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Regulatory Agencies and Courts in the South: The Overlaps in Colombian Water Regulation

Julián Daniel López-Murcia

Abstract: How can we explain the emergence and evolution of the overlaps between the Colombian Water and Sanitation Regulatory Commission (CRA) and the Constitutional Court? This paper shows the dominant literature's limitations in explaining these overlaps. By contrast, I argue that the "regulatory enterprise" approach developed by Tony Prosser (2010) and the theory of "institutional isomorphism" explained by DiMaggio and Powell (1991) are better equipped to offer plausible explanations. Moreover, I hypothesize that the lack of understanding regarding the differences between the role of a regulatory agency in developed countries and the role of a regulatory agency in Colombia is critical in these overlaps. The specific conditions that determine these differences are a precarious legislature, a "thick" constitution that includes several social rights, and an activist judicial enforcement of these rights. This qualitative research does not allow for generalizable conclusions. However, the intention of this study is to provide insights into the role and specific challenges for a regulatory agency in developing countries. Furthermore, this case study seeks to demonstrate that regulation researchers must focus on the political context to develop tools appropriate for evaluating regulatory agencies outside the developed world.

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Keywords: Colombia, regulatory rationales, regulatory enterprise, institutional isomorphism, regulatory agency, right to water

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Introduction

The core of this paper is a case study of the overlaps between the Colombian Water and Sanitation Regulatory Commission (CRA – Comisión de Regulación de Agua Potable y Saneamiento Básico de la República de Colombia) and the Colombian Constitutional Court regarding water service disconnection issues. Based on the Public Utilities Statute (Law 142 of 1994), the CRA has issued a number of regulations that oblige providers to disconnect water service when there is no payment during a three-month period. However, typical claims brought before the Constitutional Court have been against a provider by a single petitioner arguing that the provider deprived him or her of the minimum essential level of water because of failure to pay. In the majority of these cases (mainly related to low-income families), the Court has ruled in favor of the claimant based on General Comment 15 of the UN Committee on Economic, Social and Cultural Rights. These rulings have been reproduced by a number of judges around the country. The CRA's regulations are not under the control of the Constitutional Court, but rather the judicial review of the Council of State (Colombia's highest contentious administrative tribunal). These overlaps have affected not only thousands of poor families who have to make a claim before a judge to protect their right to water, but also water providers – who have not received clear directions regarding water service disconnection issues.

The overall question posed by the study is as follows: How can we explain the emergence and evolution of the overlaps between the CRA and the Constitutional Court?

To respond to this question, this paper mainly draws on the notions of “regulatory rationales,” “regulatory enterprise” and “institutional isomorphism.” Regarding regulatory rationales, it is possible to identify perspectives both against and in favor of their plurality. These perspectives are also relevant with regard to the understanding of the regulator's role and legitimacy (see Majone 1999; Dubash and Morgan 2012). For instance, Majone (1997) rejects any other regulatory rationale different from “economic efficiency.” He states that a “nonmajoritarian body” would lose its legitimacy if it were to go beyond this rationale (Majone 1997). In contrast, Prosser (2006) states that this traditional public-interest explanation of regulation as a “second best” to market allocation does not properly explain current regulatory practice. He identifies four regulatory rationales: “efficiency and consumer choice,” “human rights,” “social solidarity” and “participation and deliberation” (Prosser 2010). Furthermore, regulatory processes should not be seen as “the application of rules laid down by a principal for the regulatory agent to enforce,” but as a regulatory enterprise with “different levels of government” (Prosser 2010: 8). Finally, institutional isomorphism is a notion

widely used to explain the diffusion of institutional designs and regulatory instruments (see Gilardi 2002, 2005; Thatcher 2002, 2007; Baldwin, Cave, and Lodge 2012). This is based on the concept of isomorphism described by Hawley as a “constraining process that forces one unit in a population to resemble other units that face the same set of environmental conditions” (DiMaggio and Powell 1991: 66).

This qualitative research does not allow for generalizable conclusions. Nonetheless, the intention of this paper is to provide valuable insights into the particular role and challenges for a regulatory agency in developing countries (or even emerging economies) where the legislature functions badly, there is a “thick” constitution that includes several social rights, and activist judicial enforcement – such as in Colombia. Regarding the creation of independent regulatory agencies (see Jordana and Ramió 2010; Thatcher 2002, 2007; Gilardi 2002, 2005) and thick constitutions (see Sunstein 2001; Scheppele 2005; Langford 2009; Landau and López 2009), Colombia is not an isolated example. Similar conditions can be found in Hungary, Bulgaria and the Czech Republic in Eastern Europe; Argentina, Brazil, Chile, Peru and Venezuela in Latin America; and to some extent India in Asia. However, the activist judicial enforcement of social rights developed by the Colombian Constitutional Court is particularly higher than the judicial enforcement in these countries (Landau 2012).

This paper is organized as follows: Part 1 provides an explanation of the notions used here (i.e., regulatory enterprise, regulatory rationales and institutional isomorphism) to analyze this case study instead of the specific literature on the relationship between regulatory agencies and courts or other more dominant approaches such as capture theories. Part 2, according to Prosser’s approach, presents the “interinstitutional mapping” and “normative mapping” of the CRA and the Constitutional Court. Part 3 describes the origin and evolution of the overlaps between CRA regulations and the Constitutional Court rulings regarding water service disconnection issues. Part 4 applies Prosser’s notions and the institutional isomorphism concept to the Colombian case and explains why (a) there are overlaps between regulatory rationales, (b) the CRA’s regulatory rationale is the product of different episodes of institutional isomorphism, and (c) the CRA’s position regarding these overlaps is not sensible (even though the dominant theories on the regulator’s role would find it appropriate) given Colombia’s institutional context. Part 5 concludes by suggesting that the role of a regulatory agency is not the same in developed countries as it is in Colombia, because of the radical differences in the configuration of political institutions.

