

**Report on the prohibition against regressivity in
the field of economic, social and cultural rights in
Colombia: legal basis and cases (2002-2008)**

- Executive summary -

Bogotá, March 2010

Report on the prohibition against regressivity in the field of economic, social and cultural rights in Colombia

- Executive summary -

Legal basis

By virtue of the ratification of the International Covenant on Economic, Social and Cultural Rights, the Colombian State has a series of obligations of an immediate character in the field of social rights, including the duty to abstain from adopting deliberately retrogressive measures.

In general, pursuant to international human rights law, retrogressive measures are considered, *prima facie*, to be in violation of commitments acquired through the ratification of binding instruments by the Colombian State. Thus, the prohibition against regressivity operates as a presumption of the lack of validity of retrogressive measures, a presumption that can be disproved by the State when it is able to demonstrate that the provisions have been adopted in accordance with the criteria defined by the United Nations Committee on Economic, Social and Cultural Rights (CESCR).

However, even if the justification given by the State on behalf of a retrogressive measure in the field of ESC rights is admitted, that measure shall in all cases have a *temporary* character. That is because, although the adoption of retrogressive legislation or policies may be admissible, the State nonetheless has the duty to progressively achieve full satisfaction of the rights recognized in the ICESCR (International Covenant on Economic, Social and Cultural Rights).

This prohibition against adopting retrogressive measures stops being relative and becomes absolute when the implemented policies or norms imply ignorance of any of the basic (immediate) obligations of the signatory States, such as that of ensuring as a minimum the satisfaction of essential levels of each of these rights, that of guaranteeing the enjoyment of the rights recognized in the ICESCR without discriminations or that of committing

available resources to the maximum. In these cases, regressivity has absolutely no justification, and any measure that is adopted in that sense “undoubtedly” constitutes a violation of the commitments acquired in the light of international human rights law.

In line with the above, retrogressive measures are subjected to strict scrutiny, because it is not enough to demonstrate that the purpose of the adopted provisions is admissible, but rather they must be necessary, and it is not sufficient that the selected measure be potentially adequate, but must instead be strictly urgent¹.

Until now, two ways have been recognized for establishing the regressivity of a measure. On the one hand, it is possible to carry out a normative examination of the measures, in order to determine whether the provision limits, restricts or reduces the scope or significance of a social right, or if it imposes conditions upon its exercise that it previously did not have to deal with; on the other hand, an examination may be made of the results to verify empirically the impact of the measures that are considered retrogressive, making use of estimates of the effects of its implementation.

Retrogressive measures in Colombia during the 2002-2008 period

In this report by the Colombian Commission of Jurists (Comisión Colombiana de Juristas), an evaluation is made that is both normative as well result oriented with respect to three reforms adopted by the Colombian State during the period between 2002 and 2008: the labor reform, reforms made to the system of transferences and the chapter on protection for intellectual property in the Free Trade Agreement signed by the governments of Colombia and United States and approved by the Colombian Congress by means of act 1143 of 2007.

¹ These criteria have been chosen from the jurisprudence of the Colombian Constitutional Court, which has ended up adopting an “intermediate” position regarding application of the examination of retrogressive measures in the field of social rights, which “harmonizes” with international standards. Pursuant to the predominant doctrine in the jurisprudence of the Constitutional Court “*retrogressive measures are presumed to be unconstitutional but can be justified if the authorities openly debate their necessity and show that they are needed in order to achieve urgent objectives*”. Rodrigo Uprimny Yepes and Diana Guarnizo, *¿Es posible una dogmática adecuada sobre la prohibición de regresividad? Un enfoque desde la jurisprudencia constitucional colombiana*, at <www.dejusticia.org>, consulted on October 30, 2008, page 16.

