

**WIEGO REPORT ON THE POLICY ENVIRONMENT OF INFORMAL
URBAN WASTE PICKERS AND ARTISANAL MINE WORKERS IN
COLOMBIA**

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“Virtually all policies affect the informal Economy.

In the past, interested policy makers have advocated some mix of the following policies for those who work in the informal economy: *social policies* to improve their health and education; *infrastructure and services* to improve their housing and living environment; *microfinance* and *enterprise development services* to increase the productivity of their enterprises; *bureaucratic and legal changes* to reduce the barriers—and related transaction costs—to registering their enterprises; and, more recently, *property rights* to give them the ability to transform their assets into liquid capital. Too few policy makers have considered how other areas of policies—economic policies, labour legislation, and social protection schemes—affect the informal economy.

(...) Until recently, there was a widespread assumption that mainstream economic policies do not and cannot reach the informal economy. (...) Clearly, a reappraisal of the impact of existing economic policies and the need for supportive economic policies is called for. This is because economic policies impact the process of redistribution between the formal and informal economy. Policy analysis needs to determine whether the informal economy shares in benefits from government expenditure and procurement policies.”

A Policy Response to the Informal Economy

WIEGO Brochure, Cambridge MA

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ACRONYMS AND ABBREVIATIONS

ANR	Asociación Nacional de Recicladores
ARB	Asociación de Recicladores de Bogotá
ASM	Artisanal and Small-Scale Mining
CEDAW	Convention on the Elimination of all forms of Discrimination against Women
CiViSOL	Foundation for the Civic-Solidary Building of Systemic Change
CLEP/ "The Commission"	The Commission on the Legal Empowerment of the Poor
CONES	Consejo Nacional de la Economía Solidaria
CRA	Comisión de Regulación de de Agua Potable y Saneamiento Básico
CRC	Convention on the Rights of the Child
CVC	Corporation of the Valle de Cauca
DAGMA	Departamento Administrativo de Gestión del Medio Ambiente
DANSOCIAL	Departamento Administrativo de Economía Solidaria
EDIS	Empresa Distrital de Servicios Públicos de Bogotá
EMSIRVA	Empresa de Servicios Varios Municipales de Cali
GERT	Grupo Empresarial de la Recuperación y Transformación de materiales S.A ESP
GREMIVALLE	Asociación Gremial De Mineros Del Valle
ICBF	Instituto Colombiano de Bienestar Familiar
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IDP	Internally Displaced People
ILO	International Labour Organization
INGEOMINAS	Instituto Colombiano de Geología y Minería
MDG	Millennium Development Goal
NGO	Non-Governmental Organization
NPO	Nonprofit Organization
NOVIB	OXFAM NOVIB- Netherlands
PGIRS	El Plan de Gestión Integral de Residuos Sólidos - PGIRS
POS	Plan Obligatorio de Salud
SENA	Servicio Nacional de Aprendizaje
SISBEN	Sistema de Identificación de Beneficiarios de Subsidios Sociales
SSPD	Superintendencia de Servicios Públicos Domiciliarios
WIEGO	Women in Informal Employment Globalizing and Organizing Global Policy Research Network
UNEP	United Nations Environmental Programme
SSPD	Superintendencia de Servicios Públicos Domiciliarios de Colombia
UAESP	Unidad Administrativa Especial de Servicios Públicos de la Alcaldía Mayor de Bogotá
MBOP	Membership Based Organizations of the Poor
OSes	Organization of the Solidary Economy
OSDs	Organization for Solidary Development
CTA	Cooperativa de Trabajo Asociado

EXECUTIVE SUMMARY

This document presents a research and policy analysis encompassed under WIEGO's Global Project on Law and the Informal Economy. Initiated in India in 2008, WIEGO's project aims to contribute to developing an enabling labor law environment for informal workers, one that promotes decent work and economic opportunity, labor rights, benefits and protection, and actively encourages the growth of strong, democratic, sustainable unions or member-based organizations of informal workers. This document continues WIEGO's Global project and identifies the public policy barriers facing own account workers in two occupational groups of Colombia's informal economy – urban waste pickers and rural mine workers living in poverty. By making explicit the role that law and policy have played in shaping the waste and mining sectors of the Colombian economy, this report also reveals the space within which waste pickers and mine workers, and their organizations, may maneuver to challenge the present regulatory environment, protect their constitutional rights to live, work and develop, as well as the trades that they have cultivated and developed over time, and seek opportunities for growth and progress.

The first occupational group of informal own account workers considered in this report is Colombia's urban recyclers, who are also known as waste pickers. This trade has emerged throughout the developing world as a response to limited municipal resources, the inability of the formal economy to absorb a growing urban population, and the particular market value placed on recyclable materials in the modern globalized economy. Although engaged in the provision of recycling services and contributing to a greener environment, the men, women and children in this trade do not work in a well-defined trade environment within the more comprehensive economy for waste management services.

Linked to the country's high levels of urbanization and growing need for efficient and universal waste services, Colombia's waste management sector has evolved from a municipally owned-and-operated service delivery to one that has been increasingly privatized since the 1990s. Yet, and as established by the Colombian Constitution and relevant policy measures, namely Law 142 of 1994 and Decree 1713 of 2003, waste management remains an essential public service in Colombia for which the public administration remains responsible to every Colombian constituent. Included within this set of essential public services are the waste management elements of the environmental sanitation public service, notably waste collection, transportation, final disposal, and the advantageous uses of waste, a category that encompasses, among other things, recycling, and linked to it, the trade of the waste pickers. The implications of this characterization of the waste pickers' trade are significant and lie at the heart of the waste pickers' body of law, a series of cases in front of the Constitutional and Administrative Courts of Colombia that have established the state's obligation to facilitate the waste pickers' inclusion into the formal waste economy.

The informality of the waste pickers' trade is rooted in their history as internally displaced people settling on the margins of urban life by salvaging recyclables from trash heaps. Initially a women's

trade, as income opportunities dwindled and urban populations grew, the trade expanded to include its current population of women and men, children, and the elderly, all of whom may be found going from trash can to trash can collecting bottles, glass, cardboard, and other recyclable materials, or living and working in public dumps doing the same. Over the past several years, and as the market value of recyclable materials has increased in Colombia, the trade has grown both formally and informally, with capital-intensive, private sector companies entering the market, alongside more traditional actors in waste management, such as the State, private concessionaires providing waste collection, transport and disposal services via concession contract, and other authorized organizations under relevant waste law and policy, i.e., waste pickers' cooperatives and other nonprofit organizations, as well as the newly poor, indigent or displaced.

However, and even as the value chain for recyclable materials has extended beyond Colombia into international markets, Colombia's waste pickers remain at its tail end, depending on society's trash to survive from day to day. For them, access to this trash is paramount to survival. When provisions in the public policy of waste management threatened to curtail that access, organized waste pickers and their allies embarked on a decade-long struggle to protect it and create further opportunities for growth in their trade. In 2003, the Asociación de Recicladores de Bogotá (ARB) and their lawyers brought a Constitutional challenge to the terms of reference for the public procurement of waste management contracts in Bogotá that was open only to equity-owned corporations and excluded non-profit, solidarity based organizations of the poor, i.e., waste pickers organizations, from competing. The Court's decision recognizing that their exclusion was, indeed, unjustified and constitutional, paved the way for subsequent cases that increasingly grew the public policy space for waste pickers' inclusion in the formal waste economy. Later decisions have determined that the terms for future procurement processes be reachable by waste pickers' organizations and recognized their legitimate rights to access the trash that is at the heart of their trade. And, in 2009, waste pickers from Cali organized to challenge recent legislation that prohibited characteristic elements of the waste pickers' trade, e.g., the transportation of waste in non-motorized vehicles, and their expulsion from a public dump without any provisions for work or survival. In its decision T-291-2009, the Constitutional Court both affirmed the trade identity of waste pickers within the formal waste economy and mandated their inclusion as entrepreneurs in recycling.

As highlighted in section 2.6 (Governance: Pursuing Open Democracy and Inclusive Development Through Organizations of a Civic-Solidaristic Nature), while confronting these numerous and complex struggles, from displacement and marginalization to informality and unfair competition, the organizations of the waste pickers – primarily in the form of cooperatives, foundations and associations – have been instrumental. It is in their collective form that they bargain for better prices in the marketplace and, within the rule of law, otherwise mitigate their highly vulnerable and precarious status as own account workers in the informal economy. Unfortunately, time, space and resource limitations have so far prevented the mass organization of Colombia's entire population of waste pickers and organizations of waste pickers in Colombia. The organizational history of waste pickers from the mid-1970s to the present, and especially that of ARB and the Cali waste pickers who were

engaged in the most recent Constitutional Court decision favoring waste pickers' inclusion in the formal waste economy, show that this process of organization is long-standing and even today in a certain degree of flux as the policy environment relating to the third sector remains without certainty for the poor and their organizations. Given the legal challenges that have been mounted thus far, the disparate levels of organization among waste pickers, and the historically noted limitations of the trade of waste picking, this report finally presents the possibility of expanding the waste pickers' work into waste management so as to broaden their horizon for waste pickers' formal inclusion in democracy and development.

The second trade group of informal own account workers explored in this report are rural mine workers, and, more specifically, the mining activities of two ethno-cultural minorities that have a special history vis-à-vis the mining trade in Colombian – indigenous and afro-Colombian mine workers and their communities. These two minority groups continue to find themselves geographically, culturally, and politically isolated from the channels of democratic governance in Colombia and deeply entrenched in circumstances of poverty. As with waste pickers, the informality characteristic of their mining activities is in part attributable to the law and policy environment of the broader, formal mining sector, and emanates from the Constitution, which recognizes State as the sole owner of all subsoil and natural non-renewable resources in the country. Thus, and as presented in this report, own account mine workers work in a realm where the Colombian State has an explicit monetary interest that be in tension with its responsibilities to constituents informally engaged and surviving therein.

The definitive legislation for the mining industry in Colombia is the Mining Code of 2001. While lauded for minimizing government bureaucracy and ushering in foreign direct investment in the mining sector of the country's economy, the Mining Code is not without controversy. Most relevant here, the Code has not advanced the inclusion of mine workers who live and work in poverty. The limitations on own account mine workers in poverty range from information asymmetry due to an inability to access and make sense of the Code's provisions, which are themselves fraught with imprecision and a lack of clarity, to its intent to encourage large-scale mining in Colombia. Further, the State's role in mining has been restricted by a recent policy reform that dismantled all public industrial mining and promotion and left a bare minimum State involvement, i.e., protecting natural parks, ethnic groups rights to certain lands or resources, or State security interests, while creating an enabling environment for considerable amounts of private investment monies in the mining sector. The State's increasingly limited role has resulted in an expanded privatization of the mining sector, where the State's dual obligations as law maker and sole owner of all mineral and sub-soil resources tend to conflict with the rights of those ethno-cultural minorities and constituents in poverty who engage in micro-scale and artisanal mining to survive.

Micro-scale and artisanal mining have historical and cultural significance to the ethno-cultural minorities considered in this report. The ancestors of contemporary indigenous communities had been mining the wealth of resources found underneath Colombia's rich ecological landscape since pre-Colombian times, while West African slaves were brought to Colombia to support the Spanish colonial

administration's large-scale extractive operations. The contemporary descendants of these ethno-cultural groups still retain strong ties to mining culture and the cultural, social and economic integrity of their communities continues to rely on the natural resources found on their communal lands. This relationship is recognized and protected under Colombian Constitutional and legal provisions to protect the communal lands of indigenous or Afro-descendant communities, termed *resguardos* or *territorios comunitarios*, respectively. The mining that takes place on these lands today is most commonly artisanal, performed without the use of any mechanized operations, and on a micro-scale, in the same manner that their ancestors once mined the same lands. However, the legislative and policy intention to protect the ethno-cultural heritages of these groups has also restricted the very use of the natural resources they are Constitutionally entitled to so as to limit their capacity to use mine work or mineral resources to break through the poverty traps that constrict their development. Limitations on individual benefit of communal resources or the prohibition of sale of communal lands prevent members of these communities to take advantage of their mineral wealth to work out of poverty. At the same time, given the multiple degrees of isolation from the centralized locus of political and democratic engagement that indigenous and Afro-Colombian communities experience, provisions that are intended to protect these groups' mineral resources from private sector mining operators are difficult to enforce. They are, therefore, over-protected from development on one hand, and under-protected from enforcement on the other.

The gender implications of this struggle between recognizing and protecting ethno-cultural minorities' special relationship with mine work and creating the space for the individual or community development, as well as enforcing legislative provisions to protect these rights, are notable. Women, whose rights to equality must be considered alongside their cultural and ethnic rights protected by international conventions adopted into domestic State obligations, are found in varying degree throughout the mining sector, in large, medium and small-scale operations, as well as micro-scale and artisanal mining, where they are more prevalent. Indeed, due to the low barriers to entry, the primary place for women in mining is in informal and, particularly, artisanal mining, a fact that renders their livelihood greatly vulnerable and precarious. Yet the Mining Code makes no mention of these mine workers, whose contribution to their communities and the trade go virtually unnoticed.

Given this context, the provisions of the Mining Code that are particularly problematic for rural own account mine workers include the following: (1) Establishment of the concession contract as the only mechanism for legal, formal exploration, exploitation and development of mineral or natural resources. This provision abrogates earlier legislation that had allowed alternatives to the concession contract such as granting a permission or license for small scale operations. In contrast to this license, the concession contract demands a great level of economic and resource investment to procure, consequently, those ethno-cultural minorities that continue to mine do so in a State of legally compelled informality. (2) A noted absence in the policy framework recognizing the right to prior consultation for mining activities taking place on protected lands, an obligation under international law that the Colombian government has ratified into domestic law and extensively developed through Constitutional jurisprudence. (3) The 30 day timeframe for exercising the "first in right" authority extended to ethno-cultural communities that counters the "first in time, first in right" rule that private mining companies rely upon to secure their investments. Rather than the Colombian State affirmatively protecting their "first in right" authority, ethno-cultural communities must defensively take advantage of the provision within just one month. (4) Burdensome mechanisms for formal

authorization to work on state-led concession contracts or engaging in untitled occasional mine work, such as gold panning, and otherwise limiting artisanal extraction to subsistence mining only. (5) The complete absence of any gender framework in the Mining Code, thus, the virtual invisibility of all women engaged in any scale or mode of mining. Three illustrative examples in Section 3.5 (From Own Account to Self-Employment Mine Work: Three Illustrative examples of Artisanal and Small-Scale Miners Placed in Poverty Traps by the Law) provide greater depth to these issues and how their effects are compounded in the daily reality of the indigenous and Afro-Colombian mining constituents.

The report therefore recommends the following policy recourses for greater inclusion of rural, own account mine workers: (1) Greater clarity and distinction between mining that deliberately seeks to violate the mining law and mining that is unable to meet the law's lofty conditions, in other words, a regulatory distinction between mining illegally (or informally) due to convenience and choice and illegality (or informality) due to being poverty trapped; (2) Reconsideration of the limitations placed on artisanal mining restricting it to a subsistence trade, and thus denying the right to development, especially in light of the disparate impact of these limitations on indigenous and afro-descendant constituents; (3) Redressing the burdens placed on these communities to protect their rights to their natural resources, land and trade and appealing for State intervention to address the poverty-traps that have been created through the mining policy framework; (4) Above all, the absence of a labor identity for artisanal, micro- and small-scale miners – and the absence of any gender inclusion – is what veils these workers' contributions and work in the mining sector. Their inclusion cannot occur without the formal recognition of their work as a legitimate trade in the mining sector. Thus, the Colombian State– part imperial owner of all sub-surface rights, part neo-liberal capitalist in its privatization efforts – must re-orient the “rules of the game” in mining to better reflect the reality and needs of its indigenous and afro-descendant citizens who are rural mine workers and who have been relegated to the informal sector through law and policy directed by the State's interests rather than a concern for a marginalized and isolated constituency.

1. AUTHORS' CONCEPTUAL FRAMEWORK FOR THIS WIEGO REPORT

This chapter situates the analysis of own account urban waste pickers and rural mine workers that follows in chapters two and three within a framework that considers the role of law and policy in contributing to the poverty and exclusion within which these own account workers live and work. Section 1.1 introduces the dominant survival strategy for those living and working in poverty – i.e., informality – as in part the consequence of a legal and policy system that is exclusionary of the poor. This idea of the “legal impoverishment of the poor” is introduced and linked to the strategy of using law for poverty reduction in section 1.1.1, then considered in its most prevalent realm – the informal economy – in section 1.1.2. Section 1.1.3 continues to consider the phenomenon of the most vulnerable workers in the informal economy - own account workers – and the role of organizations of the working poor in their lives and livelihoods. The analysis then focuses on the Colombia’s informal economy in section 1.1.4, linking the political economy of the country with the circumstances of its informal own account workers. Within this internationally positioned and nationally situated framework, Section 1.2 then sets forth the varied challenges that are revealed when using law as a poverty reduction strategy, and that, when overcome, would result in a more inclusive policy-making environment with laws that work for all, namely, the disproportionate numbers of women and children who are working informally, often as own account workers, the multiple levels of exclusion facing ethno-cultural minorities, especially those of indigenous and African descent in Colombia and throughout Latin America, the particular issues of social protection and democratic or participatory governance, and, finally, the relevant international agendas on informal, poverty-trapped workers, i.e., the Decent Work agenda, the agenda on the Legal Empowerment of the Poor, and the more recent Target B to Goal 1 of the Millennium Development Goals.

1.1. SURVIVING POVERTY IN THE INFORMAL ECONOMY

1.1.1. POVERTY AS A CONSEQUENCE OF BAD LAW AND NEGLIGENT POLICY MAKING

Without disregarding the numerous and important definitions of the notion of “poverty” in both the international development and human rights agendas, the authors of this WIEGO report opt for understanding *poverty as a socioeconomic circumstance, rather than a human condition*¹. The intention of presenting and relating to “poverty” as an external circumstance rather than an inherent condition² of the person, is first, to stress the *direct role* that national law and policy makers have, through their public decision making and implementing tasks, in (a) the provision, (b) the absence or (c) the removal of opportunities to all fellow constituents of the State, whom they directly or indirectly represent, to live a life with dignity and a horizon of development. Second, this understanding introduces a degree of distance between the person and the fact of their living or working in poverty to psychologically create the space within which to maneuver for contingency to happen and for empowerment to take place, and thus increase the possibilities for the person in poverty to operate and realize change. By depersonalizing poverty and trying to root its source in causes that are external to the individual, the idea is to allocate enough authority in the impoverished person for breaking, or leaping out of, the poverty trap.³

Representing poverty as a circumstance rather than a condition also facilitates approaching poverty not as a uniform and homogenous category of analysis, but as a set of diverse poverty traps with their own specificities⁴ that are -without prejudice to conflict and/or foreign aggressions or the devastating force of nature- chiefly and regularly created by national public decisions makers, intentionally or not. When intentional, poverty traps often stem from political lobbying or criminal pressures on public decision makers; when unintentional, they result from sheer technical incompetence in law and policy making or the political indifference towards powerless constituents and the stakes of those who are

1 United Nations Draft Guiding Principles on “Extreme Poverty and Human Rights: The Rights of the Poor” State that “Poverty is a human condition characterized by sustained or chronic deprivation of resources, capabilities, choices, security and power necessary for the enjoyment of an adequate standard of living and other civil, cultural, economic, political and social rights.” A definition borrowed from the Declaration by the Committee on Economic, Social and Cultural Rights on poverty and the International Covenant on Economic, Social and Cultural Rights (Official Records of the Economic and Social Council, 2002, Supplement No. 2 [E/2002/22-E/C.12/2001/17], annex VII), para. 8.

2 Besides, poverty as a human “condition” can eventually end up perversely twisted and presented as a genetic, intellectual, and moral, psychological or physiological dysfunction of a person or given group of persons.

3 rra (Public Law + Social Innovation) thinktank / LEP LAB; On the notion of Legal Empowerment of the Poor, Working Document # 3, 2007 (unpublished)

4 The need of understanding or contextualizing within diverse types of poverty was the main cross-cutting conclusion arising from twenty-two national consultations that were conducted by the former Commission on Legal Empowerment of the Poor. A reiterated recommendation to policy makers was to differentiate poverties in order to gather better knowledge on the burdens, limitations and threats imposed on them. The legal framework affecting the livelihood of a rural farmer is completely different from that of an urban domestic worker or waste picker. In fact, it seems that the request is to applying a differential approach not only by gender, race, etc.. but by occupational groups of people living in poverty. In a certain way it resembles the data disaggregation demand recurrently made to economists. The National Consultations and its joint analysis should be available at UNDP/ILEP. <http://www.undp.org/legalempowerment/>

most vulnerable and far to reach. In any case, the end result is the same: policy and regulatory barriers and gaps that translate in the absence of opportunities for constituents of the State to create, increase and acquire income through work.

Further, by understanding poverty as a circumstance the role of law as a poverty reduction strategy is better perceived, because it provides the need to analyze the impact of policy and regulatory decisions on human development. Concretely, it invites the need to assess the legal output of public decision maker, i.e., to monitor and evaluate whether the legally binding provisions governing the lives of all are creating and effectively distributing opportunities for income generation to all or only some of the State's constituents, whether they are not providing any income generation opportunities or only not to a particular occupational group or sector of the population, or whether, in the worst case, they are actually taking away income generation opportunities to all or some part of the population. When the end result of a policy or regulatory framework limits or restricts the space or conditions for income generation of constituents who are not well off, live in exclusion, discrimination or with limited economic resources, without providing for a systemic inclusion solution or any other reasonable and effective alternative to continue ensuring their survival and development, then the latter case further worsens, and becomes, as the authors of this report in a very explicit manner choose to describe as the *legal impoverishment of the poor*.

The Legal Impoverishment of the Poor results from observing the effects of norms and policies when they are implemented on the ground, primarily in countries rushing for economic growth. It is useful to describe the impact of the trend in contemporary law-making processes in developing countries that, when entering into vast liberalization schemes, have no consideration for ensuring any space for development and protection the most vulnerable constituents of that State. The term, proposed by legal practitioners observing the potential impact of several Colombian norms on people living in poverty (Carimagua, AIS, Forestry and CTAs laws), and later in other countries in the Global South has no other pretense other than to turn the spotlight on the systemic impoverishment resulting from bad law and negligent policy making. Once issued and codified, these provisions become, due to the principle of legality, binding and enforceable on all and thus reshape the life, livelihood and development space and conditions of all constituents. Preventing the negative impact that impoverishing decisions may have on specific occupational groups like waste pickers, artisanal mine workers, indigenous rural farmers or agricultural workers like sugar cane cutters, is particularly difficult. People in poverty have tremendous difficulty in raising a deliberative voice in democracy or in being heard in public decision making circuits. Besides, these constituents are living in a survival mode, meaning that both time and space are scarce, even the time and space required to actually step in and engage in active citizenry and collective organization, which itself requires meetings, associations and a constant access to pertinent information and the production of information for substantive participation in democratic deliberation. The legal impoverishment of the poor usually passes inadvertently in the flow of public opinion and is only detected once the enforcement of the law is imposed or the barriers and loopholes are felt by those in poverty, which explains the sprouting of

seemingly spontaneous manifestations of frustration that are channeled through the most available anti-establishment ideology.

Because public decisions are mediated through policy and regulatory frameworks that also relate to other frameworks, and by doing so create a systemic understanding of institutions, it is often very hard for the non-legally trained eye to detect impoverishing effects. Furthermore if, like vast population of people living in poverty, there is either a time and/or skill restriction to analyze law and policy and build arguments for protection and advancement, impoverishing policy and regulatory provisions easily enter the social realm and begin to fashion and refashion the lives of the most vulnerable constituents. In any case, the restriction of lawful life and development space mediated by the law and enforced by authorities will always have greater impact on constituents living in poverty, who already live in the smallest survival space available to them, and thus receive the most intense effects of regulatory restrictions and limitations.

The notion of the Legal Impoverishment of the Poor is descriptive of a law making trend in growth driven economies and the rationale for advocating for (a) the development of sound third sector policy and nonprofit law that may enable and foster civic-solidarity based legal persons, as this type of organizations, better known as non profits, are more likely to reach those living in poverty to foster their collective inclusion in democracy and development⁵, (b) the overall strengthening of pro-poor governance and inclusive policy making, and, chiefly, (c) the acute need of justices, lawyers and community based paralegals in the *thesis* and *praxis* of the development agenda to realize systemic change, as opposed to legal aid and justice reform initiatives, and, concretely, within the realm of constitutional and administrative law. Their role in detecting, claiming and redressing norms that legally impoverish the poor or may potentially do so is fundamental to ensure that justice is delivered through the executive and legislative branches of political power, and remedially through the judiciary, and also to create disincentives for poverty creation. In other words, using law as a poverty reduction strategy and the law trained professionals that may compel systemic change in the rules of the game bring the added value of individualizing the responsibility of public servants who are at the source of man-made poverty, as the political, disciplinary and even penal consequences of legally impoverishing the poor are revealed to the public eye.