1 Exploring beyond the Limitations of the Dominant Literature on the Regulator's Role

Bearing in mind the difficulties in using the specific literature on the relation between regulatory agencies and courts, this case study should be approached in other ways, testing different types of regulatory theories. Some of these theories are not equipped to build an adequate explanation for the overlaps between the CRA and the Constitutional Court or the regulator's role in a developing country. In this sense, the main purpose of this part is to explain (a) why some of the most influential explanatory theories, such as capture theories, fail to take into account key factors of this case study and (b) the reasons that support the use of the notions of regulatory rationales, regulatory enterprise and institutional isomorphism. This section uses the classification of the types of regulatory theories presented by Baldwin, Cave, and Lodge (2012) in the following four categories: "interest group," "public interest," "institutional" and "power of ideas explanations" theories.

Most of the work on the relation between regulatory agencies and courts is based on the assumption that courts control agencies through their judicial review (see Baldwin and McCrudden 1987; Sunstein 1989, 2006; Eskridge and Baer 2008; Mashaw 2007). Within this literature – particularly with regard to the differences in interpretation of agency statutes between agencies and the judiciary in the United States – Lemos found that "judges, as lawyers, may have different intellectual priorities than agency policymakers" and that "judicial interpretations are likely to be narrower than those of agencies" because the Supreme Court "was heavily dependent on specific indications of congressional intent," while the agency (the Equal Employment Opportunity Commission) was "focused on the overall purpose or 'mission' of the statute – which is, after all, the agency's *raison d'être*" (Lemos 2010: 434).

The applicability of this literature in the analysis of this case study is limited. First, CRA regulations are not under the judicial review of the Constitutional Court. Second, the role of courts is not the same in developed and developing countries, because of the radical differences in the configuration of political institutions, such as the type of legislature (see Scheppele 2005; Landau and López 2009; Landau 2012). These differences are particularly evident between the United States and Colombia (see Landau and López 2009; Landau 2012). The limitations of this literature have also been pointed out by Thiruvengadam and Joshi (2012) regarding Indian telecom regulation. Still, this literature offers interesting findings about the possible "inbuilt" differences regarding statutory interpretations between the courts and agencies, which can be compared with the findings of this paper.

To analyze this case study beyond the limitations of said literature, it is necessary to explore different types of regulatory theories. Within the hegemonic interest group theories (see Dal Bó 2006; Piori 2011), the works of Stigler (1971), Peltzman (1989) and Wilson (1980) are particularly representative (Baldwin, Cave, and Lodge 2012). Stigler explains that regulation does not seek the public interest, but that “as a rule, regulation is acquired by the industry and is designed and operated primarily for its benefits” (Stigler 1971: 3). The regulator is captured by organized interests at the expense of a diffused group (Baldwin, Cave, and Lodge 2012). Similarly, Peltzman (1989) explains that deregulation cases are generally processes promoted by the industry when regulation affects the wealth base on which the regulatory equilibrium is based. Wilson (1980) recognizes the “capture” of the regulator when there is a confrontation between “concentrated benefits” and “diffused costs,” which he calls “client politics.” However, he also explains that there are three other possibilities where there is no capture: “interest group politics” (concentrated benefits and costs), “majoritarian politics” (diffused benefits and costs) and “entrepreneurial politics” (diffused benefits and concentrated costs).

The interest group theories are ill-equipped to explain the Colombian case. From the theories developed by Stigler (1971) and Peltzman (1989), the capture of the CRA and Congress by the water and sanitation services industry would be the main explanation for CRA regulations. However, they are not capable of fully explaining the Colombian water and sanitation services regulation because they do not analyze the role of the Constitutional Court and are not able to explain the legislative dysfunction that takes place in Colombia beyond the possible capture by the industry (see Landau and López 2009). For instance, they cannot explain why the Constitutional Court’s rulings support consumers’ claims rather than the industry’s interests. Similarly, Peltzman’s theory on deregulation cannot explain why the industry would capture the CRA and Congress but would not capture the Constitutional Court.

Alternatively, according to Wilson’s theory (1980), the Colombian case could be an example of entrepreneurial politics. This is because there are concentrated costs (water providers) and diffused benefits (low-income consumers) regarding water service disconnection issues. In this sense, Colombian regulation would not merely be the product of a regulatory capture. However, in the Colombian case, there is no “entrepreneur” that directs an organized coalition, but rather a number of individual claims from members of the “disorganized” group of water consumers. In sum, interest group theories are ill-equipped to analyze this case study because they do not real-

ize the “role played by institutional arrangements in the shaping of regulation” (Baldwin, Cave, and Lodge 2012: 48).

According to public interest theories, regulation seeks “the protection and benefit of the public at large” (Hantke-Domas 2003). Within this group of theories, regulation is commonly seen as a response to a market failure (McVea 2005). However, beyond that traditional understanding, Prosser (2010) identified four positive-normative regulatory rationales in England. The efficiency and consumer choice rationale emphasizes the “lifting of regulatory burdens which prevent the free operation of markets” (Prosser 2010: 13). It “views citizens solely in their capacity as consumers” (Prosser 2010: 14). According to the human rights rationale, the regulator protects service users’ rights directly “through developing standards reflecting these rights and monitoring their application through inspection” (Prosser 2010: 14). Here, “the very nature of a citizenship right means that [it] is universalizable” (Prosser 2010: 15). The social solidarity rationale “starts from the duties of the community to secure inclusiveness, resting both on a moral sense of equal citizenship and a more prudential goal of minimising social fragmentation,” – for example, the assurance of universal service (Prosser 2010: 15). According to the participation and deliberation rationale, the regulator should provide “a forum in which participation and deliberation can take place” and the “key characteristics are regulatory transparency, regulatory consultation, accountability, and openness in general” (Prosser 2010: 17).