1. Labor reform (act 789 of 2002)

Act 789 of 2002 affected the scope of various guarantees that have been recognized on behalf of workers in the Substantive Employment Code (Código Sustantivo del Trabajo):

- It modified the definition of daytime and nighttime work, affecting the liquidation of additional remuneration for night work (nighttime surcharge).
- It reduced surcharges for work during holidays and on Sundays.
- It established differential settlements in accordance with salary level for unjustified firings.
- It modified the liquidation of settlements over failure to pay.
- It reduced the salary and benefits system for apprentices.

The retrogressive nature of the provisions of act 789 of 2002 in terms of labor relations is both normative as well as with respect to results, because it has signified a serious reduction in the incomes of workers in Colombia.

The Centro de Investigaciones para el Desarrollo (CID) de la Universidad Nacional de Colombia (Research Center for Development of the National University of Colombia) has made some estimates of the impact of two provisions of act 789 of 2002 in the case of workers in the security guard sector: those related to modification of the daytime/nighttime work day and those related to payment of the surcharge for work on Sundays and holidays. The security guard sector makes it possible to recognize the impact of the reform, because those employed by it provide their services in shifts (as ordinary or extraordinary work) that cover the 6 p.m. to 10 p.m. time period and which extend to Sundays and holidays².

The report by the CID concludes that, in the particular case of workers in the security guard sector, “*adding together the results from all of these measures that affect the workers, in other words, extension of the daytime work day and regarding surcharges for Sundays and*

² Universidad Nacional de Colombia, Centro de Investigaciones para el Desarrollo (CID), *Evaluación de la reforma laboral (Ley 789 de 2002)*, Bogotá, 2007, page 66.

*holidays, it turns out that each security guard in 2005 lost an average of 1,151,000 COP*³ (around US \$620). According to estimates by the CID of the Universidad Nacional, workers in the security guard sector as a whole (149,165 workers) during the 2003-2006 period would have lost around \$514.000 millions COP (around 278 million US dollars) due to extension of the daytime work day and reduction of surcharges for working on Sundays and holidays.

These two modifications included in act 789 of 2002 not only affected the remuneration of workers in the security guard sector, to whom the report by the CID refers, but of all workers who, due to the nature of their jobs, must provide their services after 6 p.m. as well as on Sundays and holidays⁴.

Now then, the reasons cited by the National Government and the Legislature for approving the reform of the labor system in 2002 do not pass examination under the criteria defined by the Committee on ESCR with respect to retrogressive measures: the government and Congress have not shown that the reform would fulfill an urgent social or economic need, nor have they demonstrated that the decision was adopted after wide-ranging consideration of the diverse possible courses of action, nor that it was justified in reference to all of the economic, social and cultural rights.

³ Universidad Nacional de Colombia, Centro de Investigaciones para el Desarrollo (CID), *Evaluación de la reforma laboral (Ley 789 de 2002)*, Bogotá, 2007, pág. 71.

