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The Impact of OECD recommendations and the world bank's *Doing Business Report* in the Colombian Legal System: The Challenge of ensuring regulatory quality and performance within a culture of non-compliance with rules

Bernardo Carvajal

Universidad Externado de Colombia

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Bernardo Carvajal

Paola Andrea Acosta, Editora
Calle 12 n.º 1-17 Este, Of. A-306. Bogotá, Colombia
www.icrp.uexternado.edu.co/

Presentación

Los *Documentos de Trabajo* son un espacio para la reflexión y el debate. A diferencia de otros formatos, esta serie ofrece un palco para los trabajos inacabados, para la discusión de las ideas en formación y el perfeccionamiento de los procesos de investigación. Se trata pues, de textos que salen a la luz para ser enriquecidos con la crítica y el debate antes de pasar por el tamiz editorial.

En esta colección se sumarán cinco grandes áreas del conocimiento: el derecho constitucional, el derecho internacional, la sociológica jurídica, la teoría y filosofía del derecho. Además, de poner a prueba nuestras ideas, el cometido principal de esta publicación es aportar a los debates actuales, tanto aquellos que se viven en la academia como los que resultan de la cada vez más compleja realidad nacional e internacional.

Esta publicación está abierta a todos los miembros de nuestra Casa de Estudios, profesores y estudiantes, así como a quienes nos visitan. Esperamos contar con el aporte de todos aquellos interesados en la construcción de academia.

Magdalena Correa Henao
Directora del Departamento de Derecho Constitucional

Paola Andrea Acosta A.
Editora

BERNARDO CARVAJAL*

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KEYWORDS: *Legal Indicators, Legal Metrics, Global Standards, Regulatory Reform, Regulatory Quality, Regulatory Performance, World Bank, Doing Business report, OECD, Soft Law, Hard Law, informal constraint, internormativity, non-compliance with rules, Legal Culture, Legal Consciousness, Colombian legal system, Economy, International Trade, Global Economy and Law, Formal Legal Systems, Latin America, Latin American Studies, Latin American Law and Society, Legal Structure, Legal Institutions, Official Law and State Institutions, Regulation, Reform, and Governance*

*Professor of Constitutional Law, Administrative Law and Philosophy of Law at Externado University of Colombia

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INTRODUCTION

Legal indicators, as well as global Soft Law, have become increasingly important, since they took the role of powerful informal constraints (D. North, 1981, 1990, 1999) in the regulatory reform process regarding law, economy and society. Formal rules, such as the sources of Hard Law, are more often conceived by national authorities in order to fit into global standards, and aiming to improve scores on legal indicators (B. FRYDMAN, W.TWINING, 2015; D. RESTREPO-AMARILES, 2015).

Colombia's two latest governments have supported regulatory reforms in the context of globalization. This paper aims to explain how regulatory standards portrayed in OECD documents (OECD, 2005, 2012), SMART regulations studies of World Bank´s experts (The World Bank – IFC, 2013, 2016), and legal metrics used by the Doing Business annual reports, play an influential role in designing and implementing regulatory reforms at the local level.

While trying to pursue this objective, the following question arises: ¿How can we seize the impact of those new performative sources in the legal system of Colombia? Firstly, from an empirical point of view, this article points out some relevant examples of legislative and regulatory reforms, which are entirely or partially based on the informal constraint produced by the OECD or the Doing Business reports. This array of cases is evidence of an interaction between legal norms and non-legal normativity, like managerial standards or legal metrics (B. FRYDMAN, A. VAN WAEYENBERGE, 2014; B. CARVAJAL, 2017).

Secondly, this external influence has introduced a new debate on how to ensure quality and performance of Law, leading us beyond the classical questions about legality as validity (B.CARVAJAL, 2013). Finally, from a critical and prospective point of view, this paper analyses whether those constraints could be seen as vectors of change within the Latin American

culture of non-compliance with rules (M. GARCÍA-VILLEGAS, 2004, 2012); or if they simply create the illusion of change in the Colombian legal culture.

Thus, two main questions arise: (I) how informal constraints became a source of formal regulatory reform in Colombia? And (II) could this kind of legal indicators and managerial standards make a change in terms of non-compliance with rules?