Additionally, Prosser (2010) explains that regulatory processes should be seen as a regulatory enterprise with different levels of government. In this way, the same author explains that regulators “have responsibility for both economic and social or distributive goals, which are anyway inseparable” and that “regulatory independence is not the key principle of institutional design, because regulation is a collaborative enterprise between regulatory agencies and other government bodies” in a “regulatory space” (Prosser 2010: 8). From this perspective, “capture is less of a danger than lack of regulatory responsiveness” (Prosser 2010: 6).

From the public-interest perspective, the overlap between the CRA and the Constitutional Court would be a consequence of their different understandings of public interest. The CRA and Congress consider the market to need a rule that orders the automatic disconnection of water service when there is no payment. As Majone (1997) prescribes, they attend only to the regulatory rationale of economic efficiency. In contrast, the Constitutional Court understands that regulation is not only guided by economic rationales, but also by substantial principles beyond market values (see Prosser 1999 and 2010; Sunstein 1990; Feintuck 2010). Therefore, to understand the over-

laps between the CRA and the Constitutional Court and the consequent role of the CRA, it is necessary to analyze the different regulatory rationales of Colombian water and sanitation services law.

In developing countries, such as Colombia, the plurality of regulatory rationales (Prosser 2010) is often explicitly recognized in the constitution. As a consequence of the common understanding that ordinary politicians cannot be trusted to achieve the changes that these societies hope for (see Sunstein 2001), most of these countries have thick constitutions (which include several social rights and specific economic mandates) and create constitutional courts to ensure that their mandates will have force (Scheppele 2005; Landau and López 2009). This phenomenon has led to the “juridification of regulation,” defined by Padgett (1992: 205) as a “tendency to express ethical, social and economic issues in the form of legal or constitutional precepts, and to resolve those issues through the judicial process.” Among the most developed countries, probably only Germany shares this tendency. For instance, in a paper on nuclear regulation, Padgett (1992) explains that in contrast to the pragmatic and flexible regulatory regimes in Britain and France, the German regime is characterized by a juridification of regulation.

However, from Prosser’s perspective, the problem is not only the lack of recognition by the CRA and Congress of the plurality of regulatory rationales, but also their hierarchical understanding of regulation. The emergence of overlaps between the CRA and the Constitutional Court is not uncommon in utilities regulation (see Prosser 2010). The real challenge is to find a way to develop relations between the different actors in the regulatory space toward a regulatory enterprise. In sum, Prosser’s theory on regulatory rationales and the notion of regulatory enterprise are useful not only to understand this case study (with all of its actors) but also to identify a normative state of the world. However, it is not similarly useful to explain the origin of the current regulatory rationales of the CRA beyond its normative mapping.

The institutional theories are based on the assumption that “institutions structure actions, and perhaps preferences, and are themselves shaped by the actions of individuals and organizations” (Black 1997: 74). Within this trend, McCubbins, Noll, and Weingast (1987) developed one of the most influential works on regulatory agencies in the literature (Baldwin, Cave, and Lodge 2012). They explain that a principal–agent relationship emerges between the enacting coalition (Congress and the president) – the principal – and the created regulatory agency – the agent – (McCubbins, Noll, and Weingast 1987). The interests and objectives of the bureaucrat agents may be different from those of the coalition (McCubbins, Noll, and Weingast 1987). However, the enacting coalition can control agencies through “police

patrols” (constant monitoring), “fire alarms” activated by affected constituencies, and administrative procedures (McCubbins, Noll, and Weingast 1987).

In the institutional analysis of Hancher and Moran (1989) and Black (2001), the same determinism of the interest group found in the works of Stigler and Peltzman is not present. As Black explains (1997: 77), “the capture thesis, which is rooted in neoclassical economics, has to be modified if the other factors, for which neoclassical economics has no room, are to operate.” Moreover, the concepts of regulatory space (Hancher and Moran 1989) and “decentered regulation” (Black 1997, 2001) explain that diverse public and private actors share the regulatory authority (there is no monopoly) and emphasize the central role of the communication between them. In this respect, as Scott (2001: 331) explains, a regulatory reform

might then focus not exclusively, or even mainly, on a single organisation, but rather on the whole configuration of resources and relations within the regulatory space. [...] This conception of organic reform supports normative approaches to law and regulation which argue for greater responsiveness or reflexivity as an alternative to the dead end of legalisation or juridification.

These institutional theories offer interesting possibilities for a better application of Prosser’s notions to this case study. From the institutional perspective developed by McCubbins, Noll, and Weingast, the overlap between CRA regulations and Constitutional Court rulings could be a principal-agent problem between the CRA and the “enacted coalition” – for example, a lack of monitoring or a problem in the appointees. However, the CRA is, in fact, merely attending to the Public Utilities Statute prepared by the government and approved by Congress. In any case, it is relevant to explore the relation between the agency and the members of the coalition, or even a different principal-agent problem between the enacted coalition and its constituents. Moreover, the works of Hancher and Moran (1989) and Black (2001), which to some extent support the notion of regulatory enterprise (Prosser 2010), are particularly relevant for a better understanding of the plurality of actors with regulatory authority regarding the water service disconnection issues in Colombia and the number of complexities of their communication.