⁴ In its fifth report to the Committee on ESC Rights of the United Nations, the Colombian State points to act 789 of 2002 as an advance in various aspects of labor and social security legislation: "313. For persons over the age of 16, the goal was to implement all mechanisms incorporated in act 789 of 2002 to facilitate their protection and labor classification under the modalities of the Contract for Apprenticeship and vocational training (...) 351. act 789 of 2002 empowers the parties to agree that the forty-eight (48) hour work week can be carried out through flexible daily work days, distributed over a maximum of six days per week, with one obligatory day of rest, which can coincide with a Sunday (...) 405. [act 789 of 2002](#), by means of which regulations are issued to support employment and extend social protection and certain articles of the Substantive Employment Code (Código Sustantivo del Trabajo) are modified. It provides for support to the unemployed". One of the aspects of the approval of act 789 of 2002 most emphasized by the National Government was the creation of a system for subsidies to the unemployed (article 2 and subsequent articles). However, out of approximately 2.5 million unemployed persons, only 351,000 received these subsidies in 2003-2008, according to information supplied by the Superintendent for Family Subsidies (Superintendencia de Subsidio Familiar), most of whom had at one time had formal employment. Only 30% of the subsidies were given to informal workers. "Sólo 351 mil de dos millones y medio de desempleados han recibido subsidio al que tienen derecho", *El Tiempo*, April 21, 2008, internet version. Estimates by the CID of the Universidad Nacional have also demonstrated deficiencies in implementation of the "system for subsidies for the unemployed": "*The subsidy for the unemployed, in addition to its reduced amount and duration, a currently-in-effect minimum monthly wage distributed in six monthly installments, is not enough to cover demand in so far as in the four years during which it has been applied, there have been more applicants (a yearly average of 123,663) than people who have been accepted into the program (a yearly average of 109,569) and even fewer again access to the subsidy (a yearly average of 57,773)*". Additionally, to attend to the demand for the subsidy for the unemployed, the government ought to have allocated resources in excess of 68 billion COP annually but effectively provided only 32.6 billion pesos that did not come from the national budget but rather from payroll deductions on behalf of the family welfare societies themselves (cajas de compensación familiar), which administer and assign the subsidies. Universidad Nacional de Colombia, Centro de Investigaciones para el Desarrollo (CID), *Evaluación de la reforma laboral (Ley 789 de 2002)*, Bogotá, 2007, page 24.

At the same time, it should be pointed out that even if their motive for the 2002 labor reform were accepted, the reform could in no way be of a permanent nature, as is the case with act 789 of 2002, but must instead be temporary, because the obligation persists for the Colombian State to progressively advance in the effective and full guarantee of ESC rights for the population as a whole, including the right to fair and satisfactory working conditions⁵.

In the same sense, with respect to the temporary nature of the reform, it must be pointed out that the modifications of the labor system did not fulfill the announced purpose: to massively generate quality employment⁶. Therefore, even if the validity of the motive for the reform were to be admitted, it nonetheless failed to achieve the proposed objective, which, pursuant to the text of act 789 of 2002 itself, ought to lead to its abolition⁷.

2. Reforms of the system for transferences (Acts 01 of 2001 and 04 of 2007)

Constitutional reforms of the system for transferences carried out in 2001 and 2007 constitute retrogressive measures in relation to the financing of social investment in the regions⁸. According to estimates by the National Federation of Departments (Federación Nacional de Departamentos), the 2001 reform of the formula to increase resources for transferences actually signified a decrease in financing guarantees for education, healthcare, basic sanitation and potable water during the period from 2002 to 2008 amounting to

⁵ Right recognized in article 7 of the ICESCR.

⁶ Research carried out by Alejandro Gaviria of the Universidad de los Andes, by the Observatorio del Mercado de Trabajo y Seguridad Social of the Universidad Externado de Colombia and by the Centro de investigaciones para el Desarrollo (CID) of the Universidad Nacional de Colombia agrees in affirming that, while it may not be possible to make a definitive judgment on the impact of the labor reform of 2002 on employment levels, it is clear that there is no reliable empirical evidence to show that this reform stimulated massive and sustained generation of quality employment in Colombia, which was used to justify the adoption of retrogressive measures by means of act 789 of 2002. See: Alejandro Gaviria, *Ley 789 de 2002: ¿funcionó o no?*, documento CEDE 2004-45 ISSN 1657-7191 (electronic version), November of 2004, available at www.banrep.gov.co/documentos/seminarios/. Alejandro Gaviria and María del Mar Palau, *Evolución reciente del mercado laboral urbano y alternativas de política*, October 30, 2007, available at www.economia.uniandes.edu.co. Universidad Nacional de Colombia, Centro de Investigaciones para el Desarrollo (CID), *Evaluación de la reforma laboral (Ley 789 de 2002)*, Bogotá, 2007, page 76. Observatorio del Mercado de Trabajo y Seguridad Social, *Mitos y realidades de la reforma laboral colombiana, la ley 789 dos años después*, Cuadernos de trabajo No. 6, Universidad Externado de Colombia, Bogotá, 2005, page 20.

