argumento de que no en pocas ocasiones las leyes de un país han sido debilitadas por las dinámicas del libre mercado, por la presión de las empresas transnacionales y por la necesidad de atraer inversión extranjera, lo que permite aún cuestionar la extensión de ese 'más allá' que pretende ser cubierto con medidas de *soft law* en materia de RSE.

Con base en estas precisiones esbozaremos una serie de argumentos en favor y en contra de soluciones de *soft law* en materia de RSE, no sin antes de recordar que es creciente la tendencia de mirar la discusión no en términos de dicotomía sino de interacción. Incluso muchos de los

65 PARKER, Christine. Op cit., p. 24

exponentes de los argumentos que se presentan a continuación, hacen parte de dicha línea, pero existen ciertamente diferencias de grado, entre quienes preferirían ver la balanza inclinada hacia soluciones de *soft law*, y aquellos que preferirían ver un rol más activo del Estado y de la comunidad internacional en materia de RSE. Pero sobre esto volveremos en la última parte del artículo.

En defensa de profundizar las soluciones de *soft law* en materia de RSE

Es difícil subsumir en líneas ideológicas a los defensores del *soft law* en materia de RSC. Si bien como lo señala McInerney[66] la historia muestra que las raíces intelectuales de la RSE se fundan en la ideología neoliberal, no todos los proponentes y defensores de la RSE abrazan dicha ideología. Son muchos los que aún teniendo reservas sobre el modelo de liberalismo económico imperante, defiende las soluciones voluntarias propias de la RSE por motivos altruistas, pragmáticos o de simple estrategia[67]. De hecho como impulsores de la RSE se encuentran diferentes ONG, organizaciones sindicales, y hasta académicos que difícilmente podrían ser clasificados como neoliberales[68]. Hago esta advertencia pues presentaré un panorama general de los argumentos, sin entrar en precisiones sobre las corrientes ideológica desde la que se esbozan, dejando entonces al lector la tarea de ubicarlas.

66 McINERNEY, Thomas. Op cit.

67 KENNETH, Amaeshi y BONGO, Adi. Reconstructing the corporate social responsibility construct in Utlish. En: International Centre for Corporate Social Responsibility. Nottingham University Business School. [en línea] No. 37-2006 ICCSR Research Paper Series - ISSN 1479-5124. Consultado en junio de 2008 en SSRN: http://ssrn.com/abstract=761564. Por su parte Trubek, Cotrell y Nance, al caracterizar las discusión entre el *hard law* y *soft law*, señalan que este debate su funda principalmente en discusiones pragmáticas y funcionales. TRUBEK, David M; COTRELL, Patrick y NANCE, Mark. Op cit,. p. 3

68 Aunque según Shamir, no son pocas las organizaciones que han sido cooptadas por las empresas para avanzar sus intereses. Vid. SHAMIR, Ronen. Op cit, p. 98.

El *soft law* en materia de RSE es la respuesta al fracaso de la regulación

Uno de los argumentos más recurrentes para explicar el surgimiento y dinámica del *soft law* en materia de RSE, es que es la respuesta a vacíos de regulación tanto nacional como internacional. Vacíos que no se miran sólo desde el punto de carencia de normas, sino de efectividad de las existentes. Sobre esta base, son recurrentes las críticas al *hard law* por su rigidez e inflexibilidad. Así, se pone de presente que las soluciones de *hard law* tienden a dar tratamientos uniformes e inflexibles, que no dan cuenta de la naturaleza competitiva y altamente cambiante de los mercados. En otras palabras, que muchos de los asuntos actuales están caracterizados por altos niveles de incertidumbre, por lo cual se necesita de respuestas flexibles que permitan constante experimentación y ajuste[69]. Los instrumentos de *hard law*, para sus críticos, son extremadamente demandantes, y si se abusa de ellos o no funcionan corregir los errores es muy difícil[70]. Por ello, prefieren las soluciones de *soft law "pues éstas pueden hacer cosas que el derecho duro no puede, en la medida en que es menos demandante y más flexible"*[71].

69 Aunque no referido explícitamente a la RSE, Abbot y Snidal, ponen de presente que muchos de los asuntos internacionales son nuevos y complejos, de manera que los Estados están limitados para anticipar las posibles consecuencias de adoptar medidas de *hard law*. Por eso, aducen que las medidas de *soft law* pueden ser más útiles para enfrentar la "incertidumbre". Por ejemplo, señalan los autores, asuntos ambientales como el calentamiento global, sirven para ilustrar el punto: "*por la naturaleza, la severidad, e incluso la existencia de las amenazas -al igual que los costos de responder a ellas- son inciertas, los compromisos abiertos, como los que se encuentran en acuerdos marco en materia ambiental, pueden ser una mejor respuesta*". Vid. ABBOTT, Kenneth y SNIDAL, Duncan. Op cit., p. 12- 14.

70 BAYNE, Nicholas. Hard and Soft Law in International Institutions: Complements not Alternatives. En: KIRTON, John J. y TREBILCOCK, Michel J. (Eds.). Hard Choices, Soft Law. Voluntary Standards in Global Trade, Environment and Social Governance, Aldershot, Ashgate, 2007, p. 350.

71 Ibid.

Uno de los asuntos sobre los cuales hacen énfasis los defensores del *soft law*, es que estos instrumentos permiten avanzar hacia una mayor RSE de las empresas. Se pone de presente que las empresas muchas veces eluden las obligaciones nacionales al desarrollar sus actividades en múltiples jurisdicciones y al aprovechar la complejidad de los diferentes sistemas políticos y legales en los que operan[72]. Otros añaden que incluso las imposiciones legales pueden llevar a empresas a adoptar prácticas poco 'santas' para evadir la responsabilidad legal[73]. Se objeta, además, que las respuestas de *hard law* pueden ser ineficaces en tanto que en el mercado global los países están limitados para regular las actividades corporativas internacionales, más allá de sus fronteras territoriales[74].

En materia de vacíos en la regulación, hay quienes tienen críticas fuertes, en relación con las respuestas de países en desarrollo. Por ejemplo, Dixit[75] defiende las soluciones de *soft law* en materia de responsabilidad social, con el argumento de que las leyes de países en desarrollo son *"muy costosas, lentas, no confiables, no objetivas, corruptas débiles o simplemente ausentes"*. Otros, si bien no tiene reparos tan fuertes frente a las legislaciones de países en desarrollo, sí insisten en que con frecuencia estos países se ven presionados para bajar sus estándares de regulación o incluso imposibilitados para hacer frente al poderío económico de las empresas transnacionales. Por eso hacen énfasis en que, ante tantas debilidades de la regulación, es preferible apelar a un comportamiento ético de las empresas que permita llenar estos vacíos. De hecho, sus defensores ponen de presente que en la práctica son múltiples los ejemplos que dan cuenta de que los planteamientos voluntarios y de autorregulación han producido resultados y que los llamados a las conductas socialmente responsables han terminado por cambiar el comportamiento de muchas empresas de manera más eficaz[76].

En esta misma línea, algunos ponen de presente que imponer RSE a través de obligaciones impositivas (*hard law*) puede afectar la inversión si se combina con otros factores como los altos costos laborales. Esto lleva a que los inversionistas prefieran trasladar sus actividades a regiones con regulaciones y estándares legales más débiles[77]. Por el contrario, aducen los defensores, un sistema de *soft law* permite que las empresas, que de hecho tienen una intención de maximizar sus utilidades con o sin responsabilidad social, se involucren con menos temor en causas sociales.[78]

En relación con el campo internacional, algunos autores refieren que la debilidad de los ordenamientos nacionales no se suple con normas internacionales obligatorias, en tanto éstas son abstractas y difíciles de hacer cumplir[79]. Otros piensan que simplemente es muy difícil llegar a un consenso internacional, pues *"con frecuencia, el orgullo nacional, el argumento de la so-*

72 CRAGG, Op cit., p. 219. McInery por su parte, añade que aún cuando las empresas no busquen evadir propiamente la regulación, las prácticas de las empresas pueden cambiar constantemente, de manera que la regulación puede quedarse obsoleta. Vid. McINERNEY. Op cit.

73 LAUFER, W. Corporate liability, risk shifting and the paradox of compliance. Vaderbilt Law Review 52 & Corporate prosecution, cooperation and the trading of favors. Iowa Law Review 87 (2002). Citado en: PARKER, Cynthia. Op cit., p. 31.

74 CRAGG. Op cit., p. 219.

75 DIXIT, Avinash. Lawless and economics: Alternative Modes of Governance. New Jersey: Princeton University Press, 2004. Citado en: NWETE, Bede. Corporate Social Responsibility and Transparency in the Development of Energy and Mining Projects in Emerging Markets; Is Soft Law the Answer?, p. 333.

76 KERCHER, Kim. Op cit., p. 3. CORTINA, Adela. Responsabilidad Social Empresarial. Conferencia pronunciada el 29 de septiembre de 2008. Corporación Club el Nogal-Fundación el Nogal, Bogotá.

77 UNIDO. Op cit. NWETE, Bede. Op cit. p., 334.

78 Ibid. p. 337.

79 CLOGHESY, Michel. A Corporate Perspective on Globalisation, Sustainable Development and Soft Law. En: KIRTON, John J. y TREBILCOCK, Michel J. (Eds.). Hard Choices, Soft Law. Voluntary Standards in Global Trade, Environment and Social Governance, Aldershot, Ashgate, 2007, p. 323-328.

berania, y otros asuntos emocionales salen a flote en oposición".[80] Y otro tanto, como ya se mencionó, rechazan la solución de un régimen internacional obligatorio en materia de RSE con el argumento de que la comunidad internacional no puede hacer exigencias directas a las empresas, sino indirectas a través de los Estados[81]. En todo caso, se afirma también que los instrumentos de *soft law* promulgados por distintos organismos internacionales han mostrado su utilidad al poner en perspectiva global la importancia de la RSE.

Las empresas responden mejor a incentivos económicos y de reputación que a imposiciones de ley. Además la RSE, fuera de contribuir a la sociedad y al planeta, sirve para los intereses de las empresas

En concordancia con lo anterior, otro de los argumentos centrales de los de los defensores de soluciones de *soft law* en materia de RSE, es que la mejor forma de generar cumplimiento con los compromisos de responsabilidad social, son los incentivos económicos. En gran parte, estos incentivos están atados a la reputación[82] de las empresas. Según esta línea de argumentación, las compañías responden a preocupaciones sociales y ambientales como resultado de su interés de mejorar su reputación ante los consumidores, competidores e inversionistas[83]. Una buena reputación puede mejorar las ventas, las utilidades, e inclusos el precio de sus acciones, mientras que una mala reputación genera consecuencias opuestas.[84] Los escándalos de Enron, Nike, Gap, entre otros, son ejemplos que con frecuencia se aducen para mostrar cómo las empresas pueden ver afectados su ingresos si no actúan de manera responsable, pero también como su respuesta en términos de actividades en materia de RSE les ha ayudado a mejorar la confianza en los inversionistas y su reputación ante competidores y consumidores. En términos de la revista The Economist[85]: "[La RSE] *permite limitar el daño a una marca y los prejuicios que se generan de una mala prensa y de boicots de los consumidores, al igual que de las amenazas de acciones legales*".

Si la preocupación central de las empresas es la de generar mayores utilidades, los defensores de las soluciones blandas en materia de RSE no dejan de poner de presente que las empresas socialmente

80 RATNAM Venkata y VERNA Anil. Hard Law or Soft Law: India and International Labor Standars. En: KIRTON, John J. y TREBILCOCK, Michel J. (Eds.). Hard Choices, Soft Law. Voluntary Standards in Global Trade, Environment and Social Governance, Aldershot, Ashgate, 2007, p. 167. Sobre los "costos para la soberania" frente a los acuerdos de *hard law* ver en general: ABBOTT, Kenneth y SNIDAL, Duncan. Op cit. p.9-12.