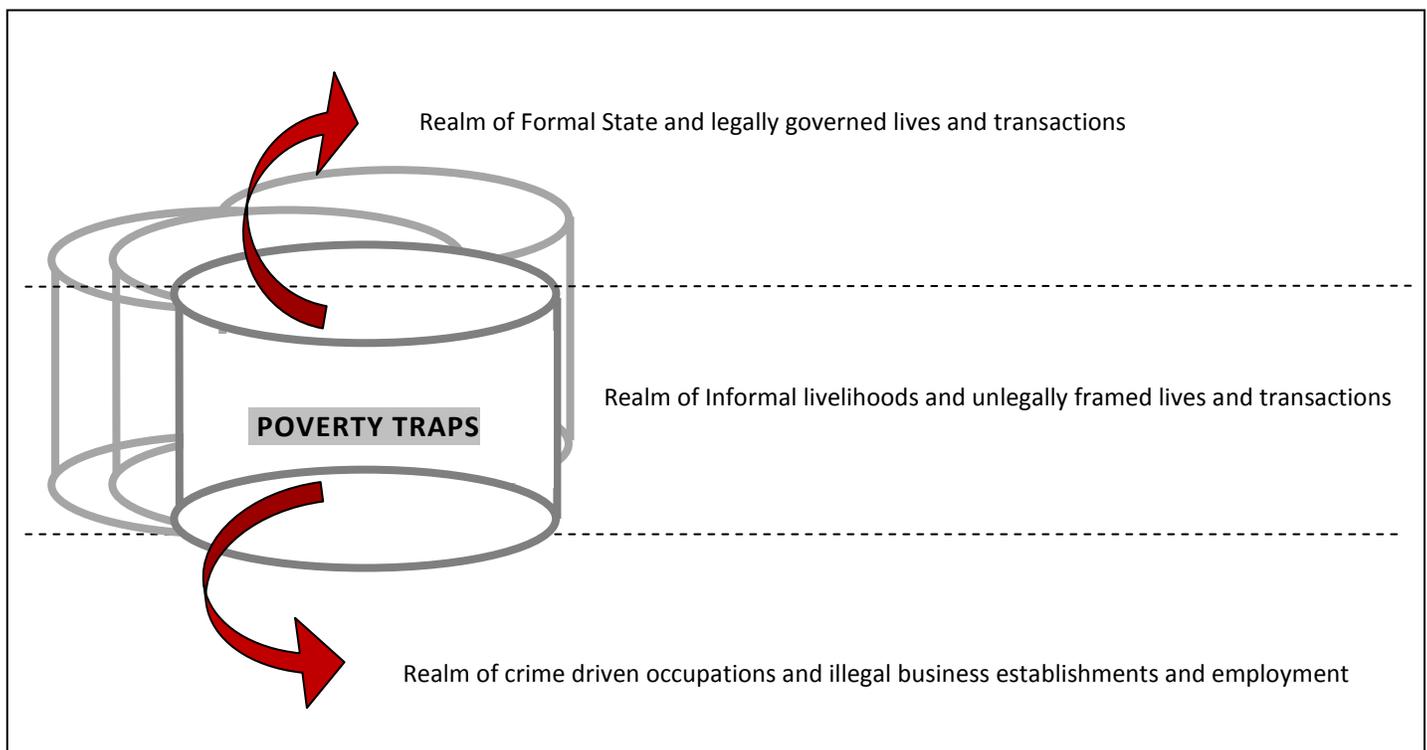
Chapters two and three of this report on the law and policy environment of the occupational groups of waste pickers and mine workers living in poverty illustrate the burdens of surviving in informality as own account workers, and the fact that, by doing so, they expose the sophisticated and intricate filigree that underlies the legal *impoverishment of the poor*.⁶

5 Ruiz-Restrepo, Adriana, *Nature Juridique et Rôle Politique des Organisations Sans But Lucratif du Tiers Secteur*, Document de recherche pour une thèse doctorale en droit public de l'Université Panthéon-Assas. 2000 (Sans publier)

6 Ruiz-Restrepo, Adriana. *A Legal Empowerment Strategy for Latin American Poor: A Reading of the National Consultations for the Commission on Legal Empowerment of the Poor*: http://www.abanet.org/intlaw/fall09/materials/Ruiz-Restrepo_Adriana_166_AR10451028166_CLEMaterials_sysID_1649_733_0.pdf

1.1.2. THE INFORMAL ECONOMY REALM

When understanding poverty as a circumstance, and, by doing so, assessing the role of law in fashioning in whole or in part the life, livelihood and development environment and conditions of a population, it is possible to observe two dominant ways out of poverty: (1) an upward movement consisting of an *extraordinary effort of the person or group in poverty to transition to the formal sector* to attain formal opportunities of income generation. This is an effort premised on the general understanding that the formal or legal sector provides more certainty and thus facilitates planning for progress, as well as a broadened sense of trust in navigating the field game beyond the immediate circle of family and friends, which in turn, facilitates expansion and innovation for income production. The possibility of effecting such upward movement for leaping out of a poverty trap depends notably on the top-down efforts made by inclusive law and policy makers. It is precisely objective law, i.e. legal, policy and regulatory frameworks, and the effective public administration response what creates and delivers ease of access and transit or graduation conditions to the poverty trapped constituents willing to shift to a formal or legal mode of income generation. And (2), a down ward movement consisting of fast-tracking out of poverty by tunneling-out of the poverty trap through exploitation or delinquency in a crime driven economy that is capable of ensuring income on a constant basis and/or at rapidly increasing rate. Fast tracked income is created by challenging formality / legality and is done regardless of self-inflicted harm or the risk of harming others. Victimization, self-victimization and delinquency are evident in a vast array of activities that range from robbery, drug-couriering and money laundering, passing by kidnapping, human trafficking for labour or sexual exploitation, and up to joining illegally armed groups for conflict or terrorism, among many others.



In between these two, there is a formal-lawless-land: the ever-extending realm of informality. This realm has experienced such prolific growth that a recent document of the OECD on the subject, entitled “is informal normal?” recognized the vast scope and near normalcy of global informality.⁷

The informal economy understood as every country’s realm of formal-lawless land, is where the poor survive outside of the reach and protection of the law of the institutionalized State⁸. In informality, the poverty-trapped live in a continuum of *survival efforts* trying to earn a meager income for subsistence and through whatever resource is at hand or whatever opportunity, that is harmless to others, appears. Because of the urgency of need, considerations of formality or legality of access to reachable opportunities is irrelevant. Decency or honesty is the only limitation for many of the people living in poverty in the informal economy. People living in poverty will rather continue to do so as best they can earning or creating income through whatever means are readily available to them, instead of trying to rise to the formal economy or fall to the crime driven economy.⁹ In most cases, the poverty-trapped will survive by investing their work capacity in any informally available wage opportunity (construction, domestic work, home base production, etc.) or any naturally available material resource (timber, waste, fish, leaves, sand, gold glitter, etc.), both of which are becoming less and less available to the powerless in this era of organization and globalization.¹⁰ These individuals, who are working for themselves and their families’ survival, regardless of existing institutions and formalities, do not fall within the legal or illegal dichotomy. They are better described as being within a realm of “unlegality,” a space that has not yet been duly reached and organized through law and its institutions and where instinct and force of life continue to take precedence over the formality derivative of political representation.

A big part of the informal economy – not that which is informal by choice or convenience, such as the persons and establishments evading taxes and transactional responsibilities - is informal for survival. For a person living in poverty, formality is either an unknown concept¹¹ or the silly sophistication of

7 Please see: OECD’s report *Is informal normal ?*
http://www.oecd.org/document/54/0,3343,en_2649_33935_42024438_1_1_1_1,00.html

8 On this notion, please read Hernando de Soto’s books entitled *The Other Path* and *The Mystery of Capital*

9 rra (Public Law + Social Innovation) thinktank, *On the notion of Legal Empowerment of the Poor*, LEP LAB Working Document # 3, 2007 (unpublished)

10 Progress brought by science, technology and mechanization tend to end with jobs that were once important. For instance, water carriers (*aguatero*, *porter d’eau*) once capitalized on the human need to access water daily for cooking and hygiene and gave the opportunity to create a market for the door to door delivery of water to those who did not have a groundwater cisterns.. Nowadays access to water does not create work opportunities as it is now universally functional through aqueducts reaching directly to different rooms in the most homes and legally deemed and claimed as a public service.

11 One of the most illustrative cases of unawareness of formal law and state or the lack of a formality cognition of many persons living and working for survival in the informal economy is that of an old waste picker in Cali Colombia. During a meeting convened by State authorities, and Waste Pickers and the CiViSOL foundation for systemic change in view to discuss ways to implement Court’s orders of formalizing waste pickers Luis stood up and actually claimed to the authorities “better conditions” for him as an employee. He requested from the municipality a change in the night hour routes in which

what is, in plain and simple terms, the god given right or natural human capacity to do work. In either case, in the absence of formal opportunities and eschewing the criminal economy, these individuals would rather work informally than starve to death in due respect of law.

These poverty-trapped individuals are more concerned with surviving and providing for themselves and their families than with whether the means to do so are formal or informal. For instance, a street vendor knows that she might be forced to hide from police patrolling the streets, and risks losing some merchandise in the process; but, because the street vendor is aware of these risks, she may bear and mitigate them to some degree. The costs, however, of identifying, learning and understanding the applicable law, navigating a sea of ever-changing public policy, and producing the necessary documents to present to the bureaucracy regulating formal business ventures are far greater for this street vendor than living in constant stress and losing some merchandise, especially when the benefits of formalizing are not apparent or even certain. As imperfect and inefficient as informality may be, for the working poor the route to formality is as narrow and intricate as for authorities' the realm of informality is vast and precarious.

the Major made the waste pickers run after waste collection trucks. He claimed that it running behind trucks at 2 am was very inconsiderate from the employer, that these were very hard and difficult "work shifts" that he would appreciate, particularly for old waste pickers like him, if the municipality could send the waste trucks at midday. He added that those nightly hours also exposed them to being murdered by the so called "social cleaning groups". By CIVISOL's request, the authorities had to actually answer the question and explain that they were informal workers living outside the reach of work opportunities and protection given by the State. Another interesting example of legal unawareness and irrelevance for those surviving in poverty is that provided by the former ASENTIR nonprofit corporation working with street homeless youth. Back in the 90s most of the men dreamt of going to the army for getting hold of some power, respect and having "legal papers" to then work; women dreamt of being street vendors or establishing a home based micro business after marrying and having a baby. All of them commented night after night that the night before they had seen Colombia's President himself patrolling the streets and riding his super motor bike. Very interestingly they had downsized the legal and formal institutions they have heard of, to their quotidian context, one in which all the State apparatus is represented by a police officer. The education they liked the most was that of State navigation skills and Empowerment in rights, which they put to use immediately in their rapport to the police on the street and social exchanges.

People surviving in the informal economy, as opposed to those cutting costs by opting to operate in it, exert their *right to life* wherever an income opportunity presents itself. In fact, they may end up working in (i) a precarious informal employment opportunity, that is to say, selling their labor in exchange for often meager wages and rarely any social protections. Even slave-like jobs are widely available for those trapped in poverty, which they will still seize as they represent opportunities to provide some *modicum* of certainty, stability, and even hope to themselves and their families. Another path for income generation for the informal working poor, sometimes by choice, sometimes because there is just no other opportunity to survive, is (ii) self employment, i.e., seeking out resources or opportunities that may be transformed or to which value may be added to create some good or service for sale in the marketplace. They may work through an establishment or as individuals in own account work. Examples of self-employed people in poverty (as opposed to well off self-employed entrepreneurs and independent consultants who are either in or out of formal work relationships) are, usually, micro and small establishments and own account workers. The people in poverty who are self-employed through establishments will in many occasions rely on nonprofit legal persons of a civic-solidarity nature, defined by WIEGO as MBOPs.¹² Individuals working on their own account, such as men collecting sand, gravel and stones at the bottom of a river for selling it to construction companies, women recovering the glitter left behind industrial gold mining operations or along the riverbed for sale it to intermediaries, women, men and their children scavenging trash to sell as a secondary commodity to industrial buyers, or old women rolling *tendu* leaves to sell as cigars in the Delhi market place, all represent the poorest of the poor, who work and live just beyond the limitations of extreme poverty.



Photo by: Shailly Barnes ©

For the purposes of this report, the informal economy is understood to include all economic activities that are not covered or are insufficiently covered by formal arrangements either in law or practice.¹³ Workers included in this definition will usually be either (1) wage workers in informal jobs or (2) non-wage workers (or the self-employed) in informal enterprises or both.¹⁴ The first category includes employees of informal enterprises, casual or day laborers, domestic workers, unregistered or undeclared workers, temporary or part-time workers, and industrial outworkers or home-workers.¹⁵

12 On this notion, please read Chen, Martha Alter *et al.*: *Membership Based Organizations of the Poor: Concepts, Experiences and Policy*

13 ILO. *The Informal Economy, Note from the Committee on Employment and Social Policy*

14 For instance, paid domestic work can be included in this definition. Unpaid or precarious domestic work or care activities that most of the world's poor women engage in for the better part of their reproductive years still remain formally unacknowledged in many countries. Fortunately, ILO is advancing a standard-setting effort, a Domestic Workers rights Convention to be defined on June 2011.

15 Please read: Martha Alter Chen, *Rethinking the Informal Economy: Linkages with the Formal Economy and the Formal Regulatory Environment*

Along with owners of informal enterprises, owner-operators of informal enterprises, and unpaid family workers¹⁶, own account workers (both heads of family enterprises and individual workers) fall under the second category, and in all developing regions, the second category of the self-employed constitutes a greater proportion of the informal employment than wage-employment. The self-employed represent seventy percent of the informal work in sub-Saharan Africa, sixty-two percent in North Africa, sixty percent in Latin America, and fifty-nine percent in Asia.¹⁷ If South Africa is excluded, the share of self-employment in informal enterprises rises to eighty-one percent in sub-Saharan Africa.¹⁸ The global economic crisis will have contributed to a considerable increase in these numbers. In fact the International Labor Organization's (ILO) Global Employment Trend Update for the year 2009 estimated that global unemployment would increase anywhere from 29 to 59 million people since 2007, corresponding to a global unemployment rate of 6.5 to 7.4 percent.¹⁹ The numbers of men and women who will be in vulnerable employment – as own account workers or unpaid family workers – are cause for particular concern, because they will have no recourse other than to continue working for lower wages, and will consequently face even greater threats to their living and working conditions. The ILO estimates that this group of vulnerable workers will account for 48.9 to 52.8 percent of the global workforce or between 1.49 and 1.6 billion workers worldwide.²⁰ In the worst possible scenario, and in light of the emerging impact of the crisis on labor markets, the numbers of the extreme working poor – or those earning less than \$1.25 per day – may increase by as much as 233 million.²¹ Even by conservative estimates, the number of additional workers living in extreme poverty may swell by 122 million since 2007.²² Thus, it is possible that there will be more than 1.4 billion workers living below \$2 per day, showing an increase of more than 200 million people since 2007.²³ In Latin America and the Caribbean, it is projected that unemployment will rise by anywhere from 22 million to nearly 26 million, corresponding to an unemployment rate of between 8.1 and 9.2 percent. The region's share of

16 It is important to highlight that the self employed, the component in which the most defenseless poor may be statistically encompassed may be linked to what class analysts will call the *petit bourgeoisie*, that is professionals and artists that work autonomously and are increasingly home-based and that will fall in the informal economy when operating in the margins of law for convenience reasons.

17 ILO, *Women and Men in the Informal Economy: A Statistical Picture*, p. 7.

18 ILO, *Women and Men in the Informal Economy*, p. 7.

19 ILO, *Global Employment Trends*, p. 4, 8

20 Ibid, p. 14

21 Ibid, p. 16

22 Ibid. p. 17

23 Global Employment Trend Update, p. 17; According to the Global Employment Trend Update, the United States and European countries are experiencing an increase in unemployment that was much greater than anticipated – the total number of unemployed is estimated at 39.7 to 46.4 million people and will account for 35 to 40 percent of the global increase in unemployment, “despite comprising less than 16 percent of the global [labor] force.” Central and South Eastern Europe (non EU) and CIS regions are expecting an increase of as much as 35 percent in 2009. In East and South East Asia (and Pacific), vulnerable employment is a notable challenge, representing 51.8 to 56.6 percent of total employment in East Asia and over 60 percent of employment in South east Asia; this could rise to as much as 64 percent of employment in South East Asia in 2009. In South Asia, the number of vulnerable workers may grow by as much as 493 million, which would account for 79 percent of total employment.” It is especially alarming in India, where nearly 80 percent of workers were living on less than \$2 per day before the economic crisis.²³ In Sub-Saharan Africa, upwards of three quarters of workers will face vulnerable employment. Please see: ILO, *Global Employment Trend Update*, pgs. 17-20

vulnerable workers was expected to increase by as much as 34.5 percent in 2009, forecasting a considerable drop in wage employment.²⁴

These figures, although troubling, still do not show that the conditions of the most vulnerable of the working poor will deteriorate as their ranks increase. These workers – whether they are wage workers or self-employed – will be competing with each other for the deflated wages described above and with still no social protection to rely upon when those wages fall short or when even the informal economy cannot accommodate them. Yet, their particular circumstances are not necessarily highlighted by domestic regulations. Indeed, although the working poor and their labor characteristics have become more statistically visible to both scholars and policy makers as the definition of the informal economy has evolved, in many countries, the informal economy has remained officially unchanged. In terms of law and policy, the informal economy is still only considered to include unincorporated enterprises and employers, even though in reality its complexity is in line with the modern conception adopted in 1993 and revised again in 2003. The public policy in these countries continues to pivot on an anachronistic definition that not only excludes informal employment relations, but also lacks a poverty-based differentiation of the informal economy, one that would more effectively reach the poverty-trapped who are surviving through informal micro-business employment and, moreover, through own account work.

1.1.3. OWN ACCOUNT WORKERS: AT THE CROSSROADS OF ENTREPRENEURSHIP AND LABOR RIGHTS

Despite being aware of the vast dimension of the informal economy, and the two main paths that are available for the poverty-trapped to create income, this report narrows its scope to own account workers, possibly the most vulnerable and least studied category within the informal economy. As commissioned by WIEGO, this report and its narrowed focus represent a major opportunity for poverty reduction through law and policy inclusion into mainstream development. For many occupational groups of the informal economy, and, notably the two considered in depth in Chapters two and three, law is very relevant: the State shapes and controls who may access valuable resources such as waste or gold, as well as the parameters of that access.

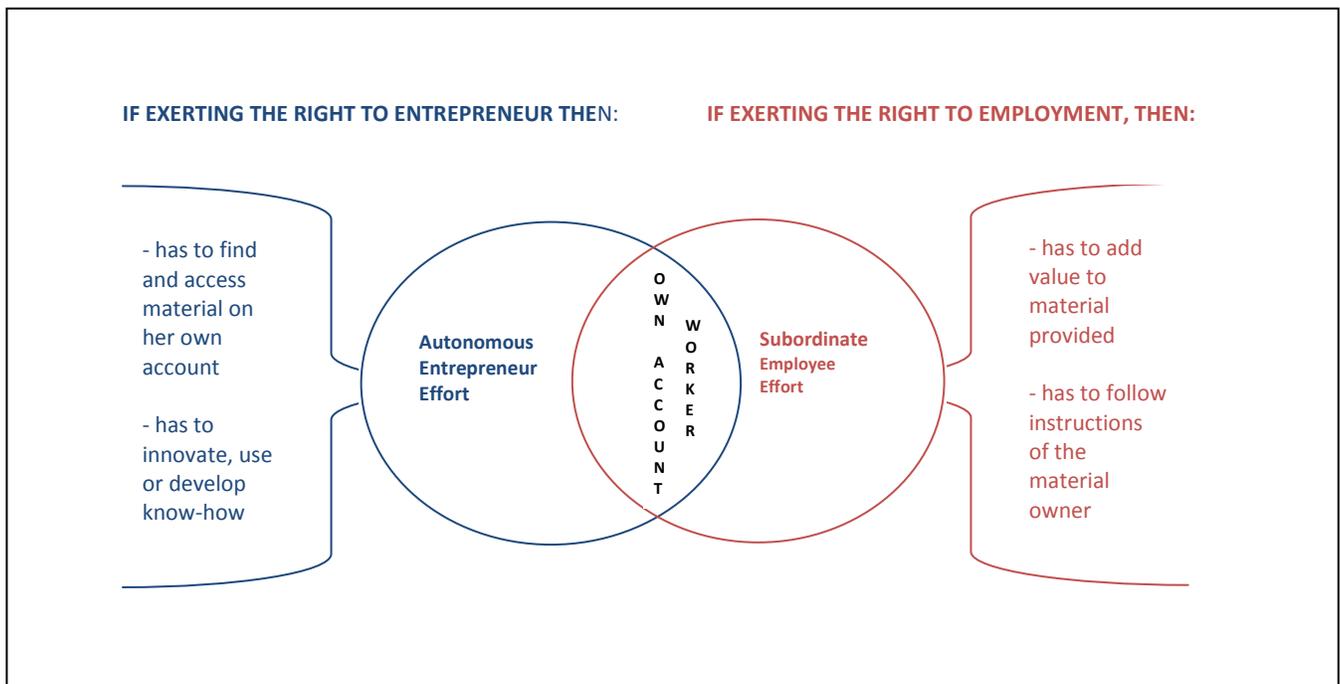
For own account workers specifically, their particular vulnerability may be explained by their *lack of connectedness*²⁵, directly or indirectly, to formal mainstream opportunities and protections of the State and the formal market. By comparison, informal **employees** working in either a **formal or informal business** have at least, the possibility of learning in the establishments where they work. Through collective exchange, it is possible for these informal employees to build their understanding of rights, rules and formal justice and detect opportunities to channel their claims into collective voice and organization spaces. The own account worker, however, is literally on her own. Without an immediate surrounding to foster some kind of automatic cooperation or solidarity, her fellow colleagues are also

24 Ibid, p.20

25 Ruiz-Restrepo, Adriana. *A Legal Empowerment Strategy for Latin American Poor: A Reading of the National Consultations for the Commission on Legal Empowerment of the Poor*: [http://www.abanet.org/intlaw/fall09/materials/Ruiz-Restrepo Adriana 166 AR10451028166 CLEMaterials sysID 1649 733 0.pdf](http://www.abanet.org/intlaw/fall09/materials/Ruiz-Restrepo%20Adriana%20166%20AR10451028166%20CLEMaterials%20sysID%201649%20733%200.pdf)

own account workers, usually in direct competition for access to the same resources that she needs for her and her family's survival. Their work is in a state of perpetual disconnect from work and market networks, dialogues and, usually, the outreach capacity of the State.²⁶

From a juridical standpoint, own account workers fall under both (a) the right to be entrepreneur, i.e. the right to freely choose a profession or occupation and to create an enterprise, and (b) the right to labor for someone else's venture. In fact, it is possible to say that in the autonomous-entrepreneur capacity of their work activities, own account workers create working opportunities by exerting their constitutional right to entrepreneur²⁷ and by developing as much innovation as survival requires. In this sense, many own account workers are the ultimate entrepreneurs, creating income opportunities where the labor market does not.²⁸ This micro-entrepreneurialism does not involve the hiring of others until necessary, although familial help or support is common. The unpaid contributions of family members ensures that all income generated provides for those whom the entrepreneur is responsible.



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26 It is important to note that persons working in slave like jobs and bonded labor are in even a higher level of defenselessness because in fact they are victims the criminal exploitation of human beings and the transnational human trafficking, that facilitates it.

27 On this point see the livelihood and entrepreneurship arguments presented by the CiViSOL Foundation for Systemic Change, to the Constitutional Court of Justice in Colombia accepted and further developed through ruling T-291-09. <https://docs.google.com/viewer?a=v&pid=sites&srcid=Y2I2aXNvbC5vcmd8bGEtYmFzdXJhLWVzLXZpZGF8Z3g6NmViOWZiMTI3NzcwZTYxYw&pli=1>

28 Not all own account workers are innovators and entrepreneurs in the sense proposed. Actually many seem-to-be own account workers lean more to the dependent-employee side. Delocalized from the factory or establishment and laboring in their own premises, home based producers receive all material that is to be transformed. They don't have to seek access and acquire resources to add value.

On the autonomous-entrepreneur side, the own account worker must identify and obtain her own materials to transform into commercial commodities, while carrying all the risks of a failed investment with no safety net; and on the dependant–employee side, she is working under a dependency to the buyers of her produce or merchandise, a subordination springing from the urgency of survival.

In this train of thought, and on the entrepreneur-like side, many of the own account working poor strongly depend on law and regulation for having a right to access the material, be it urban waste or alluvial glitter gold, to add value to it by separation, classification or even transport. On the employee-like side, the own account working poor have virtually no ability to negotiate the terms of sale and will accept whatever price a buyer offers for their wares, regardless of the labor invested both in acquiring the material and in its transformation for commercialization. As much as the means to material access of resources is determined by law and regulation, the market access is determined unilaterally by the buyer and does not necessarily factor in the varied physical capacities or requirements of individual workers. For example, how much an urban waste picker will earn is a function of that individual's strength and endurance. The elderly, disabled and incapacitated find themselves in greater situations of defenselessness where their product is valued, but their labor is not. Own account workers are, therefore, intensely un-free, tightly bound by both policy and regulatory frameworks and industrial forces. At the same time, this implies that there two sets of rights (business and entrepreneurial) to claim and legally empower out of their poverty traps.

Upon even closer inspection, an own account worker may find herself facing circumstances that are well beyond her ability to control, influence or mitigate, and which may propel her into even greater conditions of vulnerability and impoverishment. Returning to the example of waste pickers, the impact of the global economic crisis on businesses and producers of consumer goods, who have experienced declines in sales and increases in inventory, has translated into considerable drops in prices for salvaged materials. As exports of raw materials have dropped, entities that would normally buy these materials from waste pickers have stopped doing so.²⁹ In their capacity as entrepreneurs, waste pickers will continue to exploit their personal resources, i.e., their physical capacity to recuperate recyclables, their know-how developed over years of doing so, and their access to available materials as best as they can; and in their capacity as employees, they must accept the deflated prices offered for their wares and labor. These workers will, most likely, work longer hours while earning lower wages, in other words, work with less stability and security and live in greater vulnerability.