Finally, the gap in Prosser’s theory in explaining the origin of the current regulatory rationales of the CRA can be filled by the concept of institutional isomorphism (see DiMaggio and Powell 1991). There are three types of institutional isomorphism: “coercive,” “mimetic,” and “normative.” Coercive isomorphism results from economic, financial, political or legal pressures by other organizations upon which the organization is dependent (DiMaggio and Powell 1991; Thatcher 2007). Mimetic processes are derived

from uncertainty. The organizations model themselves on organizations that “they perceive to be more legitimate or successful” (DiMaggio and Powell 1991: 70). These processes “can take the form of attempts at rational analyses of overseas experiences and their applicability domestically” (Thatcher 2007: 32–33). Normative pressures stem from the “collective struggle of members of an occupation to define the conditions and methods of their work, [...] and to establish a cognitive base and legitimation for their occupational autonomy” (DiMaggio and Powell 1991: 70). In this way, transnational epistemic communities “can be important vehicles for transmitting norms across nations” (Thatcher 2007: 32).

Therefore, the main explanation of the origin of the regulatory rationales applied by the CRA is not necessarily its own understanding of the public interest or the product of a regulatory capture. The regulatory rationales’ origins are explained as a consequence of resembling other units’ responses because of external pressures, uncertainty or the action of epistemic communities. This hypothesis is plausible keeping in mind that institutional isomorphism has been widely used to explain the diffusion of institutional designs and regulatory instruments (Gilardi 2002, 2005; Thatcher 2002, 2007; Baldwin, Cave, and Lodge 2012). Thatcher explains that DiMaggio and Powell analyzed “organisations rather than national institutions, but their insights can be applied to internationalisation and sectoral economic institutions” (2007: 31). Additionally, Meyer explains that peripheral countries, such as Colombia, experience more isomorphism than their central peers (DiMaggio and Powell 1991). For example, regarding Latin America, Drake (1989) explains that since the 1920s, regulation based on separate agencies was “strongly influenced” by North American designs, while Levi-Faur (2003) argues that the processes of privatization and liberalization were “less voluntary” than in Europe. Moreover, Jordana and Levi-Faur (2005) highlight the significant role of “normative isomorphism” in the creation and reform of several regulatory agencies in the same sector across different countries in Latin America from 1979 to 2002.

2 Mapping the Positions of the CRA and the Constitutional Court

In each one of the case studies analyzed in his book, Prosser (2010) maps the position of the regulators within the regulatory space based on the notions of regulatory rationales and regulatory enterprise. He uses two methods of mapping: interinstitutional mapping and normative mapping. The former examines the regulator’s relations with other institutions; the latter, the “patterns of norms governing each regulator, for example its statutory

duties and corporate objectives” (Prosser 2010: 7). The main purpose of this section is to present a similar analysis regarding the CRA and the Constitutional Court as well as to highlight the impact on Colombia’s water regulation of the precarious functioning of the legislature, the thick constitution and the activist judicial enforcement of social rights.

2.1 Interinstitutional Mapping

Historically, Congress has represented few of the Colombian social groups other than rural bosses (Landau and López 2009; Gutiérrez 2010). It has failed to initiate policy proposals, supervise major policy proposals originating from the executive, and check the implementation of these policies (Landau and López 2009). This legislature has not been responsive to the main social issues, but has merely increased pork barrel and other individual benefits (such as bureaucratic quotas) that it can obtain from the executive (Landau and López 2009). Generally, presidents have unilaterally dominated the policy-making process (Landau and López 2009).

The CRA and the Constitutional Court were created during one of the most reformist periods (1990–1994) in Colombia’s recent history. In 1990, César Gaviria was elected president. He was a young economist and former minister of finance who favored market-oriented reforms, such as the removal of trade barriers and critical privatization processes (Biglaiser and Brown 2003). Gaviria called for National Constitutional Assembly elections in 1991 (Falleti 2010). He also appointed to the highest positions young professionals who had been educated abroad and favored the institutional models from Britain and the United States (Vélez 2010).

The Constitutional Assembly created the Constitutional Court to ensure that the Constitution would have powers even if traditional political actors were not reformed (Landau and López 2009; López 2010; Landau 2012).¹ In such an environment, the Colombian Constitutional Court has become one of the most activist courts in the world (Landau and López 2009). As Landau and López explain (2009: 57), the Constitutional Court

has acted as a replacement for the legislature on various issues and at various times, by injecting policy into the system, by managing highly complex, polycentric policy issues, and by developing a thick construct of constitutional rights that it uses to check executive power.

1 With the same purpose, the Constitution provided that international treaties on human rights constitute relevant criteria for interpreting constitutional rights (see López 2010; Nieto 2011).

This role has seen the Constitutional Court involved in serious confrontations not only with the executive, but also with the Supreme Court and the Council of State (Colombia's highest contentious administrative tribunal) (Uprimny and García 2002). In turn, some members of Congress have learned that the Constitutional Court's role allows them to avoid the political costs involved in monitoring legislation for constitutionality (Landau and López 2009).

The technocrat team led by Gaviria created the CRA in 1992 through a presidential decree.² The CRA's structure and functions were improved by Law 142 of 1994, also known as the Public Utilities Statute. With a small degree of foreign input, the Public Utilities Statute's bill was prepared by the National Planning Agency (DNP) – which hired Hugo Palacios, a Colombian lawyer and economist as well as ex-minister of finance and former executive director of the Inter-American Development Bank (for Colombia and Peru), to lead the drafting of the bill. In undertaking this task, Palacios drew upon his own experience (e.g., dealing with power-sector debts), studies prepared by DNP economists (generally grounded on the work of Alfred Kahn) and works prepared by a group of economists from England,³ the United States and Australia (Vélez 2010). Regarding institutional design, this bill mainly focused on the organization of “independent regulatory agencies” (Vélez 2010). As Palacios stated,

there was no ‘model’ that we would have adopted or wanted to follow and, much better, we would have wanted to do something that would attend to our experiences but, of course, we could not have invented the world, nor things already invented.⁴

The bill proposal did not suffer substantial modifications by Congress (Vélez 2010).