81 Puesto de presente en: INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY. Más allá de lo discrecional. Los derechos humanos y la emergencia de obligaciones legales internacionales para las empresas. Consultado en agosto de 2008 en: http://www.international-council.org/files/summaries/9/107_-_Business_and_Human_Rights_-_Spanish_Summary.pdf

82 La reputación, se dice, trasciende la idea de imagen. Es decir que construir reputación requiere construir una opinión pública favorable basada en el "ser" de la empresa y en sus mejores prácticas, que se da a conocer no exclusivamente a través de instrumentos publicitarios, sino mediante informes transparentes y publicaciones certificadas por terceros competentes. Se busca entonces ganar no sólo reconocimiento público, sino también lograr ser respetado y posicionarse frente a los competidores como una empresa que esta comprometida con estándares altos de calidad y que se involucra en un "comercio justo". Vid. SARMIENTO, Nataly ¿Bondad o Estrategia? Tejiendo responsabilidad social en el mundo del carbón. Colombia Internacional 67 (enero-junio 2008) , p. 147

83 SKAPINKER, Michel. Virtue's reward?. En: Financial Times. (2, Apr. 2008). Consultado en agosto de 2008, en: http://www.wbcsd.org/plugins/DocSearch/details.asp?txtDocTitle=corporate%20social%20responsibility&txtDocText=corporate%20social%20responsibility&DocTypeId=-1-&ObjectId=Mjk4ODc&URLBack=result%2Easp%3FtxtDocTitle%3Dcorporate+social+responsibility%26txtDocText%3Dcorporate+social+responsibility%26DocTypeId%3D%2D1%26SortOrder%3D%26CurPage%3D3

84 UNIDO. Op cit., p. 8-9.

85 Just good business. En: The Economist. [en linea] (Jan 17th 2008). Consultado en www.economist.com/specialreports/PrinterFriendly.cfm?story_id=10491077

responsables terminan siendo más competitivas y teniendo mayores oportunidades de mercado que aquellas que no lo son[86]. *"Si las empresas se aproximan de manera estratégica, la RSE pude convertirse en una ventaja competitiva"* [87]. En otras palabras, se insiste, que para que una empresa tenga éxito a largo plazo sus directores deben considerar los intereses de los accionistas y de otras partes interesadas relevantes, como los empleadores, consumidores y comunidades en las que operan[88] De hecho en defensa de este argumento, los proponentes de las soluciones de *soft law* no se cansan en insistir en que existe evidencia demostrada de que las empresas que implementan prácticas sostenidas de RSE les va mejor y garantizan mayores ventajas competitivas que aquellas empresas que no adoptan prácticas de RSE[89]. En síntesis, se promueve la idea de que con la RSE "todos ganan", tanto las empresas, como el planeta y la sociedad.

El *soft law* en materia de responsabilidad social permite una mayor contribución de las empresas

Además es útil para preparar mejores compromisos de hard law.

Ahora bien: otro argumento importante que sustenta la defensa del *soft law* en materia de RSE, es que permite una contribución mayor de las empresas en materias sociales, laborales, ambientales, que la que ordinariamente podría exigirse a través de un sistema de normas impositivas. Difícilmente las leyes podrían obligar a una compañía a construir escuelas, promover centros de capacitación, desarrollar proyectos de conservación ambiental. Estos son, en cambio, ejemplos frecuentes en las iniciativas actuales de RSE, y que para los defensores ilustran con creces los beneficios de que se extiendan dichas prácticas.[90] Se añade, igualmente, que en la medida en que se profundicen las iniciativas de RSE, las empresas empezarán a ofrecer soluciones innovadoras que contribuyan a un verdadero desarrollo sostenible.[91] Para algunos, lo que veremos es también una competencia por exhibir mayores y mejores contribuciones sociales y ambientales.

Un punto central de la RSE, según sus defensores, es que los beneficios no se limitan a las prácticas responsables de las empresas en su país de origen, sino que también es de esperarse que se extiendan a los diversos lugares en donde ellos operan. Es lo que se conoce como *efecto chimenea*, es decir que cuando las empresas cuentan con políticas y comportamientos responsables en materias laborales, ambientales y sociales, las mismas se extienden tanto a sus filiales como a las empresas pro-

86 Vid, entre otros, WILSON, Andrew y OLSEN, Leon. Corporate Responsiblity -Who is Responsible. *The Ashtridge Journal* [en línea] (2003), p. 10. Consultado en Julio de 2008 en: https://www.ashridge.org.uk/website/IC.nsf/wFARATT/Corporate%20Responsibility%20%E2%80%93%20Who%20is%20Responsible/$file/corporateres.pdf SCHAEFFLER, Klaus. Pobreza y responsabilidad social del empresario. Un modelo de gestión que agrega valor y crea capital social en beneficio de la comunidad. Revista Futuros [en línea] No 13. 2006 Vol. IV.(2006) p. 1-2. Consultado en agosto de 2008 en: http://www.revistafuturos.info/raw_text/raw_futuro13/pobreza_rse.doc SKAPINKER, Michel. Op cit.

87 The Economist. Op cit.

88 KERCHER, Kim. Op cit. p.3

89 THE ECONOMIST. Op. cit.

90 Lisa Mills añade además, que no en pocos casos la legislación puede atrasar los avances por ejemplo en biotecnología, pues en su discusión terminan incluyéndose factores exógenos a los científicos. MILLS, Lisa. Terminating Agricultural Biotechnology? Hard Law, Voluntary Measures and the Life Science Industry. En: KIRTON, John J. y TREBILCOCK, Michel J. (Eds.). Hard Choices, Soft Law. Voluntary Standards in Global Trade, Environment and Social Governance, Aldershot, Ashgate, 2007, p. 342.

91 A New Study by Arthur D. Little Presents the Sustainability Value Formula - 'Integrity + Innovation = Sustainable Performance. En: Business Wire [en línea] (Agosto 2, 2007). Consultado en septiembre de 2008 en: http://findarticles.com/p/articles/mi_m0EIN/is_2007_August_2/ai_n27351928

veedoras.[92] Este efecto multiplicador, no es una cuestión que involucra individualmente a cada empresa, sino que por el contrario se espera, según sus proponentes, que en la medida en que más empresas adelanten prácticas socialmente responsables, otras van a querer hacer lo mismo; es decir, la RSE va a ir en aumento[93].

Las soluciones de soft law son útiles para preparar los compromisos de hard law

Ahora bien: los defensores de las soluciones de *soft law* en materia de RSE ponen de presente las ventajas de estos sistemas frente al *hard law*. Entre otras, se aduce que los mecanismos de *soft law* en materia de RSE permiten un aprendizaje social y empresarial de forma flexible, alientan a una diversidad de actores para participar en el proceso de definición de las medidas y facilitan el compromiso de actores, con diferentes grados de poder, intereses y valores.[94]

Sumando a lo anterior se evidencia el hecho de que regímenes de *sof law* sirven de estímulo para que se adopten mejores compromisos de *hard law*. Se afirma que estas soluciones pueden ser útiles como una fase preparatoria, antes de que se establezcan compromisos de *hard law*, lo que en últimas permitiría, sobre la base de la experiencia, una mejor legislación en el futuro[95].

Además, si bien instrumentos como los códigos de conducta son voluntarios y en principio no generan obligaciones legales, ellos sirven como instrumentos de presión de ONG y otras organizaciones civiles. Presión que, a la vez, puede generar consenso entre gobiernos para incorporar sus preceptivas en legislaciones nacionales o en estándares universalmente aceptados.[96]

El *soft law* en materia de RSE contribuye a profundizar el debate político, movilizar a la comunidad, y generar consumidores más activos

En relación con lo anterior, se señala por ejemplo, que el *soft law* pude contribuir a profundizar el debate político. Si las empresas no cumplen los compromisos que adquirieron de manera voluntaria grupos activistas pueden hacer conocer estos hechos, y presionar para su cumplimiento. La presión de ONG's, grupos de consumidores, inversionistas y los medios de comunicación, juegan un papel determinante en el uso de incentivos de mercado para inducir a las corporaciones a volverse públicamente responsables.[97] De hecho, como se señaló, muchos de los proponentes de la RSE sostienen que estas presiones pueden llegar a ser incluso más efectivas que las sanciones impuestas a través de un sistema de *hard law*.[98]

La RSE además, lleva a generar consumidores más activos. La experiencia ha demostrado que las campañas de consumidores han logrado promover un mayor conocimiento sobre si los bie-

92 GUTIERREZ, Roberto, AVELLA, Luis Felipe y VILLAR, Rodrigo. Aportes y desafíos de la responsabilidad social en Colombia. Bogotá: Edisoma Ediciones Especiales, 2006. Citado en: SARMIENTO, Nataly. Op cit., p. 135

93 CORTINA, Adela. Op.cit.

94 OLLEFSON, Chris. Op cit., p. 94

95 Ibid. Ver también BAYNE, Nicholas. Op cit., p. 350 y ABBOTT, Kenneth y SNIDAL, Duncan. Op cit., p. 9

96 Para Abboy y Snidal, los instrumentos de *soft law* en el campo internacional son una herramienta valiosa para los activistas. *"Aunque no pueden ser invocadas como "ley", ellas se basan en un discurso normativo similar. Permite a los activistas exponer los vacíos entre compromisos internacionales [de soft law] y las conductas de los gobiernos."* En otros términos las soluciones de *soft law* pueden promover una *"política de accountability"* si contienen compromisos normativos claros. ABBOTT, Kenneth y SNIDAL, Duncan. Op cit., p. 18-19

97 Vid, DASHWOOD, Hervina. Op cit., p. 198. SARMIENTO, Nataly. Op cit, p. 135.

98 Para Chris Tollefson, las soluciones de *soft law* son políticamente más atractivas y eficientes para los gobiernos, ONG's y otros grupos de interés, y permite además a grupos "pobres" una mayor participación para poner de presente sus necesidades e intereses. El *soft law* es a su juicio, una buena alternativa frente a litigios largos y costosos. TOLLEFSON, Chris. Op cit., p. 100-103.

nes que se ofrecen están producidos de acuerdo con estándares laborales justos, con el impacto mínimo ambiental, y sin abusos de los derechos humanos[99].

Las soluciones de *soft law* en materia de RSE son inevitables

Esta es sin duda una conclusión generalizada: el discurso de la RSE ha calado a nivel global y lo que debemos esperar es que cada día se extienda más. Como sustento de esta afirmación, entre muchas otras evidencias, se pone de presente que hoy en día una gran parte de los ejecutivos considera que el rol de las corporaciones exige el ir más allá que el simple cumplimiento de sus obligaciones legales[100]. Incluso una vasta mayoría reconoce que los asuntos ambientales, sociales, y de buen gobierno corporativo son críticos para el desempeño en inversión[101], y se predice que los indicadores sobre comportamiento frente a temas ambientales y sociales terminarán siendo factores determinantes para la consideraciones en inversión.[102] La frase de Carly Fiorina, Presidenta de Hewlett-Packard, resume esta idea de que la RSE ya tiene un lugar, y que es difícil dar marcha atrás: *"las empresas bien pueden tomar control de la tendencia de la responsabilidad social corporativa, o bien la tendencia de la responsabilidad social corporativa tomará control de las empresas"*[103].

Críticas a las soluciones de *soft law* para garantizar la responsabilidad social de las empresas

Ahora bien, al igual que los defensores de las soluciones de *soft law* en materia de RSE, sus críticos también provienen de distintas corrientes. Por una lado, como con anterioridad mencionamos, imperan visiones radicales, de corte neoliberal, que insisten en que las empresas no deben adherirse a responsabilidades sociales porque su verdadera responsabilidad es la de maximizar utilidades a sus accionistas y porque, en general, la RSE es incompatible con la naturaleza competitiva de la economía global[104]. No obstante, más allá de estas visiones extremas, hay una serie de voces que si bien consideran que la participación de las empresas es fundamental para promover el desarrollo sostenible y contribuir a la solución de los enormes problemas sociales y ambientales que subsisten en el mundo, piden cautela frente al entusiasmo que ha adquirido la RSE y critican la tendencia internacional de impulsar principalmente soluciones de *soft law* para responder a los retos sociales, ambientales y de derechos humanos que plantea la globalización.