29 For instance the Asociacion de Recicladores de Bogota (ARB), as of January 2009, indicated that, the market for high and low-density polyethylene has come to a standstill and the ferrous scrap metal market has seen a decline of seventy percent in prices, while non-ferrous has dropped nearly sixty percent. In India, the Self Employed Women's Association's (SEWA) estimates show that the prices of steel iron, hard plastic, plastic bags, paper and cloth in India had all been cut from October 2008 to January 2009, some just one third as valuable as they once were months ago. In parts of Brazil, cardboard waste that once was bought for nearly half of a Brazilian real in late 2009 was worth as little as one cent and as much as fourteen cents. On this topic, see http://www.wiego.org/about_ie/ie_news.php#ieNewsWastePickers

While this relationship of the own account worker to the buyers of her goods and services can be highly exploitative, it also shows that the informal economy is not a separate and distinct entity from the formal economy. Rather, in many situations, informal enterprises may be linked with formal firms through different commercial relationships, individual transactions, sub-sectors or value chains and informal workers may be linked to formal firms in situations of disguised employment or ambiguous employment. The own account worker above must engage with buyers – who may be formal or informal – to make her living. She is, in fact, relying on some relationship with the formal economy that establishes the market prices for her goods and services. What differentiates the formal and informal elements of the economy is in large part the absence not only of applicable and appropriate regulation, but also legal and social protections for workers in the informal economy, which, therefore assume a central role in the policy discussion around informality.³⁰

When organized into cooperatives and associations, individual own account workers acquire a legal personhood that enables them to bargain for better prices. On occasion, however, these organizations end up being nothing more than a shell giving the illusion of an organized and formal trade; within it the informality of each individual's own account labor, and the precariousness of their work and exploitative conditions, remain the same.³¹ The individual workers remain entrenched in the informal economy, without any degree of social protection, regardless of their organization and due mainly to the lack of a worker identity and some law and policy space to effectively work and develop. What is worse is that the guise of formality shrouding these organized informal workers may come to mislead policy makers into believing that these workers are choosing informality, rather than actually being excluded from the formal economy. As rationalized above, for a person living in poverty choice is not an option. They work wherever work is to be found, with whatever is at hand. A World Bank study on informality in Latin America and the Caribbean³² found that approximately one-third of the informal self-employed in Brazil (45 percent among women), 40 percent of the informal self-employed workers in Argentina, 25 percent in Bolivia and the Dominican Republic, and nearly 60 percent in Colombia would rather be working in salaried jobs with benefits than their current situations.³³ These numbers do not mean that there are not informal self-employed workers who choose to be informal; they merely indicate that there is a desire among some proportion of the self-employed who would not choose informality if other options were available. This segment of the self-employed are most likely

30 Heyzer, Noeleen. Presentation on Globalization and Gender Perspectives for the Women's Federation for World Peace <http://www.wfwp.org/wfwp/library/archive/03/NHeyzer03.pdf>

31 IIRA (Public Law + Social Innovation) thinktank. *On the notion of Legal Empowerment of the Poor*, LEP LAB Working Document # 3, 2007 (unpublished)

32 Unless otherwise specified, Latin America is used in this paper to refer to the following countries: Argentina, Belize, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guyana, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay, and Venezuela. Caribbean countries, which are only referred to in some of the data in this document, include Antigua and Barbuda, Aruba, the Bahamas, Barbados, Cayman Islands, Cuba, Dominican Republic, Grenada, Haiti, Jamaica, Puerto Rico, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, and Trinidad and Tobago.

33 Perry, Guillermo E. et al. *Informality: Exit and Exclusion*, p. 65

to be those for whom self-employment carries the most risks and the least benefits, i.e., own account workers.

Yet, the informal actors who have received the most attention from policy makers are those that are informal out of convenience, in other words, the businesses of those individuals, usually SMEs, who have chosen to be informal rather than those who are forced into situations of informality. In fact, although the informal economy was “discovered” in the 1970s, own account work was not even included in the idea of the informal economy until over twenty years later. Instead, the informal economy was a term applied only to unregulated economic enterprises or activities. In 1993, the Resolution Concerning Statistics of Employment in the Informal Sector, adopted by the Fifteenth International Conference of Labor Statisticians, began to recognize unregistered (or unincorporated) enterprises below a certain size, e.g., micro-enterprises owned by informal employers who hired one or more employees on a continuing basis, as well as “own-account operations owned by individuals who may employ contributing family workers and employees on an occasional basis.”³⁴ In 2003, the International Conference expanded the notion again in order to capture not only entrepreneurial relations, but also employment relations found in the informal sector, as well as informal employment that exists outside the informal sector.

1.1.4. COLOMBIA, POVERTY AND THE INFORMAL ECONOMY

Set in the corner of South America with access to both the Atlantic and Pacific oceans, bordered with Central America via Panama, separated by dense Amazon jungle from Ecuador, Peru and Brazil and by the vast oriental llanos or plains from Venezuela, Colombia is a country that has developed predominantly through its cities. Most of them are found along the valleys and hills of the three Andean mountain ranges that cross through the country and down to the Caribbean Sea.

From a legal perspective it is worth noting that the Political Constitution of 1991 institutionalizes Colombia as a Social State of Rights, which thus serves as the democratic premise and principle for a social rule of law. This rule of law is to be delivered through law, policy and regulation frameworks, but it has also been advanced by the very progressive Constitutional Court and judiciary branch of Colombia. Indeed, the Colombian juridical System stems from the civil family of law and thus has a separate Administrative Court, the Council of state, and its main source of law is codified rather than jurisprudential. Increasingly, the politically legislated domestic law is being constitutionalized through groundbreaking precedents, many of which recurrently draw from international human rights standards. Article 93 of the Colombian Constitution is, in fact, at the source of what is called the “*bloque de constitucionalidad*” a constitutional article that ratified international human rights treaties that are consequently directly incorporated in the national legal order.

34 WIEGO, *About the Informal Economy*, http://www.wiego.org/about_ie/definitionsAndTheories.php

From a political standpoint, Colombia is a centralized republic based on a well-established democratic regime and with decentralized territorial administration. Mayors of Colombian municipalities are elected by universal suffrage just as with the President of the Republic and the Senators and Representatives of the Congress. For many years now Colombia has been leaning towards a Presidential system and a neoliberal trending economic model. Juan Manuel Santos was elected in as President in August 2010 under the same political affiliation as the preceding eight years under President Alvaro Uribe. Initially characterized as a government focusing on democratic *security*, and implying a concern over State security rather than Human Security, the new central administration claims to be devoting all efforts to *democratic prosperity*. A cabinet with technical expertise and open and frank dialogue with the Supreme Court and leaders of the opposition have sent messages of relief and optimism to a rather small sector of the population that was concerned with former President Uribe's trend towards implementing a so called State of Opinion. President Uribe at one point indicated some intent to run for office a third time, and by doing so, increasingly de-institutionalized the country and weakened the rule of law. It is worth noting that the affection of the people around the country, with whom the President met weekly, and the vast support within the business community for his economic policies are reflected in former President Uribe's 84 percent approval rating. Because it is still too early to assess the new Santos presidency, and because the policy and regulatory frameworks adopted and enforced in the past years are still the ones that remain valid and shape society and the market, this section will continue to refer to what has been until now the sociopolitical situation of the country.

One of the most glaring consequences of the intense conflict Colombia has endured over the past 50 years and the recent "Democratic Security" program of the former Uribe government has been the obfuscation of poverty as both a core issue and crosscutting concern in law and policy making. In fact, Colombia, a country of more than 40 million people, is ranked as one of the most inequitable countries in Latin America, a region that in turn, is considered as one of the most inequitable regions of the world. Living far away from Bogota, the political capital of the country, the rural peasant poor (many of whom are afro-Colombian and indigenous) are the visible face of Colombia's conflict. With their children recruited by any one of the several illegally armed groups, working in illicit agriculture with crops that are far better paid than coffee or bananas, trapped in trilateral cross fire (army, guerrillas and paramilitaries) and displaced from their lands and livelihoods, they live in conditions of utter exclusion from the policy decisions that affect their every day survival. Rural women bear extraordinary economic pressures when men leave to work in the cities or are recruited for the conflict by irregular groups. Meanwhile, the forced displacement of rural families to the cities translates into greater urban poverty and a more expansive urban informal economy.

For many years and like other countries in Latin America, Colombia had Marxist guerrilla expressions (M19, EPL, ELN and FARC) fighting for the revolution of the working class and installing a communist political regime. The FARC and ELN guerilla groups are still active, but in the 1980s, it is well known that they began to lose their political ideology, or, more precisely, to trade-off a big part of their political legitimacy by entering into and being sustained by the drug trafficking business. While still active, the

guerilla groups are hidden in the mountains of Colombia and have been working in cities through urban militias that are, supposedly, linked to labor unions and populist student movements, as widely messaged out by several members of the outgoing, and even earlier, governments. On the other side of the political spectrum are the para-military illegal armed groups that draw from the extreme right of Colombia's political ideological spectrum and were born out of desire to refrain the expanding leftist guerrillas as they perceived the State was unable to do. Like leftist-guerrillas, rightist-paramilitaries have also financed their war with the multinational business of drug trafficking to supply an illegal, global demand for narcotic substances.

With this background, and although difficult to affirm, it is possible to explain that in Colombia, the broad public opinion –notably, that which is oriented by mainstream media, that is, in turn, generally owned by industrials investors and leaders – is one where labor unions are usually perceived as being either linked or empathically too close to the leftist guerilla groups in the country. This has had enormous impact on the space for organizing and empowering on work related rights, as have most economic policies tending towards the opening of markets, competition, free trade and foreign investment. This application of neoliberal ideology has, in turn, translated into flexible labor policies that have intensely burdened workers by extending working hours, reducing payment for working on Sundays and holidays, and the authorization of intense outsourcing of labor that is passed on as service provision. In many cases, this takes place by softly forcing the creation of cooperatives prior to licensing the individual membership as employees so as to ensure a continuous supply of labor. Indeed, for many years, Colombia has been intensely lobbying for a free trade agreement with the United States, and has recently made substantive progress on the approval of a Trade agreement with the European Union.

With an unemployment rate of 12.2 percent, and ranking second after the Dominican Republic in terms of unemployment in Latin America, Colombia's employment policy is actually resulting in a structural problem. Even though this unemployment rate is considerably less than the 20 percent experienced in 2001 or the 14 percent in 2009, it is far higher than the rates that a country with such levels of national development should have, for instance, Brazil's unemployment was at 8.1 percent, Peru 8.4 percent, Morocco 9.9 percent, India 5 percent or Iceland 7.6 percent and that after the financial crisis of 2008.³⁵

The most recent national poverty data shows that the percentage of Colombians who lived below the poverty line in 2009 was 45.5 percent, compared to 46 percent in 2008, and that the Gini index slightly narrowed to 0.578 from 0.589 of the previous year. This means that out of 43.7 million of Colombians, almost 20 million (45.5 percent) live below the poverty line and 7.2 million (16.4 percent) are indigent or destitute, a metric that may be broadly equated to a national line of extreme poverty at USD 2 per day. For comparison purposes, in 1995 the percentage of Colombians living below the poverty line was 50.9 percent and 17 percent were in extreme poverty or destitution. According to the National

35 Please see : http://www.dinero.com/actualidad/economia/retos-santos-economia_73275.aspx

Administrative Department of Statistics (DANE), Colombians are considered poor when their monthly income is less than 281,384 Col pesos (143 USD), and indigent or destitute when they earn less than 120,588 Col Pesos (61 USD), slightly higher than the global standard of USD 1.25 used for measuring extreme poverty.

The legal minimum wage in 2009 was 556.200 COP and 576.500 COP for 2010,³⁶ which means that an average Colombian household relying on one source of income lived on an equivalent of 285 USD per month in 2009.³⁷

By 2010, the social expenditure, a constitutionally ranked priority in Colombia's public budgeting, amounted to 14.41 percent of the GDP; however, much of these funds are lost through both public and private corruption. For instance, it has been recently discovered that, when crossed with fiscal data, beneficiaries of SISBEN, the national system for identifying the population in poverty to receive social services, included more than 250.000 people³⁸ with incomes higher than the national poverty line.

In this environment, Colombia's economic growth for 2010 has been forecasted to be one of the lowest in the region. This is due to the public investment restrictions caused by a failure to collect taxable income and maintaining sovereign debt.³⁹ Private household consumption for 2010 is expected to be as low as around one percent due to heavy financial burdens, the reduction of formal wage work and high unemployment.

While immersed in the background research for this report, the most conspicuous aspects of Colombia's informal economy are that (a) it appears as a very closed domain of theoretical economic research and thus accessing relevant data for monitoring the informal economy and participatory and inclusive governance is extremely difficult; (b) the informal economy is mainly of interest to policy makers seeking growth through the promotion of MSME and very rarely will there be more than a slight reference to the informal MSME; (c) the approach to the informal economy is determined mainly around those who operate informally by choice rather than those who are informal by need. This, in turn, translates to channeling most authorities' thought and action to improving tax collection and easing bureaucratic controls or red tape so as to facilitate the transitioning of informal establishments to the formal economy. However, generally speaking, the population of Colombians surviving through the informal economy receives very little or no attention whatsoever, and that (d) in terms of the public opinion, there is a vast grey zone of activity that is broadly identified as the realm of the informal economy, within there is no clear distinction between the economy that is legally based from the one that is criminally driven. This is also true for policy makers and, based on the authors' research and understanding and as evidenced in the following chapters, the absence of a criteria to distinguish

36 Please see: http://www.businesscol.com/empresarial/tributarios/salario_minimo.htm

37 Please see: <http://en.mercopress.com/2010/05/04/almost-half-of-43.7-million-colombians-live-below-the-poverty-line>

38 Please see: http://www.dinero.com/actualidad/economia/retos-santos-economia_73275.aspx

39 A Fedesarrollo economic projection; cited in *La Economía en Barrera*, Periódico Alma Mater, February 2010

informality by choice and informality by need aggravates the vulnerability of the poverty-trapped constituent. Further, this gap makes it very difficult to hold policy makers accountable for a process of inclusive development. It is possible that this gap – this failure to understand the space and conditions within economic and development policy where the informal working poor of Colombia operate – might explain why the poverty trapped in Colombia tend to only receive assistance and humanitarian attention, instead of the labor identity and economic incentives needed for securing a formal space to work and develop, to lift themselves out of poverty and effectively contribute to the economic development of the country.

The DANE 2005 definition of informal economy in Colombia deems as informal, all workers in establishments of up to 10 workers; non remunerated family workers; domestic workers; own account workers excluding professional and independent technicians, employers with 10 or less workers. In a recent national policy document of June 2008, the CONPES 3527 on Competitiveness and Productivity plans for a redefinition of the informal economy concept and the optimization of its statistical information. It has also agreed⁴⁰ and aims to pivot all labor formalization on the decent work principles and the strengthening of protection system to the unemployed. The same policy document aims for bettering social dialogue, corporate social responsibility in labour matters, strengthening labour law inspection and enforcement and to strengthen entrepreneurship for labour inclusion of vulnerable population such as women, people with handicap, ethnical minorities and the youth. Among others, the CONPES also foresees promoting voluntary savings for old age prevision and bettering occupational health and professional risks, among others. If implemented, this CONPES should open channels for starting to strategically address the informality of many Colombian poor and follow recommendation 195 of the ILO on training for the informal economy and the many other ILO conventions and recommendations on the informal economy and the fulfillment of economic, social and cultural rights for all.

1.2. MAIN CHALLENGES FOR INCLUSIVE POLICY MAKING

1.2.1. WOMEN

Using law as a poverty reduction strategy demands a differential analysis to not only highlight the diversity of poverties experienced by the world's bottom billion, but also to illuminate the varied paths out of their circumstances. This may be most generally apparent when analyzing poverty in terms of sex: national level data show that the systemic discrimination facing women in terms of education, health care and other resources translates into more women living and working in poverty than men. These discriminatory practices, often defended by cultural or religious ideology, have multiplicative effects for women in the labor market. Women enter the labor market with fewer market-relevant skills than men, further limiting their economic opportunities. With formal employment already limited in its capacity to absorb the available labor force, women are crowded into a narrow range of opportunities in the formal economy, encouraging them to take on whatever work is available, be it formal or informal.⁴¹ These women will accept lower-paying jobs with increasingly fewer social

40 Republica de Colombia, DNP, Documento CONPES 3527 *Política nacional de Competitividad y Productividad*, Consejo Nacional de Política Económica y Social, 23 de Junio de 2008, p. 35

41 Kabeer, Naila. *Mainstreaming Gender in Social Protection for the Informal Economy*, p. 91.

protections and severe blows to their inherent dignity to continue to provide meager support for their families and children.⁴² In 2008, women made up less than half of the global labor force, accounting for only 40.5 percent of the world's workers, showing that they actually have less access to labor markets than men.⁴³ Of these women, less than half were employed in wage or salaried work (45.5 percent), while the percentage of women engaged as own account workers rose over five percentage points from 1997 to 28 percent in 2008.⁴⁴ Of the 1.5 billion people who are own account workers or unpaid family workers worldwide, 51.7 percent were women in 2008.⁴⁵ The global economic crisis may further entrench women in these circumstances of vulnerable employment and they may account for as much as 54.7 percent of own account and unpaid family workers as the crisis' impact settles into the world's labor markets.⁴⁶ In Latin America, for instance, "...a more significant impact on vulnerable employment rate can be expected for women than for men."⁴⁷ Women are, therefore, among the most defenseless of the world's workers.⁴⁸

Even in the informal economy, women's work and contributions to the household, family, community and country go unacknowledged or unsupported. For instance, due to its unpaid nature, women's role in the care economy is simply not included in national labor statistics or economic calculations and is instead categorized with all domestic work. Poverty-trapped women, who use their few free hours of the day weaving mats, making and selling food, cleaning fish or otherwise supporting their male family members' businesses, are underestimated both economically and socially. These women's work is not valued or recognized as work, which means then that the law doesn't grant them a labour identity on which to build and develop, posing a great challenge to policy makers attempting to address those individuals and families trapped in poverty. According to "rough estimates" gauged by UNDP, in 1995, the value of unpaid activities at the prevailing wage totaled to \$16 trillion or approximately 70 percent of the world's total output; of this amount, nearly 69 percent - \$11 trillion - was accounted for by women's unpaid work.⁴⁹ While it is extremely difficult to compare paid and unpaid work, these estimates indicate the contribution of women's work - albeit unpaid - to the global economy.⁵⁰

42 Ibid, p. 91

43 ILO, *Global Employment Trends For Women* March 2009, p. 9.

44 Ibid, p. 9

45 Goetz, et al., *Who Answers to Women*, p. 118

46 ILO, *Global Employment Trends for Women*, p. 30.

47 Ibid

48 There is, of course, considerable regional variety in terms of women's vulnerable employment. In several regions of the world - Developed Economies and EU, Central and South Eastern Europe and Latin America and the Caribbean - women were in less vulnerable jobs than men in 2007. This indicates that access to labor markets does not necessarily provide access to decent jobs. Transforming these jobs into decent work requires not only that worker productivity increase, but that this increase in productivity corresponds to an increase in wages. Thus, perhaps more important than the impact of this crisis is the persistence of social and cultural barriers that women experience in both accessing labor markets and once in the labor force.

49 Beneria, Lourdes, *Gender, Development and Globalization: Economics as if All People Mattered*, p.74, citing UNDP 1995 estimates.

50 Beneria, p. 74, citing UNDP 1995 estimates; it is likely, of course, that both the dollar contribution and the percentage contribution of women's unpaid work has changed since 1995. This it provided just to underscore the extent of women's

Women's rights are, of course, well recognized under the Universal Declaration of Human Rights, and other human rights conventions that later determined the specific need of highlighting women's human rights. The Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), the ICESCR, the ICCPR, the Beijing Declaration and Platform of Action, regional charters and protocols, including the UNSC Resolution 1820 recognizing sexual violence against women as a war crime, and others, all recognize the unique position that the world's women and their economic, political, social, and sexual rights warrant special attention. In 2008, poverty, work and gender were specifically addressed in the new target under Millennium Development Goal 1 on extreme poverty and hunger. The new target focuses on reducing the numbers of own account workers and, in doing so, encourages countries to begin capturing this element of their labor markets and economics in greater detail and with a disaggregated, differentiated approach, a much needed first step in illuminating the extent of vulnerable work among women and eventually addressing their particular labor demands.

Within the category of poverty-trapped women there is, however, great complexity, requiring a deliberately designed and executed differential analysis from a law and policy perspective. In Latin America, women of African or indigenous descent face an aggravated discriminatory experience due to their ethnic origin. In Brazil, for instance, 71 percent of Afro-Brazilian women work in the informal economy, which stands in contrast to Afro-Brazilian men (65 percent), white women (61 percent), and white men (48 percent).⁵¹ These women face intersecting forms of disadvantage: as members of a household, they will have less access to education, food, health services and valuable resources such as land; as workers, this discrimination and their greater household responsibilities translate into limited opportunities for work in the formal economy, as well as lower incomes in the informal economy; regardless of these conditions, these poverty-trapped women must work, and therefore, fall disproportionately among the ranks of the most vulnerable of workers.

In these circumstances, organization among women workers is crucial to raising their capacity to influence the decision-making processes that impact their lives and livelihoods. Women's organizations raise their multiple roles as worker, head of household, mothers, and partners, and express their practical concerns over childcare, safety, sexual harassment and domestic violence, among other issues. While women are over-represented among own account and vulnerable workers, their leadership among organizations of these workers is not always representative of their numbers and presence. The waste pickers' associations and cooperatives in Colombia present a remarkable exception: while men and women are nearly equally numbered in this organization of waste pickers, women are more or less equally represented among their leadership. Thus, the issues facing women waste pickers – as mothers, care-takers of elderly or disabled family members, girls and workers – may

activities that, although highly valuable, remain unvalued because they are unpaid.

51 Abramo, Luis and Valenzuela, Maria Elena, *Women's Labour Force Participation Rates in Latin America*, p. 382

be expressed and made explicit, in the hopes that their public unveiling will compel the public decision-making process to take note and veer in their direction.

1.2.2. CHILDREN

Despite international conventions and norms prohibiting the exploitation of child labor, in particular the Convention on the Rights of the Child (CRC) and ILO Convention 182 on the Worst Forms of Child Labor, children remain a staple of the informal economy. For a poverty-trapped family – with one or both parents working in the informal economy – the opportunities for formally educating their children may be virtually non-existent; and, without resources to provide for child care, these children, especially when young, will end up accompanying their mothers, fathers, and other family members to their places of work, whether that be in a trash dump, river bed, or forest collecting leaves and timber. In this context, they become incorporated into their parents' trade, at first mimicking in their play what they see as their adult futures and eventually contributing to the family's income to the extent possible. This is the unfortunate reality for these young workers, even though they require special protections safeguarding their rights as human beings, especially when their parents – already encumbered with the responsibilities of providing food and shelter as best as they can, with any available means – cannot do so. Yet, when a country's laws, regulations and policies fail to reflect the modern complexity and reality of informal labor, children quickly fall among the invisible population of workers in the informal economy and, because of their heightened vulnerability, among the more easily exploited, commoditized and victimized.

The CRC and ILO Convention explicitly place the responsibility of caring for these children in the hands of the State apparatus. The CRC states that ratifying members are responsible for ensuring that every child achieves a standard of living adequate for the child's physical, mental, spiritual, moral and social development.⁵² And, ratifying State parties shall take the appropriate measures to assist parents and other caregivers to implement this right and "in case of need, provide material assistance and support programs, particularly with regard to nutrition, clothing and housing."⁵³ The rights that are included under the CRC are, among others, the right to be protected from economic exploitation and performing any work that is likely to be hazardous or interfere with the child's education, or be harmful to the child's health, physical, mental, spiritual, moral or social development.⁵⁴ As with other provisions of the CRC, and while recognizing the role of parents and caregivers, ratifying States are required to take legislative, administrative, social and educational measures to ensure the implementation of these provisions, including providing for minimum employment ages, regulated hours of employment and penalties or sanctions for violations of these provisions.⁵⁵

⁵² *Convention on the Rights of the Child*, Article 27

⁵³ *Ibid*

⁵⁴ *Convention on the Rights of the Child*, Article 32

⁵⁵ *Ibid*

Children are further protected under ILO Convention 182, which recognizes the link between poverty and child labor, from the worst forms of labor, which include work that “by its nature of the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.”⁵⁶ And, although Colombia, which ratified this convention in 2005, is responsible to take “effective and time bound measures to...prevent the engagement of children in the worst forms of labor, provide the necessary and appropriate direct assistance of the removal of children from the worst forms of labor, ensure access to free basic education, identify and reach out to children at special risk and take account of the special situation of girls,” children continue to play visible and significant roles in both waste picking and artisanal and small-scale mining (ASM).⁵⁷ This may be in part due to the invisibility of poverty in informality; the need of updating the definition of informality⁵⁸ to include the intersections between the informal and formal economies or the reality of own account work, self-employment and vulnerable employment.

ASM presents a particular challenge for child labor. Child labor in mining is prohibited under most national and international law, therefore it is only in informal mining, which is usually the case with ASM that child labor persists and, in fact, flourishes.⁵⁹ These young workers are in danger of being completely marginalized and neglected: in many countries like Colombia, ASM does not even constitute formal, that is, recognized, protected and promoted “work”. Girls face an even greater danger of this marginalization, because they are not even expected to be working in ASM and their presence virtually overlooked.⁶⁰ Yet, “the involvement of girl child labor is much more frequent and far-reaching than was previously recognized,” in both the operational aspects of mining such as extraction and processing, as well as the ancillary economies that support mine workers based in a given community.⁶¹ Indeed, young girls may carry much of the burden of child labor in countries around the world. A national labor force survey conducted in India for 2004-2005 showed not only that child labor was driven by poverty⁶² – with 96 percent of employed children coming from households consuming less than \$2 per day – but also that girls under the age of fifteen constitute 42 percent of all employed children.⁶³

The numbers for children and youth working in the informal economy will most likely swell as a result of the economic crisis of 2008. In 2006, the ILO estimated that at least 400 million new jobs would be required to reach the full productive potential of the world’s youth, which was not even a realistic possibility at that time.⁶⁴ ILO had also estimated that the global economic crisis would increase youth

56 *Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child*, Article 3

57 ILO Convention 182, Article 7

58 Cárdenas S., Mauricio and Mejía M., Carolina, *Informalidad en Colombia: Nueva Evidencia*, p.4

59 ILO, *Girls in Mining: Research Findings from Ghana, Niger, Peru and United Republic of Tanzania*, p. 10.

60 *Ibid*, p. 8

61 *Ibid*, p. 8

62 See Basu Kaushik and Hoang Van Pham: *The Economics of Child Labor*.

63 ILO, *Global Employment Trends for Women*, p. 19

64 Please see: <http://www.cinterfor.org.uy/public/english/region/ampro/cinterfor/news/unemploy.htm> .

unemployment by as many as 17 million in 2009.⁶⁵ While this increase would be in large part due to the increase in youth unemployment in Central and South-Eastern European and CIS countries, the effects should have been felt in all regions of the world. On the African continent, youth now account for 37 percent of the working age population, but 60 percent of the unemployed.⁶⁶ In Latin America and the Caribbean, the youth unemployment rate was expected to rise from anywhere from 1.5 to 4.3 percentage points from 2008 to 2009.⁶⁷ More and more children will be forced into tolerating the most exploitative and dangerous circumstances to provide for themselves and their families, yet will most likely remain invisible and unprotected due to failures of law and policy.