⁷ “Two years after enactment of this act, the Follow-up and Verification Commission established hereunder shall present a complete evaluation of its results. At that time, the National Government shall present draft legislation to Congress to modify or repeal those provisions that have not achieved practical effects for employment generation”. Paragraph of article 46 of act 789 of 2002.

⁸ Transferences refer to funds from the General System of Participations (Sistema General de Participaciones - SGP), in other words, money that the National Government transfers to the territorial entities (departments, districts and municipalities) to attend to the basic needs of their inhabitants in terms of health, education, basic sanitation and potable water.

around 27.9 billion pesos⁹ (around 15.000 million US dollars). In addition to the above, act 04 of 2007 gives rise to a further reduction, in real terms and compared to the original system provided for under the Constitution of 1991, of 34 billion pesos in 2009-2016¹⁰ (around 18.000 million US dollars).

The retrogressive nature of these reforms is unjustified, because the reasons given for their approval do not fulfill the argumentative burden of the State when adopting retrogressive measures. In effect, there are at least two criteria specified by the Committee on ESCR in its general observations that are in no way satisfied by the reasons given for the reforms made to the system of transferes: (1) that the measures be adopted after the most careful consideration of all possible benefits, and that the measures chosen would be the least harmful for the rights involved; and, (2) that they be framed within the context of full exploitation of all available resources to the maximum. Additionally, it must be pointed out that the two reforms of the system of transferes have had a negative impact on the financing of education, health, basic sanitation and potable water of the populations that, in light of the Colombian Constitution, have special constitutional protection, such as the case of children (art. 44 of the Colombian Constitution), the rural population (art. 64) and low income individuals (art. 13). At the same time, the priority for public social expenditure regarding other allocations (art. 350) was not addressed in the approval of the two above-mentioned reforms, because the restriction on social investment in the regions has nonetheless been accompanied by a significant increase in military expenditure over the last decade¹¹.

Finally, with the reform of 2007 measures are perpetuated that (in case the validity of the reasons is admitted) can only be temporary and not permanent. In this manner, with the most recent modification of the system of transferes, the promise was broken to return in 2009 to a system similar to the one originally provided for in the Constitution of 1991

⁹ Federación Nacional de Departamentos, "Posición de los departamentos frente al proyecto de acto legislativo que modifica el SGP", available at www.federacionnacionaldedepartamentos.org.co.

¹⁰ Federación Nacional de Departamentos, "Posición de los departamentos frente al proyecto de acto legislativo que modifica el SGP", available at www.federacionnacionaldedepartamentos.org.co.

¹¹ While the government has insisted on the need to control increases in funding for health, education and basic sanitation, military expenditures have increased in a sustained manner since 1991, currently accounting for around 6.5% of GDP. José Fernando Isaza Delgado and Diógenes Campos Romero, *Algunas consideraciones cuantitativas sobre la evolución reciente del conflicto armado*, Bogotá, December of 2007, available at http://www.dhcolombia.info/IMG/pdf_ConflictoColombiano.pdf.

(linked to the National Government's Current Income), thereby unjustifiably extending until 2016 norms that were originally merely transitory¹².

3. The chapter on intellectual property in the Free Trade Agreement (FTA) signed by the governments of Colombia and the United States

In the Colombian case, it has been proven that the restriction on competition deriving from protection of intellectual property for medications would lead to an increase in the price paid by consumers, whereas when there is competition involving the active ingredient, the average price tends to decrease considerably¹³.

In the trade promotion agreement signed by the governments of Colombia and the United States, provisions were incorporated that would result in an increase in protection standards for intellectual property, under a regulatory scheme known as TRIPS *plus*, because it is more strict than the one established in the Agreement on Trade Related Aspects of International Property Rights (TRIPS) of the World Trade Organization (WTO).