En este sentido, no todos los críticos rechazan la adopción de medidas voluntarias para garantizar un mayor compromiso social y ecológico de las empresas. La mayoría de argumentos apuntan a

99 Ibid.

100 THE MCKINSEY QUARTERLY. The McKinsey Global Survey of Business Executives and Society, 2005. Citado en: KERCHER, Kim. Op cit., p. 4

101 MERCER INVESTMENT CONSULTING. Fearless Forecast-What do investment managers think about responsible investment, (2006) p. 11. Citado en: KERCHER, Kim Op cit., p. 4

102 Ibid. Sobre la tendencia creciente de adoptar prácticas de RSE, vid: UNIDO. Op cit., p. 18.

103 FIORINI, Carly. Adress at Business for Social Responsibility, Noviembre 17 de 2003. Citado en: WILLIAMS, Cynthia. Op cit., p. 466

104 Un buen exponente es Martin Wolf, columnista del Financial Times. Para él, la RSE es conducida por grupos activistas que en general son hostiles y demasiado críticos de las empresas multinacionales, del capitalismo y de la libertad de mercado. A su juicio la RSE conlleva una falsa crítica de la economía de mercado, presenta una visión errada sobre el poder de las multinacionales, amenaza con difuminar regulaciones costosas en el mundo entero, y es más propensa a frenar la reducción de la pobreza global que a acelerarla. Su conclusión es que *"el rol de las compañías que se manejan bien es generar ganancias, no salvar al planeta. Dejen que no cometan el error de confundir los dos"*. WOLF, Martin. Financial Times. (may 16, 2001) Citado en: Alternative view of Corporate Social Responsibility: A Dialogue with the Financial Times. Consultado en junio de 2008 en http://www.mhcinternational.com/ft.htm

insistir en que si bien algunas medidas de *soft law* son importantes, estas no pueden ni deben desplazar el rol regulatorio de los Estados[105], y que la comunidad internacional, más que seguir insistiendo en medidas voluntarias, debe encontrar también mecanismos impositivos para controlar las desviaciones en el actuar de las empresas. A continuación, entonces, resumiremos algunas de las principales objeciones en contra de las iniciativas de *soft law* en materia de RSE.

La RSE es un concepto ambiguo, estratégico y utilitarista

Empecemos por señalar que una de las principales críticas acerca del discurso de la RSE es que todavía no hay acuerdo en lo que se entiende por una empresa socialmente responsable, incluyendo qué actividades deben considerarse como parte de un comportamiento responsable. Como manifestación de ello son las distintas definiciones sobre RSE, así como la creciente disputa sobre la utilización de la misma expresión. Como lo pone de presente la Revista *The Economist*[106] algunas empresas prefieren el término "responsabilidad corporativa", excluyendo la palabra "social", o hablar de "ciudadanía corporativa" o "empresa sostenible", que en el transfondo expresan visiones distintas sobre lo que el concepto debe implicar. Sin embargo, en últimas todas estas definiciones y expresiones tratan de presentar a la empresa como una entidad "que hace bien", aunque, según los críticos, sin foco claro sobre lo que significa "hacer bien".[107]

Vogel[108] por ejemplo, presenta la ambigüedad del concepto RSE con preguntas bastante elocuentes, que hablan por sí solas:

"(...) ¿Al introducir Monsanto semillas genéticamente modificadas está contribuyendo a la agricultura sostenible, o es una amenaza a la salud pública y a la integridad ecológica?(...) ¿Es McDonalds una firma responsable porque utiliza empaques amigables con el ambiente o una firma irresponsable por contribuir a masificar la producción agrícola? ¿Es Union Oil una empresa responsable al mejorar las condiciones de los trabajadores de su oleoducto en Burma, o irresponsable por continuar haciendo negocios en un país con un gobierno militar represivo."

En síntesis, una objeción común es que la RSE se utiliza de manera bastante estratégica, en asuntos que pueden convenir a la empresa, pero que la 'actividad virtuosa' no llega hasta el punto de dejar de lado o modificar actividades que si bien son bastante lucrativas, inciden negativamente en cuestiones sociales o ambientales. De allí, que en el centro de las críticas esté el carácter voluntario de las propuestas en materia de RSE, que para muchos son interesadas, guiadas por un móvil principalmente utilitarista y mercantil: *"En la mayor parte de los casos, la RSE sólo tiene sentido para las empresas si el costo de desplegar un comportamiento más virtuoso continúa siendo menor que los beneficios. Esto impone límites en los recursos que las empresas pueden pagar en materia de responsabilidad social, y limita las mejoras en las actividades de las empresas en relación con temas sociales y ambientales."*[109]

105 Proponentes de este argumento se centran en estudios que insisten en el cumplimiento como un proceso dinámico de interacción entre las empresas y los agentes de regulación. Sobre esta interacción vid, por ejemplo, PARKER, Christine. Op cit. Para Parker *"se debe reconocer que las corporaciones son a la vez un objeto apropiado de responsabilidades democráticas, y apropiados sujetos de auto-regulación".*

106 THE ECONOMIST. Op cit.

107 Ibid. McInerney, por ejemplo, pone de presente el transfondo ideológico que subyace a esta disputa por el término. Para él no es gratuito la reciente presión de algunas compañías de redefinir el término dejando de lado la palabra social, que en sus términos "vuelve aún más confuso" el panorama de la RSE. McINERNEY, Thomas. Op cit.

108 VOGEL, David. The Market for Virtue: The Potential and Limits of Corporate Social Responsibility. Washington, D.C: Brookings Institution Press, 2005, p.5

109 VOGEL, David. Op cit., p. 4

Las voces críticas sobre el carácter estratégico de la RSE, se expresan de diferentes maneras. Bakan[110], por ejemplo, considera que la RSE no significa nada más que un *"nuevo credo"* diseñado para ocultar el hecho de que las empresas les interesa acrecentar sus propios intereses e invalidar las preocupaciones morales. Nwete[111], insiste en que las algunas empresas buscan atraer beneficios a sus actividades al ser asociadas con la RSE y principios de transparencia, pero que es poco lo que en realidad ponen en práctica. La RSE, a su juicio, *"se ha convertido en un truco de relaciones públicas que no sirve en nada al público. Las compañías no son sancionadas por no cumplir lo que predican, y pueden señalar que no hay ninguna ley que les obligue a cumplir"*[112]. McInerney[113] y Doane[114] sostienen que la RSE es simplemente la estrategia a través de la cual las empresas mantienen al margen las regulaciones obligatorias que pueden ser más beneficiosas para la sociedad y el ambiente y, Shamir[115], añade que la RSE es la respuesta *"astuta"* de las empresas multinacionales por *"silenciar, evadir, oponerse y cooptar"* la presión política que intenta sujetar a las empresas multinacionales a mecanismos efectivos de control social.[116]

Ahora bien: Otra preocupación común sobre la utilización estratégica de la RSE y principalmente sobre su naturaleza voluntaria, es el hecho de que a través de la lógica de la RSE se otorga un amplio poder a las ya poderosas empresas transnacionales. Es decir, los críticos hacen énfasis en la contradicción que subyace al discurso de la RSE, pues ésta, se ha dicho, es necesaria para contrarrestar el gran poder de las empresas, pero al mismo tiempo les da un enorme poder para que ellas decidan cómo ponerla en práctica.[117]

El carácter voluntario de la RSE no asegura soluciones comprensivas y perdurables para la sociedad

Precisamente, esta discrecionalidad de las empresas a la hora de adoptar soluciones de *soft law* en materia de RSE, lleva a otras objeciones en términos de la potencialidad de dichas respuestas para enfrentar los grandes problemáticas en materias sociales, de derechos humanos o ambientales que plantea la globalización.

Por un lado, se objeta que las respuestas *de soft law* en materia de RSE no pueden ofrecer soluciones comprensivas y perdurables. Bajo el marco de la RSE las empresas sólo ofrecen respuestas parciales medidas por sus propios intereses y criterios[118]. Algunos de los críticos, por ejemplo,

110 BAKAN, Joel. The Corporation – The Pathological Pursuit of Profit and Power. Free Press, 2004. Citado en: VOGEL, David. Op cit., p. 2

111 NWETE, Bede. Op cit., p. 330

112 Ibid.

113 McINERNEY, Thomas. Op cit.

114 CORE COALITION. From Red Tape to Road Signs. Redefining regulation and its purpose, 2004. Consultado en agosto de 2008 en http://www.business-humanrights.org/Links/Repository/753874

115 SHAMIR, Ronen. Op cit, p. 93

116 En sus términos: *"La estrategia fundamental adoptada por las EM frente al surgimiento de varios "escándalos de producción" que amenazan sus imágenes empresariales ha sido convertirse en participantes activos dentro del área de RSE (...)El principio de autorregulación se ha convertido en el argumento principal en la lucha acerca del significado del término y también en un tópico ideológico esencial para diseminar la lógica neoliberal de que la participación social altruista debería estar medida por la buena voluntad exclusivamente."* Ibid.

117 Vid: VILLIERS, Charlotte. 'Overcoming Corporate Law Obstacles to Socially Responsible Behaviour'. EU/International Law Forum 22 – 23 January 2007, "Perspectives on Corporate Social Responsibility". University of Bristol, School of Law. Consultado en agosto de 2008 en: http://www.qmul-fairtradeproject.org/openaccess/Bristol%20CSR%20summary.doc

118 McInerney trae como ejemplo la capacidad que tienen las empresas para enfrentar problemas ambientales o de salud, en comparación con la respuesta que puede dar la regulación. A este respecto afirma: *"En comparación con las medidas voluntarias en materia de RSE, que cuando mucho pueden ofrecer una cobertura parcial de firmas e industrias, los estados regulan de manera comprensiva. Una ley ambiental, por ejemplo, se aplica a firmas de un determinado tamaño. Las leyes en materia de salud se aplican a todas las firmas que operan ciertos tipos de*

ponen de presente la preferencia de las empresas por trabajar en programas de formación educativa o de apoyo a la niñez, que se perciben como "apolíticos" y poco polémicos, pero dejan por fuera asuntos sensibles y controversiales, en temas, por ejemplo, de derechos humanos[119]. En otras palabras, que la RSE por sí misma, no garantiza soluciones valientes a los inmensos retos que la globalización y la apuesta hacia un desarrollo sostenible presentan.

A esta observación se añade el hecho de que dada la naturaleza voluntaria de la RSE, las empresas no son sancionadas por incumplir sus 'promesas'. Se puede iniciar un programa en materia de RSE y dejarlo a medio camino, suscribir instrumentos como el Global Compact o las Directrices de la OECD sin desplegar mayores acciones para su implementación, o anunciar un proyecto bajo el lema de la RSE que en la práctica no trae mayores beneficios para la comunidad[120]. Para muchos de los críticos, como más adelante se reseñará, a diferencia de las sanciones que pueden derivarse de medidas obligatorias, las sanciones sociales o económicas que enfatizan los proponentes de la RSE, no son suficiente garantía para forzar a una empresa a cumplir lo que predica.

En línea con lo anterior, una observación frecuente es que no hay mecanismos claros, objetivos y uniformes para medir y evaluar desempeños sustanciales en materia de RSE. Si bien han aparecido diferentes empresas, entidades empresariales y organizaciones que compiten por desarrollar sistemas de evaluación para valorar el comportamiento empresarial, son múltiples los reparos a estos sistemas de evaluación. Entre las críticas más frecuentes se encuentra el hecho de que estos sistemas se centran en procesos, más que en cuestiones sustantivas, lo que permite a la empresa una mayor amplitud para asegurar cumplimiento: *"en la medida en que ellas adopten el proceso adecuado para enfrentar un tema particular de regulación, las compañías terminan satisfaciendo los requisitos regulatorios (...) Pero el análisis de un proceso, no lleva a garantizar que en la realidad se generen beneficios sustanciales."*[121] En otras palabras, los distintos estándares y sistemas de certificación hacen surgir *"dudas acerca de hasta qué punto se está evaluando las cuestiones sustantivas y no tanto la existencia de procedimientos"*[122]. Para Shamir[123], incluso, la *"auditoría social"* que

facilidades. Las medidas de RSE no pueden reclamar ese mismo nivel de cobertura.". MCINERNEY, Thomas. Op cit.