1.2.3. ETHNOCULTURAL MINORITIES OF INDIGENOUS AND AFRO-DESCENDANT PEOPLES

Along with own account workers, women and children, indigenous peoples and afro-descendants are marginalized socially, economically, and politically around the world, resulting in greater numbers of individuals within these groups being poverty-trapped. Indigenous people represent only five percent of the world's population, but account for 15 percent of the world's poor.⁶⁸ While the precise figures vary country by country, their over-representation among the poverty-trapped is consistent. A World Bank study reported in 2004 that indigenous people represented 10 percent of Latin America's population and the largest disadvantaged group in Latin America.⁶⁹ For instance, in Bolivia and Guatemala, more than half of the total population was living in poverty in 2004, but almost three-quarters of the indigenous population lived in poverty during this same period.⁷⁰

At roughly 150 million, Afro-descendants constitute nearly one third of Latin America's population, but account for 40 percent of the region's population living in poverty.⁷¹ In Colombia, which is home to the second largest population of Afro-descendants in Latin America, key economic indicators showed a prominent racial divide – 98 percent of black communities in Colombia lacked basic public utilities, while only 6 percent of white communities lacked these utilities; 97 percent of black communities lacked social security benefits, while only 63 percent of white communities similarly lacked these benefits; and literacy was as high as 45 percent in black communities, but only 14 percent in white communities.⁷² Indeed, “the picture that emerges from (...) Latin America and the Caribbean is not that of a region advancing towards equality of opportunities for all, independent of social origin (...)”.⁷³

65 ILO, *Global Employment Trends Update*, p. 12

66 Please see: <http://allafrica.com/stories/200909250137.html>

67 ILO, *Global Employment Trends Update*, p. 12

68 Commission on the Legal Empowerment of the Poor, *Making the Law Work for Everyone*, p. 145

69 World Bank, *Indigenous Peoples, Poverty and Human Development in Latin America: 1994-2004*, (2004).

70 Ibid

71 Marquez, Gustavo, et al., IDB 2008 Report *Outsiders: The Changing Patterns of Exclusion in Latin America and the Caribbean*, p.3

72 *Afro-Descendants, Discrimination and Economic Exclusion in Latin America*, p. 5

73 Ibid, p. 10

As citizens, these two groups in particular experience incredibly poor political representation, further isolating their needs, concerns and awareness of political processes, State mechanisms and their identity as constituents of their States. In Brazil, although 45 percent of its population is of African descent, only 5 percent of the congressional representatives claim this heritage and in Nicaragua, there is not one person in the national assembly of African descent, which accounts for 9 percent of the country's population.⁷⁴ As workers, this socio-political exclusion translates into less employment and less quality work. In Mexico, indigenous men earn about 15 percent less than non-indigenous men in agricultural wage jobs; country data from Brazil reveals that non-Afro-descendant workers earn more than double than Afro-descendant workers in urban areas.⁷⁵ These workers have, in general, "unstable work lives and often drop out of the workforce altogether. Although it can be argued that this pattern may be the result of individual preference, it is likely that many workers are trapped in a life of bad jobs, poor employment opportunities, low and unstable earnings and no social protection."⁷⁶ Their circumstances are then perpetuated upon their children, who, without access to better education and health opportunities and while remaining encumbered by work responsibilities to supplement their family's income, will remain in the poverty trap of their ancestors. Without education and in precarious work conditions, social mobility is extraordinarily difficult to happen.

In 1957, the ILO responded to studies on the vulnerability of indigenous peoples and called for their integration into the life of their countries, approving ILO Convention No. 107.⁷⁷ This convention had a much more individual emphasis, focusing on the rights of members of indigenous groups, rather than the rights of indigenous groups themselves. This Convention was eventually followed by ILO Convention No. 169, adopted in 1989, which places much greater emphasis on preserving indigenous cultures and institutions, including their rights of ownership and possession over traditionally occupied lands. The 2007 United Nations' Declaration on the Rights of Indigenous People goes further to not only link colonization with the dispossession of these populations, but to also link the loss of land with the loss of cultural rights. These international norms, along with the Inter-American Declaration of the Rights of Indigenous Peoples, protect indigenous people's rights to their culture, cultural institutions and practices, as well as extending to them their modern rights, including labor rights, recognized under international and domestic law. Land rights warrant special concern in these documents, as they have held distinctive importance to indigenous people's lives and livelihoods and have been wrested from them by governments, multi-national corporations, and groups and individuals engaged in illicit activities.

While afro-descendants may take advantage of ILO Convention 169, as well, due to the co-optation of communal lands provided to them as "refuge from enslavement, and later, an important means of

74 Ibid, p. 27

75 IDB, *Outsiders*, p. 25

76 *Outsiders*, p. 83

77 Dannenmaier, Eric, *Beyond Indigenous Property Rights: Exploring the Emergence of a Distinctive Connection Doctrine*, p. 18.

survival in a socially and economically exclusionary society,” afro-descendants in Latin America have been in general much less successful in obtaining collective land rights than indigenous peoples.⁷⁸ The Brazilian and Colombian constitutions include some normative provisions extending cultural and agrarian land rights to their Afro-descendant citizens; however, in Brazil, these provisions do not extend to agricultural land and in Colombia, titles do not effectively protect these communities from the dispossession driven by illegally armed groups like rightist paramilitaries or leftist guerrillas who need the land for illicit cropping of coca for supplying multinational demand.⁷⁹

While there have been some monumental successes in these groups’ attempts to secure their human rights, especially their land rights – the landmark *Awas Tingni* case against the State of Nicaragua brought the country to account for treating untitled indigenous lands as State land and granting logging concessions to private companies – indigenous and afro-descendants in Latin America persist among the poorest margins of society.⁸⁰

1.2.4. THE SOCIAL PROTECTION ISSUE

Of critical importance to own account workers, women, children, and ethnic minorities within the informal economy is providing social protections to prevent their decline into further impoverishment. Conceived as a benefit to be derived from labor that is bought and sold through employer-employee relationships, social protection is usually a set of normative provisions set in place and jointly implemented and paid for by both the employer and the employee. This protection not only assures a sense of stability in workers, but also is intended to minimize the risk that individuals fall into poverty through no fault of their own.⁸¹ The provisions usually include basic social security, some kind of contingency-based assistance of the poor, prevention of threats to livelihood security, promotion of livelihoods and labor markets, transformative measures that addresses the cause and symptoms of poverty and vulnerability.⁸² While providing social protection involves significant transfers from governments to its citizens – totaling up to twenty-five percent of GDP in developed countries – these measures have also contributed to reductions in poverty in developed countries over the past fifty

78 IDB 2008 Report, *Outsiders*, p. 22; *Afro-Descendants, Discrimination and Economic Exclusion in Latin America*, p. 11.

79 Ibid

80 The Inter-American Court of Human Rights ordered Nicaragua to “demarcate and title Awas Tingni’s traditional lands in accordance with its customary land and resource tenure patterns, to refrain from any action that might undermine the Community’s interests in those lands, and to establish an adequate mechanism to secure the land rights of all indigenous communities of the country.” See *Case of the Awas Tingi Community v. The Republic of Nicaragua*. Inter-Am. Ct., H.R. Series C- No. 66. (2001), <http://www1.umn.edu/humanrts/iachr/C/66-ing.html>

81 Canagarajah, Sudarshan & S.V. Sethuraman, *Social Protection and the Informal Sector in Developing Countries: Challenges and Opportunities*, , p. 16.

82 Kabeer, *Mainstreaming Gender*, p. 25-26

years.⁸³ In fact, “investments in social protection can (...) help to ensure that progress in poverty reduction is not reversed.”⁸⁴

However, social protections have not necessarily been provided to those who are in most need of them. Indeed, “the poor have generally been left out of formal social protection provisions because of the dispersed nature of their employment, the irregularity of their incomes and their inability to contribute to social security schemes.”⁸⁵ At the same time, international efforts to extend social protection to the poverty-trapped tend to “organize their strategies around global value chains, focusing their attention on wage workers in the ‘traded’ sectors of the global economy,” virtually ignoring informal workers, and the most defenseless among them.⁸⁶ In developing countries, where up to ninety percent of the workforce is in the informal economy, there is a renewed concern for these workers who lie beyond the reach of social protection measures typically afforded by the State and formal employers.⁸⁷ Informal employment has not been able to provide the quality of income and social security characteristic of the formal economy, although the need for social protection has not been eliminated. These workers are arguably in more need of social protection – not only are they subject to the same risks of aging, illness and job-related injury as other workers, but the circumstances of their work are often more dangerous.

Yet, social protection has traditionally been conceptualized as linked with labor rights, rather than fundamental human rights.⁸⁸ Focusing on the use of law for poverty reduction provides a mechanism to tackle the complexity of determining the discrete needs of the individuals who are currently excluded from social protection mechanisms. On the “supply side,” State structures must be made aware of the challenges of any biases that are inadvertently created and implemented in the policy-making process, including geographical, ethnic, or the social distribution of State services.⁸⁹ This engages law from the top-down, when law and policy-makers realize the true, lived experience of their decisions on the poorest of their constituents and who of their constituents remain excluded, outside the reach of their laws, policies and regulations. On the “demand side,” individuals must be made aware of their rights as citizens and engage their political orientation to advocate for and realize their rights to life, work, health and livelihood. Here, law is engaged from the bottom-up, as the worker realizes her status as citizen.

83 Canagarajah, Sudarshan & S.V. Sethuraman, "Social Protection and the Informal Sector in Developing Countries: Challenges and Opportunities," p. 16.

84 ILO, *Global Employment Trends*, p. 19, discussing China’s investment in social protection as curbing the impact of the global economic crisis on its workers and citizens.

85 Kabeer, Naila, *Social Protection Strategies for an Inclusive Society: A Citizen-Centered Approach*, p. 4.

86 Kabeer, *Mainstreaming Gender*, p. 279

87

88 That is why, the Constitutional Court of Colombia, in order to enforce the social protection rights of the elder, for instance, links these rights to the fundamental right to life and enjoying a vital minimum.

89 Kabeer, *Mainstreaming Gender*, p. 332

1.2.5. DEMOCRATIC GOVERNANCE FOR INCLUSIVE DEVELOPMENT

On her own, the poverty-trapped person exists in state of survival, with limited engagement with society or State institutions. Through developing her voice and identity, perhaps through organizing efforts or greater access to information, she comes to realize and understand her status as a citizen and her incumbent rights and responsibilities attached thereto. The exclusionary barriers encircling her show cracks as she begins to identify as someone more than a poor individual; a poverty-trapped constituent of her State. She may now reach out and grab onto opportunities presented by academia, civil society and media outlets to advance her empowerment and access her *right to rights*. When she accesses the State institutions that are obligated to deliver the rights enshrined under the social contract between them, she has not only destroyed the exclusionary barriers, but has compelled her State institutions to provide her with the tools to do so.

For the most vulnerable of the working poor legal persons of a civic-solidary nature, better known as nonprofits and ranging from charities to coops and mutuals, constitute ideal vehicles for inclusion in both democracy and development.⁹⁰ The organization enables the individual worker to not only see the structural inequality she faces, but to challenge it in unity and solidarity with others like her. Her voice is raised with other similar voices. At the same time, organization may only yield a louder voice and a more visible presence; it alone cannot guarantee access to the resources and institutions necessary to be lifted out of deprivation. This requires a responsive State and, in a democracy, it is the constituent that may elicit a response from her State and all of its institutionalized resources and opportunities. Indeed, the relationship of the individual as a constituent with her State may be her most valuable asset in terms of addressing poverty, accessing the State mechanism and reinvigorating their social contract.⁹¹

As a constituent, she may insert herself into the public-decision making in a democratic State, but only so far as she has access to the public-decision making circuits and mechanisms. If she is isolated geographically, politically, economically, socially or culturally from that locus, then her opportunities and abilities to influence that decision-making process – and the resulting laws, policies and regulations – disappear. If, on the other hand, the question is one of the State's responses to her raised voice, then it is the nature and quality of the State apparatus that is at issue. Thus, governance, and moreover, democratic and participatory governance is absolutely fundamental for ensuring that marginalized members of society, especially those living in poverty traps created, propounded and perpetuated by poor law and policy, may influence the public-decision making process to work for them, rather than against them.⁹²

90 *Civic-Solidary Organizations* is a term proposed to designate nonprofit organizations in positive sense instead of a negative or residual one. Ruiz-Restrepo, Adriana, *Nature Juridique et Rôle Politique des Organisations Sans But Lucratif du Tiers Secteur*, Document de recherche pour une thèse doctorale en droit public de l'Université Panthéon-Assas. 2000 (Sans publier)

91 Ruiz-Restrepo, Adriana. *A Legal Empowerment Strategy for Latin American Poor*, p. 3

92 Ibid, p. 25 and Annexes 1 and 2

1.3. INTERNATIONAL AGENDAS ON THE INFORMALITY OF POVERTY-TRAPPED WORKERS

Due to a variety of factors, there has been a persistent rise in informality in the developing world. In 2002, informal employment accounted for one-half to three-fourths of non-agricultural employment in developing countries, i.e., forty-eight percent of non-agricultural employment in North Africa, fifty-one percent in Latin America, sixty-five percent in Asia, and seventy-two percent in sub-Saharan Africa; excluding South Africa, the share of informal employment in non-agricultural employment rises to seventy-eight percent in sub-Saharan Africa.⁹³ In 2007, it was estimated that the informal economy employed up to ninety percent of sub-Saharan Africa's workforce, anywhere from forty-seven to eighty-four percent of Asia's workforce, and nearly seventy-five percent of Latin America's workforce.⁹⁴ As indicated above, it is projected that, due to the global economic crisis of 2008, there will be up to 50 million newly unemployed individuals and the numbers of the working poor earning less than \$2 per day will increase by 200 million, with most of them working in the informal economy (since 2007).⁹⁵

As the informal economy has grown, its contribution to gross domestic product and job growth likewise increases, swelling to represent over forty percent of the regional GDPs of Africa, Latin America and Central Asia/Eastern Europe in 2002-2003⁹⁶ In Latin American and Caribbean countries, it is estimated that the informal economy has accounted for nearly seventy percent of all jobs created over the last 15 years.⁹⁷ Indeed, the consensus is that the informal economy is a "growing, permanent phenomenon of capitalist development and traditional economies."⁹⁸

There is, however, great concern over the low quality jobs that have been created during this time and the changing patterns and demographics of workers, giving greater momentum to the informal economy debate in international policy discussions. The international community has specifically addressed the need for tackling the precarious situations of own account worker and the working poor from several different angles. The following international agendas consider these individuals' socio-economic circumstances through addressing work quality, labor rights, legal empowerment and extreme poverty reduction.

1.3.1. THE DECENT WORK AGENDA

93 *Women and Men in the Informal Economy*, p. 7

94 ILO, Committee on Employment and Social Policy, *Social Security standards and the ILO campaign for the extension of social security*, Note for debate and guidance, Geneva 2008, GB 298/ESP/4

95 *Global Employment Trends Report 2009*, in *Global Economic Crisis and the Informal Economy*, Realizing Rights (2008)

96 World Watch, Vital Signs 2007-2008, using data from Friederich Schneider, *The Size of Shadow Economies of 145 Countries from 1999 – 2003*, IZA Discussion Papers (Bonn: Institute for the Study of Labor, December 2004).

97 ILO, *The Informal Economy*, Note from the Committee on Employment and Social Policy, p. 5.

98 Chen, *Rethinking the Informal Sector*, and ILO, Chen, Martha, Jhabvala, Renana, & Frances Lund, *Supporting Workers in the Informal Economy: A Policy Framework*, Working Paper on the Informal Economy, No. 2, Geneva 2002

The ILO's agenda on decent work stresses that not any job will provide the opportunity for individuals to avoid or lift themselves out of poverty; rather, only a job that realizes their potential as workers and recognizes their human dignity will do so. A *decent job* is one that gives people "the opportunity to earn enough for themselves and their families to escape poverty, not just temporarily but permanent...it provides social security and ensures protection by labor laws, and a voice at work through freely chosen workers' organizations."⁹⁹ Decent work, therefore, provides a more productive and satisfying labor market and the just distribution of the benefits of work that are fundamental to democratic societies that foster human development. The decent work agenda is applicable to all workers, both formal and informal. Indeed, the ILO has for several years insisted that its decent work agenda be applicable to both the formal and informal economies and in 2008, the Millennium Development Goals (MDGs) incorporated the informal economy in its first goal of reducing extreme poverty and hunger.¹⁰⁰ Yet, how to implement this goal, extend decent work to workers who remain outside the regulatory framework, and to ensure that a regulatory framework that does not in fact further impoverish informal workers still present a practical challenge for responsive governments.

As recognized by the ILO, democratic governance must play a key role in addressing decent work deficits in the informal economy. While political will, specific laws, policies and programs to extend protection to all workers and remove the barriers of entry into the mainstream economy will vary by country and circumstances, "their formulation and implementation should involve the social partners and the intended beneficiaries in the informal economy."¹⁰¹ At the same time, any measures taken to address informality "should not restrict opportunities for those who have no other means of livelihood...it should not be a job at any price or under any circumstances."¹⁰² Further, "public authorities should include [membership-based organizations of the poor] in public policy debates and provide them access to the services and infrastructure they need to operate effectively and efficiently and protect them from harassment or unjustified or discriminatory eviction."¹⁰³ It is in their meaningful participation in inclusive policy making that public measures to address the needs of these workers – and the more vulnerable and defenseless among them – that will bring them under a responsive legal and institutional framework, and, eventually, the mainstream labor market.

A relationship of particular concern in the decent work agenda is that between law, regulation and informality. The ILO has defined three different manifestations of this relationship, each requiring different policy responses: (1) where law is silent with respect to activities or groups falling outside the regulatory framework; (2) where laws exist, but lack of compliance and enforcement in informal

99 ILO, *Key Issues in the Labor Market: Decent Employment and the MDGs*

100 The first Millennium Development Goal, to eradicate poverty and hunger, has set as Target 1B to "achieve full and productive employment and decent work for all, including women and young people" indicators are the growth rate of GDP per person employed; the employment-to-population ratio; proportion of employed people living below \$1 (PPP) per day and the proportion of own-account and contributing family workers in total employment" <http://www.mdgmonitor.org/goal1.cfm#>

101 ILO, Resolution concerning decent work and the informal economy, 2002, paragraph 21

102 ILO, Resolution concerning decent work and the informal economy, paragraph 21

103 ILO, Resolution concerning decent work and the informal economy, ", paragraph 24

economy is the problem; and (3) where regulatory framework does not provide basic protection or create a level playing field, but acts as an impediment to job creation and a factor contributing to informality.¹⁰⁴ Indeed, informal workers – and own account workers especially – are not only excluded from formal regulatory schemes, but they are sometimes impoverished through laws and policies that are not merely unresponsive, but create adverse circumstances for groups of informal workers.

1.3.2. THE LEGAL EMPOWERMENT OF THE POOR AGENDA

As articulated by the former Commission on Legal Empowerment of the Poor, poverty and informality must be approached from four angles – access to justice, property rights, business rights, and labor rights – to both identify and redress the social, political, legal and economic exclusion that have resulted in circumstances of deprivation for the world’s bottom billion and more.¹⁰⁵ This agenda cuts across various international human rights instruments to articulate a way to realize those rights using the law and the rule of law to lower the exclusionary mechanisms that prohibit poverty-trapped individuals and communities’ access to State and market institutions and the resources they require to lift themselves out of poverty. Using law for poverty reduction is both a bottom-up and top-down process of inclusion¹⁰⁶. This strategy provides a means for these workers to begin their journey out of precariousness and towards greater security by widening the avenues through which these workers may access their governments and demand their rights. It allows for informal workers to raise their voices as persons / constituents and demand their rights from their governments, whose responsibility it is to provide and protect their rights at least of life with dignity, and decent work¹⁰⁷

In an early 2010 resolution the UN General Assembly, based on the normative framework on international human rights, and recognizing the Commission’s Final Report as a useful reference: “Encourages countries to continue their efforts in the area of legal empowerment of the poor, including access to justice and the realization of rights related to property, labour and business, addressing both formal and informal settings by taking into account those dimensions in their national policies and strategies, while bearing in mind the importance of national circumstances, ownership and leadership”.

1.3.3. THE REVISED FIRST MILLENNIUM DEVELOPMENT GOAL

Although the world’s bottom billion include 550 million people who are working to survive, but who will never work themselves out of poverty, the Millennium Development Goals did not address work

104 ILO, *The Informal Economy*, 2007

105 The Commission on Legal Empowerment of the Poor concluded that over four billion people in the world live and work beyond the reach of the law. Please see: *Making the Law Work for Everyone*, 2008

106 On the need of understanding legal empowerment as much more than a normative change in regulation but the appropriation of law in the micro, meso and macro structures of governance that will claim, advance and produce change in law, with or without the initiative and help of the establishment, please see: Ruiz-Restrepo, Adriana, *A Legal Empowerment Strategy for Latin American Poor*.

107 Ibid

and employment – let alone decent work and employment – when they were initially conceived and adopted by the United Nations. However, in 2008, a new target (to be included in the set of targets that each of the eight goals encompasses) was created under the first MDG that addressed this gap. This target aims “to make the goals of full and productive employment and decent work for all, including women and young people, a central objective of our relevant national and international policies and our national development strategies.”¹⁰⁸ The indicators for this target include measurements of the main categories within the informal economy as defined above, captured in the “vulnerable employment” indicator measuring the numbers of individuals (or percentage of workers) who may be categorized as informal wage and salary workers, contributing family workers, self-employed employers, own account workers and members of producers’ cooperatives.

Compiling country-level statistics on the numbers, age and sex of own account workers will not only unveil the extent of this sector of the labor economy, it will also inadvertently force policy-level discussions on what own account work is, where it fits into the regulatory edifice, and how to resolve the issues confronting these workers through law and policy-making. In this sense, it is a necessary step in the pre-law phase of the own account workers who have not yet been seen by their State actors and institutions.¹⁰⁹ At the same time, the challenges incumbent upon the “discovery” of these workers will be significant; once these workers have captured the attention of their representatives and State institutions, they will require and demand a more responsive reaction from the State. It is at this phase that law once again enters to open the doors of discussion among these various actors – to lift the voices of the workers as they realize their citizen-ship status and to open the ears of law and policy-makers to this frequency.¹¹⁰ Implementing the new target for MDG 1 will necessitate strong State action and responsive democratic institutions that are willing to reassess and redress their conceptions of the informal economy and labor markets.

108 ILO, *Key Issues in the Labor Market: Decent Employment and the MDGs*, p. 1

109 (1) Pre-law; (2) Law, and (3) Post- law are the three moments in which the rra thinktank divides participatory governance & and policymakers inclusion analysis. Ruiz-Restrepo, Adriana. *A Legal Empowerment Strategy for Latin American Poor: A Reading of the National Consultations for the Commission on Legal Empowerment of the Poor*: [http://www.abanet.org/intlaw/fall09/materials/Ruiz-](http://www.abanet.org/intlaw/fall09/materials/Ruiz-Restrepo_Adriana_166_AR10451028166_CLEMaterials_sysID_1649_733_0.pdf)

[Restrepo Adriana_166_AR10451028166_CLEMaterials_sysID_1649_733_0.pdf](http://www.abanet.org/intlaw/fall09/materials/Ruiz-Restrepo_Adriana_166_AR10451028166_CLEMaterials_sysID_1649_733_0.pdf) and rra (Public Law + Social Innovation) thinktank / THRD SECTOR LAW LAB / Working Document # 23, 2007 (unpublished)

110 Ibid

2. URBAN AND INFORMAL WASTE RECYCLING WORKERS IN COLOMBIA

This chapter analyzes the law and policy environment for own account urban waste pickers in Colombia. As with many countries in the global south, this occupational group has grown considerably with increasing urbanization and limited municipal resources and capacity. Section 2.1 sets for the history and context of the waste management economy in Bogota and its evolution into an essential public service that was increasingly delivered by private waste operators through a public procurement process beginning in the 1990s. Section 2.2 then considers the public policy environment for waste management, first under the Colombian Constitution and its provisions for the environmental sanitation public service, then the relevant legislative provisions, namely Law 142 of 1994, Decrees 1713 of 2002 and 1505 of 2003, Decree 805 of 2005, followed by judicial orders relevant to waste pickers' trade within the waste economy. Section 2.3 continues to analyze the occupational group of own account waste pickers' in more detail, from their history of internal displacement to the different groups of workers within the trade, including waste dump and street waste pickers, women, children, the elderly, and ethno-cultural minorities, and finally, social protection and health issues facing these workers. Section 2.4 then analyzes the trade context of own account waste pickers including the various actors interacting with, and competing with, the waste pickers, such as the Colombian state, private sector corporations in waste management, authorized organizations under Law 142 of 1994, and businesses and individuals engaged in waste recycling specifically. Section 2.5 then considers the labor and market for own account waste pickers, from the physical labor of their trade to the entrepreneurialism of their work. This section also sets forth the legal impoverishment of waste pickers through the relevant public policy environment and how this impoverishment was redressed through strategic litigation and advocacy efforts. Finally, Section 2.6 completes this analysis by looking at the role of waste pickers' organizations in advancing waste pickers' inclusion and participatory governance. This section looks at both the space available for the solidarity economy in Colombia to act as mechanisms of inclusion for informal workers and the evolution of waste pickers' organizations and their legal empowerment.