Currently, the CRA is composed of the minister of housing (who also acts as president of the CRA), the director of the DNP, the minister of health, and four commissioners appointed by the president. The Domestic Utility Services Superintendency (SSPD) participates in the CRA with voice but without vote. Since its creation, the majority of these commissioners have been engineers and economists (Castalia 2005); at least one-third have

2 National Decree 2152 of 1992, articles 4, 59 and 60.

3 Hugo Palacios, external advisor who prepared the Public Utilities Statute's draft and current managing partner of the Colombian leading law firm regarding public utilities regulation, interview 4th February 2012.

4 Hugo Palacios, interview 4th February 2012. In Spanish, he said: “No hubo un ‘modelo’ que hubiéramos adoptado o querido seguir y, más bien, quisimos hacer algo que consultara nuestras experiencias pero, por supuesto, no podíamos tampoco inventar el mundo ni cosas ya inventadas.”

not been technocratic experts on water issues, but persons well connected to politicians (Castalia 2005). During the interviews, both a commissioner⁵ and the current director of institutional relations at Colombia's biggest public utility⁶ highlighted the CRA's limited financial resources to develop its tasks.

The Constitutional Court cannot directly control CRA regulations; they are under the judicial review of the Council of State. Therefore, to some extent, the formal relation between Constitutional Court rulings and CRA regulations is mediated by the Council of State.

Finally, the relation between the CRA and Congress reflects the critical dysfunction of the Colombian legislature. The commissioners interviewed⁷ explained that, at this time, the CRA does not have an active relationship with Congress beyond the application of the current Public Utilities Statute. In fact, since 2005, the number of requirements to report back to Congress has substantially decreased.⁸ This limited communication was confirmed by the legal director of the SSPD.⁹ She explains that most members of Congress are unaware of the functions of the CRA. Thus, in several hearings, they have mistakenly compelled the SSPD and ministries to report on tariffs or other CRA issues. Moreover, it is common for members of Congress to prepare policy proposals without CRA information. In general, these draft proposals have inadequate technical support and foster the immediate decrease or limitation of public utilities rates (López and García 2008) or the increase of taxes that public utilities have to pay. Consequently, it is possible to argue that the CRA is not particularly relevant for Congress beyond the general possibilities of obtaining bureaucratic quotas, like in any other agency.

2.2 Normative Mapping

In the 1991 Constitutional Assembly, the main issues regarding public services were the growing external debt of the power sector and the crisis of the centralized and politicized system of water and sanitation provision (Vélez 2010). In such an environment, Colombia's thick Constitution ensured (a) the liberalization of public services as a general rule (art. 365); (b)

5 Commissioner, interview 3rd April 2012.

6 Rubén Darío Avendaño, former public official at the DNP who worked on the Public Utilities Statute's draft, former CRA commissioner and current director of institutional relations at Empresas Públicas de Medellín (Public Utilities of Medellín), interview 18th July 2012.

7 Three of the four current commissioners, interviews 3rd April, 5th June and 12th June 2012.

8 Commissioner, interview 5th June 2012.

9 Marina Montes, legal director of the SSPD, interview 19th April 2012.

efficiency, universal service and the protection of private providers against expropriation as substantial principles of public utilities regulation (art. 365); (c) that public utility rates addressed the criteria of cost, solidarity and income redistribution (art. 367); (d) that subsidies only apply to low-income people (art. 368); (e) the right of consumers to audit providers owned by the Colombian state (art. 369); and (f) the creation of an agency (SSPD) charged with monitoring and enforcing utilities compliance (art. 370). Furthermore, several social and collective rights, such as the right to water (art. 94; López and García 2008) and the right to adequate housing (art. 51; Sepúlveda 2008), were included in the new Constitution.¹⁰

According to the Constitution of 1991, the Constitutional Court has the powers to hear abstract review petitions initiated at any time by any single Colombian citizen as well as to review any ruling issued as a result of an *acción de tutela* (Landau and López 2009). The latter is an individual complaint procedure to enforce the constitutional rights, such as the right to water, against any public or private actor (Landau and López 2009). The *tutela* has been widely used, particularly regarding health and housing claims (Uprimny 2006), not only because of the progressive doctrines of the Court, but also because of its low cost and the fact that these cases are heard quickly (Landau and López 2009). Since 1992, the Court has issued a number of rulings on the right to water and on the suspension of water provision.¹¹

The Public Utilities Statute, which developed these constitutional mandates, applied to water and sanitation services, telecommunications, electricity and gas.¹² This statute is mainly based on (a) competition between providers, (b) no entry or exit barriers, (c) mandatory commercial orientation for every provider, (d) a tariff-setting system that only recognizes efficient economic costs, and (e) basic-consumption subsidies for low-income people only (Palacios 1999; López and García 2008). Regarding service disconnection, the statute (art. 140) states that every service should be disconnected after two or three unpaid bills depending on the bill's frequency. This statute mainly requires the CRA to develop tariff methodologies that not only ensure cost recovery but also promote economic efficiency. Also, article 73.1 allows the CRA to prepare bill proposals on water issues for the central government.

10 See Constitutional Court rulings T-270 of 2007, T-888 of 2008, T-381 of 2009, T-614 of 2010, C-220 of 2011, T-273 of 2012, T-525 of 2012.

11 See Constitutional Court rulings T-406 of 1992, T-578 of 1992, T-380 of 1994, T-092 of 1995, T-481 of 1997, T-270 of 2007, T-888 of 2008, T-381 of 2009, T-091 de 2010, T-614 of 2010 and T-273 of 2012.

12 Since 2009, there is a special law regarding telecommunications.

3 The Overlaps between the Water and Sanitation Regulatory Commission (CRA) and the Constitutional Court

The overlaps between CRA regulations and Constitutional Court rulings regarding water service disconnection issues have been common. Without exception, the Public Utilities Statute and CRA regulations order the disconnection of water provision after a three-month period of non-payment (CRA 2011). The CRA states that it cannot change its regulations on disconnections without legal reform.¹³ On the other hand, the Constitutional Court has, in a number of cases, ruled in favor of the *tutelas* against a provider for depriving an individual belonging to a vulnerable population of the “minimum essential level of water” due to their failure to pay. These rulings have been primarily based on General Comment 15 of the UN Committee on Economic, Social and Cultural Rights (see López 2010).