According to estimates by the Pan American Health Organization, the inclusion of those regulations, with the resulting increase in the prices of medications, will cause serious damage to the resources of the Colombian health system (endangering its sustainability), while at the same time increasing economic barriers to people's access to medications¹⁴. As a whole, the rules on intellectual property included in the FTA imply an increase of around 40% in the price of medications, amounting to a nearly 900 million dollar rise in expenditures for medications by 2020 and leaving around 5 million people without access to them¹⁵.

¹² Promise contained in article 357 of the Colombian Constitution, modified by act 01 of 2001.

¹³ Pan American Health Organization (PAHO), Regional Office of the World Health Organization (WHO) and the Fundación Instituto para la investigación del medicamento en los sistemas de salud, IFARMA, *Impacto de fortalecer las medidas de propiedad intelectual como consecuencia de la negociación de un tratado de libre comercio con Estados Unidos*, Bogotá, November of 2005, available at www.recalca.org.co.

¹⁴ Pan American Health Organization (PAHO), Regional Office of the World Health Organization, IFARMA and Fundación Instituto para la investigación del medicamento en los sistemas de salud, *Modelo prospectivo del impacto de la protección de la propiedad intelectual sobre el acceso a medicamentos en Colombia*, Bogotá, November of 2004, page 8.

¹⁵ Red Colombiana de Acción Frente al Libre Comercio y el ALCA (RECALCA), "No hay derecho... a la salud en el TLC, la salud en coma en el TLC", February of 2007, available at www.recalca.org.co.

Additionally, the reasons alluded to by the National Government and the Colombian Congress for approving the trade agreement by means of act 1143 of 2007 are neither sufficient nor adequate in the light of standards defined in that regard by the Committee on ESCR.

In the first place, the intellectual property rules of the FTA do not represent measures that are aimed at the *general welfare of the population* (according to the terms of the Committee on ESCR) or at improving the living conditions of Colombians. On the contrary, as a whole, the rules on intellectual property included in the FTA imply an increase in the price of medications, an increase in expenditure on medications and lack of protection regarding access to medications for large social sectors.

At the same time, the rules on intellectual property in the FTA do not respect the principle of *not affecting people with special constitutional protection*. In effect, chapter 16 of the FTA (on intellectual property) will have a serious impact on access by people who are carriers of HIV-AIDS to antiretroviral medications that they need to avoid deterioration of their health.¹⁶ In addition, the main effect of the increase in the prices of medications will be on low income individuals' access to medications, who must use a greater proportion of their incomes to acquire the medicines that they need¹⁷.

The rules on intellectual property contained in the FTA also fail to respect the constitutional principle of *priority in social public expenditure over other allocations*, because they imply the transference of a significant level of funds from the Colombian health system towards US companies in the pharmaceutical sector. That will cause a grave fiscal impact that would affect the sustainability of the Social Security system in healthcare as well as a restriction on the level of resources that are effectively used for so-called public social expenditures.

¹⁶ Pan American Health Organization (PAHO), Regional Office of the World Health Organization (WHO) and the Fundación Instituto para la investigación del medicamento en los sistemas de salud, IFARMA, *Impacto de fortalecer las medidas de propiedad intelectual como consecuencia de la negociación de un tratado de libre comercio con Estados Unidos*, Bogotá, November of 2005, available at www.recalca.org.co.

¹⁷ Misión salud, *La bolsa o la vida, impacto de la agenda norteamericana para el TLC sobre el acceso a medicamentos y la salud pública*, Bogotá, 2004, page 70.

Finally, the rules on intellectual property of the FTA violate the principle of *not ignoring the minimum or lower level* mentioned in Colombian constitutional jurisprudence, which refers to respect for the minimum content of the rights involved. As the Committee on ESC Rights has stated, access to medications in economic terms and without discrimination is part of the essential minimum content of the right to physical and mental health at the lowest possible level.