It is estimated that the number of city dwellers will double around the world between 1987 and 2015, with over 90 percent of this growth hitting third world nations whose growth rate is approximately three times that of developed countries¹. In Colombia, approximately 74 percent of the population already lives in urban environments², and as any other country in the world, it is consuming large quantities of plastic, metal, paper and glass products. In this face of this demographic reality, solid waste management has emerged as a critical issue relating to the health and safety of burgeoning urban populations. Even so, formal waste collection usually accounts for only 50 –80 percent of trash generated, with even less waste formally disposed of by municipal authorities directly or indirectly.³ According to World Bank estimates cited in the UNEP's 2008 report on Green Jobs: Towards Decent Work in a Sustainable, Low Carbon World, municipalities spend on average 20 – 50 percent of their available budgets on solid waste management, even if only 30 – 60 percent of the solid waste is collected and less than 50 percent of the population is served by these formal services.⁴ In-income countries, the mere collection of waste may use up to 90 percent of municipal solid waste management budgets; this drops to 50-80 percent in middle-income countries and at most 10 percent in high-income countries, whose budgets for these services are substantially greater.⁵

Limitations of capital resources or logistical or management capacity in the municipal waste management of developing countries often leave space for informal waste collection to flourish and complement the formal waste operations around the world. Informal waste collection is, in fact, a work opportunity for the very poor; although there is no authoritative number of formal and informal jobs created by the waste management industry globally, it is estimated that up to 2 percent of the population in third world cities are engaged in some kind of informal waste collection activity.⁶ In China, the number of informal waste collectors (2.5 million) is nearly double that of formal waste collectors (1.3 million), while in Cairo, there are approximately 70,000 informal waste collectors (*zabaleen*), who collect approximately half of the city's trash.⁷ Despite the enormous environmental and socio-economic impact of waste on the informal work and livelihoods of recyclers and waste pickers around the world, municipal governments of developing countries have embarked on waste management privatization efforts, usually following macro-structural adjustment recommendations made to national governments, without providing or even considering⁸ any substantive alternative for

1 Medina, Martin, *The World's Scavengers: Salvaging for Sustainable Consumption and Production*, p. 50.

2 Please see: <https://www.cia.gov/library/publications/the-world-factbook/geos/co.html>

3 Medina, Martin, *The World's Scavengers: Salvaging for Sustainable Consumption and Production*, p.51.

4 UNEP, p. 7

5 UNEP, p. 7

6 Medina, Martin, *Waste Picker Cooperatives in Developing Countries*, El Colegio de la Frontera Norte, Mexico, p. 8.

7 UNEP, p. 17; Medina, Martin, *The World's Scavengers*, p. 213

8 CiViSOL, *Arguments to the Constitutional Court of Colombia / Judgment T-291-09*
<https://sites.google.com/a/civisol.org/la-basura-es-vida/>

protecting the right to life with dignity, work and development of those constituents whose only opportunity for work and life are found in scavenging trash and salvaging recyclables.⁹

Considering that many of the countries in the global south have not implemented a waste recycling system or grown a culture of separating garbage at its source, most waste recycling in the cities of Colombia and elsewhere is the product of the physical effort and sweat of the State's most deprived constituents. Their work not only prevents contamination and climate change by minimizing the burial or incineration of waste in landfills, but also supports national industries by recuperating tons of secondary commodities such as used paper, scrap metal, plastics and glass. The privatization of waste management without considering the traditional work, livelihood and social contribution made by urban and informal waste recycling workers illustrates perfectly the notion of *legal impoverishment of the poor*,¹⁰ i.e. the closure of the only space that the poorest of the poor have found for realizing their survival needs and development aspirations. Due to its high commercial value and in light of increasing costs of production and demographic growth linked to consumerism, waste is now at the center stage of both the market, as a secondary commodity, and developing countries' green agendas focusing on a culture of zero waste. Unfortunately, efforts by city authorities to privatize this industry do not often provide alternative livelihood options for informal waste pickers or options that satisfy their existing economic conditions. In fact, and until recently, waste pickers have existed in a minimal economic security; the security that they have enjoyed is, in large part, due to their own hard labor and innovation, rather than supportive State or market efforts. For instance, some waste pickers in some Colombian, Indian and Mexican cities receive as little as 5 percent of the formal price for recyclable materials, and even still manage to earn more than the minimum wage by working arduous hours.¹¹ In Colombia, waste pickers work on average 10 *physical* hours per day along city streets, to earn their living.¹²

This chapter examines and analyzes the legal and policy environment of Colombia's waste pickers as informal workers in the waste collection and management economy and as situated within the international discourse on informality, waste and the green agenda. As own account workers, these men, women and children persist in vulnerability and precariousness, outside the very margins of law and policy. Over the past seven years¹³, through organization and diverse type of advocacy interventions, including voluntary constitutional litigators and other professionals, the CiViSOL Foundation and other members of civil society, the waste pickers' socio-economic and political exclusion has managed to receive national and international attention. The waste pickers' insertion and visibility in the public sphere and arguments for systemic change have forced the State toward a

9 Padilla, Nohra, Ruiz, Silvio, and Ruiz-Restrepo, Adriana (attorney at law), *Arguments to the Constitutional Court of Colombia* / Judgment T-724-03 <http://www.scribd.com/doc/36979764/Caso-de-La-Sentencia-T-724-03-Sobre-Licitacion-de-Aseo-Empobrecedora-y-para-ARB>

10 On this notion: Ruiz-Restrepo, Adriana. *A Legal Empowerment Strategy for Latin American Poor*

11 Medina, Martin, *Waste Picker Cooperatives*, p. 10.

12 Ibid, p. 163.

13 Please see the legal struggle starting back in 2003: <http://www.eltiempo.com/archivo/documento/MAM-999638>

more inclusive process, and, most recently, by order of the Court, a formalization effort that should maintain and nurture the waste pickers' entrepreneurial endeavors. Their particular journey towards achieving better governance in the formal waste management system is unique and illustrates the possibilities for widening the public decision-making space for those who remain poverty-trapped.

2.1. CONTEXT AND HISTORY OF WASTE MANAGEMENT

As in many places around the world, the phenomenon of waste management in Colombia was a necessary consequence of urbanization. Before the advent of the modern city, people lived in open rural areas where individuals and households could manage the disposal of their private trash and waste. Not only were their disposable items made out of natural materials, often providing feed for animals, fertilizer for fields or otherwise decomposing in their natural environments, rural households had access to enough physical space for such domestic disposal.¹⁴

With the arrival of industrialization, cities soon followed, teeming with an influx of rural inhabitants drawn to the lure of urban employment. In these cities, populations were more concentrated and personal space was limited to the confines of the home. Yet, households did not abandon their approach to the disposal of waste – it was still each household that managed its own waste disposal and, as before, trash was disposed of in the space separating households, i.e., public streets; during this same time frame, the very nature of waste changed as non-organic materials, like plastic, were introduced to daily life. This combination of factors – dense communities, the absence of vast public space, and synthetic or non-organic refuse – soon culminated in severe health and sanitation problems for city residents as their trash collected in urban public spaces. These problems fell under the domain of municipal authorities, who were charged with caring for the collective hygiene and health of the inhabitants in their jurisdictions.¹⁵

Thus, hinged on the premise of public health, sanitation and environmental cleanliness, municipal and urban authorities began addressing the issue of urban waste disposal. Initially, these efforts were concentrated on the removal and transport of waste to outside of the city centers. This collected waste was often placed in one of two areas: waste dumps at the edges of cities or in bodies of water, where vermin and other creatures' access would be limited, thus preventing the spread of infection and disease.¹⁶ In Cali, Colombia, and in many other places around the world, the growth of the city can be traced by the history of public waste dumps at the outskirts of the city's limits; as Cali grew, its municipal authorities looked for waste sites that could not only provide for the increasing amount of waste produced by the city's inhabitants, but that were also far enough away from the city to meet the health and sanitation responsibilities of the government. These heaps of waste – collections of discarded food, clothes, boxes, bottles, and other organic and non-organic materials – attracted those

14 rra (Public Law + Social Innovation) thinktank / SOCIAL INNO LAB; *Waste Pickers, Policy Reform and CSR in the Green Era*, Working Document # 1, Cali, Colombia, 2009 (unpublished)

15 On this topic, the French School of Public Service and Administrative Law in countries of civil law tradition.

16 Silvio, Dario, Nohra, Maria Eugenia, Ingeniero / rra interview / 2009 / Bogotá

in need of what might be found there. Silvio Ruiz, a Colombian waste picker, remembers how decades ago in the city of Manizales, waste pickers waited for the carriages transporting urban waste to rivers to eventually fish out what they needed from the city's trash.¹⁷ This included meat discarded by the city's butchers, which was captured by waste pickers yielding metal hooks before it fell into the river water.

Because rural communities may continue to address their waste needs on a personal or household level, waste disposal is, therefore, primarily an urban phenomenon. For instance, in rural Nigerien villages, families still tend to the disposal of waste on a household level, reusing organic materials when possible and taking advantage of the space between villages and compounds for waste disposal. Just outside the villages' edges will lie piles of waste – dirtied shards of cloth, plastics, animal droppings, and other discarded materials – where goats roam to scavenge for food and nourishment. However, in larger Nigerien villages or central towns, whose inhabitants are more densely packed than in smaller villages, waste disposal poses more serious health and sanitation problems and must be addressed by the local authorities. And, in countries like Colombia, where nearly three quarters of the population live in urban areas,¹⁸ waste removal and disposal take on a more pressing character and responsibility for urban, municipal, and State authorities. A country such as Colombia, which functions around cities and its urban population, requires an efficient, capable and expansive waste management system to provide for its public health, sanitation and environmental cleanliness.

2.1.1. HISTORICAL CONTEXT OF WASTE MANAGEMENT SERVICE AND ECONOMY IN BOGOTA

Bogota's current waste management system has evolved over the past 150 years, as the city itself has grown and attempted to address its mounting waste concerns. In 1875, by town council agreement, a body of municipal watchmen was created whose charge was to manage the city's cleanliness, embellishment, health and safety.¹⁹ Just a few years later, in 1880, the city appointed the Director of Public Construction to be the new chief of this group of watchmen.²⁰ The appointee had, in fact, been addressing the city's cleanliness for some time by taking advantage of the inmate population of Bogota – it was regular practice at that time for up to 100 inmates to clean the city every day.²¹

However, by the mid-1880s, due to the city's growing population this municipal body required additional resources to continue its activities. Thus, in 1884, a small tax of 10 – 15 pennies was exacted upon business owners in Bogota.²² Collected by the Cleanliness and Embellishment Guild²³, a private

17 Silvio, Dario, Nohra, Maria Eugenia, Ingeniero / rra interview / 2009 / Bogotá D.C.

18 CIA, *World Fact Book*, Colombia

19 rra (Public Law + Social Innovation) thinktank / SOCIAL INNO LAB; *CSR & CSOs for Poverty Reduction through Inclusive Waste Management Policy and Public Cleanliness' Choices*, Working Document, 2006 (unpublished)

20 Ibid

21 Ibid

22 Ibid

23 Ibid

non-profit organization, and following Town Council Agreement 36 of 1902, this money was used to create a new Agency for Public Cleanliness, which was responsible for the “collection, transport and disposal of waste (...) in the main roads of central neighborhoods.”²⁴ This mandate was executed by hired workers, who were in fact public employees, and who, “in exchange for payment of 12 pesos per month...will take care of the cost of twenty-three chariots and their animals, the conductors of the chariots and the workers themselves.”²⁵ Despite these early efforts to address the waste removal and disposal needs of Bogota’s residents, many city residents were dissatisfied with the persistent presence of trash in public spaces. “It is unbearable the lack of cleanliness on the street’s of Bogota. Wherever one looks, trash and waste is piled up. There is not one single clean road. If Bogota deserved the title of the very noble and very royal, now it deserves the title of the suicidal and filthy” noted one citizen.²⁶ Municipal efforts were simply insufficient to resolve the growing problem of waste management, which multiplied as Bogota’s population grew year by year.

In 1911, waste collection was formally handed over to municipal authorities, who received 36 coaches and 53 animals to transport and dispose of the collected waste.²⁷ Municipal resources were, however, rapidly depleted, with only ten coaches and 36 animals remaining in a few years.²⁸ To support their additional work requirements, taxes were again levied, this time upon residents whose poultry roamed along public roads, fruit vendors, and citizens who did not clean their homes or sweep the city’s streets.²⁹ Yet this was still not enough. In the 1920s, the municipal authorities attempted to revolutionize their responsibilities by introducing mechanical cars to make the process of collection, transport and disposal more efficient.³⁰ However, the global economic crisis of 1929 forced Bogota to return to its early collection and transport mechanism of animal-drawn coaches.³¹ This waste collection and management system persisted for over twenty years.

Then, in 1954, the city of Bogota became a Capital District and was thus able to revisit its waste management operations and design. By Town Council Agreement 115 of 1956, the city hired a consultant to study and report on the most efficient method to manage the waste created by Bogota’s inhabitants.³² Around this time, the city experienced a change in the very approach it took towards waste management. What was once an issue purely of *hygiene and sanitation facility* was reconceptualized as a *public service that each inhabitant was entitled to* and that was to be provided for by the State. The premise of providing for the city’s inhabitants’ basic needs inspired Bogota’s

24 Ibid

25 Ibid

26 Ibid

27 Ibid

28 Ibid

29 Ibid

30 Ibid

31 Ibid

32 Ibid

waste management policy as Colombian policy-makers adopted the rhetoric and approach of public service.³³ Yet, once again, the waste problem in Bogota continued to grow beyond the city's capacity to address it.

In 1958, Bogota passed Town Council Agreement 30, which stated, among others, the following considerations for creating EDIS, the capital district's public services enterprise:

"1.It is the duty of the authorities to provide the efficient delivery of public services; 2. For bettering the provision of public services of cleanliness and street sweeping and of domiciliary collection of waste, it is necessary to create an autonomous and decentralized enterprise with sufficient resources; 3. In accordance with the binding and valid decisions of the Capital District, there is a tax exclusively designed for the sweeping and cleanliness of the city streets; 4. Ordinary resources on which the Capital District relies are unable to provide an efficient service of domiciliary/household waste collection; 5. Various legal dispositions, especially the legislative decree 3300 of 1954, authorize the district to organize public services through autonomous administrative entities with independent juridical personhood and patrimony."³⁴

This municipal, and thus State owned, enterprise became the sole entity responsible for door to door waste collection and final disposal in Bogota.

Bogota continued to grow at an amazing pace in the mid-twentieth century. In 1960, there were 378 neighborhoods in Bogota; less than five years later, in 1964, there were 653 neighborhoods.³⁵ EDIS had 863 public employees devoted to sweeping city streets alone, illustrating the great demand for waste management services.³⁶ During this time, EDIS relied heavily on multilateral financing.³⁷ This, along with the increasing influence of neo-liberal ideology in a small non-interventionist State, and the real need for better, more frequent waste management services, contributed to the public perception that EDIS had failed to provide quality services to the city's inhabitants. BY 1993, EDIS was officially dissolved³⁸, and its "low quality services, excessive administrative costs, and clear financial insolvency,"³⁹ were perfect evidence of the need for privatization schemes in domiciliary public utilities or services. Consequently, Law 142 of 1994 was passed and aimed to reform the provision of services, which included among other services, the waste management public services. According to the rationale of Law 142, "it is undeniable that many public entities reveal highly intolerable inefficiency, above board operational costs and extraordinary failures of management (...) there is a need for in depth solution to manage these companies if we want to guarantee and ensure adequate

33 Ibid

34 Ibid

35 Ibid

36 Ibid

37 Ibid

38 Ibid

39 Ibid

delivery of services (...) *one of the reasons why Colombians do not take advantage of domiciliary services is that there has been no competition within this sector*".⁴⁰

Indeed, in practice, the domiciliary public services sector had been subject to an official monopoly under EDIS in Bogota, just like EMSIRVA⁴¹ was for Cali until March 2009. Law 142 of 1994 permitted the participation and involvement of private actors in providing and delivering public services, including waste management services to Bogota's inhabitants. These private actors appeared on the waste management scene as "concessionaires" of the State, who would usually be awarded exclusive service contracts for waste management services: a contract for an *Exclusive Service Area (ASE)*⁴². Since Law 142 of 1994, it is through a public, and thereby open, bidding process, that competition for providing waste services is made available to private actors of national, international or multinational origin, who bid for the exclusive right to operate integrated waste management services for the city's residents (door to door collection and transport to the final disposition place). This model of waste management was eventually implemented throughout Colombia and private concessionaires flourished within the country's waste management economy. However, traditional and informal waste picking workers persisted on the margins of the waste trade, specializing concretely in the collection, separation and commercialization of recyclables. This space for the waste pickers' trade remains even today, because, in general, municipalities and concessionaries implement and operate only one waste collection route for trash,⁴³ which ends by burying all collected trash and potentially recyclable material - that is not previously salvaged by the waste pickers - in public waste dumps and sanitary landfills.

It is worth noting that currently, the city of Bogotá is amidst a new tender public procurement process for rewarding the private operation of Bogota's *Doña Juana* sanitary landfill⁴⁴. Terms of reference indicate that the city of Bogota is willing to also find some advantageous use of the waste destined for the landfill. Bogota already initiated a bio-gas operation and is also requesting landfill bidders to present in their bids a component addressing the advantageous use for 20 percent of the landfill waste destined for *Doña Juana*. Despite this explicit request for proposals for the advantageous uses of this waste, including recycling, this contractual scheme has not effectively included waste pickers and thus

40 Ibid

41 EMSIRVA was Bogota's public waste management company; the one in charge of the collection and final disposal of waste prior to the privatization of waste management.

42 The exclusivity of an area for operation is structured in the public contract or procurement scheme not only for clarifying the territorial clause of operation but defining the financial exploitation possibilities of the bidder and more over for ensuring that public sanitation will also be offered to deprived neighborhoods where otherwise, a market driven waste collection operation wouldn't go.

43 A pilot project for creating a second route for recyclables (selective route) was conceived and is in operation (minimal) since 2003. However, it is not very successful as the selective trucks collecting door to door recyclables through a second route arrive usually half empty. The recyclable or selective route in Bogota ends in a recyclable plant, called *La Alquería* that is operated by municipal contract with the ARB providing jobs for more or less 30 waste pickers.

44 Please see: <http://www.elespectador.com/noticias/bogota/articulo-220535-recicladores-advierten-desacato-corte-licitacion-de-dona-juana> and

<http://www.terra.com.co/noticias/articulo/html/acu33559-licitantes-de-dona-juana-deberan-incluir-recicladores.htm>

has not abided by the affirmative action of inclusion of waste pickers ordered by the Court, particularly in decision T-724-03 which specifically addressed public waste management procurement contracts in Bogota. The CiViSOL Foundation has recommended that waste pickers request the Court to suspend this tender process under contempt of court orders, stressing that although not the main and principal source of law in the civil law tradition of countries like Colombia, jurisprudence remains a source of law that is more relevant when it consecrates an affirmative action for poverty reduction. The Asociacion de Recicladores de Bogota (ARB) has followed this recommendation and requested a contempt of court hearing and the suspension of the Dona Juana tender for due inclusion with the assistance of one of their professional lawyers and friends based in Bogotá.

2.2. PUBLIC POLICY OF WASTE MANAGEMENT

The livelihood of the waste pickers depends directly on access to waste and thus to the relevant law and public policy on waste management. The regulation that defines the rules applicable for waste pickers is the set of norms that have, either at the theory level of norms or at the practice level of implemented policy, residually left some spaces available for the waste pickers' trade, and in which self employment and own account work in waste have flourished.

In Colombia, and partly due to the absence of an effectively implemented urban recycling policy as it exists in theory, it is in the practice level where a space was found and developed *de facto* into a waste recycling trade. In fact, it is quite surprising that the authorities, who are well aware that almost 90 percent of trash is recyclable and that it has now commercial value as secondary commodity in both national and international industry, have left the recycling trade open for interpretation, without defining and controlling it within the existing legal framework for the advantageous uses of waste. Understanding waste management policy is therefore crucial for understanding the livelihood, identity, work, economy, and moreover, the challenges of waste pickers in Colombia and the Global South in light of a poverty reduction strategy reflecting a rights based approach to development, global engagement of the Millennium Development Goals and counter-global warming.

2.2.1. CONSTITUTIONAL UNDERSTANDING OF WASTE MANAGEMENT

Municipal waste management is encompassed under the notion of "environmental sanitation," which, in Colombia, is considered a domiciliary and essential public utility or service, i.e., one that one that is crucial to satisfy the basic needs of the population. It is, simply, essential to the life of the citizens. The two words "environmental" and "sanitation," – referring to cleanliness, health, safety and the physical environment, as well as the notion of environmental sanitation as an essential public service – immediately reveal the link between waste, health, life and the environment. This connection further explains why understanding the trade and environment of the waste pickers in Colombia requires an analysis of constitutional law, administrative law and environmental law. Where there is improper or inadequate waste management, or in other words where this essential public function is not being properly performed, the public suffers detrimental consequences in three dimensions: as individuals,

the impact manifests on their personal health and safety; as a collective body the impact manifests on the fundamental right to enjoy a healthy environment in the city; and as a civilization, the impact manifests on good climate as a global public good. At its largest scale, improper environmental sanitation will have multiplicative effects on the health of the planet at large, thus implicating the global environmental policy agenda in the domestic discussion of waste management and waste pickers' livelihoods.⁴⁵

As in other countries, in Colombia the notion of “environmental sanitation” includes within it the provision of public utilities or services relating to water, sewage and cleanliness. The cleanliness component has special application for the waste removal dimension of the environmental sanitation public service. Waste comes in different and varied qualities and quantities – including, liquid, solid and gaseous waste, domiciliary or residential waste, biological, industrial, agricultural, radioactive and nuclear waste – and impacts every resident of a country in their individual and collective dimensions of life. In this regard, a comprehensive waste management policy is critical to any policy framework in any given country.

The basic principles and rules of environmental sanitation policy in Colombia begin with the 1991 Political Constitution of Colombia. Under the overarching social purpose of the State, the Colombian government is responsible for providing for the general well-being of its population, as well as improving its quality of life.⁴⁶ Providing public services is inherent⁴⁷ to realizing the social purpose of

45 CiViSOL, *Arguments to the Constitutional Court of Colombia / Judgment T-291-09* <https://docs.google.com/viewer?a=v&pid=sites&srcid=Y2l2aXNvbC5vcmd8bGEtYmFzdXJhLWVzLXZpZGF8Z3g6NmViOWZiMTl3NzcwZTYxYw&pli=1>

46 Article 366. The general welfare and improvement of the population quality of life are social purposes of the state. A basic objective of the state's activity will be to address unsatisfied public health, educational, environmental, and potable water needs. For this purpose, public social expenditures will have priority over any other allocation in the plans and budgets of the nation and of the territorial entities. // *Artículo 366. El bienestar general y el mejoramiento de la calidad de vida de la población son finalidades sociales del Estado. Será objetivo fundamental de su actividad la solución de las necesidades insatisfechas de salud, de educación, de saneamiento ambiental y de agua potable. Para tales efectos, en los planes y presupuestos de la Nación y de las entidades territoriales, el gasto público social tendrá prioridad sobre cualquier otra asignación.*

47 **Article 365.** Public services are inherent to the social purpose of the state. It is the duty of the State to ensure their efficient provision to all the inhabitants of the national territory. Public services will be subject to the juridical regime determined by the law, may be provided by the State directly or indirectly, by organized communities, or by individuals. In any case, the State is responsible for the regulation, control, and application of such services. If for reasons of sovereignty or social interest, the State, by means of a law approved by the majority of the members of both chambers upon the initiative of the government, should decide to assign to itself specific strategic or public service activities, it must first indemnify fully those individuals who by virtue of the said law are deprived of the exercise of a lawful activity. // **Artículo 365.** Los servicios públicos son inherentes a la finalidad social del Estado. Es deber del Estado asegurar su prestación eficiente a todos los habitantes del territorio nacional. Los servicios públicos estarán sometidos al régimen jurídico que fije la ley, podrán ser prestados por el Estado, directa o indirectamente, por comunidades organizadas, o por particulares. En todo caso, el Estado mantendrá la regulación, el control y la vigilancia de dichos servicios. Si por razones de soberanía o de interés social, el Estado, mediante ley aprobada por la mayoría de los miembros de una y otra cámara, por iniciativa del Gobierno decide reservarse determinadas actividades estratégicas o servicios públicos, deberán indemnizar previa y

the State and it is, accordingly, the duty of the State to ensure the efficient provision of public services to all citizens of the national territory and protect their rights thereto.⁴⁸ The President of the Republic of Colombia is responsible for setting the general administration and efficiency control over public policies of Colombian domiciliary public services and to exert this function via the National Superintendent of Domiciliary Public Services⁴⁹. Public services are legally framed; they may be provided directly by the State or indirectly by delegation to private entities, usually through the contractual technique of the concession contract. In either case, the State as the constitutional duty holder maintains the responsibility of regulation, control and supervision over these public services. In regards to environmental sanitation, Article 49 of the Constitution indicates that this particular public service falls under the domain of the State⁵⁰. Specifically, the State must organize, direct, and regulate the public services of environmental sanitation following the principles of efficiency, universality and solidarity⁵¹. Further, every person has the obligation or duty to provide for their own health and that

plenamente a las personas que en virtud de dicha ley, queden privadas del ejercicio de una actividad lícita.

48 Article 369. The law will determine the duties and rights of users, the regime of their protection, and their form of participation in the management and funding of the State enterprises that provide the service. Similarly, the law will define the participation of the municipalities or their representatives in the entities and enterprises that provide domestic public services. // **Artículo 369.** La ley determinará los deberes y derechos de los usuarios, el régimen de su protección y sus formas de participación en la gestión y fiscalización de las empresas estatales que presten el servicio. Igualmente definirá la participación de los municipios o de sus representantes, en las entidades y empresas que les presten servicios públicos domiciliarios.

49 Article 370. It is the responsibility of the President of the Republic to stipulate, subject to the law, the general policies of administration and efficiency control of domestic public services and to exert through the Superintendence of Domestic Public Services, the control, inspection, and supervision of the entities that provide them. // **Artículo 370.** Corresponde al Presidente de la República señalar, con sujeción a la ley, las políticas generales de administración y control de eficiencia de los servicios públicos domiciliarios y ejercer por medio de la Superintendencia de Servicios Públicos Domiciliarios, el control, la inspección y vigilancia de las entidades que los presten.