1. HOW INFORMAL CONSTRINTS BECAME A SOURCE OF FORMAL REGULATORY REFORM IN COLOMBIA?

In the Colombian instance, if we overcome a Westphalian model of Law (C. RODRÍGUEZ-GARAVITO, 2011) —where its sources come from or rely solely on the State, its sovereignty, its will and its Constitution—and follow a post-

Westphalian methodology for Law´s sources analysis within the context of Globalization (C. RODRÍGUEZ-GARAVITO, 2011) we can visualize truthful global sources of local Law that, due to the authority where they come from, its objective, or the technique in which they build on, have no formal juridical character (B. CARVAJAL, 2016).

However, these global sources must be treated as binding rules even if they are not legal rules, since they effectively have normativity. What occurs is that its normative nature is different to the one that characterize and differentiates juridical normativity (N. BOBBIO, 1960, 2016, F. SCHAUER, 2015). Therefore, its coercion is not immediately juridical but another kind of coercion, for instance it can be managerial or psychosocial, and it can be seen corroborated in practice by the strength they have in Law production, or in its complementarity or antagonism with Law, as seen with managerial standards, labels, technical norms, economic doctrines, normative ethics, legal indicators, legal rankings and nudges (S. CASSESE, L. CASINI, 2012).

Thus, in the age of Globalization, on the one hand we witness the recognition of a normative pluralism (W. TWINING, 2010, E. BERNHEIM, 2011); on the other hand, as a result of that context, we notice the establishment of extra-State originated rules (in that way, they are global sources different from the sources of Communitarian Law and International Law) which are required and solicited—directly or indirectly—by the main global institutions. These are norms that certainly become legal rules, but cannot be considered as an original creation of States (J. CHEVALLIER, 2008, 2011, J-B. AUBY, 2010, A-J. ARNAUD, 2004).

Next, we will analyze the operation and impact of two of these informal constraints, in how the formally valid legal norms are produced within the Colombian legal system.

A. Do Like TOP Reformers do: The doing business constraint

Since 2004, the World Bank Group has annually published the Doing Business Report. This is a legal indicator that "provides objective measures of business regulations and their enforcement across 190 economies" (The World Bank, 2017). Each year a ranking of countries is set up according to how easy or how hard it is to do business, depending on the type of regulation they have on 10 items that are subject to measurement (such as starting a business, dealing with construction permits, getting credit, enforcing contracts, etc.)

The goal of this Report is quite clear: "By gathering and analyzing comprehensive quantitative data to compare business regulation environments across economies and over time, Doing Business encourages economies to compete towards more efficient regulation" (The World Bank, 2017).

Moreover, this periodic data is relevant for several States because it "offers measurable benchmarks for reform" (The World Bank, 2017).

As a matter of fact, just one Doing Business report can easily go from the descriptive to the prescriptive field, through the technique of informal constraints. Indeed, its influence begins with the attachment of a measurement methodology based on a hypothetical case. Then, the country with a regulation that enables to fulfill the case in the best way, will get the highest score. Therefore, it is settled a logic of competition between nations, where the country that wish to improve its ranking place will tend to emulate the reforms made by the top-rated countries, or at least emulate those top reformers who had successful regulatory reforms, so they can climb as much as possible in the ranking (B. CARVAJAL, 2017).

As for Colombia, the Doing Business reports are the origin of a significant number of reforms in laws and regulatory acts. In fact, the 2016 report highlights that Colombia is the only country in Latin America and The Caribbean that since 2009 has performed reforms in all the fields measured in the Doing Business (The World Bank, 2016).

Regarding, the most emblematic example perhaps is the law 1676 of 2013 on nonpossessory security interests in movable property. Before this law, Colombia had no regulation that enabled banks to hand away credits backed with this type of estate asset guarantee. As for the report, the Doing Business indicator named "Getting Credit" is based on a setting where it is presuppose that the country where it is going to be invested in, has a regulation with this kind of guarantee. In fact, Colombia had the 73th place in that category during the 2014 report but after the new legislation entered into force, the country suddenly jumped to second place in the same indicator for the 2015 report (The World Bank, 2014, 2015).

What really happened here? In one year it became easier to get a credit in the Colombian financial system than in more-developed countries? For sure, it did not change the social reality regarding it. Probably it changed the perception that was held from the regulation. Logically, the goal of the Doing Business based on the informal constraint of the indicator "Getting Credit" was accomplished, as Colombia changed its legislation and it brought it closer as much as possible to the standard promoted by the World Bank.