119 SHAMIR, Ronen. Op cit., pp. 99-100.

120 Se dice que la práctica ha demostrado que las iniciativas voluntarias, si bien preferidas por las empresas para responder a cuestiones sociales o ambientales, no sirven como sustitutos de una efectiva regulación. Por ejemplo, se pone de presente que las directrices de las OECD o los principios del UN Global Compact son cumplidas tan sólo parcialmente, y las quejas que se elevan ante el incumplimiento no han sido en su gran mayoria resueltas. También se aduce que la desregulación en sectores estratégicos no ha llevado beneficios a los consumidores, a pesar de que esta fue la justificación para ello. En últimas se sostiene que mientras las empresas se ven beneficiadas con la ausencia de regulación, el costo lo pagan los consumidores y en general la sociedad en su conjunto. Vid.: FRIENDS OF THE EARTH , CHRISTIAN AID Y AMNESTY INTERNATIONAL UK._Flagship or failure? The U'K implementation of the OECD guidelines and approach to corporate accountability. (2005). Consultado en agosto de 2008 en: http://www.foe.co.uk/resource/reports/flagship_or_failure.pdf

121 MCINERNEY. Thomas. Op cit., p. 11

122 PARKER, Christine. The Open Corporation: Effective Self-Regulation and Democracy. Cambridge: Cambridge University Press, 2002. Citado en: SHAMIR, Ronen. Op cit, p., 97. Ver también: EDELMAN, S., PETTERSON, E. CHAMBLISS Y H. ERLANGER. Legal ambiguity and the politics of compliance: Affirmative action officer's dilemma, Law and Policy 14 (1991) pp. 128-130. Citado en: PARKER, Christine. Op cit., p. 29

123 SHAMIR, Ronen. Op cit,, p.97. En el ámbito nacional, José Ernesto Ramirez y Juan Carlos Segura cuestionan la ausencia de interlocución explicita con la sociedad civil en el proceso de creación y definición de los estándares de certificación, como el ISO 14000 (medio ambiente) y el ISO SA 8000 (responsabilidad laboral). A su juicio, el "autismo" existente entre sector privado y sociedad civil que se da en el marco global, se reproduce a escala nacional. RAMÍREZ, JOSÉ ERNESTO y SEGURA, JUAN CARLOS. Las perspectivas de las organizaciones sociales para cambiar el actual panorama instrumental de la Responsabilidad Social Empresarial en Colombia. *Revista Opera [en li-*

se exhibe actualmente, es en gran parte dominada por participantes afiliados a las empresas o dependientes de ellas, lo que *"carga todavía más el significado de "responsabilidad social" en la dirección de los intereses empresariales"*. A su juicio, a través de esas iniciativas, *"la idea de responsabilidad social sufre un proceso de burocratización y estandarización que transforma la idea de responsabilidad empresarial, hasta el momento políticamente significativa y moralmente debatida, en un conjunto conmensurable de indicadores que pueden entonces intercambiarse y negociarse entre accionistas e inversores, como cualquier otro bien que le añada (o quite) "valor" a la empresa"*.[124]

Y a esta objeción sobre la burocratización y estandarización de la RSE, se suma otra que va en la misma dirección: el discurso dominante de la RSE ha terminado por tratar a los derechos humanos y al ambiente como mercancías. En la medida en que se invita a las empresas a ser "responsables" con el ambiente, "responsables" con sus trabajadores, "responsables" con la sociedad, porque hacerlo es en últimas es un "buen negocio", tiende a minimizar la importancia que el mundo entero debe dar a la garantía de los derechos, a la idea de dignidad que subyace a los mismos y a la imperiosa necesidad de conservación ambiental[125].

El discurso a favor de las soluciones de soft law en materia de RSE exagera la efectividad de los incentivos económicos y la potencialidad de la sociedad civil para presionar y controlar a las empresas transnacionales

Ahora bien: en el aparte anterior se subrayó la importancia que tienen los "incentivos económicos" para los defensores de las soluciones de *soft law* en materia de RSE, hasta al punto de que muchos consideran que son más efectivos que la regulación obligatoria para controlar el actuar de las empresas y potenciar su compromiso con el desarrollo sostenible. La preocupación por mejorar la reputación ante los consumidores, competidores e inversionistas, así como para generar ventajas competitivas, está pues en el centro de los argumentos de los proponentes de la RSE.

No obstante, sus críticos consideran que el argumento es exagerado. Si bien se acepta que los riesgos a la reputación o el interés frente a los consumidores pueden tener influencia en el comportamiento de algunas empresas, *"es menos importante e influyente de lo que se hace creer"*[126] y, además, difícilmente puede ser un hecho generalizable. Así, en términos de Vogel[127] muchos de los defensores de la RSE se equivocan al asumir que como algunas compañías se están comportando de manera más responsable

nea] Volumen 5, N° 5. (2005) p.104-105. Consultado en agosto de 2008 en: http://redalyc.uaemex.mx/redalyc/pdf/675/67550507.pdf

124 SHAMIR, Ronen. Ibid.

125 Nils Rosemann señala que la visión mercantil, selectiva y voluntaria del cumplimiento de los derechos, es contradictoria con el reclamo universal por el respeto, protección y garantía de los derechos humanos. Vid. ROSEMANN, Nils. Op cit., p. 11. Por su parte Adelle Blacket pone de presente la visión mercantil de los derechos al contrastar los códigos de conducta frente a la regulación estatal en materia laboral. Para ella los códigos de conducta tienden a tratar las condiciones laborales de forma que se asemejan a otros procesos de producción. A su juicio, esta concepción es problemática, pues al reducirse el trabajo a un proceso productivo, se olvida que aquél se centra en "personas". A diferencia, la legislación laboral cumple una función principal, la de *"imprimir de dignidad las relaciones laborales, algo que el mercado por sí sólo no puede hacer"*. Vid. BLACKETT, Adelle. Codes of Corporate Conduct and the Labour Regulatory State. En: KIRTON, John J. y TREBILCOCK, Michel J. (Eds.). Hard Choices, Soft Law. Voluntary Standards in Global Trade, Environment and Social Governance, Aldershot, Ashgate, 2007, p. 125. Cragg añade que una de las debilidades de los códigos de ética, es que terminan dando definiciones unilaterales sobre qué es el interés público, y cuáles contribuciones sirven para lograrlo y cuáles no. Esas definiciones, a su juicio, tienden a ser arbitrarias y paternalistas. Vid. CRAGG, Wesley. Op cit., p 218.

126 Ibid.

127 VOGEL, D. Op cit., p. 3

en algunas áreas, debe esperarse que otras se comporten de manera más responsable en otras áreas. A su juicio, *"hay un lugar en la economía del mercado para firmas responsables; pero también un amplio espacio para competidores menos responsables"*[128].

Sin demeritar el valor de las presiones de activistas, consumidores, empleadores e inversionistas por cambiar las prácticas de las empresas, los críticos agregan que la potencialidad de estas presiones no se puede magnificar. Para ellos, dado el amplio número de empresas en el mundo, sumando a la naturaleza voluntaria de los compromisos, los inversionistas y consumidores sólo tienen capacidad para enfocarse en unas cuantas firmas y en unas cuantas acciones, y como parece demostrarlo la práctica, su presión, en todo caso, no garantiza un alto nivel de cumplimiento. En términos de Corking[129] *"como consumidores, sólo podemos vigilar la RSE en los bordes –un boycott de consumidores aquí, un cappuccino de comercio justo allá –sin afectar lo fundamental del rol de la empresa en una sociedad"*.

Trebilcock[130] añade que asumir que los consumidores responderán negativamente a las empresas que no exhiban compromisos concretos en materias, por ejemplo, laborales o de derechos humanos, es un presupuesto que sufre de una serie de limitaciones. Por un lado, los consumidores, especialmente en países importadores de productos, no le dan tanta importancia a las condiciones en la que los bienes se producen. Su interés mayor es en comprar productos a bajo precio. Pero incluso, aún si los consumidores valoraran las condiciones en la que los productos fueron manufacturados, enfrentan problemas para la acción colectiva, especialmente en países en desarrollo, cuentan con información limitada y el costo de adquirir dicha información excede el valor que le dan a la misma.[131]

No se puede desestimar el rol principal del Estado y del derecho internacional para asegurar cambios sociales. Las ventajas de las medidas de hard law

Como antes se señaló, muchos de los críticos no cuestionan la existencia de ciertas medidas de *soft law* para encaminar el actuar de la empresa. Lo que cuestionan es que a través del discurso de la RSE se minimice el papel del Estado y del derecho internacional, para garantizar y potenciar una mejor actuación empresarial y hacer frente a los abusos en las que las mismas puedan incurrir. En otras palabras, se reclama que antes que priorizar el fortalecimiento de los actores regulatorios a nivel nacional e internacional para enfrentar los riesgos sociales y ambientales atados a la globalización, la comunidad internacional haya terminado por favorecer soluciones principalmente de *soft law* en materia de RSE.

Por eso un primer llamado es el de recordar que si bien el papel de los Estados ha cambiado por el impulso de la globalización, son ellos -y debe seguir siendo- el centro de la protección ciudadana y los principales responsables de impedir o castigar los abusos que puedan cometer los

128 Ibid.

129 CORKIN, Joseph. Misappropriating Citizenship: The limits of corporate social responsibility. EU/International Law Forum 22 – 23 January 2007, "Perspectives on Corporate Social Responsibility". University of Bristol, School of Law. Consultado en agosto de 2008 en: http://www.qmul-fairtradeproject.org/openaccess/Bristol%20CSR%20summary.doc. Para él sólo el Estado puede efectivamente presionar a este cambio. Por eso insiste en la importancia de reafirmar el rol de aquél como principal regulador de las corporaciones. De esta manera, sugiere, el colectivo se empodera y de paso controla al Estado.

130 TREBILCOCK, Michel. Op cit., p. 17-177

131 En esta misma línea se expresa el informe de Christian Aid. Vid. CHRISTIAN AID. Behind the Mask: The Real Face of Corporate Social Responsibility 2, 5, 50, p. 10-11. Consultado en agosto de 2008 en: http://www.globalpolicy.org/socecon/tncs/2004/0121mask.pdf.

agentes privados.[132] Se critica que algunos de los proponentes de la RSE presenten a las empresas como las máximas garantes de beneficios sociales, de derechos humanos y de protección del medio ambiente, caracterizando, en contraposición, al Estado como lento e ineficaz o incluso en declive.[133] Esta caracterización se considera inadecuada por varias razones, entre otras, porque olvida que la mayor parte de las personas siguen viendo al Estado como el principal garante de los derechos[134] y porque de hecho la mayor parte de estructuras institucionales –como por ejemplo en materia laboral, de educación y salud, continúa dependiendo de regímenes regulatorios dispuestos por los Estados.[135] Basta mencionar, además, que si las empresas y el mercado fallan, como la práctica lo ha demostrado, la mirada se centra en la respuesta estatal. En términos de Garret[136] *"la razón por la cual los gobiernos siguen manteniendo el control sobre sus economías, a pesar de la globalización, es porque ellos pueden proveer bienes públicos económicamente importantes, incluyendo capital humano, infraestructura, estabilidad social, reducción de la desigualdad, e incluso apoyo al mercado"*, asuntos que difícilmente puede garantizar la empresas.