50 Article 49. Public health and environmental protection are public services for which the State is responsible. All individuals are guaranteed access to services that promote, protect, and rehabilitate public health. It is the responsibility of the State to organize, direct, and regulate the delivery of health services and of environmental protection to the population in accordance with the principles of efficiency, universality, and cooperation, and to establish policies for the provision of health services by private entities and to exercise supervision and control over them. In the area of public health, the State will establish the jurisdiction of the nation, territorial entities, and individuals, and determine the shares of their responsibilities within the limits and under the conditions determined by law. Public health services will be organized in a decentralized manner, in accordance with levels of responsibility and with the participation of the community. The law will determine the limits within which basic care for all the people will be free of charge and mandatory. Every person has the obligation to attend to the integral care of his/her health and that of his/her community. // **Artículo 49.** La atención de la salud y el saneamiento ambiental son servicios públicos a cargo del Estado. Se garantiza a todas las personas el acceso a los servicios de promoción, protección y recuperación de la salud. Corresponde al Estado organizar, dirigir y reglamentar la prestación de servicios de salud a los habitantes y de saneamiento ambiental conforme a los principios de eficiencia, universalidad y solidaridad. También, establecer las políticas para la prestación de servicios de salud por entidades privadas, y ejercer su vigilancia y control. Así mismo, establecer las competencias de la Nación, las entidades territoriales y los particulares y determinar los aportes a su cargo en los términos y condiciones señalados en la ley. Los servicios de salud se organizarán en forma descentralizada, por niveles de atención y con participación de la comunidad. La ley señalará los términos en los cuales la atención básica para todos los habitantes será gratuita y obligatoria. Toda persona tiene el deber de procurar el cuidado integral de su salud y la de su comunidad.

51 Article 368. The nation, departments, districts, municipalities, and decentralized entities may grant subsidies in their respective budgets so that individuals with lower incomes may pay rates of domestic public services that cover their basic needs. // **Artículo 368.** La Nación, los departamentos, los distritos, los municipios y las entidades descentralizadas podrán

of his community within the ambit of environmental sanitation.⁵² The Constitution further indicates that public domiciliary services will be provided directly by each municipality when the technical and economic characteristics of the service permits it and is advisable.⁵³ Thus, Article 367 implicitly reveals that, not only is the private sector allowed and welcomed to provide public services, but it is only in certain situations – i.e. where the technical and economic characteristics of the service being provided require it to be as such – that the municipality itself will provide and operate the given service.⁵⁴ Therefore, it is possible to conclude that the private sector will provide such public services to the population as a general rule, with the State indirectly serving its mandate through contracting with these private providers. As with all industrial and commercial public services (and as opposed to administrative public services of the State), waste management is an operation, that although carried on behalf of the State, is believed to be better run and provided by the private sector.⁵⁵

The foregoing articles, when taken together, clearly indicate that (1) public services are the quintessential responsibility of the State, (2) they may be provided by the private sector through contracting mechanisms and (3) the State does not abrogate its responsibility to provide these services even if they are being provided through the private sector. In the context of waste management and recycling, this implies that potentially recyclable waste falls directly within a Constitutional environmental sanitation concern of the State as much so as non-recyclable organic waste; thus, recyclable waste is encompassed within the provision of the municipalities' cleanliness public services and constitutes a matter of direct responsibility of the State⁵⁶. In other words, the traditional trade of waste recycling work, and of informal workers taking care of non-organic waste collection, separation and valorization who work in a regulatory absence of implemented recycling policies, fall under the responsibility of the Government in two capacities: as the poverty-trapped working poor constituents

conceder subsidios, en sus respectivos presupuestos, para que las personas de menores ingresos puedan pagar las tarifas de los servicios públicos domiciliarios que cubran sus necesidades básicas.

52 Ibid, Article 49.

53 **Article 367.** The law will determine the relative jurisdictions and responsibilities for domestic public services, their provision, quality, and financing, and the schedule of rates, which will take into account the following criteria: cost, cooperation, and the redistribution of revenues. Domestic public services will be provided directly by each municipality when the technical and economic characteristics of the service and the general benefits of the services indicate it to be possible and advisable, and the departments provide support and coordination. The law will determine the entities competent to determine rates. // **Artículo 367.** *La ley fijará las competencias y responsabilidades relativas a la prestación de los servicios públicos domiciliarios, su cobertura, calidad y financiación, y el régimen tarifario que tendrá en cuenta además de los criterios de costos, los de solidaridad y redistribución de ingresos. Los servicios públicos domiciliarios se prestarán directamente por cada municipio cuando las características técnicas y económicas del servicio y las conveniencias generales lo permitan y aconsejen, y los departamentos cumplirán funciones de apoyo y coordinación. La ley determinará las entidades competentes para fijar las tarifas.*

54 Ibid, Article 367.

55 Colombia's legal system falls in the civil family of law. It has a Romano-Germanic origin and as such has been intensely influenced by French Administrative law and Public Administration structure. The difference between Industrial and Commercial Public Services or utilities (SPIC) and Administrative Public Services or utilities (SPA) roots in French law and its distinction on legally applicable regime of contracting according to the nature of one or other.

56 CiViSOL, *Arguments to the Constitutional Court of Colombia* / Judgment T-291-09

of the State, and as preeminent, if not exclusive, actors within the public service of collection and disposal of recyclable waste.

The public policy framework on cleanliness and waste management is further articulated and established through several laws, decrees and resolutions, but the primary governing principles are defined in Law 142 of 1994, or the General Public Utilities or Public Services Law and its subsequent amendments, and Decree 1713 of 2002, which defined and structured the public services of cleanliness and waste management, among many other norms in laws, decrees and resolutions, relating directly or indirectly to waste management and thus the policy space for waste pickers' lives and trade. Decree 1713 of 2002 was later amended by Decree 1505 of 2003 and complemented by Decree 838 of 2005, which regulates new sanitary landfills.

2.2.2. LAW 142 OF 1994

Law 142 regulates all domiciliary public utilities including water, sewage, cleanliness, electric energy, gas distribution, land telephone services and rural cellular telephone services⁵⁷ and is, therefore, an extremely complex and comprehensive legislation; anything that touches upon domiciliary public services is regulated under Law 142. To address its broad purview of services, Law 142 defines the institutions that are responsible for promoting competition among service providers or regulating necessary monopolies by (a) designing and adopting certain tariff formulas through which the price of utilities may be determined, and by (b) inspecting and controlling domiciliary public services. Both functions are constitutional responsibilities of the President to the citizens that have been delegated to the institutions defined under Law 142 of 1994.⁵⁸ In the case of the cleanliness public service, the respective authorities are the Regulatory Commission of Potable Water and Basic Sanitation – CRA⁵⁹, and, just as for all other public services, the Superintendent of Domiciliary Public Services – SSPD⁶⁰. Article 162 establishes that the cleanliness development policies are the responsibility of the Vice-Ministry of Housing, Urban Development and Potable water⁶¹.

Article 2 of Law 142 of 1994 defines the procedures for State intervention in the provision of municipal public services, i.e. in accordance with its mandate of guaranteeing that the public utilities and services meet and improve their users' quality of life.⁶² Article 5 sets the responsibilities of the Municipalities in the provision of public services, and Article 6 establishes the occasions on which Municipalities may

57 Law 142/94 , Article 2

58 Ibid, Article 370

59 As with the SSPD, the Regulatory Commissions also depend on the President of the Republic (Article 68) <http://www.google.com/search?q=+comision+regulacion+saneamiento&ie=utf-8&oe=utf-8&aq=t&client=firefox-a&rlz=1R1GGLL en CO370>

60 Please see: <http://www.superservicios.gov.co/home/web/guest/inicio>

61 Please see: <http://www.minambiente.gov.co/portal/default.aspx>

62 Law 142/94, Article 2

directly provide public services. Article 10 recognizes the existence of freedom of enterprise, as the right of every person to organize and operate enterprises incorporated for the provision of Public services. And, Article 14 includes a set of definitions. Among many others, “Basic Sanitation” is understood as the activities inherent to sewage and cleanliness; and the “Cleanliness Public Service,” as amended by Law 689 of 2001, “is the service of municipal collection of waste, mainly solid. It also encompasses the complementary activities of transport, treatment, advantageous use (*aprovechamiento*) and final disposition of such waste. It also includes, among others, grass cutting and pruning of trees on roads and public areas; the washing of these areas and transfer, treatment and advantageous use (*aprovechamiento*).”⁶³

Under Article 15, there are four types of persons that may provide public services in Colombia: (1) public utilities companies, which as specified in article 17 and 19 must be investor or equity owned companies.⁶⁴ identified in their name as ESP and with capital from national or foreign investors, (2) natural or juridical persons who produce for themselves as a consequence or complement of their main economic activity, (3) municipalities that have directly assumed the provision of public services as legally authorized, and (4) Law 142 authorized organizations that may provide public utilities/services in minor municipalities of rural zones and in specific urban areas and zones. As developed by Decree 421 of 2000, Article 1, potable water and basic sanitation (which includes the cleanliness service and thus waste management) may be provided by nonprofit legal persons of organized communities, in minor and rural municipalities and specific urban areas, without prejudice to the provision that other types of persons may also carry out and provide these services. An additional paragraph of Article 15 of Law 142 of 1994 links citizens to the provision of public services by stating that where public services are being provided, the provider must be a user of those public utilities. Otherwise, it is necessary to demonstrate that its alternative provision of potable water, sewage and cleanliness is not detrimental to the community.

The notion of *Exclusive Areas of Service (ASE- Areas de Servicio Exclusivo)*, is defined in Article 40 of Law 142⁶⁵, as the zone that is awarded exclusively and for a certain period of time to the legal person

63 “Es el servicio de recolección municipal de residuos, principalmente sólidos. También se aplicará esta ley a las actividades complementarias de transporte, tratamiento, aprovechamiento y disposición final de tales residuos. Igualmente incluye, entre otras, las actividades complementarias de corte de césped y poda de árboles ubicados en las vías y áreas públicas; de lavado de estas áreas, transferencia, tratamiento y aprovechamiento.”

64 This legal market barrier, effectively restricting the entrance of nonprofit organizations like cooperatives of waste pickers in the waste management market, that are not equity owned, was eventually found to be inconsistent with constitutional principles and was later conditioned to a more inclusive interpretation in constitutional ruling C-741-03.

65 **Artículo 40. ÁREAS DE SERVICIO EXCLUSIVO.** *Por motivos de interés social y con el propósito de que la cobertura de los servicios públicos de acueducto y alcantarillado, saneamiento ambiental, distribución domiciliaria de gas combustible por red y distribución domiciliaria de energía eléctrica, se pueda extender a las personas de menores ingresos, la entidad o entidades territoriales competentes, podrán establecer mediante invitación pública, áreas de servicio exclusivas, en las cuales podrá acordarse que ninguna otra empresa de servicios públicos pueda ofrecer los mismos servicios en la misma área durante un tiempo determinado. Los contratos que se suscriban deberán en todo caso precisar el espacio geográfico en el cual se prestará el servicio, los niveles de calidad que debe asegurar el contratista y las obligaciones del mismo respecto del servicio. También podrán pactarse nuevos aportes públicos para extender el servicio.*

having won the municipality's invitation to publicly bid for the provision of services within it. Currently, Bogota has six waste management ASEs and Cali has four non-exclusive concession areas for waste management services.

Following the industrial and commercial nature of public utilities provision and operation, Article 31 establishes that the applicable law for the contracts of public utilities companies is private instead of public law. In other words, the Public Contracting Statute or Law 80 of 1993⁶⁶ is not applicable. However, contracts passed by the territorial entities of the State for the provision of public utilities or services are subject to the rules contained within the Public Contracting Statute or Law 80 of 1993. Article 146 of Law 142 of 1994 establishes the measurement of consumption and price in the contract, stressing that consumption is the principal determinant of price, and determining that the price asked of the utilities user results not only from cost factors encompassed in tariff formulas, but also from the frequency of the services provided and the volume of waste collected. Article 147, in turn, creates the obligation of disaggregating the services provided into bundled bills, with the exception of domiciliary cleanliness and other basic sanitation services.

Finally, Article 30 determines that the principles of interpretation of the applicable law will be subject to the best guarantee of freedom of competition and impeding abuses of dominant positions, so as to favor the continuity and quality in the public provision of services.

2.2.3. WASTE MANAGEMENT DECREES 1713 OF 2002 AND 1505 OF 2003

The cleanliness public service defined and foreseen by Law 142 of 1994 was further developed by National Decree 1713 of 2002, as well as subsequent amending and complementing decrees. Article 1 of Decree 1713 sets forth various definitions regarding the cleanliness public service. Among many others, the policy definitions relevant to recycling and waste recycling work include the following:

Solid waste or residue: Is any object, material, substance or solid element resulting from consumption or use of a good in domestic, industrial, commercial, institutional, or service activities, that the generator abandons, rejects or hands away and that may be advantageously used or transformed into a new good with economic value or finally disposed of. Solid wastes are divided into advantageously usable and non-advantageously usable. Solid waste includes the waste resulting from the sweeping of public areas.⁶⁷

Quality of the cleanliness public service: Understood as quality in Domiciliary Cleanliness Public Service, the provision with continuity, frequency and efficiency to the entire population in accordance with the provisions of this decree, with due care program failures and emergencies, a full customer service,

66 Law 142/94, Article 31

67 *Residuo sólido o desecho.* Es cualquier objeto, material, sustancia o elemento sólido resultante del consumo o uso de un bien en actividades domésticas, industriales, comerciales, institucionales, de servicios, que el generador abandona, rechaza o entrega y que es susceptible de aprovechamiento o transformación en un nuevo bien, con valor económico o de disposición final. Los residuos sólidos se dividen en aprovechables y no aprovechables. Igualmente, se consideran como residuos sólidos aquellos provenientes del barrido de áreas públicas.

accurate and timely, an efficient use and proper disposal of solid waste so as to ensure public health and environmental preservation, keeping clean the serviced areas.⁶⁸

User: The natural or legal person that benefits from the provision of a public service, either as owner of the property where the service is delivered, or as the direct recipient of the service.⁶⁹

Large producers or generators of waste: Non-residential users that produce and present solid waste in quantities greater than one cubic meter per month for collection.⁷⁰

Source separation: Classification of solid waste in the place where they are produced for their subsequent recovery.⁷¹

Collection: The action and effect of collecting and removing solid waste from one or more generators by the person providing the service.⁷²

Management: The set of activities that are carried out from the generation to the elimination of a residue or solid waste. This includes the activities of source separation, presentation, collection, transportation, storage, treatment and / or elimination of residues or solid waste.⁷³

Integrated solid waste management: The set of transactions and arrangements pursuant to giving to waste produced the most appropriate destination from an environmental perspective and in accordance with the waste characteristics of volume, source, cost, treatment, recovery possibilities, advantageous use, commercialization and final disposal.⁷⁴

Advantageously Usable Solid Waste: Any material, object, substance or solid element that has no value for direct or indirect use for the person generating it, but may be incorporated in a productive process.⁷⁵

Non-advantageously Usable Solid Waste: Any material or substance is solid or semisolid organic and inorganic origin, putrescent or not, generated from domestic activities, industrial, commercial, institutional, service, which offers no possibility to use, reuse and re-enter the productive process.

68 **Calidad del servicio de aseo.** Se entiende por calidad del servicio público domiciliario de aseo, la prestación con continuidad, frecuencia y eficiencia a toda la población de conformidad con lo establecido en este decreto; con un debido programa de atención de fallas y emergencias, una atención al usuario completa, precisa y oportuna; un eficiente aprovechamiento y una adecuada disposición de los residuos sólidos; de tal forma que se garantice la salud pública y la preservación del medio ambiente, manteniendo limpias las zonas atendidas.

69 **Usuario.** Es la persona natural o jurídica que se beneficia con la prestación de un servicio público, bien como propietario del inmueble en donde este se presta, o como receptor directo del servicio.

70 **Grandes generadores o productores.** Son los usuarios no residenciales que generan y presentan para la recolección residuos sólidos en volumen superior a un metro cúbico mensual.

71 **Separación en la fuente.** Es la clasificación de los residuos sólidos en el sitio donde se generan para su posterior recuperación.

72 **Recolección.** Es la acción y efecto de recoger y retirar los residuos sólidos de uno o varios generadores efectuada por la persona prestadora del servicio.

73 **Manejo.** Es el conjunto de actividades que se realizan desde la generación hasta la eliminación del residuo o desecho sólido. Comprende las actividades de separación en la fuente, presentación, recolección, transporte, almacenamiento, tratamiento y/o la eliminación de los residuos o desechos sólidos.

74 **Gestión integral de residuos sólidos.** Es el conjunto de operaciones y disposiciones encaminadas a dar a los residuos producidos el destino más adecuado desde el punto de vista ambiental, de acuerdo con sus características, volumen, procedencia, costos, tratamiento, posibilidades de recuperación, aprovechamiento, comercialización y disposición final.

75 **Residuo sólido aprovechable.** Es cualquier material, objeto, sustancia o elemento sólido que no tiene valor de uso directo o indirecto para quien lo genere, pero que es susceptible de incorporación a un proceso productivo.

Therefore they have no commercial value, requiring treatment and final disposal and thus generate costs for disposal.⁷⁶

Advantageous use of Waste within integrated waste management: The process whereby, through integrated solid waste management, recovered materials are reincorporated to the economic and productive cycle, by means of reutilization, recycling, incineration for purposes of energy generation, composting or any another modality that carries sanitary, environmental and / or economic benefits.⁷⁷

Advantageous use of Waste within domiciliary cleanliness public service: The set of activities that are directed to the collection, transport and separation, when so, of the solid waste that will be subject to processes of reutilization, recycling or incineration with energy generation purposes, composting, worm farming or any other modality that will carry sanitary, environmental and/or economic benefits within the Integrated Waste Management framework.⁷⁸

Ordinary cleanliness service: The provision of domiciliary cleanliness public services for solid waste of a residential origin and other waste that may be managed by the capacity of persons providing the public services and not corresponding to any other services defined under Decree 1713, it is composed by the collection, transportation, treatment, final disposition of waste, and encompasses the sweeping and cleanliness of public roads and areas and the collection, transport, transfer, treatment and final disposal of the solid waste generated by these activities.⁷⁹

Special cleanliness service: Related to the activities of collection, transport and treatment of solid waste that by their nature, composition, size, volume and weight cannot be collected, handled, treated or normally disposed of by the person providing the service, in accordance with what is established in this decree. It includes activities of grass cutting tree pruning on public roads and areas, the collection, transport, transfer, treatment, advantageous use and final disposal of the residues resulting from these activities; the washing of the areas mentioned, and the advantageous use of residential solid waste and the waste resulting from the sweeping and cleaning of public roads and public areas.⁸⁰

76 Residuo sólido no aprovechable. Es todo material o sustancia sólida o semisólida de origen orgánico e inorgánico, putrescible o no, proveniente de actividades domésticas, industriales, comerciales, institucionales, de servicios, que no ofrece ninguna posibilidad de aprovechamiento, reutilización o reincorporación en un proceso productivo. Son residuos sólidos que no tienen ningún valor comercial, requieren tratamiento y disposición final y por lo tanto generan costos de disposición.

77 Aprovechamiento. Es el proceso mediante el cual, a través de un manejo integral de los residuos sólidos, los materiales recuperados se reincorporan al ciclo económico y productivo en forma eficiente, por medio de la reutilización, el reciclaje, la incineración con fines de generación de energía, el compostaje o cualquier otra modalidad que conlleve beneficios sanitarios, ambientales y/o económicos.

78 Aprovechamiento en el marco del servicio público domiciliario de aseo. Es el conjunto de actividades dirigidas a efectuar la recolección, transporte y separación, cuando a ello haya lugar, de residuos sólidos que serán sometidos a procesos de reutilización, reciclaje o incineración con fines de generación de energía, compostaje, lombricultura o cualquier otra modalidad que conlleve beneficios sanitarios, ambientales, sociales y/o económicos en el marco de la Gestión Integral de los Residuos Sólidos.

79 Servicio ordinario de aseo. Es la modalidad de prestación de servicio público domiciliario de aseo para residuos sólidos de origen residencial y para otros residuos que pueden ser manejados de acuerdo con la capacidad de la persona prestadora del servicio de aseo y que no corresponden a ninguno de los tipos de servicios definidos como especiales. Está compuesto por la recolección, transporte, transferencia, tratamiento y disposición final de los residuos sólidos originados por estas actividades. También comprende este servicio las actividades de barrido y limpieza de vías y áreas públicas y la recolección, transporte, transferencia, tratamiento, y disposición final de los residuos sólidos originados por estas actividades.

80 Servicio especial de aseo. Es el relacionado con las actividades de recolección, transporte y tratamiento de residuos sólidos que por su naturaleza, composición, tamaño, volumen y peso no puedan ser recolectados, manejados, tratados o

No-waste Culture: The set of customs and values of a community that tend to reduce the amount of waste generated by its residents especially, the reduction of non-advantageously usable waste and the effective advantageous use of the waste that is potentially reusable.⁸¹

Recovery: The action of selecting and removing solid waste that can be off set to an advantageous use process in order to be converted into a commodity useful for the creation of new products.⁸²

Recycling: The process by which recovered solid waste is advantageously used and transformed and the materials' potentiality of reincorporating as commodities for the manufacturing of new products is returned. Recycling may consist of several stages: clean technology processes, industrial conversion, separation, selective collection, stocking, reutilization, transformation and commercialization.⁸³

Recycler: The natural or legal person that provides the public service of cleanliness in the activity of advantageous use.⁸⁴

Final disposal: The process of isolating and confining solid waste, especially the non-advantageously usable, in a definitive way, in places specially selected and designed to prevent pollution, and damage or injuries to human health and the environment.⁸⁵

Work front: The landfill site where the processes of downloading, accommodation, compacting and covering of solid that waste given for final disposal are done.⁸⁶

The guiding principles of Decree 1713, expressed in Article 3 and applicable to all services under the Decree⁸⁷, are (1) to guarantee quality services to the entire population (universality); (2) to provide the

dispuestos normalmente por la persona prestadora del servicio, de acuerdo con lo establecido en este decreto. Incluye las actividades de corte de césped y poda de árboles ubicados en las vías y áreas públicas; la recolección, transporte, transferencia, tratamiento, aprovechamiento y disposición final de los residuos originados por estas actividades; el lavado de las áreas en mención; y el aprovechamiento de los residuos sólidos de origen residencial y de aquellos provenientes del barrido y limpieza de vías y áreas públicas.

81 Cultura de la no basura. *Es el conjunto de costumbres y valores de una comunidad que tiendan a la reducción de las cantidades de residuos generados por sus habitantes en especial los no aprovechables y al aprovechamiento de los residuos potencialmente reutilizables.*

82 Recuperación. *Es la acción que permite seleccionar y retirar los residuos sólidos que pueden someterse a un nuevo proceso de aprovechamiento, para convertirlos en materia prima útil en la fabricación de nuevos productos.*

83 Reciclaje. *Es el proceso mediante el cual se aprovechan y transforman los residuos sólidos recuperados y se devuelve a los materiales su potencialidad de reincorporación como materia prima para la fabricación de nuevos productos. El reciclaje puede constar de varias etapas: procesos de tecnologías limpias, reconversión industrial, separación, recolección selectiva acopio, reutilización, transformación y comercialización.*

84 Reciclador. *Es la persona natural o jurídica que presta el servicio público de aseo en la actividad de aprovechamiento.*

85 Disposición final de residuos. *Es el proceso de aislar y confinar los residuos sólidos en especial los no aprovechables, en forma definitiva, en lugares especialmente seleccionados y diseñados para evitar la contaminación, y los daños o riesgos a la salud humana y al medio ambiente.*

86 Frente de trabajo. *Sitio en el relleno sanitario donde se realizan los procesos de descargue, acomodación, compactación y cobertura de los residuos sólidos entregados para disposición final.*

87 Artículo 3°. Principios básicos para la prestación del servicio de aseo. *En la prestación del servicio de aseo, se observarán como principios básicos los siguientes: garantizar la calidad del servicio a toda la población, prestar eficaz y eficientemente el servicio en forma continua e ininterrumpida, obtener economías de escala comprobables, establecer mecanismos que garanticen a los usuarios el acceso al servicio y su participación en la gestión y fiscalización de la prestación, desarrollar una cultura de la no basura, fomentar el aprovechamiento, minimizar y mitigar el impacto en la*

services with efficiency and efficacy, in a continuous, uninterrupted manner; (3) to establish economies of scale relating to the services being provided; (4) to establish mechanisms to nurture and grow a culture of non-waste among users; (5) to promote the *advantageous use (aprovechamiento)* of waste or the transformation of waste to productive or valuable materials, energy and/or fuel; and (6) to minimize and mitigate any adverse impacts of waste on health and the environment.⁸⁸

Article 8 of Decree 1713 of 2002 creates the policy mechanism for Colombia's municipal integrated solid waste management. The PGIRS (*Plan de Gestión Integral de Residuos Sólidos*) or Integrated Solid Waste Management Plan is to be adopted by each municipality of the country. The PGIRS must decide on the collection of advantageous-usable and non-advantageously usable waste. In this regard, Decree 1713 recognizes that Colombia must begin its process of creating value out of discarded materials, beginning with the source separation of recyclable materials, and, further, to embed this principle within its long-term vision for integrated solid waste management of the country. Article 126 of the same Decree establishes the role of the country's Autonomous Regional Corporations⁸⁹. These entities, as autonomous environmental authorities, are responsible for advising and orienting municipalities in the design of their PGIRS.

Decree 1713 later explains in article 70 that the forms for taking advantage of solid waste are, among others, the reutilization of waste, recycling, composting, worm farming, and biogas and energy recovery. Actually, Chapter 7 of Decree 1713 of 2002 structures Colombia's System for the Advantageous use of Solid Waste comprehensively, from the guiding and implementing principles up to the requirements for infrastructure designated to creating value out of such waste.