Having said that, one thing is "to be" and another one is "to look like". There is a huge difference between "doing what the best countries do" to improve in a ranking position like the one made by Doing Business, and "becoming one of the best countries", in regard of having a regulatory frame with an effective application that promotes and makes easier to do business.

All in all, the improve in perception of the regulatory frame of the country can be something positive, from a social ontology, due to the creation of a favorable cognitive context to change believes on social reality (SEARLE,

1995, 2010). However, this favorable context for institutional change through law cannot be mistaken for reality itself.

B. Follow the best practices (and we'll choose you): The OECD'S promise

According to the 1th Article of the Convention on the Organization for Economic Co-operation and Development signed in Paris in 1960, the OECD has three main goals: "(a) to achieve the highest sustainable economic growth and employment and a rising standard of living in Member countries, while maintaining financial stability, and thus to contribute to the development of the world economy; (b) to contribute to sound economic expansion in Member as well as non-member countries in the process of economic development; and (c) to contribute to the expansion of world trade on a multilateral, non-discriminatory basis in accordance with international obligations".

Based on the 5th Article of this Convention, to achieve those goals, the OECD can: "(a) take decisions which, except as otherwise provided, shall be binding on all the Members; (b) make recommendations to Members; and (c) enter into agreements with Members, non-member States and international organizations". Likewise, countries that want to be part of the OECD must obtain first an approval in order to begin the process of acceptance, where they must then obtain the approval of 24 thematic committees experts (regarding the topics we can mention: investments, international trade, corporate governance, financial markets, insurances and retirement pensions, taxes, competency, public governance, regulatory quality, etc.) If this stage of monitoring, negotiation, commitments and local reforms, is successfully approved, the country could be accepted into the organization.

In this set up, there are several managerial standards suggested by the OECD to the candidate country, mainly through the technique of recommendations. These recommendations become true informal constraints of mixed nature, even though they are voluntary, the country commits to enforce them as if they were binding (S. CASSESE, L. CASINI, 2012). Therefore, if a country wants to obtain the "OECD member" label, it makes sense it will do as many regulatory reforms as possible in each of the fields that the organization assesses.

In the Colombian instance, the administration of president Santos requested in 2011 to start the accession process to the OECD. This process officially started in May 2013 and to date, there are only two approvals left out of the 24 needed from the committee evaluators. Along this way, several juridical rules have been reformed in many areas of Public Administration aiming to fit into the standards set by the OECD.

Among several examples regarding it, it must be said that: a) the National Development Plan 2014-2018 expressly included a number of commitments with the OECD; b) in October 2014 an explicit National Policy on Regulatory Reform and Regulatory Impact Analysis was adopted; c) in January 2015 a Decree was issued to enable insurance companies so they would be able to cover the risk of life-contingent annuities and pensions; d) in September 2015 another Decree was issued to guarantee the stability of State agents in charge of enforcing the rules, in terms of limited companies, industry, trade, tourism and financial institutions; e) in April 2016 a new National Policy on Internet Safety was adopted; f) in February 2017 a Decree was issued to improve participation and transparency to the regulatory process.

Hence, these and many other rules were issued with the main goal being the accession of Colombia to the OECD. Thus, it can be shown that the recommendations made to countries, which although are not members and are in admission process, are a powerful tool in the process of standardize local Law in a global environment.

Henceforth, is time to question if all of these formal sources of law, that come from these particular kind of global informal constraints, can led to a reliable institutional change in Colombia with goals set in political, economic and social development. Accordingly, we will focus on the State's behavior in a cultural context of generalized non-compliance with rules.

1. COULD THIS KIND OF LEGAL INDICATORS AND MANAGERIAL STANDARDS MAKE A CHANGE IN TERMOS OF NON-COMPLIANCE WITH RULES?

To try and answer this difficult question, we will take the case of the set of strong regulatory reforms that the State has established aiming to provide the Colombian legal system with a normative system that can guarantee regulatory quality; all of this within the frame of the eventual process of admission of Colombia to the OECD.

First of all, this will enable to establish that the Colombian legal system has been provided with sophisticated normative tools and that they are applied in the most developed western countries. Secondly, this example later will be subject to a critical review, in order to find out if there are reasons to consider that the Colombian State and particularly its public authorities and civil servants would take seriously this chance for institutional change.