Despite the fact that CRA regulations are not under the judicial review of the Constitutional Court, the effects of the latter’s rulings on water regulation are significant. Constitutional Court rulings regarding water service disconnection issues have followed the “individualized model,” giving a “single remedy to a single plaintiff” but tending “to deny systematic remedies that would affect larger groups” (Landau 2012: 404). Moreover, despite the activist character of the Constitutional Court (Landau and López 2009), it has not even required Congress to provide a systematic remedy that protects the constitutional rights of consumers and investors. However, given the Constitutional Court’s “extraordinary institutional popularity” and even “democratic legitimacy” (Landau and López 2009: 57), its rulings are well known by common citizens and have been replicated by several judges.¹⁴ Consequently, private and public water providers have to disconnect water service in order to comply with CRA regulations, but they have to reconnect service in a significant number of cases as a consequence of a judicial decision.¹⁵

13 CRA, official communication signed by its executive director, 8th March 2012.

14 Rubén Darío Avendaño, interview 18th July 2012.

15 Currently, it is not possible to determine at the national level the exact number of *tutelas* associated with the right to water. First, the statistics related to *tutelas* are prepared by the “*Consejo Superior de la Judicatura*” (Judicial Supreme Council). This body has not created a specific category related to the *tutelas* to enforce the right to water (Defensoría del Pueblo 2010: 173, 186). Second, it is common that water issues are claimed as part of the rights to life, to adequate housing or some other related rights (Defensoría del Pueblo 2010: 172–173, 183).

Nonetheless, the commissioners state that there is no overlap between the CRA and the Constitutional Court. They have consistently rejected any reference to the notions of overlaps, conflicts, competition or communication between regulators or regulatory rationales. Their views regarding the Constitutional Court varied from (a) having no power to develop general rules regarding water and sanitation services, (b) to issuing rulings with a tangential role in water and sanitation regulation, (c) to creating restrictions that foreign regulatory agencies do not have.¹⁶

A different explanation for the lack of initiative of the CRA to promote deliberative processes on how to deal with those overlaps could be the commissioner's fear of personal liability. According to a report to the World Bank on the economic regulation of Colombia's water and sanitation sector (Castalia 2005), CRA commissioners are largely motivated by factors related to their (a) career path, (b) political capital, and (c) personal liability. Career path refers to their future as international consultants. The maintenance of their political capital implies the avoidance of decisions that could negatively affect their political mentors. The fear of personal liability makes them more prone to making decisions where they face less risk of being subjected to a lawsuit. Bearing in mind the omnipresent legalism during the interviews with the commissioners, particularly regarding the Public Utilities Statute, it is possible to argue that one of the main causes of the CRA's limited initiative to deal with the mentioned overlaps could be the commissioners' fear of personal liability.

For years, water service disconnection issues have been affecting thousands of poor families as well as water providers.¹⁷ However, unlike some other actors in this regulatory space, the CRA was late in actively participating in the debate on the regulation of the minimum essential level of water. It was not until May 2012 that the CRA sent a draft bill on the minimum essential level of water to the minister of housing.¹⁸ Before this, a water consumer NGO promoted a referendum to overcome water service disconnection issues and obtained more than 2 million supporters in 2008 (see *El Espectador* 2008), and, in February 2012, the municipal government of Bogo-

16 Three of the four current commissioners, interviews 3rd April, 5th June and 12th June 2012.

17 According to the Empresa de Acueducto y Alcantarillado de Bogotá (Bogotá's water and sanitation provider), in February 2012 in Bogotá, there were 66,219 water connections suspended or disconnected because of no payment. See Alfredo Bateman, Sub Secretary of Economic Development of Bogotá, interview 23rd July 2012. Regarding the situation of water providers see Rubén Darío Avendaño, interview 18th July 2012.

18 CRA, official communication signed by its executive director, 18th May 2012.

tá began to pay for the minimum essential level of water for the poorest families of the city.¹⁹

4 The Colombian Case through the Lens of Prosser's Theory and Institutional Isomorphism

Using Prosser's (2010) notions of regulatory rationales with the institutional concept of regulatory space (Hancher and Moran 1989; Scott 2001), it is possible to map this case study. First, the Colombian Constitution explicitly incorporates all of the mentioned regulatory rationales: efficiency and consumer choice (arts. 365 and 367), human rights (arts. 13, 42, 44, 46, 49, 51, 78, 80, 94), social solidarity (arts. 95, 365, 368), and participation and deliberation (arts. 23, 369). Nonetheless, Congress and the CRA have given more relevance to the provisions of efficiency and consumer choice and social solidarity (see García and Castro 2003). With regard to service disconnections, the Public Utilities Statute only took efficiency and consumer choice into account, which has thereafter been applied through CRA regulations.

In this regulatory space, there are at least two competing views on water service disconnection issues. From the CRA's perspective, according to the regulatory rationale of efficiency and consumer choice, citizens are viewed "solely in their capacity as consumers" (see Prosser 2010: 14). Therefore, the CRA's imaginary statement would be: "Without payment, there is no water provision." In contrast, the Constitutional Court has been applying the plurality of regulatory rationales recognized by the Constitution, including the human rights regulatory rationale. Thus, the Constitutional Court's imaginary statement would be: "As a general rule, without payment, there is no water provision – but there are some exceptions based on human rights." This statement has also been replicated by several judges around the country.