Starting from Article 67, Decree 1713 establishes that the purposes for the recuperation and advantageous use of solid waste are: (1) to make rational use and consumption of the commodities that originate from natural resources; (2) to recuperate any remaining energetic and economic values of materials that have been already used in productive processes; (3) to reduce the quantity of waste requiring final disposition; (4) to lessen the environmental impact of solid waste as much by demand and use of commodities as by the procedures of final disposition of solid waste; and (5) to guarantee the participation of waste pickers and the solidarity sector in the activities of recuperation and valorization of solid waste, with the aim of consolidating their activities and improving their livelihood conditions.⁹⁰ It is worth noting that this fifth and last purpose referring explicitly to waste pickers was introduced by an amendment to Decree 1713, Decree 1505 of 2003. Decree 1505 of 2003 clearly shows that policy makers at the time, following waste pickers' and their professional friends' advocacy efforts, decided to recognize the existence of the traditional work and contribution of Colombia's waste pickers in the process of finding advantageous uses to solid waste in the country and the need for bettering their impoverished working and living conditions. The policy makers' intention to include

salud y en el medio ambiente, ocasionado desde la generación hasta la eliminación de los residuos sólidos, es decir en todos los componentes del servicio.

88 Decree 1713/02

89 Please see: <http://www.car.gov.co/> and <http://www.cvc.gov.co/vsm38cvc/>

90 Article 67, Chapter 7, Decree 1713 and Decree 1505 of 2003

waste pickers in the provision of these particular services is clear. Indeed, Article 81, which was included by amendment in Decree 1505 of 2003, establishes that, as far as possible, the municipality and district shall ensure, and not merely promote, the participation of waste pickers in the activities of recycling and the advantageous use of solid waste.⁹¹ In fact, under Article 68 of Decree 1713,⁹² waste pickers organizations, cooperatives and associations are included as potential providers of services for the advantageous use of solid waste, alongside public utilities companies and the authorized organizations of Article 15 of Law 142 of 1994. Further, the Decree establishes that any district or municipality with more than 8000 users of the cleanliness public service must consider the viability of developing sustainable projects for the advantageous use of solid waste when designing its PGIRS, and that the municipality or district is obligated to promote the advantageous uses of solid waste and ensure the execution of such projects⁹³.

Articles 74 and 75 envision the creation, operation and maintenance of special plants and buildings for that purpose, and article 73 stresses the need to build municipal programs for developing advantageous uses of solid waste process within the PGIRS. It is worth noting that that advantageous use activities are not, as some have interpreted, limited to merely residential waste. Rather, Article 35 expressly indicates that industrial and commercial waste – or solid waste produced by industrial and commercial activity – also fall within the purview of the Decree, specifically under ordinary cleanliness services⁹⁴.

91 Artículo 81. Modificado por el Decreto 1505 de 2003, artículo 8º. Participación de recicladores. Los Municipios y los Distritos asegurarán en la medida de lo posible la participación de los recicladores en las actividades de aprovechamiento de los *residuos sólidos*. Una vez se formulen, implementen y entren en ejecución los programas de aprovechamiento evaluados como viables y sostenibles en el PGIRS, se entenderá que el aprovechamiento deberá ser ejecutado en el marco de dichos programas. Hasta tanto no se elaboren y desarrollen estos Planes, el servicio se prestará en armonía con los programas definidos por la entidad territorial para tal fin.

92 Artículo 68. *Personas prestadoras del servicio de aseo que efectúan la actividad de aprovechamiento. El aprovechamiento de residuos sólidos podrá ser realizado por las siguientes personas: 1. Las empresas prestadoras de servicios públicos. 2. Las personas naturales o jurídicas que produzcan para ellas mismas o como complemento de su actividad principal, los bienes y servicios relacionados con el aprovechamiento y valorización de los residuos, tales como las organizaciones, cooperativas y asociaciones de recicladores, en los términos establecidos en la normatividad vigente. 3. Las demás personas prestadoras del servicio público autorizadas por el artículo 15 de la Ley 142 de 1994 conforme a la normatividad vigente. Parágrafo. Las personas prestadoras del servicio de aseo que efectúen la actividad de aprovechamiento incluirán en su reglamento las acciones y mecanismos requeridos para el desarrollo de los programas de aprovechamiento que hayan sido definidos bajo su responsabilidad en el PGIRS. Sin perjuicio de lo anterior, los prestadores del servicio que no desarrollen esta actividad, deberán coordinar con los prestadores que la efectúen, el desarrollo armónico de las actividades de recolección, transporte, transferencia y disposición final a que haya lugar.*

93 **Artículo 69. Recuperación en los PGIRS.** Los municipios y distritos superiores a 8.000 usuarios del servicio público, al elaborar el respectivo Plan de Gestión Integral de Residuos Sólidos, están en la obligación de analizar la viabilidad de realizar proyectos sostenibles de aprovechamiento de residuos; en caso de que se demuestre la viabilidad y sostenibilidad de los proyectos, el Municipio y Distrito tendrá la obligación de promoverlos y asegurar su ejecución acorde con lo previsto en este decreto.

94 **Artículo 35. Frecuencias de recolección.** La frecuencia de recolección dependerá de la naturaleza de los residuos y de los programas de aprovechamiento de la zona. Para residuos que contengan material putrescible, la frecuencia mínima del servicio de recolección dependerá de las características del clima o de la zona y deberá incrementarse para prevenir la generación de olores y la proliferación de vectores asociados con la acumulación y descomposición de tales residuos. En el caso de servicios a grandes generadores, la frecuencia dependerá de las características de la producción.

Article 71 of the same chapter explains that the advantageous uses of waste can be carried out through the collection of solid waste that is already separated at the source, in a separate selective waste collection route, or by means of centers of selection and storage, options that must be duly identified in the respective PGIRS.⁹⁵ It also determines how materials that may be advantageously used should be collected and transported. For instance, as provided for in each district or municipality's PGIRS, advantageously usable waste may be collected from sidewalks outside of private residences.

Article 80 of Chapter 7 of Decree 1713 indicates that, for the purpose of promoting and propounding the advantageous use of solid waste, the Ministry of Environment, Housing and Territorial Development, with the support of the waste management industry, universities, and research centers, will advance studies on waste and ways to recapture value through recycling, composting, etc.⁹⁶ It advances these specific activities with the purpose of promoting the recuperation of reusable materials in waste, diminishing the quantities of disposable waste produced by the public, and to gather technical, economic and entrepreneurial information necessary to incorporate such refuse materials into productive processes.⁹⁷ For the same purpose, the Decree requires the head of the Regulatory Commission on Potable Water and Basic Sanitation (CRA) to define the relevant criteria and parameters that are needed for creating additional incentives for users in terms of source separation of recyclables to facilitate the advantageous use of solid waste.⁹⁸

This idea is revisited in Article 109, which relates to the need to create economies of scale for positive reinforcements on the price paid by users of the cleanliness service.⁹⁹ The idea of an engaged public is carried out further in Article 120¹⁰⁰, by which the persons providing the cleanliness services must

95 **Artículo 71. Selección de residuos sólidos.** El aprovechamiento de residuos sólidos, se puede realizar a partir de la selección en la fuente con recolección selectiva, o mediante el uso de centros de selección y acopio, opciones que deben ser identificadas y evaluadas en el respectivo Plan de Gestión Integral de Residuos Sólidos de cada Municipio o Distrito.

96 Decree 1713 / 02, Article 80

97 **Artículo 80. Fortalecimiento del aprovechamiento.** *Con el objeto de fomentar y fortalecer el aprovechamiento de los residuos sólidos, en condiciones adecuadas para la salud y el medio ambiente, el Ministerio del Medio Ambiente en coordinación con el Ministerio de Desarrollo Económico podrá, con apoyo de la industria y la participación de las universidades y/o Centros de investigación, adelantar estudios de valoración de residuos potencialmente aprovechables, con el fin de promocionar la recuperación de nuevos materiales, disminuir las cantidades de residuos a disponer y reunir la información técnica, económica y empresarial necesaria para incorporar dichos materiales a los procesos productivos. Del mismo modo, la Comisión de Regulación de Agua Potable y Saneamiento Básico, CRA, acorde con lo previsto en el artículo 12 de este decreto, definirá los criterios y parámetros necesarios para el otorgamiento de incentivos tarifarios adicionales a los usuarios.*

98 Ibid, Article 80

99 **Artículo 109 Economías de escala.** *El Municipio o Distrito, al adoptar el respectivo Plan de Gestión Integral de los Residuos Sólidos, y al desarrollarlo directamente o mediante contrato, debe propender por el aprovechamiento de las economías de escala, en beneficio de los usuarios, a través de la tarifa. Parágrafo. Para el aprovechamiento de las economías de escala se deben tener en cuenta variables tales como: Cantidad de residuos a manejar en cada una de las etapas de la gestión, nivel del servicio, calidad del servicio, densidad de las viviendas, innovación tecnológica de equipo, gestión administrativa, operativa y de mantenimiento del servicio, la asociación de municipios, las condiciones y la localización de los componentes del sistema.*

100 **Artículo 120 Relaciones con la comunidad.** *La persona prestadora deberá desarrollar planes y programas orientados a mantener activas y cercanas relaciones con los usuarios del servicio. Estos planes deberán atender los siguientes objetivos:*
1. *Suministrar información a los usuarios acerca de los horarios, frecuencias, normas y características generales de la*

implement educational programs targeting communities to foster a culture of “no waste,” expressly linking communities to promoting the advantageous use of solid waste management. Once again, and in light of Article 81, which was included by amendment in Decree 1505 of 2003, the lawmakers’ intended to include waste pickers in the provision of these public services.

For citizens who prefer not to use the public cleanliness services provided under Decree 1713, Article 125 imposes a positive duty to justify that their disposal mechanisms are not detrimental to the community at large; otherwise they must become users of the service.¹⁰¹ In this sense, all members of the public are considered users of the municipal cleanliness service, and are obligated under Decree 1713 and the provisions above to engage in the System of Advantageous Use of Solid Waste delineated therein.

2.2.4. LAW IN THE FIELD OR PUBLIC POLICY IMPLEMENTATION OF WASTE MANAGEMENT DECISIONS

All the foregoing provisions are of particular importance for the waste recycling work of waste pickers, in that until now, seeking and recovering trash for the advantageous use of waste (i.e., waste recycling) has been perceived by the Colombian community at large as some kind of unregulated, unarticulated waste related activity carried out by traditional waste pickers who, sadly, have found their only income opportunity in other people’s trash. Legally, however, the collection of potentially recyclable waste or advantageously usable waste, as informal as it currently is and as poverty related as it is lived on the streets, is not in the least an unregulated free private market space. On the contrary, as broadly described by the norms cited above, it is a State responsibility and a municipal duty to develop a separate route for the selective collection of advantageously usable waste, separated by citizens at the source, or via a sole route that takes all mixed trash to a center for the selection and recovery of the potentially recyclable waste prior to its final disposal. This is a clear component of the *integrated public service* of municipal cleanliness. If this policy continues to be left unimplemented and unenforced, then the waste realm expanding in and around the public cleanliness service becomes an unregulated Wild West marketplace of waste. In this scenario, the poverty-trapped informal and traditional waste pickers competing with the investor-driven recycling companies will not be ones who make the cut.¹⁰²

The perception of a free, unregulated, and lawless open market for entrepreneurs in the recycling business¹⁰³ is supported only by the fact that the Government’s constitutional functions regarding

prestación del servicio. 2. Promover la educación de la comunidad para la formación de la cultura de la no basura que vincule a las comunidades en la solución del problema.

101 Decree 1713/02, Articles 124, 125

102 One of the most criticized competitors by waste pickers is *Residuos Ecoeficiencia*.

103 In the waste pickers and CIVISOL case decided favorably by ruling T-291-09 for instance, the government’s defense arguments tried to explain, with regard to the exclusion of waste pickers’ work and their recycling business resulting from the closure of Navarro waste dump without providing alternatives, that “the advantageous use or recovery [of solid waste] as such has not been under technical conditions banned, these people [the waste pickers] may realize and execute their job as everyone in Colombia, procuring their own clients (...)” // “la actividad de aprovechamiento o recuperación como tal bajo condiciones técnicas no ha sido prohibida, estas personas pueden realizar y ejecutar su oficio como todos en Colombia, procurándose sus propios clientes”. In the same sense, the young sons of President Alvaro Uribe who recently

domiciliary public services have not been implemented or enforced by the President of the Republic or the delegated authorities made responsible for these legal provisions, namely, the Ministry of the Environment, Housing and Territorial Development, the Superintendent of Domiciliary Public Services, and the Regulatory Commission of Potable Water and Basic Sanitation.¹⁰⁴ All of the provisions above are basically in a legally raw existing only in plain paper and ink; Colombia's solid waste recycling public policy is currently unimplemented and unenforced law.

The recycling component of the waste management system has not been fully enforced or implemented through the control and regulation by national authorities as a key component of the public cleanliness service or sanitation in the least.¹⁰⁵ It is actually left unattended and thus operated freely by informal and formal operators, national and international forces present in marketplace of recyclable waste. District and municipal mayors have also failed to implement the binding provisions of their cities' PGIRS. This failure falls implicates the executive branch of government as well, even though it is placed within the local, district and municipal authorities' jurisdiction, who remain the implementers of sanitation policy in their localities.

In this void of implementation and enforcement, a wild private market has flourished and grown at an exponential rate, especially since waste is no longer unwanted refuse but a highly valuable commercial good that is sold as a secondary commodity in markets around the world.¹⁰⁶ The void also explains why some of the wealthiest power-holders of Colombia have ended up fighting with the most powerless citizens for access to trash. Meanwhile, the waste pickers have been almost exclusively developing the recycling trade for nearly one hundred years in the only niche available to them for ensuring their survival. While recognizing the network of intermediary warehouses, political and capital power-holders are now taking the lead in domestic and international waste recycling market. It is also worth noting that the very dangerous trade interests of illegally armed groups are also seemingly present in the waste recycling marketplace.

At the same time as this void has allowed the private waste market to flourish, some of the more technical provisions of waste policy are effectively implemented, and even enforced, through police action. For instance, the old waste dump of Navarro in city of Cali, where more than 1200 waste pickers lived and worked, was finally closed by the city in June 2008. Citing environmental reasons, the municipal authority created a new sanitary landfill in Yotoco within the normative provisions of

started to invest and operate in waste recycling for national and international clients, argued radio and tv that they were just entrepreneurs and that in no way they were benefiting from their fathers role as president of the country, given that recycling, according to them, is a completely private market matter unrelated to public contracting of the State.

104 The level of responsibility and power of the President of the Republic is such that as article 83 of Law 142 of 1993 states, it is the President who has that last word with regard to the conflicts of competence aroused between the authorities of regulation and control.

105 For instance, *La Alqueria* waste separation plant in Bogota has been a pilot experiment for many years now. Operated by a few Bogota waste pickers it separates a few tons out in a city of more than 7 million people. In Cali there is no separation experiment even despite having a PGIRS that created the obligation of having a recyclables selective route for by 2007.

106 Please see : http://www.economist.com/node/13135349?story_id=13135349

law, which, among other things, prohibit waste pickers from working in front of the new landfill¹⁰⁷. This closure and ensuing prohibition of access to trash naturally created a humanitarian crisis for the waste pickers of Navarro. They responded first through desperate protest and action,¹⁰⁸ including a takeover of Cali's main church. When more promises to the waste pickers remained unfulfilled, and writs of human rights protection were presented to several judges and later accumulated and selected for review in the Constitutional Court, the CiViSOL Foundation for Systemic Change stepped in through an *Amicus Curiae* that strategically built a case for requesting not only the immediate protection of, but also the development space for waste pickers by means of a judicial order for formalization in the waste economy and the recognition of waste pickers as entrepreneurs in waste. In ruling T-291-09, the Colombian Constitutional Court ruled entirely in the waste pickers' favor and recognized the traditional work and micro-entrepreneurial capacity of waste pickers own account work. As requested by CiViSOL, the Court also ordered the creation of an Ad Hoc Committee to develop and implement an all inclusive waste management policy capable of formalizing the city's waste recycling workers, while also respecting and strengthening their entrepreneurial spirit by means of their solidarity based economy consisting mainly of cooperative enterprises.

In its decision T-291-2009, and while referring to the local government defense arguments on the allegedly private nature of waste management and the need of each actor to seek clients, the Court stated *obiter dictum* that, "on this point, it is important to note that contrary to what ESP EMSIRVA notes, the provision of a domiciliary public service, like cleanliness, and encompassed within it, the management and the advantageous use of solid waste, by virtue of the Constitution has not been left entirely to the free market realm. Quite on the contrary, and as noted by the Court in Case C-615, 2002, in so far as public services are an economic activity that comprise the basic needs of the population, 'the State intervention in the activity that private actors assume through companies dedicated to this purpose is particularly intense, and the public service provision is subject to special regulation and control '(emphasis away from text). In fact, as the Court has already explained, the State intervention is specially justified, among other circumstances, "to give full employment of human resources" and "ensure that all persons, particularly those of a lower income, have effective access to basic goods and services."¹⁰⁹

107 Decree 805 of 2005

108 Please see: <http://www.desdeabajo.info/index.php/actualidad/colombia/2852-policia-presiona-a-recicladores-que-se-tomaron-la-ermita-cali-valle-del-cauca.html> and <http://www.elespectador.com/noticias/nacional/articulo-recicladores-de-cali-llevan-dia-y-medio-dentro-de-ermita>

109 "Sobre este punto, es importante señalar, que contrario a lo que señala EMSIRVA ESP la prestación de un servicio público domiciliario, como lo es el de aseo –y comprendido en él, el de manejo y aprovechamiento de residuos sólidos, en virtud de la Carta, no ha sido dejado completamente al ámbito de libre mercado. Muy por el contrario, como lo señaló la Corte en la sentencia C-615 de 2002, en tanto que los servicios públicos son una actividad económica que compromete las necesidades básicas de la población, "la intervención del Estado en la actividad de los particulares que asumen empresas dedicadas a este fin es particularmente intensa, y su prestación se somete a especial regulación y control" (subrayas fuera de texto). De hecho, como la Corte lo ha referido, la intervención estatal, se justifica de manera especial, entre otras circunstancias, "para dar pleno empleo a los recursos humanos" y "asegurar que todas las personas, en particular las de menos ingresos, tengan acceso efectivo a los bienes y servicios básicos".

2.2.5. THE NEED TO RECONCEPTUALIZE THE NOTION OF WASTE IN THE XXI CENTURY FOR SUSTAINABLE AND INCLUSIVE WASTE MANAGEMENT SYSTEMS IN THE GLOBAL SOUTH

In recent years, it has become clear that what was once considered worthless refuse has now been repackaged as a highly valuable secondary commodity, fueling a multi-billion dollar recycling industry and other ancillary industries. New technology has made discarded materials into new products – paper is now created from recycled paper, as are metals, glass and plastics that are melted, pelletized and resold – that, in turn, have developed their own consumer niche. These products have found renewed interest and value as the “green market” advances an environmentally conscious agenda and enjoys greater international popularity and attention than ever before, in turn compounding the value of recycling. This revaluation of trash must be translated into a new reality that is reflected through effective policy on the ground. Otherwise, the lack of State action, by ignoring or pretending to ignore that waste today has value, that its production can only grow due to demography and consumerism, and that it drives lucrative national and transnational business, appears as an either a worrisome or suspicious type of negligence on the part of public authorities.

Although the public cleanliness and waste management service have been highly regulated in Colombia, the government’s lack of effective implementation, investment, development¹¹⁰ and enforcement to prevent both the negative environmental impacts of collection and burial of mixed trash, and the negative social impacts of cutting the waste pickers’ access to waste, portray an urgent necessity to advocate for the reconceptualization of waste. Trash cans today are valuable mines of secondary commodities that have acquired commercial value via recycling science and technology. And, in contrast to industrialized countries, in developing countries there are people who have been eating, wearing, working and entrepreneuring in this waste, informally, for decades. Finally, mixing organic and recyclable refuse in landfills represents not only the loss of potential commodities that, if recovered, could save the energy that processing raw material otherwise consumes, but could also reduce carbon emissions and prevent larger green house gas emissions resulting from the lixiviates and methane gasses of huge landfills, thus minimizing adverse trends and impacts on global climate change.¹¹¹ Labor-intensive waste recycling implemented by traditional waste pickers has a lower carbon print than collecting recyclables on a larger, industrial scale. It is also a powerful poverty reduction strategy for the urban poor, a horizon of organization and progress for this occupational group, and could prove to be an interesting way to engage developing countries in preventing climate change. Indeed, waste pickers are quintessentially the oldest and most grounded example of an urban “green job”, it is just a matter of having the political will to formalize their work in the global south.

Given these realities of waste today, a failure to reconceptualize trash and the people who work with it will result in inadequate public services that do not sufficiently contribute to contemporary public

110 As for instance the lack of recognizing the value of recycling in the tariff that determines the prices paid by users and the optional, incentive, that is given to the private concessionaries that beyond ordinary waste collection pursue the advantageous use of solid waste as decided in article 17 of the CRA Resolution 351.

111 As advocated by the *Trash is Life* initiative of the CiViSOL foundation for systemic change.

health. Waste is, simply, not what it used to be, and both authorities and civil societies, particularly those of developing countries, should rapidly reconsider waste as a valuable good, recognize its negative impact on the environment and climate, and its importance in social justice and poverty reduction of traditional waste pickers.

2.3. INFORMAL WASTE RECYCLING WORKERS

Within the waste management sector of the global south, waste pickers living in poverty persist as informal and invisible, yet critical actors. In most developing countries, there is little to spare in waste management budgets for municipal recycling services, nor is waste separated into recyclables and non-recyclables at their source; instead, all waste is disposed of in one trashcan that is collected by a private concessionaire of the State and transported to a waste dump or sanitary landfill. Thus, most of Colombia's recycling is taking place in an informal environment, where the waste pickers have been reducing greenhouse gases and preventing climate change by separating recyclables, which would have otherwise remained mixed into the public's trash and buried in landfills creating high levels of air, ground and water contamination. For the past century, these informal workers have been working for decades in Colombia, India, Peru, South Africa, Chile, Mongolia, Argentina, Egypt and elsewhere, with virtually no attention from public policy makers or the policy dialogue of the green agenda.

Among the poorest of the poor of the global south, the waste pickers are not primarily driven by the green agenda, but rather by the urgency of their needs and an absence of viable alternatives, and by doing so they have become intensely aware of and committed to the contributions of their work. With no other opportunities for work, and as formally unskilled, formally uneducated laborers, they cannot find any other honest way to generate incomes in a more dignified, decent and healthy work environment. Consequently, they survive by digging through society's trash, everyday, for themselves and their families. For almost a century, thousands of Colombian families have been digging through heaps of oil, food, diapers, cardboard, rotten meat, clothes, batteries, razor blades, feces, glass bottles, bones and other trash to recuperate recyclable materials to use or to sell to earn a living. The nature of this job involves bruising, cuts, and infections to yield only a few pesos, enough to buy a tablespoon of oil, a piece of bread, maybe a piece of meat to survive until tomorrow.

In Colombia, these men, women and children have been coming to urban centers for many years, seeking refuge from the violence in rural areas. Many of today's waste pickers are the great-grandchildren of those displaced in the middle of the 20th century by the National Front period of Colombian violence. At that time, the only resources available to them were the city's discarded trash, so it was from the city's garbage that these displaced rural poor were granted the opportunity to survive in Colombia's cities. Amid society's waste, they developed their particular trade of separating and selecting recyclable and reusable materials, both for their own consumption and for resale to interested businesses. Before industrial buyers entered the modern recycling economy, drugstores

and pharmacies in Bogota bought bottles from waste pickers to package and sell their concoctions.¹¹² As modern industrial materials, such as plastics, have become more commonly used and thus more commonly found in municipal waste, the waste pickers have continued to develop their trade and identify new sources of income from the city's trash.

2.3.1. WASTE DUMP WASTE PICKERS AND STREET WASTE PICKERS

As urban populations have grown, their trash, too, has grown, eventually necessitating public places where to contain it. The city of Cali, for instance, created the Navarro dump in 1967; it remained in operation until its closure in June 2008, to be replaced by the inter-regional Yotoco sanitary landfill. And until June 2008, the Navarro dump was a landscape guarded by vultures, rats and cockroaches, although it remained the only lifeline for more than 600 families in Cali.¹¹³ These dump waste pickers came to be seen as an unique and identifiable group of the city's poor, distinct from other waste pickers who have been recovering and separating recyclables along urban streets.¹¹⁴ As compared to dump waste pickers, street waste pickers salvage waste directly from garbage cans and bags that urban households, commercial establishments and industries leave outside their premises, on public sidewalks or designated waste depositories for municipal collection.

Unlike the dump waste pickers, the street waste pickers are itinerant and work individually or in small units. While their health risk is not as great as the dump waste pickers, their bodies literally shoulder the burden of their impoverished conditions, as they walk from garbage can to garbage can searching for plastic bottles, cardboards, or plastic, and then carry whatever they salvage on their backs or push on carts they even have to rent for a few dollars a day.¹¹⁵ The better off among the street waste pickers have access to carts that they rent or sometimes own, which are either pushed manually or pulled by a horse suffering even worse conditions of deprivation. These waste pickers usually live outside the city, in slums, and carry the weight of their livelihood long distances, along city streets and among the urban populations whose consumption drives this informal trade.

Without any space to call their own, the street waste pickers' separate their recuperated materials – which they will eventually sell to intermediary warehouses or large industrial buyers – in public places, rapidly moving to the next promising can, often leaving a trail of disorder and trash behind them. They do so only because every effort and minute of their time is devoted to income generation for personal and family subsistence. This, and the fact that their work with waste results in a public disgust and mistrust of waste pickers, manifest in their further socio-economic marginalization. Due to Decree 805 of 2005, waste pickers' access to sanitary landfills is forbidden, and street waste picking is now the only informal recycling opportunity for all of Colombia's waste pickers. However, even this access to waste

112 Silvio, Dario, Nohra, Maria Eugenia, Ingeniero / rra interview / 2009 / Bogotá D.C.

113 http://www.eltiempo.com/colombia/cali/ARTICULO-WEB-NEW_NOTA_INTERIOR-8310261.html

114 Luz Angela, Milena, Helider, Espolito, Alfonso, Marta / rra interview / 2009 / Tienda frente GERT / Cali

115 Ibid, and ARB and Asociacion Carretilleros de Bogota / 2009

on the streets is at risk through the privatization of all waste, in regulatory actions the authors here refer to as the *legal impoverishment of the poor*.¹¹⁶ Privatization of organic and recyclable waste via concession contracts for waste collection as envisioned in Law 142 of 1994, or rules like those of the already derogated article 28 of Decree 1713 of 2002, or the already constitutionally reinterpreted Law 1259 of 2008 constantly impact waste pickers access to waste, and consequently, threaten their very survival.