A. An empirical example: Colombian reforms on regulatory quality based on global sources of law

Any external observer, slightly naïve and poorly informed on the cultural particularities of Colombia and Latin America, would expect that the set of

legal transplants (A. WATSON, 1993, D. LÓPEZ-MEDINA, 2004) made to adapt the principles and recommendations of regulatory quality of the OECD, will be successful and will reinforce the national legal system performance. In fact, rules concerning regulatory quality, emphasizes on the effectiveness of Law and not on the purely formal validity of the regulation (B. Carvajal, 2013). Hence, the adoption of these set of rules and principles, create high expectations of institutional, economic and social change.

Regarding regulatory quality, the OECD started in 1997 the study and disclosure of the topic, and then since 2005 (with the *Guiding Principles for Regulatory Quality and Performance* issue) developed a significant expertise for methods, standards and techniques formulation dedicated to that goal. Particularly, to every country that intends to guarantee regulatory quality, the OECD recommends: 1) Adopt the Regulatory Impact Analysis – RIA method; 2) Include affirmative actions to support the small and medium enterprises; 3) Analyze the cost-benefit ratio by studying the proportionality of all administrative measures; 4) Guarantee the gradual review of issued regulation (ex post RIA); 5) Reduce the number of current regulations; and 6) Create an authority in charge of administrate and coordinate the regulatory reform in all country's territory.

Colombia has been a compliant country with the OECD in this subject, as lately it has been able to incorporate within its legal system, the following items:

i) In January 2012, that is, a year later after requesting the start of the process of admission to the OECD, a Decree-Law was issued in order to appoint a State Agency (Administrative Department of Civil Service – DAFP in Spanish) with the role of manager of the standardization, the simplification and the coherence of the regulation. This agency has also the role of coordinator of the regulation authorities of all economic and social areas. Furthermore, in this legal mechanism it is required a minimum of RIA because the DAFP must authorize all the administrative procedure and new regulations based on the ex-ante evaluation technique (B. CARVAJAL, 2013).

ii) In 2014, the Commission for Normative Harmonization was created and formally suppressed around ten thousand rules that were scattered around. The result of this task was the issuing of 21 unique regulatory decrees from each field of the Public Administration, the Economy, and the Social life.

iii) In 2014, in the same way, an Administrative Soft Law (CONPES document) was adopted in order to fix the normative foundations

for a comprehensive public policy regarding regulatory quality for all of the Colombian State.

iv) Moreover, through a 2017 Decree, the Government of Colombia partially developed the administrative procedure for the management of rule-making, based on a 2011 Law that was setting the ground for it (Law 1437 of 2011).

Having said that, the institutional and operational capability of the state agency has not changed since 2012, when it was supposed to lead the regulatory quality, according to the rationalization of administrative procedures and the ex-ante Regulatory Impact Analysis. The increase of its statutory powers and duties implied a very slight reform in its structure, but it has not been reflected upon an increase in its budget, nor in its specialized personnel in these topics. Therefore, the influence and governance power of this agency is still limited and hence, with limited applicability in reality based on the 2012 Decree-Law.

Regarding the issuing of the 21 (now 22) unique decrees to regulate the different fields of the Public Administration, it can be seen that only from the formal point of view, scattered rules were suppressed and simplified, since they are compiler decrees that do not work towards a normative rationalization. The outcome we have now is one "Big-Decree" with the content of several decrees. Furthermore, we must point out that this mechanism did not stop de excess of regulation, because it can be said that a year later after the adoption of these Unique Decrees, there were 142 new decrees issued that are going to increase the size, complexity and hard understanding of the 22 basic decrees (C. GUTIÉRREZ, 2016).

In addition, even though the public policy regarding regulatory quality contained in the 2014 Soft Law tool is well conceived to improve the institutional performance and effectiveness within the National Government, it must be legally and administratively implemented. Due to its extra-legal nature, its mandatory role will depend greatly on the favorable perception of the rulers. On the other hand, this public policy does not take care of the regulatory quality problem in the departments, districts and municipalities where it is precisely where the country is failing in obeying the managerial standards of the OECD.

Yet, the scenario is still encouraging; however, the naivety has limits and we should ask ourselves now, in an abstract and overall way, if there are other kinds of reasons to be afraid that Colombian authorities would not be able to fully comply with this new regulatory frame.