In relation to water service disconnection issues, the CRA and Congress have been limited to the regulatory rationale of efficiency and consumer choice, probably as a consequence of different episodes of institutional isomorphism. The Colombian system has some specific features – particularly the separation between monitoring and surveillance (SSPD) and setting rules (CRA) (see Palacios 1999). Nonetheless, the CRA's creation by decree in 1992 and the subsequent Public Utilities Statute in 1994 can be seen as examples of the mimetic isomorphism of "legitimate" and "successful"

19 Alcaldía Mayor de Bogotá, Decree 064 of 2012.

models from the United States and Britain. Despite a small degree of foreign involvement,²⁰ the key factor is that the reform was mainly focused on the domestic adaptation of the imported idea of independent regulatory agencies (Vélez 2010).

Furthermore, it is possible to argue that two additional types of institutional isomorphism have emerged within the history of the CRA. Once the Public Utilities Statute was issued by Congress, the regulatory rationale applied by the CRA has also been a case of coercive isomorphism through a legal form (see Thatcher 2007). Since then, a legal mandate orders the CRA to apply the same regulatory rationale regarding nonpayment situations applied by the regulatory agencies for telecommunications and energy and gas. Furthermore, according to the interviews with three of the four current CRA commissioners, a case of normative isomorphism could be identified. During the interviews, they made general references to the emphasis placed on efficiency issues by the foreign regulatory agencies. These perceptions and the consequent normative isomorphism around the preeminence of the efficiency regulatory rationale could be further obstacles to the CRA's recognition of the plurality of regulatory rationales. Additionally, the majority of CRA commissioners have been engineers and economists (Castalia 2005), who may tend toward regulatory rationales closer to their disciplines.

The available evidence seems consistent with Prosser's theory and the institutional theories discussed here (see Hancher and Moran 1989; Black 2001; Scott 2001). It is clear that the interest group theories are not capable of explaining the current water service regulation in Colombia. First, there is not only one regulator, but rather a number of "regulators." Second, in 1991, the Colombian centralized and politicized system of water and sanitation provision had no political support (Vélez 2010); therefore, the origin of the preeminence of the efficiency and consumer choice regulatory rationale in CRA regulations was not associated with the interests of a powerful industry. Moreover, the evidence supports the idea that it was caused by different episodes of institutional isomorphism. Third, despite the significant power of the Constitutional Court (one of the water and sanitation services regulatory authority bodies), it has always been beyond the capture of the industry. The factors around the Constitutional Court's positions and the effects thereof have no room in capture theories (see Sunstein 1990; Black 2001).

The CRA has been applying Majone's position, rejecting any other regulatory rationale different from economic efficiency. Moreover, the empha-

20 See Hugo Palacios, interview 4th February 2012 and Rubén Darío Avendaño, interview 18th July 2012.

sis of the commissioners during the interviews on the limited communication between the CRA and Congress and the CRA's independence seems like another product of the hegemony of the above-mentioned interest group theories (see Piore 2011). In this respect, the dominant theories on the regulator's role would find the CRA's position appropriate. However, because of the country's institutional context, this may not be sensible. Given the situation of thousands of poor families (more than sixty thousand in Bogotá) and water providers affected by these overlaps, it would suggest that the CRA's understanding of its independence and regulatory rationales could be highly problematic in the Colombian context.

As it is predicted by Prosser's theory (2010), the limited communication between the CRA and the rest of the actors with regulatory authority has affected the responsiveness of the regulation. This limitation could explain why Congress does not have a clear idea about the CRA's functions and, normally, does not use the CRA's information in its proposals and debates. Moreover, the CRA's lack of financial resources (highlighted during the interviews) could also be associated with the CRA's passive understanding of the regulatory tasks (see Campbell 2007). Similarly, the CRA's isolated perception of regulatory authority could explain why it took nearly two decades after the Constitutional Court's first rulings on the right to water and the suspension of water provision for the CRA to send the minister of housing a draft bill on the minimum essential level of water that included some of the rationales of the Constitutional Court's rulings (see CRA 2012a, b).

The definition of the CRA's role should not be restricted by capture worries and the regulatory rationale of economic efficiency. The lack of recognition of the plurality of regulatory rationales that is affecting consumers and investors has been reinforced by the CRA's emphasis on its independence rather than on the responsiveness of regulation (see Prosser 2010; Scott 2001). Given the critical dysfunction of the legislature, the CRA should be able not only to promote debates in Congress around the most important regulatory issues, but also to directly provide "a forum in which participation and deliberation can take place" (Prosser 2010: 17). Moreover, the CRA should understand that it shares regulatory authority with other actors (see Scott 2001) and, therefore, must be in continuous dialogue with the Constitutional Court. For both purposes, the CRA should be able to apply the plurality of regulatory rationales described by Prosser (2010), particularly the participation and deliberation and the human rights regulatory rationales.

5 Conclusions

Regulation researchers must focus on the political context to develop tools appropriate for evaluating regulatory agencies outside the developed world. In the case of Colombia, the political setting includes (a) a congress that has serious difficulties in initiating and monitoring the enforcement of policy (Landau and López 2009), (b) a consequent thick constitution that implies juridification of regulation, (c) and one of the most activist constitutional courts in the world (Landau and López 2009). This context creates several challenges such as more continuous overlaps between regulatory rationales that affect consumers and investors, without having a congress with the willingness and ability to carry out the needed legal transformations by itself.

In Colombia, the applicability of American and British literature on the relations between regulatory agencies and courts is limited. CRA regulations are not under judicial review by the Constitutional Court. More importantly, the Constitutional Court's role in Colombia is different from that in the developed world because of the dysfunction of the Colombian Congress (see Landau and López 2009). For instance, in the United States “judicial interpretations are likely to be narrower than those of agencies” (Lemos 2010: 434). However, in Colombia, the CRA is significantly legalist and the Constitutional Court is one of the most activist around the world (Landau 2012).