Lo anterior no obsta para reconocer la debilidad de algunos Estados para controlar el actuar de las empresas, especialmente de las empresas transnacionales. Pero se aduce, que la RSE no suple esta debilidad sino que, incluso, en ocasiones puede profundizarla. Es decir que puede llevar a los gobiernos a abdicar su responsabilidad -por ejemplo, de expedir legislación contra la corrupción-, con la esperanza de que las empresas voluntariamente llenen el vacio.[137]

Ahora bien: otro reclamo central de muchos de los que aquí hemos llamado críticos de las soluciones de *soft law* en materia de RSE, es que la comunidad internacional lejos de seguir patrocinando instrumentos cuyo cumplimiento depende de la discreción de las empresas, ancle responsabilidades en un marco jurídico que les exija rendir cuentas ante la ley.[138] En otras palabras, hay un reclamo porque el derecho internacional establezca obligaciones directas a las empresas en materia de RSE, atadas a sanciones frente al incumplimiento; obligaciones que podrían hacerse cumplir a nivel internacional cuando los Estados no estén dispuestos o no estén en condiciones de hacerlo ellos mismos[139]. Es decir, un llamado para que se tomen medidas internacionales de *hard law* frente a la RSE.

Estos dos reclamos, el de fortalecer el papel regulatorio de los Estados, por un lado, y de la comunidad internacional, por el otro, vienen acom-

132 BAKAN, Joel. The Corporation – the pathological Pursuit of Profit and Power. Free Press, 2004., p.110 Citado en: MARDENSEN, Chris. Dealing with Joel Bakan's Pathological Corporation. A strategy for Campaigning Human Rights and Enviromental NGOs. Business and Human Rights Resource Center, July 2004. Consultado en agosto de 2008 en: http://www.globalpolicy.org/socecon/tncs/2004/07pathological.htm

133 McINERNEY, Thomas. Op cit., p.5. GÖKSEL, Nilüfer Karacasulu. Op cit., p. 2.

134 Al respecto vid: WILLIAMS, Cynthia y AGUILERA, Ruth. Op cit. McINERNEY, Thomas. Op cit., p. 6. INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY. Más allá de lo discrecional. Los derechos humanos y la emergencia de obligaciones legales internacionales para las empresas. Consultado en agosto de 2008 en: http://www.international-council.org/files/summaries/9/107_-_Business_and_Human_Rights_-_Spanish_Summary.pdf; CORE Coalition. From Red Tape to Road Signs. Redefining regulation and its purpose (2004). Consultado en agosto de 2008 en: http://www.business-humanrights.org/Links/Repository/753874

135 HALL, Peter y SOSKICE, David. Varieties of Capitalism (2001). Citado en: McINERNEY, Thomas. Op cit.

136 GARRETT, Geoffrey. Global markets and national politics: Collision course or virtuous cycle?. International Organization 52 (autumn): 787-824 (1998). Citado en: McInerney, Thomas. Op cit.

137 NWETE, Bede. Op cit., p. 313

138 INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY. Op cit.

139 FOSTER, John W. The Role of Non Governmental Organisations and Social Movements in Developing Countries. En: KIRTON, John J. y TREBILCOCK, Michel J. (Eds.). Hard Choices, Soft Law. Voluntary Standards in Global Trade, Environment and Social Governance, Aldershot, Ashgate, 2007. p. 203-212.

pañados de razones por las cuales se considera que medidas de *hard law* son necesarias y pueden generar mayores y mejores resultados que los que se pueden logara a través de medidas de *soft law* en materia de RSE. A manera de síntesis, se aduce en general, que las medidas de *hard law:*

Pueden ofrece soluciones con estándares más altos, más comprensibles, durables, seguras y usualmente más transparentes. Además, estas medidas terminan teniendo un nivel más alto de credibilidad, que las propuestas auto regulatorias de las empresas. [140]

1. Permiten de mejor manera conciliar diferentes intereses en competencia y proteger el bien común[141], al igual que ayudar a suplir fallas del mercado, y proteger a los más vulnerables[142].

2. Los instrumentos de *hard law*, además, son necesarios para asegurar que los intereses tanto de países desarrollados como de países en vía de desarrollo sean tenidos en cuenta en el derecho internacional.[143]

3. Mientras que la eficacia de los códigos voluntarios "depende enteramente del oportunismo comercial o el sentido de la caridad que posea la empresa" [144], los regímenes jurídicos hacen hincapié en principios de rendición de cuentas y de resarcimiento (indemnización, restitución y rehabilitación por el daño causado). Proporcionan así una mejor base para llegar a decisiones justas y coherentes para todas las partes.[145]

   Mientras que las soluciones de *soft law* -en especial en nacientes mercados- no brindan oportunidad a los individuos que se han visto afectados por los abusos de las empresas de acudir a las Cortes, el *hard law* permite a los afectados ventilar judicialmente sus reclamos y contar con mecanismos adecuados de reparación[146].

4. La existencia de un marco jurídico garantiza la cultura general de cumplimiento. Cuando una conducta pasa a ser considerada ilegal y violadora de derechos humanos, más si tiene peso internacional, se genera un elemento disuasor.[147]

6. Las medidas de *hard law* han sido responsables de avances sociales y ambientales importantes, mientras que no existe evidencia verificable del impacto de las soluciones voluntarias en estas materias.[148]

A MANERA DE CONCLUSIÓN: ALGUNAS PREGUNTAS A LAS QUE INVITA EL DEBATE EN EL CONTEXTO COLOMBIANO

Este escrito empezó con el caso de Chiquita Brans, porque sirve para ilustrar tanto los reclamos de los críticos a las soluciones de *soft law* en materia de RSE, como también para dar causa a sus defensores. Los primeros pueden encontrar sustento en la utilización estratégica de la RSE, los límites del *soft law* para enfrentar los abusos de las compañías transnacionales y las repercu-

140 KIRTON, John J. y TREBILCOCK. Op cit. p. 23

141 CORE COALITION. Op cit., p. 2. CHRISTINA AID. Behind the Mask: The Real Face of Corporate Social Responsibility 2, 5, 50 (1-65). Consultado en Agosto de 2008 en: http://www.globalpolicy.org/socecon/tncs/2004/0121mask.pdf

142 CORE COALITION. Ibid.

143 CLOGHESY, Michel. Op cit., p 330.

144 INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY. Op cit.

145 Ibid.

146 NWETE, Bede. Op cit., p. 313.

147 INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY. Op cit. Williams y Aguilera añaden, que los estándares establecidos en la ley y las regulaciones obligatorias, influyen fuertemente en establecer expectativas sociales sobre el comportamiento de las empresas, la cuales posteriormente se canalizarán en acciones de la comunidad, inversores, ONG's para presionar a las empresas a cumplir con los estándares establecidos en la ley. Vid. WILLIAMS, Cynthia y AGUILERA, Ruth. Op cit., p. 4.

148 CORE COALITION. Op cit., p. 4.

siones en el rol del Estado como principal garante de los derechos de los ciudadanos. Y es que paralelamente a que Chiquita Brands financiaba grupos paramilitares en Colombia, esta empresa exhibía como unos de sus logros haber ganado múltiples premios por contribuciones a la comunidad, contar con sellos que certifican su compromiso con el cumplimiento de estándares sociales y ambientales e, incluso, ser una de las pocas empresas en lograr paralelamente la certificación SA8000 y la certificación Eurogap por el cumplimiento de estándares laborales, de derechos humanos y de seguridad en el trabajo en "Colombia, Costa Rica y Panamá"[149]. ¿Qué tanta influencia ejerció esta exhibición de 'logros' para que el Estado colombiano sólo respondiera cuando fue pública la sanción de un tribunal estadounidense?, es una pregunta a la que invita el debate descrito, y sobre la cual sería interesante profundizar.

Pero este mismo caso da apoyo a muchos de los argumentos en favor de las soluciones de *soft law* en materia de RSE, pues pone en evidencia la dificultad del Estado colombiano de perseguir y efectivamente sancionar a las compañías por abusos cometidos en su territorio. Como ya se mencionó, uno de los principales argumentos sobre las cuales se sustentan las soluciones de *soft law* para avanzar la RSE es que los mecanismos de autorregulación pueden ser más útiles que las normas impositivas de los Estados, teniendo en cuenta no sólo el poderío de las empresas, sino también el hecho de que aquéllas con frecuencia eluden obligaciones locales al desarrollar sus actividades en diferentes jurisdicciones y aprovechar la complejidad de los diferentes sistemas políticos y legales en los que operan. De hecho aquí el clamor del Fiscal General, no es por conocer los nombres de los directivos de la sucursal en Colombia, sino los directivos de la casa matriz que autorizaron el pago. Así pues, en defensa de las soluciones de *soft law*, se podría añadir que este caso sirve para ejemplificar cuándo una empresa no es socialmente responsable, y las consecuencias para la reputación que se derivan de no serlo.

Pero este caso también invita a aclarar los alcances de la RSE, sobre todo en el marco de la discusión internacional, pues ella ha surgido no sólo como mecanismo para potenciar la contribución de las empresas en el desarrollo sostenible (es decir deberes positivos, enmarcados bajo una noción de exigencias éticas), sino también (y esto es central) como una forma de hacer frente a los abusos de las empresas, principalmente en países en desarrollo. Es decir, no sólo apunta a promover acciones positivas, sino también el cumplimiento de exigencias negativas como no discriminar, no contaminar, no incurrir en violaciones de los derechos humanos. Por eso personalmente creo que circunscribir la discusión de la RSE a un tema de cuánto pueden las empresas aportar "más allá de los estándares legales", no da cuenta de los retos que existen para que las empresas cumplan también los estándares legales establecidos en un determinado país en el que operan, al igual que no da cuenta expresamente de la necesidad de revisar incluso dichos estándares. Es decir, que para mirar ese "más allá", es fundamental también mirar "ese más acá", es decir el cumplimiento y efectividad de las regulaciones existentes.

Obviamente la discusión sobre la RSE puede ser mirada desde dos contextos, que si bien no son excluyentes, merecen ser diferenciados. Por un lado, un contexto internacional, en donde un debate principal se ha centrado en la conveniencia o inconveniencia de que el derecho internacional establezca obligaciones directas a las empresas. Ya se ha dicho aquí que hasta el momento si bien es el tema que ocupa gran parte del debate *hard law y soft law* en materia de RSE, la partida la van ganando los proponentes de las soluciones

149 Vid: http://www.chiquita.com/chiquita/corpres/AR%20reports/CR%20Pages%20from%202003annual.pdf. Consultado en junio de 2008.

voluntarias y de autorregulación.[150] En esta discusión Colombia debería tener una posición más clara y decidida, teniendo en cuenta, entre otras razones, que los casos de presuntas violaciones de derechos humanos ocurridas en su territorio, son con frecuencia puestos de presente por los proponentes de una legislación internacional que establezca obligaciones a las empresas y pueda hacerlas cumplir cuando los Estados no estén dispuestos o no estén en condiciones para hacerlo.

Pero por otro lado, y al margen de la discusión internacional, es interesante analizar el debate *hard law/soft law*, en una dimensión local. De hecho, la dinámica y extensión de la RSE, tiende a responder a contextos institucionales específicos, y varía de país en país, dependiendo de factores tales como la legislación, la cultura nacional, el contexto político, el interés de los consumidores.[151]

No creo aventurado sostener que en el país la dinámica de la RSE hasta ahora comienza -y de hecho para algunos es preocupante que no tenga el impulso esperado[152]-. Sin embargo, es necesario mirar con cautela las consecuencias de su avance. No se duda en que el aporte de los empresarios colombianos y extranjeros es vital en un país con tantas necesidades sociales, y que una actuación responsable en todas las dimensiones es un ideal al que no debe dejar de apuntarse; pero la pregunta a la que invita el debate es *cómo* propiciarla.