Therefore, although the Colombia-USA FTA has not been entered into force until now, due to conditions imposed by the U.S. Congress regarding the situation of trade union freedoms, it is also true that civil society concerns persist in relation to its content and the impact that its entering into effect would have on the welfare of the Colombian population.

Recommendations

The Colombian State must comply with the provisions of article 2.1 of the ICESCR and with general observation N° 3 of the Committee on Economic, Social and Cultural Rights of the United Nations – Committee on ESC Rights - (regarding the nature of state obligations), in the sense of abstaining from adopting deliberately retrogressive measures that could imply harm to the level of respect, protection and realization of the rights recognized in the Covenant.

To this effect, the Colombian State must incorporate the principle of progressiveness and compliance with basic immediate obligations that apply to it based on ratification of the ICESCR in the discussion, design, formulation and implementation of public policy measures and norms of a legislative origin that could have an impact on the content, scope and level of fulfillment of economic, social and cultural rights.

At the same time, the Colombian State must comply with constitutional mandates that order it to prioritize public social expenditure and adopt affirmative measures to benefit people who could be in conditions of vulnerability, such as low income individuals, boys and girls

and people with health problems (such as those who are carriers of HIV-AIDS) in order to ensure effective and full guarantee of their economic, social and cultural rights. Therefore, the Colombian State must immediately abolish measures such as those described in this report, which affect the conditions for satisfaction of the rights to employment under dignified and fair conditions, to housing, to potable water and to healthcare for populations that enjoy special constitutional protection.

The Colombian State should request the Committee on ESC Rights to send a mission to provide advice for implementing these recommendations, as well as final observations stemming from the Committee's examination of the fifth official report by that body, in order to advance in complying with state obligations acquired in light of the ICESCR.

1. Labor legislation

Based on diverse existing studies of the scarce effects on employment generation stemming from the enactment of act 789 of 2002, the Colombian State must review current labor legislation and modify it so that it will respect the right to employment under fair and satisfactory conditions (articles 6 and 7 of the ICESCR). In this way, the Colombian State would respect the temporary nature of retrogressive measures that are exceptionally justified and would comply with the text of act 789 itself, which established its own abolition if after two years there was no evidence of the massive generation of quality employment.

For the review and modification of labor legislation, the Colombian State must begin a consultation process with the diverse concerned actors, and must particularly ensure effective participation in discussion of the initiatives by workers and by the trade union organizations to which they belong.

2. System of transferences

In order to comply with administrative decentralization and to guarantee adequate attention to the growing needs of the Colombian population in the field of housing, health, education, potable water and basic sanitation, the Colombian State must review the current system of transferences (General System of Participations/Sistema General de Participaciones –SGP-) and return to the formula provided for in the Constitution of 1991, so as to guarantee sustained increases in the funds that are transferred to the regions. Therefore, the Colombian State must abstain from approving a new “transitory” reform (similar to those adopted in 2001 and 2007) that would once again postpone the will expressed by the Constitutional Convention to ensure a greater flow of resources in order to satisfy the needs of the population and avoid ending up in practice perpetuating a retrogressive system of transferences for guaranteeing economic, social and cultural rights.

3. Protection of intellectual property in free trade agreements

The Colombian State must revise chapter 16 of the Free Trade Agreement signed with the United States Government so that its provisions would not endanger Colombians’ access to medications and healthcare services. In case such a revision of the text of the treaty is not possible, the Colombian State must adopt all necessary measures and make maximum use of available resources to ensure that regulations for the protection of intellectual property rights contained in the trade agreement are not implemented in such a way that they would threaten the health and lives of citizens, nor the financial sustainability of the Colombian health care system. At the same time, and in the context of new treaty negotiations (such as those currently being carried out with the European Union), the Colombian State must ensure that commitments acquired in the field of trade in no way compromise respect, protection and fulfillment of the rights recognized in the ICESCR.