Accordingly, it is necessary to fill this gap by exploring different regulatory theories. Despite the fact that interest group theories are the most influential around the world regarding regulatory issues (see Dal Bó 2006; Piori 2011), they are ill-equipped to analyze the Colombian case – particularly the Constitutional Court's role in the regulation of water service disconnection issues. In contrast, the notions of regulatory rationales, regulatory enterprise (Prosser 2010), regulatory space (Hancher and Moran 1989; Scott 2001) and institutional isomorphism (DiMaggio and Powell 1991) speak directly to the main issues of this case study – they are useful for mapping it, with all of its actors, and explaining the origin of the CRA's regulatory rationale.

The overlaps between CRA regulations and Constitutional Court rulings have been caused by Congress and the CRA failing to recognize the plurality of regulatory rationales. The Colombian Constitution recognizes the four regulatory rationales described by Prosser (2010): (1) efficiency and consumer choice, (2) human rights, (3) social solidarity, and (4) participation and deliberation. Regarding service disconnections, however, the Public Utilities Statute only took into account the efficiency and consumer choice rationale, which has thereafter been applied through CRA regulations. Without exception, the Public Utilities Statute and CRA regulations order

the disconnection of water provision after a three-month period of non-payment. Citizens are solely viewed in their capacity as consumers (see Prosser 2010). In contrast, the Constitutional Court rulings apply the plurality of regulatory rationales recognized by the Constitution, including the human rights rationale. The Constitutional Court, as “water regulator,” has been protecting the rights of individual service users by applying the standards on the right to water specified in General Comment 15 by the UN Committee on Economic, Social and Cultural Rights. The Constitutional Court’s rulings have been reproduced by several judges around the country.

It is possible that the main explanation for the origin of the regulatory rationale applied by the CRA regarding water service disconnection issues is not related to its understanding of the public interest or the product of a regulatory capture, but rather a consequence of institutional isomorphism. The CRA’s regulatory rationale resembles other units’ responses because of uncertainty (upon its creation), external pressures (e.g., the legal mandates of the Public Utilities Statute), and the actions of epistemic communities (e.g., economists and engineers’ understandings of water regulation).

In sum, given the political conditions in this country, Prosser’s notion of regulatory enterprise is more appropriate for the Colombian case than is the dominant literature on the regulator’s role. In the developed world, a well-functioning legislature is the preeminent option for formulating policy (Landau and López 2009). In this context, an activist regulatory agency may be prejudicial to the system’s development. Most regulatory literature rests upon this assumption. But where the legislature is dysfunctional, as it is in Colombia, a regulatory agency that recognizes the plurality of regulatory rationales and promotes deliberation within Congress around the most important regulatory issues seems a more suitable alternative. In Colombia, specifically, communication between the CRA and the Constitutional Court is essential, keeping in mind that as a consequence of juridification of regulation it is almost impossible to conceive of a regulatory issue that does not potentially raise constitutional problems. Moreover, in practice, this communication is essential for consumers and providers because of the activist judicial enforcement that exists in Colombia. In this respect, the CRA should be less concerned with its independence and more focused on the responsiveness of Colombian water regulation through a regulatory enterprise with all actors in this regulatory space (see Hancher and Moran 1989; Scott 2001).

This qualitative research does not allow for generalizable conclusions in the developing world. However, this case study seeks to make a contribution to the demonstration that the role of a regulatory agency cannot be the same in developed and developing countries because of the considerable differ-

ences in the configuration of political institutions, such as the type of legislature. It is part of a still-emerging literature on the “rise of the regulatory state of the South” (Dubash and Morgan 2012), particularly on distribution matters (see also Urueña 2012).

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Alfredo Bateman, subsecretary of economic development of Bogotá, interview 23 July 2012.

Marina Montes, legal director of the SSPD, interview 19 April 2012.

Hugo Palacios, external advisor who prepared the draft Public Utilities Statute and current managing partner of the leading Colombian law firm in public utilities regulation, interview 4 February 2012.

Nilson Pinilla, current justice of the Colombian Constitutional Court, interview 5 September 2012.

Three of the four current CRA commissioners, interviews 3 April, 5 June and 12 June 2012.

Agencias Regulatorias y Cortes en el Sur: las Superposiciones en la Regulación Colombiana del Agua

Resumen: ¿Cómo podemos explicar el surgimiento y desarrollo de las superposiciones entre la Comisión de Regulación de Agua Potable y Saneamiento Básico (CRA) de Colombia y la Corte Constitucional? Este artículo muestra las limitaciones de la literatura dominante para explicar estas superposiciones. En contraste, argumento que la “empresa regulatoria” desarrollada por Tony Prosser (2010) y el “isomorfismo institucional” explicado por DiMaggio y Powell (1991) están mejor equipados para ofrecer explicaciones plausibles. Adicionalmente, mi hipótesis es que la falta de entendimiento de las diferencias entre el rol de una agencia regulatoria en países desarrollados y el rol de una agencia regulatoria en Colombia es crítico en estas superposiciones. Las condiciones específicas que determinan estas diferencias son una legislatura precaria, una Constitución “gruesa” que incluye varios derechos sociales y una implementación judicial activista de estos derechos. Esta investigación cualitativa no permite llegar a conclusiones generalizables. Sin embargo, la intención de este estudio es proporcionar algunas ideas sobre el

rol y los retos específicos para una agencia regulatoria en países en desarrollo. Adicionalmente, este caso de estudio busca demostrar que los investigadores de la regulación deben enfocarse en el contexto político para poder desarrollar herramientas apropiadas para evaluar las agencias regulatorias fuera del mundo desarrollado.

Palabras clave: Colombia, racionalidades regulatorias, empresa regulatoria, isomorfismo institucional, agencia regulatoria, derecho al agua