Lo que sugiere la discusión del aparte anterior es que hay ventajas y desventajas tanto de las soluciones de *soft law* como de *hard law*. Las primeras, que de hecho pueden gustar más al empresariado, ofrecen ventajas como una respuesta rápida y flexible frente a la naturaleza competitiva y cambiante de los mercados; la importancia de considerar los intereses de diferentes actores en su construcción y los beneficios de avanzar procesos participativos. Sumado a esto, se resalta el hecho de que las soluciones de *soft law* pueden potenciar que las empresas brinden su experiencia y recursos para una mayor contribución social y ambiental. Pero las aproximaciones de *soft law*, por sí solas, plantean sus propios retos, en términos de legitimidad, vigilancia, cumplimiento, cobertura y estabilidad. El *hard law*, por su parte, es útil para proteger a los más débiles de la sociedad, es un régimen que puede ofrecer un monitoreo independiente de la actividad empresarial, cuenta con mecanismos para garantizar cumplimiento y puede ofrecer soluciones más comprensivas y perdurables. Pero a parte de las dificultades que tienen algunos Estados, como el nuestro, para garantizar que se respete a cabalidad, no asegura que las empresas vayan más allá en sus compromisos sociales y ambientales.[153]

Por eso no es sorprendente abogar por la coexistencia y convergencias de soluciones de *hard law* y *soft law*, como un buen número de personas lo vienen haciendo. Pero el reto es determinar en nuestro contexto, el peso apropiado que se les debe dar a unas y otras, lo que implica discutir, entre otras cuestiones, qué actividades deben dejarse al resorte exclusivo de los Estados, qué es viable para las empresas avanzar de manera voluntaria; cómo pueden actuar de manera coordinada y cómo puede darse una relación diná-

150 No obstante existir ya antecedentes claros en el derecho internacional de que abusos por particulares pueden ser sancionados por cortes internacionales como sucede con el Estatuto de Roma y la Corte Penal Internacional.

151 Vid, SARMIENTO. Nataly. Op cit., p. 149. WILLIAMS, Cynthia y AGUILERA, Ruth. Op cit., p 1.

152 En términos de José Ernesto Ramírez y Juan Carlos Segura "El campo de la RSE en Colombia está siendo reconfigurado y es posible que se "cierre". Vid, RAMÍREZ, José Ernesto y SEGURA, Juan Carlos. Op cit., p. 117.

153 A esto se suma, como bien lo pone de presente Williams y Aguilera, que las instituciones formales, como las constituciones, las leyes y las políticas públicas, no deben mirarse en el vacío, sino también en su relación con instituciones informales, como las normas sociales, las organizaciones de la sociedad civil, empresariales, etc. Vid WILLIAMS, Cynthia y AGUILERA, Ruth. Op cit.,p. 6.

mica entre regímenes de *soft law* y de *hard law*; qué aprendizajes sirven de las iniciativas de *soft law* para avanzar incluso a mayores compromisos de *hard law*; bajo qué condiciones podrían las iniciativas de *soft law* reforzar la aproximaciones de *hard law*; cómo pueden matizarse las deficiencias de cada uno de estos regímenes.

Aunque difícilmente podría dar una respuesta satisfactoria a estos interrogantes, y precisamente lo que busca este artículo es una invitación a discutirlos, me parece importante dejar sugeridas ciertas cuestiones. La primera es insistir en que asuntos centrales como la degradación ambiental, los abusos de derechos humanos, o los actos de corrupción, entre otros, son temas que no pueden dejarse al campo de soluciones voluntarias. Aun cuando se pueda argüir que estos temas ya están incluidos en el contexto colombiano bajo un régimen de *hard law*, lo que invita también el debate es a revisar la efectividad de las normas establecidas en la materia y a exigir de Estado colombiano acciones más decididas para garantizar su cumplimiento. Si frente a estos temas hay vacíos de legislación o ineficacia de las normas existentes, la solución, a mi juicio, no es, como parecen sugerirlo algunos de los proponentes del *soft law* en el campo internacional, pretender llenar esos vacíos con iniciativas voluntarias, sino, por el contario, fortalecer la capacidad del Estado para proteger a sus ciudadanos. Cosa distinta es que las empresas puedan aportar de manera positiva y trabajar de la mano con el Estado en su promoción y protección. Para ello es vital analizar espacios de interacción.

A mi juicio un primer contexto para pensar en la interacción es la necesaria discusión sobre la conveniencia de establecer un marco regulatorio general en materia de RSE, que incluya los objetivos principales a los que deben apuntar las actuaciones voluntarias en materia de RSE -de manera que se dé una mayor coordinación con la política social y ambiental del Estado-, al igual que recuerde y clarifique el panorama sobre los estándares mínimos de obligatorio cumplimiento para las empresas en materias ambientales, laborales o de inversión social. Un marco jurídico, que incluya, por ejemplo, exigencias en materia de 'reporte social' y que establezca lineamientos y requisitos en materia de certificación, pero que de todas maneras deje un margen para que las empresas decidan cómo lograr sus objetivos dentro del marco dispuestos por la regulación. Un marco jurídico que, además, dé cuenta de la importancia de fomentar el diálogo entre las empresas, el gobierno y la sociedad[154], y que promueva las iniciativas de participación y control por parte de la sociedad civil y los consumidores[155]. Regulaciones generales en materia de RSE ya se han empezado a avanzar en países como Francia y Gran Bretaña[156], así que estas experiencias pueden ser útiles para analizar su conveniencia en el contexto local. De todas formas, guste o no, personalmente preferiría ver iniciada su discusión, pues a través de la misma se podría tener un panorama más claro de las deficiencias y ventajas existentes de la actual legislación, al igual que una idea más clara de lo que se está haciendo bien y mal bajo el *slogan* de la RSE.

Ahora bien: ya se ha mencionado aquí que una de las mayores discusiones en torno a las soluciones de *soft law* en materia de RSE apunta a

154 Aunque no sugerido en el contexto de un marco regulatorio general de la RSE, comparto lo expuesto por Ramírez y Segura, sobre la necesidad de encontrar fórmulas que desarrollen la capacidad de la sociedad civil y amplíen su participación en el diseño y puesta en marcha de iniciativas de RSE, al igual que en procesos de auditoría y vigilancia del cumplimiento de estándares éticos acogidos por las organizaciones y órganos de producción. Vid. RAMÍREZ, José Ernesto y SEGURA, Juan Carlos. Op cit., p. 117-118.

155 Un buen panorama de cómo podría ser un marco general en materia de RSE en Colombia se plantea en: MELO JIMENEZ, Oscar Guillermo y GUERRA MALDONADO, Juan Pablo. Una propuesta para la regulación de la Responsabilidad Social Empresarial del sector privado en Colombia. Tesis para obtener el título de abogado. Facultad de Ciencias Jurídicas. Pontificia Universidad Javeriana, 2005.

156 Vid. AMAO, Olufemi. Op. cit. p. 100.

visibilizar los desequilibrios que enfrentan los países en desarrollo frente al poderío y con frecuencia abusos de las empresas transnacionales. Así que, a mi juicio, es necesario buscar fórmulas que permitan al Estado demandar en cortes internacionales por abusos de las empresas en temas centrales de derechos humanos, laborales, ambientales, al igual que establecer exigencias para que las empresas que pretenden invertir en el país tengan por lo menos en marcha una política seria en materia de RSE.

En fin: el debate está abierto, los retos son enormes, pero es una discusión que difícilmente podemos evadir.

UNA ANOTACIÓN FINAL

Cuando ya había culminado este artículo, se hizo evidente la crisis de los mercados internacionales, expresada, entre otras circunstancias, por la dramática caída de la bolsa, la quiebra de Lehman Brothers e incluso el anuncio de Islandia de que por la crisis económica mundial tenía comprometidas sus finanzas[157]. Para efectos de la discusión que se presenta aquí, este hecho no puede pasar desapercibido. Es un momento para observar si la advertencia de los críticos de las soluciones de *soft law* es acertada, en el sentido de insistir en que en momentos de crisis son las inversiones e iniciativas voluntarias en materia de RSE las primeras que se sacrifican. Pero incluso, más allá de esta advertencia, los acontecimientos de estas últimas semanas hacen pensar que el sentido de la balanza internacional, que hoy se inclina hacia promover medidas voluntarias y de autorregulación, puede cambiar e inclinarse hacia una mayor presión regulatoria. Aunque en un asunto limitado al comportamiento de las bancas de inversión, que deja por fuera temas como los compromisos de las empresas con los asuntos laborales, de derechos humanos o del medio ambiente, presentes en las discusiones sobre RSE, es bastante diciente que en septiembre 26 de 2008 se diera fin al programa *"Consolidated Supervised Entities"* (CSE), el cual había sido diseñado para que las bancas de inversión de manera voluntaria reportaran su capital, mantuvieran liquidez, y permitieran la supervisión de instancias oficiales. Las palabras de Christopher Cox[158], Director del *"Securities and Exchange Commission"* (SEC) de los Estados Unidos, al anunciar el fin del programa, son bastante sugestivas en dicho sentido:

> *Los últimos meses han mostrado de manera abundantemente clara, que la regulación voluntaria no funciona. (...) el programa CSE ha sido fundamentalmente deficiente desde el inicio, porque los bancos de inversión pueden escoger, de manera voluntaria, someterse a la supervisión o no hacerlo. El hecho de que los bancos de inversión puedan retirarse de la supervisión voluntaria a su discreción disminuye la efectividad del mandato que persigue el programa CSE, y debilita su efectividad (...) El programa CSE dentro de la división de "Trading and Markets" a partir de hoy se termina*[159].

En fin, como se dice coloquialmente, 'amanecerá y veremos'.

157 Islandia, de nación rica a la quiebra en un cerrar de ojos. En: el Nuevo Herald [en línea] (12 octubre de 2008). Consultado en octubre de 2008 en: http://www.elnuevoherald.com/209/story/301125.html

158 Vid: http://www.sec.gov/news/press/2008/2008-230.htm. Consultado el 3 de Octubre de 2008.

159 Ibid. (Traducción personal de la autora).

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DERECHO CONSTITUCIONAL

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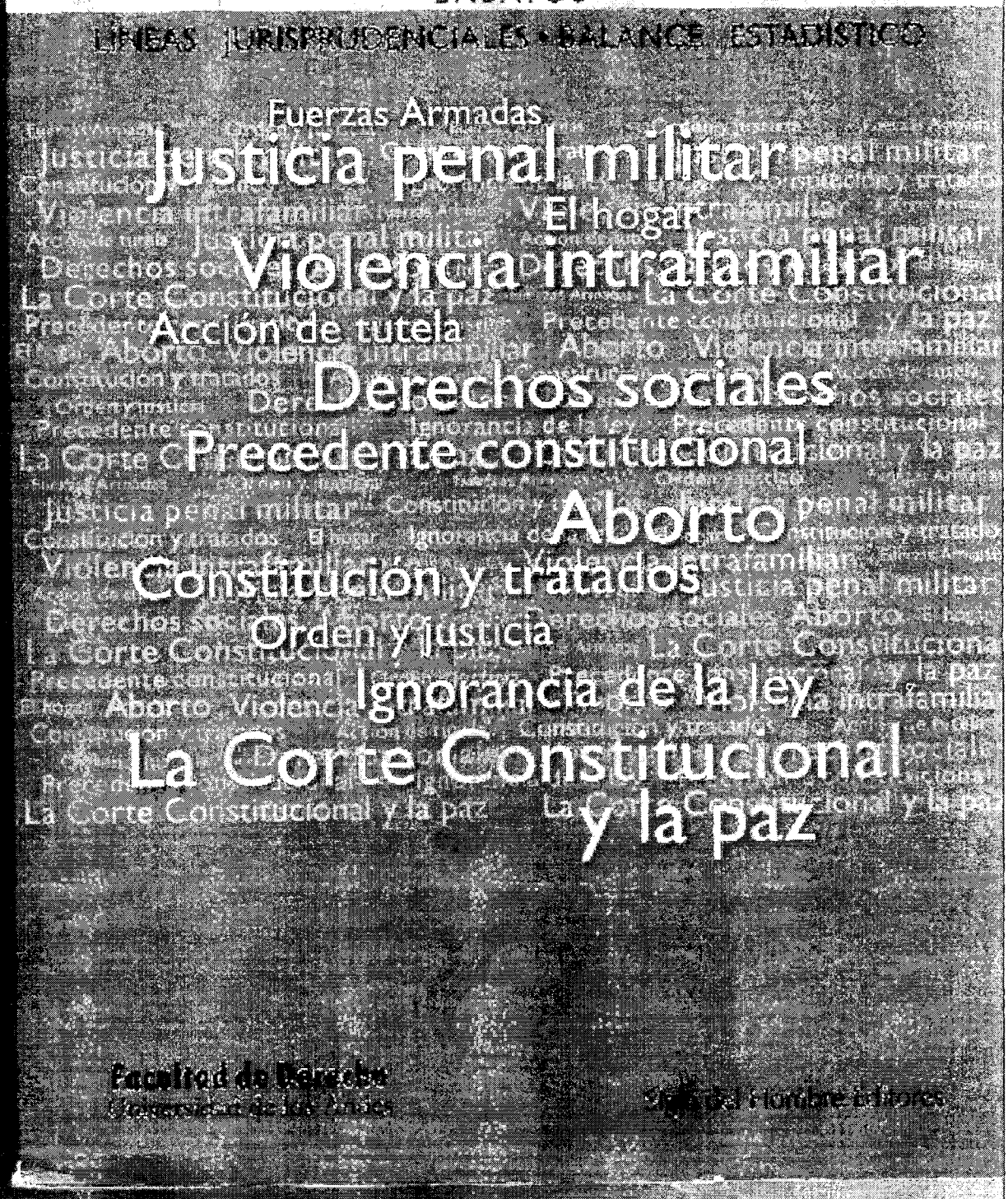