B. A hypothetical problem: are there reasons to fear that colombian authorities won't be able to comply with this regulation?

Without being pretentious, in this final section we will briefly summarize reasons that would enable to think that there is a certain risk of non-compliance of the regulation we talked about previously. Next, we will not focus on the private sector (citizens and enterprises). We will focus on state authorities, which taken within a cultural context where non-compliance with rules prevails, reflects that they cannot overrun this context. In fact, as recalled by Cicero "Just like those who engage in the public sphere, the rest of the citizens are alike"; in other words, he reminds us that people are generally virtuous or corrupt as their rulers are.

In almost all Latin America lingers an historical problem dating to colonial times and regarding rules, due to these being "observed (formally) but are not complied (materially)". The socio-legal studies as well as the law and development studies have analyzed this phenomenon, frequently considered to be a cause of underdevelopment (C. NINO, 1992, 2005, M. GARCIA-VILLEGAS, 2004, 2009, 2012, K. ARAUJO, 2009).

Probably, the rulers are part of the group of biggest noncompliance actors in Colombia and in Latin America (M. GARCÍA-VILLEGAS, 2009). Their rationality, considering the political agent, usually is no evaluative (regarding for instance, believing in an ethical value) but instrumental (adapting all means to the current objectives) (M. WEBER, 1978, 1992).

That is why, despite the quality of the OECD standards on regulatory quality, there is a problem in the ultimate goal or efficient cause for the adoption of this type of regulation in Colombia: basically, it is used just to advance favorably in the process of membership in the OECD. This makes it difficult to take seriously by some civil servants and even leads to deny its legitimacy by others who see it as an imposition.

In other words, there is a risk of, in one hand, some politicians and civil servants saying they observe the OECD recommendations (so they can become a member country and get the label) despite having no interest at all in obeying the regulatory upgrade once the membership is acquired. On the other hand, there is a risk that other politicians or civil servants deny the legitimacy (due to ideological, democratic reasons, for example) of the Colombian regulation for regulatory quality regarding its background. There has been already studied that the lack of legitimacy is one of the motives of non-compliance with rules, as it generates a unfavorable context to believe in them as good reasons to improve the political, economic and social reality (T. Tyler, 2006, 2014).

All things considered, there is a risk of having a paradox: the rules regarding regulatory quality are interested in the normative efficacy and in the

economic, social and institutional efficiency of Law; however, the way it is originated and how they reach Colombia could be the cause of efficacy and efficiency loss from the same rules regarding regulatory quality.

CONCLUSION

We will end this paper with three brief general and prospective reflections:

1. If we borrow some elements from semantics and pragmatics (F. RÉCANATI, 2004, P. STRAWSON, 1970, 1997) we could say that the permanent sense of a legal indicator such as the Doing Business Report or the OECD's managerial standards, belongs to the general definitions of what they are and what they pretend to be. However, the specific meaning that those legal metrics and standards can have in praxis depends on the context where the final meaning is developed. Therefore, in the Colombian instance and probably in the Latin American one, it is required a high dose of empiricism and pragmatism for identifying the specific manifestations of these global informal constraints in the local regulatory reform. Thus, there is a need to identify the context where the national expressions of Global Law are going to take place in, like when we talk about a culture of non-compliance with rules.

2. As for the risk or risks identified within this context, there are many approaches to take: some will underestimate the goods of these informal constraints. Others will confirm their unhappiness with local governments. Others will try to be more proactive, for instance, thinking in adjustments to the devices used by global and local institutions, likewise, to complement the diagnosis and search for solutions to the problem of non-compliance with Law, based on other legal indicators and standards that will focus on measuring an effective Rule of Law, the performance rate of local authorities and regarding the level of efficacy of the regulations (see WJP Rule of Law Index, specially Factor 6 on "Regulatory Enforcement").

3. Therefore, the governance by legal metrics and standards requires stimulating the efficacy of rules and not only its formal validity. Only by this way, the impact of the informal constraints will be favorable for the development of a country. Then, to conclude, we can leave as open the next questions: How far should the legal metric get? They have already come from the descriptive to the prescriptive stance, and in real life they have allowed the creation of perception of what it measures and tests. Should we now address them a transformation role of social reality?

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