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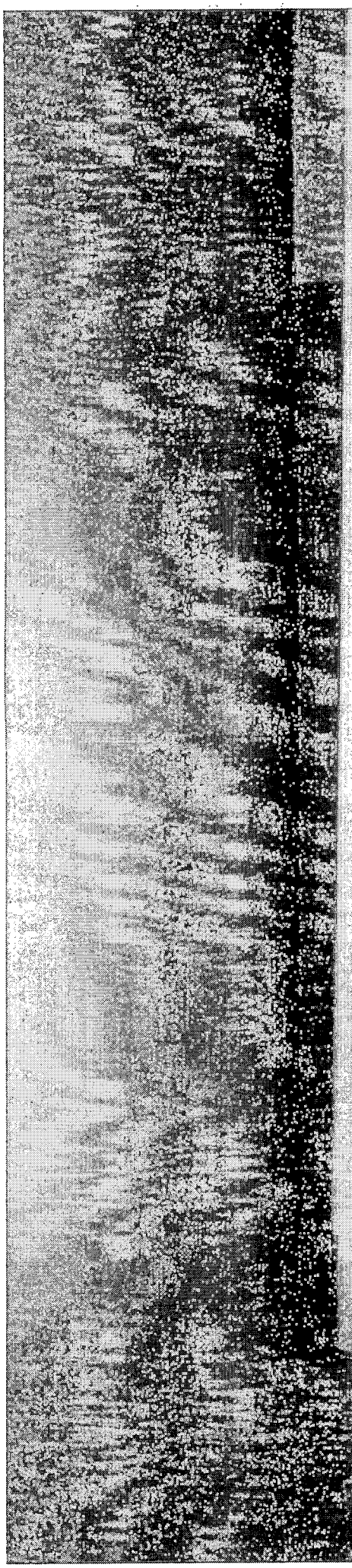


III
ESTADÍSTICAS DE LA JUSTICIA CONSTITUCIONAL

LA CORTE EN NÚMEROS: UN BALANCE ESTADÍSTICO*

Este apartado contiene un análisis cuantitativo de la actividad de la Corte Constitucional durante 1997. El análisis está dividido en dos partes. En la primera, se realiza un comentario acerca de los resultados de la labor de la Corte en procesos de constitucionalidad. En la segunda, se examinan los resultados de la actividad del Alto Tribunal en materia de tutela siguiendo el mismo esquema utilizado para los procesos de constitucionalidad, esto es, cantidad de sentencias emitidas por tipo de proceso, decisión adoptada según cada uno de los temas y la posición de los magistrados. Con esto se busca presentar un análisis completo del comportamiento de la Corte Constitucional y de sus magistrados durante este año. Finalmente se incluye una descripción de la Corte como legislador negativo.

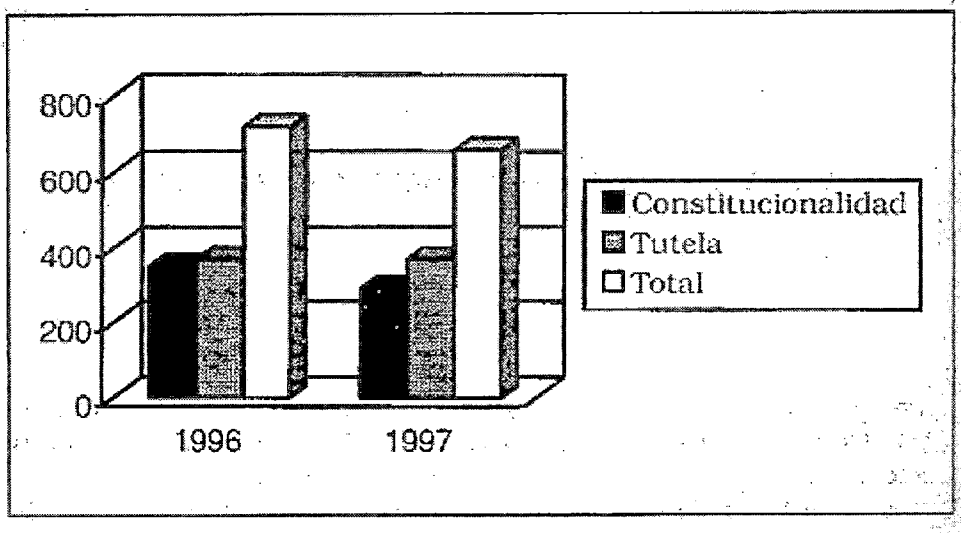
LA LABOR DE LA CORTE DURANTE 1997

Cuadro 1
El peso del control abstracto

Año	Constitucionalidad	Tutela	Total
1996	347	370	717
1997	304	376	680

*La recopilación de los datos, así como la elaboración de los cuadros y gráficos que aparecen en esta parte del libro, estuvo a cargo de Natalia Ángel (coordinadora), Alexandra Lertz y Marcela Montañez. Los comentarios estuvieron a cargo de Libardo José Ariza.

Gráfico 1
Sentencias de la Corte Constitucional 1996-1997



Como se puede observar, en general la producción de fallos de la Corte Constitucional durante 1997 continuó siendo numerosa a pesar de la leve disminución del total de sentencias (680) frente a las expedidas durante 1996 (717). Aunque se observa una disminución en el volumen de fallos, principalmente en sentencias de constitucionalidad donde el total descendió significativamente en un 5,2%, y un pequeño aumento en los fallos de tutela donde se observa un incremento cercano al 3,7%, la Corte durante 1997 mostró que su labor, lejos de mostrar niveles de decrecimiento, tiende a aumentar. En efecto, aunque en este año la Corte expidió un volumen de fallos inferior al expedido durante 1996, profirió el segundo número más alto desde que inició su labor, lo que nuevamente muestra que el desempeño de esta Corporación en el aspecto cuantitativo arroja resultados positivos.

Finalmente, vale la pena resaltar cómo las sentencias de revisión automática de fallos de tutela siguen siendo superiores a las decisiones relativas a procesos de constitucionalidad, circunstancia que aunque tiende a equilibrarse, principalmente en los dos últimos años, muestra la importancia creciente de la acción de tutela dentro de la jurisprudencia constitucional. En efecto, como lo demuestran las estadísticas elaboradas para años anteriores[1], los procesos derivados

1. Las estadísticas y comentarios sobre la actividad de la Corte para los años anteriores, que en adelante se mencionarán, corresponden a la labor realizada por el Observatorio de Jus

Consejo de Estado @consejodeestado · Jul 22, 2020

La Sala Plena del @consejodeestado terna para magistrado de la @CConstitucional a los doctores:
Jorge Enrique Ibañez Najar, Natalia Ángel Cabo y Marino Tadeo Henao Ospina.

21 218 425

Sala Plena de la Corte Constitucional eligió conjueces

Boletín No. 20 Bogotá, febrero 26 de 2020 La Sala Plena de la Corte Constitucional eligió a los dieciocho conjueces que, en caso de empate o falta de quorum necesario, tendrán la responsabilidad de participar de la deliberación y votación de decisiones para el periodo comprendido entre el 1 de marzo de 2020 y el 28 de febrero de 2021. Según la normatividad, se acude a la designación de conjueces cuando el número de los magistrados que deban separarse del conocimiento de un expediente por impedimento o recusación, afecta el quorum establecido para aprobar una decisión. Según la Ley Estatutaria de la Administración de Justicia, los conjueces tienen los mismos deberes que los magistrados y estarán sujetos a las mismas responsabilidades de éstos. Este es el listado de conjueces elegidos por la Sala Plena de la Corte Constitucional: 1. NATALIA ÁNGEL CABO 2. JUAN FERNANDO CÓRDOBA MARENTES 3. RUTH STELLA CORREA PALACIO 4. MAURICIO FAJARDO GÓMEZ 5. EMILSSEN GONZÁLEZ DE CANCINO 6. MARCO TULIO GUTIÉRREZ MORAD 7. JUAN CARLOS HENAO PÉREZ 8. LUIS FERNANDO LÓPEZ ROCA 9. JOSÉ FERNANDO ORTEGA CORTÉS 10. JULIO ANDRÉS OSSA SANTAMARÍA 11. HERNANDO PARRA NIETO 12. JAIRO PARRA QUIJANO 13. JORGE GABINO PINZÓN SÁNCHEZ 14. MAURICIO PIÑEROS PERDOMO 15. HUMBERTO ANTONIO SIERRA PORTO 16. HELÍ ABEL TORRADO TORRADO 17. RODRIGO UPRIMNY YEPES 18. WILLIAM ZAMBRANO CETINA

OTRAS NOTICIAS

No basta con señalar que se trata de una grave violación a los derechos humanos para otorgar una indemnización mayor a la determinada en el reconocimiento de perjuicios morales (?No-basta-con-senalar-que-se-trata-de-una-grave-violacion-a-los-derechos-humanos-para-otorgar-una-indemnizacion-mayor-a-la-determinada-en-el-reconocimiento-de-perjuicios-morales-8910)

Boletín N° 69

Sentencia T- 147 de 2020

Bogotá, 02 de junio de 2020

Así lo estableció la Sala Cuarta de Revisión de la Corte al estudiar la acción de tutela instaurada por ...

Es constitucional el Decreto Ley relacionado con la Cultura en el marco de la emergencia del Covid-19 (?Es-constitucional-el-Decreto-Ley-relacionado-con-la-Cultura-en-el-marco-de-la-emergencia-del-Covid-19-8908)

Boletín No. 67

Bogotá, 28 de mayo de 2020

La Corte Constitucional, con 9 votos a favor y ponencia de la Magistrada, Gloria Ortiz Delgado, encontró ajustado a la Constitución, el Decreto Legislativo 475 del 25 de marzo de 2020, "Por el cual se dictan medidas especiales relacionadas con el sect...

Es constitucional el Decreto Ley que garantiza el acceso al servicio de acueducto en el marco de la emergencia por el COVID-19 (?Es-constitucional-el-Decreto-Ley-que-garantiza-el-acceso-al-servicio-de-acueducto-en-el-marco-de-la-emergencia-por-el-COVID-19-

8909)

Boletín No. 68

Bogotá, 28 de mayo de 2020

La Corte Constitucional con ponencia del Magistrado, José Fernando Reyes examinó la constitucionalidad del Decreto 441 de 2020, por medio del cual el Presidente de la República adoptó disposiciones relacionadas con el servi...

Declaran inconstitucionales las facultades otorgadas al Minsalud y al INVIMA en el marco de la Emergencia Económica Social y Ecológica (?Declaran-inconstitucionales-las-facultades-otorgadas-al-Minsalud-y-al-INVIMA-en-el-marco-de-la-Emergencia-Economica-Social-y-Ecologica-8907)

Boletín No. 66

Bogotá, 28 de mayo de 2020

Con ponencia de la Magistrada, Cristina Pardo Schlesinger, la Corte Constitucional declaró inexequibles los artículos 1 y 2 del Decreto Legislativo 476, expedido por el Gobierno Nacio...

Es constitucional la ampliación de los plazos fijados para los trámites ante las Cámaras de Comercio. (?Es-constitucional-la-ampliacion-de-los-plazos-fijados-para-los-tramites-ante-las-Camaras-de-Comercio.-8906)

Boletín No. 65

Bogotá, 28 de mayo de 2020

La Corte Constitucional declaró la constitucionalidad del Decreto 434 del 19 de marzo de 2020 que amplió los plazos para que comerciantes y otras personas naturales y jurídicas puedan adelantar ciertos trámites ante las c&a...

Corte Constitucional ampara el derecho fundamental a la doble conformidad del ciudadano Andrés Felipe Arias Leiva (?Corte-Constitucional-ampara-el-derecho-fundamental-a-la-doble-conformidad-del-ciudadano-Andres-Felipe-Arias-Leiva-8905)

Boletín No. 64

Bogotá, 21 de mayo de 2020

La Sala Plena de la Corte Constitucional resolvió proteger el derecho fundamental al debido proceso del ciudadano Andrés Felipe Arias Leiva y, en consecuencia, ordenar a la Sala de Casación Penal de la Corte Supr...

VER TODAS LAS NOTICIAS (/contenido.php)

Contacto

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PBX: (57 1) 350 62 00
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La Corte Constitucional informa a la ciudadanía que en la sesión de Sala Plena, de marzo de 2019 fueron seleccionados los Conjueces de la Corporación para el periodo comprendido entre el 1 de marzo de 2019 y 28 de febrero de 2020, sus nombres son los siguientes:

No.	NOMBRES Y APELLIDOS
1	Natalia Ángel Cabo (/inicio/Conjueces-2019/hoja de Vida NATALIA ÁNGEL CABO.pdf)
2	Carlos Alberto Atehortúa Ríos (/inicio/Conjueces-2019/hoja de Vida CARLOS ALBERTO ATEHORTÚA RÍOS.pdf)
3	Catalina Botero Marino (/inicio/Conjueces-2019/hoja de Vida Conjuez Catalina Botero Marino.pdf)
4	Ruth Stella Correa Palacio (/inicio/Conjueces-2019/hoja de Vida Conjuez RUTH STELLA CORREA PALACIO.pdf)
5	Saúl Flórez Enciso (/inicio/Conjueces-2019/hoja de Vida Conjuez SAUL FLÓREZ ENCISO.pdf)
6	Emilssen González de Cancino (/inicio/Conjueces-2019/hoja De Vida Emilssen Gonzalez de Cancino.pdf)
7	Juan Carlos Henao Pérez (/inicio/Conjueces-2019/hoja de Vida Conjuez JUAN CARLOS HENAO PEREZ.pdf)
8	Hernán Fabio López Blanco (/inicio/Conjueces-2019/Hoja de Vida Conjuez HERNÁN FABIO LÓPEZ BLANCO.pdf)
9	Luis Fernando López Roca (/inicio/Conjueces-2019/Hoja de Vida Conjuez LUIS FERNANDO LOPEZ ROCA.pdf)
10	Álvaro Andrés Motta Navas (/inicio/Conjueces-2019/hoja de Vida Conjuez ALVARO ANDRÉS MOTTA NAVAS.pdf)
11	Julio Andrés Ossa Santamaría (/inicio/Conjueces-2019/Hoja de Vida Conjuez JULIO ANDRES OSSA SANTAMARiA.pdf)
12	Jorge Gabino Pinzón Sánchez (/inicio/Conjueces-2019/hoja de Vida Conjuez JORGE GABINO PINZÓN SÁNCHEZ.pdf)
13	Mauricio Piñeros Perdomo (/inicio/Conjueces-2019/Hoja de Vida Conjuez MAURICIO PlnEROS PERDOMO.pdf)
14	Esteban Restrepo Saldarriaga (/inicio/Conjueces-2019/Hoja de Vida Conjuez ESTEBAN RESTREPO SALDARRIAGA.pdf)
15	Helí Abel Torrado Torrado (/inicio/Conjueces-2019/Hoja de Vida HELI ABEL TORRADO TORRADO.pdf)
16	Humberto Sierra Porto (/inicio/Conjueces-2019/Hoja de Vida HUMBERTO SIERRA PORTO.pdf)
17	Rodrigo Umprimny Yepes (/inicio/Conjueces-2019/Hoja De Vida Rodrigo Uprimny.pdf)
18	William Zambrano Cetina (/inicio/Conjueces-2019/Hoja de Vida Conjuez WILLIAM ZAMBRANO CETINA.pdf)

GLORIA ESTELA ORTIZ DELGADO

PRESIDENTE

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CORTE CONSTITUCIONAL

CONJUECES 2018

La Corte Constitucional informa a la ciudadanía que en la sesión de Sala Plena, el día 21 de febrero de 2018 fueron seleccionados los Conjueces de la Corporación para el periodo comprendido entre el 1 de marzo de 2018 y 28 de febrero de 2019, sus nombres son los siguientes:

1. Natalia Ángel Cabo
2. Jaime Arias López
3. Carlos Alberto Atehortúa Ríos
4. Martín Gonzalo Bermúdez Muñoz
5. Catalina Botero Marino
6. Jose Miguel De la Calle Restrepo
7. Ruth Stella Correa Palacio
8. Emilsen González de Cancino
9. Juan Carlos Henao Pérez
10. Luis Fernando López Roca
11. Juan Ramón Martínez Vargas
12. Álvaro Andrés Motta Navas
13. Mauricio Piñeros Perdomo
14. Jorge Gabino Pinzón Sánchez
15. Jorge Restrepo Fonfalvo
16. Humberto Sierra Porto
17. Rodrigo Uprimny Yepes
18. William Zambrano Cetina

ALEJANDRO LINARES CANTILLO
PRESIDENTE

▶ Resultados de la búsqueda

Mocoa, Putumayo , 2017-04-04T05:00:00Z · Sistema Informativo del Gobierno - SIG

4/4/2017 5:00:00 AM

Declaración del Presidente Juan Manuel Santos sobre acto legislativo para blindar acuerdos de paz, ternas para magistrados y acciones para recuperar a Mocoa

Declaración del Presidente sobre acto legislativo para blindar acuerdos ...

Muy buenos días.

Primero que todo quiero agradecerle al Congreso, a la Cámara de Representantes la aprobación ayer del acto legislativo que blinda jurídicamente, le da seguridad jurídica, a los acuerdos de paz.

Hoy el Senado debe de darle el último debate al Estatuto de Oposición. Eso es un paso adelante en el cumplimiento de los acuerdos y del inicio del posconflicto.

Anoche en el Batallón, el general Hernández me decía cómo ha cambiado el departamento del Putumayo. Hace un año era impensable irse por tierra y cruzar el departamento en vehículos; tenía que ser por aire. Hoy hay total tranquilidad.

Eso es algo muy importante que hay que destacar.

Anoche también terminé la escogencia de las ternas para la Corte Constitucional. Se surtió el procedimiento del Decreto 537. Establecimos un procedimiento para hacer un proceso más transparente de divulgación, que todo el mundo conociera cuales son los postulados.

Y finalmente ayer decidí las dos ternas que voy a presentar hoy mismo al Congreso de la República.

En el caso del reemplazo de Jorge Pretelt, he decidido presentar una terna exclusivamente compuesta por mujeres, todas destacadas juristas de gran trayectoria.

Ellas son:

La doctora Isabel Cristina Jaramillo, abogada de la Universidad de Los Andes con maestría y doctorado de la Universidad de Harvard y actualmente es la directora del doctorado en Derecho de la Universidad de los Andes.

La otra postulada, la doctora Cristina Pardo Schlesinger, fue Magistrada auxiliar en la Corte Constitucional durante 14 años y medio y fue mi Secretaria Jurídica en la Presidencia de la República durante los últimos seis años y medio. Es abogada de la Universidad del Rosario.

Y la tercera postulada es la doctora Natalia Ángel Cabo, también abogada de la Universidad de los Andes, con maestría de la Universidad de Harvard. Es profesora de Derecho Constitucional, de Derecho Constitucional comparado y es miembro del grupo de investigación de Derecho Público.

Para suplir la vacancia de la doctora María Victoria Calle, quien fue la Presidenta de la Corte y quien cumplió una gestión de gran trascendencia para el país.

Los candidatos son:

La doctora María Margarita Zuleta. Ella no necesita presentación. Es una abogada muy reconocida de la Universidad de los Andes, y ha sido durante este gobierno la Directora de la Agencia Nacional de Contratación Pública, Colombia Compra Eficiente. Tiene una trayectoria como abogada en otras posiciones y la labor que ha hecho en esta institución ha sido

realmente excepcional.

El segundo postulado es el doctor Néstor Osuna Patiño, profesor de Derecho Constitucional en la Universidad Externado de Colombia, exmagistrado del Consejo Superior de la Judicatura, doctor en Derecho por la Universidad de Salamanca, en España y es abogado de la Universidad Externado de Colombia.

Y el tercer postulado de la segunda terna es el doctor Carlos Bernal. Docente, investigador, es egresado de la Universidad Externado de Colombia, tiene una maestría y un doctorado en filosofía en la Universidad de la Florida y un doctorado en Derecho en la Universidad de Salamanca, en España.

Es una de las personas que todo el mundo distingue como los mejores constitucionalistas que tiene el país.

Esas son pues las dos ternas que el día de hoy le voy a presentar a la Corte Constitucional.

En todos los casos los postulados fueron entrevistados personalmente por mí. Les hice básicamente dos preguntas sobre su compromiso, primero con la paz, y todos respondieron afirmativamente.

Tienen un gran compromiso para preservar y consolidar el proceso de paz en Colombia.

El segundo tema que les toqué, que para mí es muy importante que la Corte tenga eso en cuenta, es el tema de la responsabilidad fiscal. Que las decisiones de la Corte tengan en cuenta las repercusiones económicas, fiscales, porque como lo hemos dicho tantas veces, las crisis económicas son las que más vulneran los derechos de los ciudadanos.

Y hay que evitarlas. Y una forma de evitarlas es teniendo en cuenta, no solo por parte de las Cortes sino por parte del Congreso y del Ejecutivo, de las consecuencias fiscales, de las decisiones.

Los seis postulados me respondieron afirmativamente que ellos entendían ese concepto y que lo tendrían en cuenta si son elegidos como Magistrados a la Corte Constitucional.

Finalmente, aquí seguiremos haciéndole un seguimiento a todo lo que hemos venido adelantando en materia de la recuperación de Mocoa.

Hasta anoche tarde estuvimos revisando todos los temas, los detalles, los problemas, porque los problemas siempre aparecen.

Hoy vamos a continuar en esa tarea y hoy vamos a hacer una revisión ya sobre la perspectiva de la reconstrucción de Mocoa. Cuáles son aquellos proyectos que desde ya tenemos que iniciar, cómo se contratan, cómo se van a adelantar, para que Mocoa y el Putumayo vuelvan a recuperar su normalidad y queden, como lo he dicho tantas veces, mejor que antes del desastre.

Más tarde les daré el informe de esa reunión.

Muchas gracias.

(Fin)

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International Development Research Centre
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April 2, 2014

Ms. Natalia Angel Cabo
12 Grimthorpe Road
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- What do you find fascinating about your field research?
- What has been the hardest adjustment? Easiest?
- What challenges have you encountered? Successes?
- Any surprises?
- What are you learning?
- How are you progressing with your field research?
- Who has had the most impact on you and/or your research while in the field?

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We wish you success in your research and look forward to reading about your experiences.

Yours sincerely,

Jean-Claude Dumais
Awards Officer
Fellowships and Awards
Special Initiatives Division