2.3.2. WOMEN WASTE RECYCLING WORKERS

When the first waste pickers in Colombia arrived in urban centers, they usually settled outside the cities and alongside the large waste dumps that held the cities' growing trash heaps. Once settled, albeit informally, this population was forced to confront their new situations – as poor, displaced individuals with families to provide for and few means available to them. According to some leaders of waste pickers' stories, while the men searched for wage-earning opportunities, the women stayed at home, with their children, animals, and whatever else they could salvage and carry from their rural homes. These women were among the first waste pickers in Colombia, scavenging through urban trash heaps looking for food for their animals, which, without land to graze, were in danger of malnourishment and death.

Indeed, waste picking – dump or street – has historically been a woman's trade in Colombia. In the course of this search for animal fodder, these women realized that the trash available to and surrounding them may also serve as a supplemental source of income to whatever their husbands' were earning. With their child care responsibilities, wage oriented employment opportunities were virtually impossible to maintain for these women, even though their households required more than what their husbands and fathers could provide. To make ends meet, these women recuperated reusable materials such as glass bottles, newspapers, and metals, which local pharmacies and other businesses were willing to buy, while rummaging through trash looking for feed. Thus, these women became the cities' first waste pickers, most of them own account workers, deciding how much and with whom they worked, as they recuperated reusable materials from the city's trash dumps.¹¹⁷ By the 1960s and 1970s, raw commodity prices and technology drove industry to take advantage of the availability of recyclable materials, as well as a large supply of poor, displaced workers, willing to recuperate those materials for them.¹¹⁸ Men only became involved in waste picking at this point, when the large steel and paper mills laid off their predominantly male work force, asking the men to look instead for recyclable materials that could be used as secondary commodities.¹¹⁹ In Colombia today, men and women are both found in the waste picking trade. According to the ARB, approximately 45

116 rra (Public Law + Social Innovation) thinktank / LEP LAB; On Law as a Poverty Reduction Strategy, Working Document, 2008 (unpublished)

117 Nohra Padilla / rra interview / 2009 / Bogotá D.C.

118 Silvio, Dario, Nohra, Maria Eugenia, Ingeniero / rra interview / 2009 / Bogotá D.C.

119 Silvio Ruiz / rra interview / 2009 / Bogotá D.C.

percent of the waste picking work force in the country is women.¹²⁰ This trade continues to provide a ready alternative for women, especially female heads of household who must take care of their children, elderly family members and other dependents.

A remarkable feature of the waste picking trade in Colombia is the strong leadership position that women continue to hold in the related trade associations and in spite of the strong presence of men in the trade. Ms. Nohra Padilla is the President of both the National Waste Picking Association (ANR) and the Asociacion de Recicladores de Bogota (ARB). The President of Bogota's Horse Carted Waste Pickers Organization is also a woman, as are the President of the recently formed ARENA, a Navarro waste dump pickers' association, Ms. Luz Angela Vargas, and the President of the new street waste pickers FUNREP, Ms. Adriana Molina. Women waste pickers like Ms. Gloria Amparo Hernandez, who is the founder and director of Fundacion *Nuevas Luces*, are also present in improving the lives of the children involved in waste picking. Ms. Milena, Martha, Aliria and Karina have also important leading roles in the Cali Waste Pickers' community and some were crucial for CiViSOL's evidence gathering effort on the ground for building the T-291-09 case. Thus, in Colombia, women are not merely present in the trade of waste picking, they are recognized and highly respected leaders within it.

2.3.3. CHILDREN IN WASTE RECYCLING WORK

As a consequence of women's presence in waste picking, children of waste pickers are often born and raised within it. In the absence of neighbors or family members who can afford to stay at home, many of these women will be found breastfeeding or otherwise accompanied by their children. Leaving their children to watch over each other – whether in the dumps or the slums – is a less attractive option for these mothers, especially as they consider the dangers and risks of their living conditions as poor, excluded and the most vulnerable of society.¹²¹ These include, among other things, the very real possibilities of being forced into sex trafficking, drug trafficking or being exploited in armed conflict, as well as the dangers of domestic accidents associated with living in makeshift, unregulated housing structures, precariously placed on the edges of eroded mountain ranges. Yet, unlike children working in mines, the children in waste picking do not bring any particular utility as children *per se*; it is their constant presence that draws them into the work. Further, since the trade does not require any particular skill or strength so as to preclude their participation, children may be found separating material by color and type, watching over collected or salvaged materials, driving the horse-pulled carts or otherwise helping their mothers in related activities.



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120 Nohra Padilla / rra interview / 2009 / Bogotá D.C.

121 Silvio, Dario, Nohra, Maria Eugenia, Ingeniero / rra interview / 2009 / Bogotá D.C.

By participating in the trade, these children continue the pattern of exclusion that characterized their parents' existence in urban Colombian cities. Their only access to education – a means to end their exclusion and marginalization – depends on the numbers of positions made available to them in the public education system. And even those children who are fortunate enough to acquire a coveted seat in school must continue to collect trash afterwards to supplement their family's income. There is, clearly, a desperate need to provide child care options to their parents, not only for the men and women involved in waste picking to improve their trade, but also to provide their children healthier, safer environments away from garbage and trash.



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2.3.4. ELDERLY WASTE RECYCLING WORKERS

On the other end of the age spectrum, there are the elderly waste pickers, some of whom have been salvaging recyclable and reusable materials for anywhere from forty to sixty years.¹²² Their work has taken a significant toll on their physical capacity, yet many elderly men and women, some of whom are over 70 years of age, continue to collect waste. In that waste picking corresponds to the individual's capacity to transport collected waste, elderly waste pickers suffer greatly, because their diminished physical capacity translates into smaller incomes. Older waste pickers sometimes only collect what they can carry in a small children's backpack, which cannot generate more than few pesos daily.¹²³ Thus, the elderly find themselves in greater circumstances of poverty. Despite their greater degree of impoverishment, these workers do not have access to retirement benefits, pensions or any social security mechanisms, primarily because of their informal own account worker status. The only health attention they receive is through the subsidized health regime, which is generally known to have limited quality of medical care and which depends on the SISBEN system that, in turn, requires a national valid identification. This identification requirement was reported as a serious challenge for elderly waste pickers, some of whom have lost their SISBEN IDs during their long journeys and hard itinerant lifestyles.



Revista Semana[®], Photo by: Juan Carlos Sierra

122 Ricaurte, Salvadora, Edgar, Armando / rra interview / 2009 / Cali

123 Ibid.

2.3.5. ETHNOCULTURAL MINORITIES IN WASTE RECYCLING WORK

Contemporary IDPs continue to find waste picking an amenable and open trade considering their circumstances of displacement and vulnerability, just as other persons who have lost their jobs and have no other honest and legal way to survive. Ethnocultural national minorities living through waste work appear in the same proportions as in the general population. In Cali, a city in the Southwest of Colombia, on the Pacific Corridor and close to the Chocó region, the waste picking population is predominantly Afro-Colombian; further, many of Cali's waste pickers are women, who carry the multiplicative burden of being women and of African descent. In contrast, in Bogotá the presence of Afro-Colombians in the waste trade is minimal. Although indigenous groups often suffer great marginalization and discrimination, their presence in the waste picking trade in urban areas is minimal.

2.3.6. SOCIAL PROTECTION

According to a Medellín study, waste pickers are exposed to two health risks – (1) ergonomically related illnesses, due to the leaning, pushing, pulling and physical exertion required for their work and (2) sensorial related illnesses, due to atomized waste particles that enter their systems. They are also at high risk of occupational hazards and accidents, in the form of cuts, infections and disease resulting from their exposure to trash in its myriad forms. Waste dumps pose an additional biohazard, due to the breaking down of organic and other materials – methane and other gases have been known to induce explosions on site, risking physical deformity and even death to those working and living nearby.

Given these occupational hazards, health is a great concern for those who enter the trade, yet waste pickers' status as informal own account workers precludes them from accessing any quality health care mechanisms,¹²⁴ despite constitutional guarantees for the same. Article 49 of the Constitution of Colombian states that health is both a human right and a State responsibility.¹²⁵ This provision

124 Nohra Padilla / rra interview / 2009 / Bogotá D.C.

125 Political Constitution of Colombia, Article 49. Public health and environmental sanitation are public services for which the State is responsible. All individuals are guaranteed access to services that promote, protect, and rehabilitate public health. It is the responsibility of the State to organize, direct, and regulate the delivery of health services and of environmental protection to the population in accordance with the principles of efficiency, universality, and cooperation, and to establish policies for the provision of health services by private entities and to exercise supervision and control over them. In the area of public health, the State will establish the jurisdiction of the nation, territorial entities, and individuals, and determine the shares of their responsibilities within the limits and under the conditions determined by law. Public health services will be organized in a decentralized manner, in accordance with levels of responsibility and with the participation of the community. The law will determine the limits within which basic care for all the people will be free of charge and mandatory. Every person has the obligation to attend to the integral care of his/her health and that of his/her community // **Artículo 49.** *La atención de la salud y el saneamiento ambiental son servicios públicos a cargo del Estado. Se garantiza a todas las personas el acceso a los servicios de promoción, protección y recuperación de la salud. Corresponde al Estado organizar, dirigir y reglamentar la prestación de servicios de salud a los habitantes y de saneamiento ambiental conforme a los principios de eficiencia, universalidad y solidaridad. También, establecer las políticas para la prestación de servicios de salud por entidades privadas, y ejercer su vigilancia y control. Así mismo, establecer las competencias de la Nación, las entidades territoriales y los particulares y determinar los aportes a su cargo en los términos y condiciones señalados en la ley. Los servicios de salud se organizarán en forma descentralizada, por niveles de atención y con participación de la comunidad. La ley señalará los*

indicates that health is a right to be claimed by any constituent, as well as a public service; that is, the State must provide, regulate, and deliver health care to its citizens.¹²⁶ Health is, in fact, one of the three entitlements available under the social security mechanism of the Colombian State. This tri-fold system protects Colombians from three risks – old age, poor health, and work-related injury – all of which compromise the individual’s ability to work and live with dignity. Law 100 of 1993 is the main policy framework regulating the integrated social protection system in Colombia, most of it functioning through the private sector.¹²⁷

Law 100 of 1993 created a contributory and a subsidized regime of health protection. Falling under the contributory regime are individuals earning at least the minimum wage, i.e., those who are engaged in some kind of formal employment relationships. The costs of the *Plan Obligatorio de Salud* or obligatory health plan are shared by the employer and the employee both; due to the recent privatization of health care, the employee now enjoys a choice among several health care providers, each of whom must provide medical attention for officially approved illnesses under system coverage. Independent workers who earn at or above the minimum wage may also contribute to this regime and receive its benefits. Waste pickers, who earn typically 70 – 80 percent of the minimum wage remain limited by their earning capacity and may not participate in the contributive health care system;¹²⁸ they fall in the subsidized regime, which provides the right to health for Colombians who do not have the capacity to contribute to their health protection. This regime is tailored to address and protect the poorest and most vulnerable Colombians; however, it suffers from two disadvantages: first, to participate in the system, an individual must be identified as a SISBEN beneficiary by the government. This expedites the receipt of an Identification card, which will stand as evidence of the individual’s situation of need and grants the individual access to several social assistance programs. The SISBEN carnet or ID card is the only means to ensure an individual’s access to health care. Thus, people who have misplaced their SISBEN cards, perhaps at work or in moving, or who never received a SISBEN certification in the first place, may end up without the possibility of proving their state of need and ensuring their right to health. Second, the subsidized health care regime is much more basic than the contributory regime and does not cover the same illnesses and diseases; consequently, informal own account workers cannot enjoy the same quality of health care as those who are able to participate in the contributory system. For waste pickers, who face high risks of illness and work-related illness, this disparity in the quality of available health care may result in dire consequences.¹²⁹

términos en los cuales la atención básica para todos los habitantes será gratuita y obligatoria. Toda persona tiene el deber de procurar el cuidado integral de su salud y la de su comunidad.

126 Ibid.

127 This legislation initiated a highly controversial course of action, many complain that it turned health into a commercial commodity rather than a fundamental right to be ensured and provided for by the government.

128 Nohra Padilla / rra interview / 2009 / Bogotá D.C.

129 The Constitutional Court of Colombia in ruling T-760 - 08 ordered to the national government to redress policy and pair up the subsidized quality of health care to that of a contributive nature.

This gap in service quality and provision has compelled some waste pickers to advocate for a special health care scheme, similar to one being provided to Colombia's system of "communal parents," who, under Law 599 of 1999 and without having the capacity of contributing to system as the rest of those who do, are still part of the contributory system.¹³⁰ They are, in fact, categorized as priority affiliates of the contributory system, and pay only a percentage of the sum received for taking care of children. Waste pickers, who perform and provide an essential public service to urban Colombian citizens, believe that they, too, deserve this kind of health inclusion, especially considering the health risks associated with their trade, risks that they take on while rendering an unpaid environmental service to city.¹³¹

The waste pickers' low incomes also preclude their involvement in pension and retirement schemes and work-related injury provisions, all of which are included in the social security protections offered by the Colombian State. Waste pickers are excluded by virtue of their status as own account workers: they cannot prove that any injury incurred occurred while at or in the course of work.¹³² These limitations and exclusions to social security nets provided by the State become relevant when organizing into trade associations, worker cooperatives or other organizational entities, as waste pickers attempt to identify ways in which to receive better health care, pensions, and work-related injury protections. Indeed, organizing is one way for these workers to access their constitutionally guaranteed social protections – especially where nonprofit organizations such as cooperatives and mutuels can act as an organizational link for own account workers, thus providing access to loans, financial services, as well as the higher quality health care and social services under Law 100 of 1993. Civic-Solidary organizations also provide additional support for their members; for instance, in Cali and Bogota, some associations offer child-care, education and health care to waste pickers and their families.¹³³ These, however, are not services derived from responsive public policy, but rather, the private initiative of waste pickers responding to their own needs.

2.4. TRADE CONTEXT OF WASTE PICKERS

In Colombia, as in most parts of the world, the concern for environmental sanitation – i.e. the health and hygiene of households as well as the need for clean air, water and soil in cities – eventually resulted in the creation of a cleanliness public service that assumed within it waste management services. With increasing urbanization, and, consequently, public consumption, the public concern for efficiency in waste management and urban cleanliness became more acute. This concern, along with macro-structural adjustments recommended to the central government in the nineties, translated in the total or partial delegation of the provision of this set of public services to the private sector. Further, and as much as individual communities have long participated in recuperation activities to maximize their household economies and resources, the recycling market owes its modern depth and

130 Law 599 of 1999

131 KKKPK in India managed to get recognition of their health risks incurred while informally serving the city.

132 Silvio, Dario, Nohra, Maria Eugenia, Ingeniero / rra interview / 2009 / Bogotá D.C.

133 See Annex 3

breadth to science and technology and the higher industrial costs of obtaining and transporting raw materials. The technology to turn waste into a secondary commodity has served to create value where there was once nothing but abandoned refuse and, in turn, has completely transformed waste management from a simple public service to one connected to an extremely profitable trade environment. A service that was once dedicated to the collection and disposal of waste was forced to recognize that what it was collecting, transporting and disposing had great environmental implications and significant market value.

Although accomplished informally, recycling remains the main advantageous use of solid waste in Colombia. Yet, there is still no fully implemented policy for the separation of waste at its source, a recyclables' selective route, or any infrastructure of plants where separation of waste by material may add value to the industry, even though these actions have been normatively decided and required of the appropriate authorities. Without prejudice to small-scale projects, recycling is neither an operational public policy nor a component of Colombia's cleanliness public service.

Although the regulatory structure and implementation is lacking, there is a high demand from the public and private sectors for recyclable materials. This demand is driven primarily by two factors: (1) recyclable materials are less expensive than raw materials and (2) incorporating recyclable materials into the industrial process adds value to final product when it is so portrayed. For instance, producing paper from recyclable materials rather than timber represents a 50 percent savings in energy, a 10 percent savings in water, and a 75 percent savings in pollution.¹³⁴ The environmental impact of this process may be measured by the numbers of untouched trees – using recyclable materials saves fifteen twenty-year old trees per ton of paper produced.¹³⁵ By using recuperated glass, the industrial process saves 10-15 percent on energy and 1200 kilograms of sand are saved per ton of glass recuperated and used. This represents a savings of more than 1,000,000 kilograms of sand saved over time and a considerable reduction in the deterioration of land and soil.¹³⁶ Aside from these supply-side industrial considerations, the green market – which experienced phenomenal growth through globalization and the access to information made available through innovations in information technology – provides a demand-driven consumer interest in products made using recyclable material. Consequently, and despite a slow beginning in the 1970s, there has been an influx of capital-intensive recycling companies entering the market for waste.

Although President Uribe is no longer in office and Juan Manuel Santos is currently Colombia's President, it is worth portraying the political and economic tensions that exist around the waste market and trade. Among other business companies engaged in the waste recycling economy in Colombia, the most controversial has been *Residuos Ecoeficiencia Ltda*,¹³⁷ a company that is owned

134 Alvarez Maya, Maria Eugenia and Torres Daza, Guillermo, *Los Recicladores y el Desarrollo Sostenible: la construcción del actor social*, Fundación Social 3, Bogotá DC p. 61.

135 *Ibid.*, p. 61.

136 *Ibid.*, p. 61.

137 Please see: <http://www.ecoeficiencia.com.co/es-html/suministro%20de%20materias%20primas.html>

and operated by President Uribe's sons, Tomas and Jeronimo Uribe, who were and remain attractive business partners for national and foreign industries. In 2008, the young Urbes entered the recycling market with intense capital investment and operations. Waste pickers, who reiterate that waste recycling is their only niche for survival, resent this asymmetric competition and, along with many in the country, believe that the Urbes should work and invest in completely private activities instead of those activities that, like those in waste management, are private by delegation of the State. The fact that their father was President and therefore the responsible authority for fashioning waste management's "rules of the game", and for their enforcement and control through the Superintendent, the Ministry and the CRA, make *Residuos Ecoeficiencia* all the more suspicious in the eyes of the waste pickers.

Besides the Urbes and other intensive capital companies and even philanthropic foundations, other actors present around the waste trade are homeless and mendicant individuals who rummage for materials for their personal use and, sometimes, for sale. IDPs, recently displaced to urban zones from their rural homes, often turn to waste picking, just as the grandparents of many of today's waste pickers once did, because trash remains one of the resources that is readily available to those who have nothing. These and other poverty-trapped individuals, including the recently unemployed, will find themselves in waste picking: the low entry to barrier makes the trade both easy to access and does not demand many skills or capital investment, although earning a regular income does require trade knowledge. These occasional waste pickers much like the waste pickers who are working in the trade regularly and unlike big recycling business, did not enter the waste market by choice, but by a lack thereof.



Waste pickers' Banner: "That's it Daddy, pave me the way"
Photo by: Adriana Ruiz-Restrepo ©

As the market for waste and recycling flourishes, and as the number and kind of competitors increase, waste pickers face a serious threat of losing their trade and earning capacity, most notably because of the presence of the large-scale corporate actors. Corporations that once only faced waste pickers as buyers of their recyclable materials are now starting their own recycling operations, side by side with *Ecoeficiencia*. Colombian waste pickers believe that soon all waste will be both recycled by corporations and sold to corporations within a closed intra-corporate circle, eventually forcing waste pickers into delinquency, self-victimization or even death. As explained by one waste picker, if not even waste is an available opportunity for them, then they will literally have no other way to survive.

The various actors found in this trade are briefly explored below, where they are placed in descending order based on their capacity to affect the waste pickers' trade and livelihood:

2.4.1. THE COLOMBIAN STATE.

As indicated in the policy section above, the Colombian State remains the primary actor responsible for providing public services. With regards to waste management, collection and recycling, the specific actors in the Colombian State belong to the executive national, regional or local branch of public power. They are the President of the Republic, the Minister of Environment, Housing and Territorial Development, the Superintendent of Domiciliary Public Services –SSPD, the Regulatory Commission for Potable Water and Environment Sanitation - CAR, the Environmental Regional Autonomous Corporations, for instance, the CVC for the Valle del Cauca, CAR for Bogota, the Municipal or District Mayor and her or his secretaries of environment, urban planning and the entity or secretary responsible of the integrated solid waste management plan (PGIRS). In Bogota, this would be the UAESP; in Cali, it is the Secretary of Planning. Without taking into account the legislative branch of power and the Administrative Town halls that produce binding norms in Colombia and within each municipality, this is the public web in which waste pickers, as any other poverty trapped State constituent, must navigate and decipher in order to reveal opportunities to participate in the decisions that affect her life and livelihood.

Whether the State-Municipality chooses to provide waste management services (i) directly through a public industrial and commercial State company, such as EDIS in the 1970s in Bogota, or, until 2008, EMSIRVA in Cali, or (ii) indirectly, by delegating the service to for-profit private corporations or nonprofit private civic-solidary¹³⁸ organizations as authorized under Law 142 of 1994, the State remains, in every case and by constitutional obligation, responsible for providing the full range of waste management services to its citizens. And, where private actors are the primary providers of the waste related service, the State must still normatively frame and regulate the waste economy, as the environmental sanitation duty bearer and as its public function for societal common good mandates.

2.4.2. BUSINESS CORPORATIONS IN THE WASTE INDUSTRY

The private sector entered into the cleanliness and waste management sector by virtue of their investment and economic capacity, competing primarily for two types of contracts in Colombia: (1) door to door waste collection and transport and (2) final disposal of waste by land filling. Both of these contracts require specially designed equipment, i.e., large trucks capable of compacting waste, which enable the trucks to transport a greater quantity of waste and bulldozers for land filling waste, which the private sector was able to acquire and provide to municipalities. The private companies currently engaged in providing these services are, for the most part, equity owned corporations, many of whom are in joint ventures, consortiums or alliances with multi-national companies.

A. THE BUSINESS CONTRACT FOR THE COLLECTION AND TRANSPORT OF WASTE.

138 On the proposed notion of Civic-Solidary Organizations : Ruiz-Restrepo, Adriana, *Recherches de thèse sur «la nature juridique et le rôle politique du Tiers Secteur*

The first contract of interest to private actors is for the collection and transportation of waste, which is a seven-year contract awarded through a competitive bidding process. In Bogota, there are, in fact, six such contracts for six different exclusive zones (ASEs), each of which receives its own provider for the collection and transport of its residents' waste. The parameters and boundaries for these zones in Bogota were determined by the UAESP, the District's agency that regulates the provision of these waste services.

In 2008 in Cali, instead of the municipality, the national government delimited four zones as non-exclusive Areas of Service and granted concessions for waste collection and transport to three private corporations of both national and international origin. The national government, through the Superintendent of Domiciliary Public Services, structured this privatization scheme acting under the umbrella of a financial intervention to Cali's municipal waste company EMSIRVA to resolve the company's financial crisis. In fact, at the beginning of the financial intervention the SSPD divided Cali into four zones and destined three of them for privatized cleanliness provision, while reserving one of the zones, the North Zone or Zone 1 of Cali, for the public service provision by the intervened entity EMSIRVA. However, towards the end of SSPD's financial intervention, the Uribe Administration decided to end and liquidate EMSIRVA, very much against the will of the municipal government and Cali's general public opinion. The provision of public cleanliness services for Zone 1 was then taken for privatization, as with the other three zones. A public tender process was opened to receive private bids to select the company that would be delegated to provide the waste management public services in Zone 1; however, before closing the tender and adjudicating a contract, and by order of the Constitutional Court of Colombia, the SSPD was forced to suspend the tender process. On behalf of Cali's waste pickers, the CiViSOL foundation had requested the preemptive suspension of the process until the Court decided the case as structured and advanced by CiViSOL in an Amicus Curiae brief to the Court, in which they requested a writ of protection for the Cali waste pickers' right to life or survival, work, entrepreneuring and development. These rights were placed in peril by their lack of access to waste in the current privatization scheme, which not only ignored the reality of poverty in Cali, but also legally impoverished the waste pickers. CiViSOL requested survival and work protection, and also advanced arguments for persuading the Court to protect recycling as waste pickers' preferential market niche by recognizing them as entrepreneurs and ordering their inclusion in the formal economy of waste.¹³⁹ Weeks later the Court adopted its landmark decision in ruling T-291-2009 and ordered the SSPD to redraft the Terms of Reference of the Tender process for privatizing Cali's Zone 1 so as to make it inclusive of the waste pickers' trade and organizations. In December 2009, the Mexican company *Promoambientales*, in a strategic alliance with the waste pickers' cooperative UFPRAME, which was in its turn in alliance with FUNREP won the tender for Zone 1. According to a public servant of the SSPD, the other bidder, a private corporation *Interaseo*, presented its offer for Zone 1 without having established a strategic alliance with a waste pickers' solidarity economy organization.

139 Please see Annex 3

As mentioned above, and in accordance with Law 142 of 1994, the contract for the door to door collection and transportation of waste in Colombia is bundled with three other complementary waste-related activities, i.e., street sweeping, tree pruning and grass-cutting, within each of the contracted zones. Payment for these services is structured around the meters swept, groomed or cut. The core of the contract, however, is the collection and transportation of waste to places outside the city where waste is finally disposed. This operation depends on adequate logistics to operate the various routes that collect waste from households and establishments under the principles of universality and continuity, among other principles of public service. Payment on these contracts comes by way of a bi-monthly cost imposed on the waste generator that is bundled to the water and sewage bill. The collected monies are held by a fiduciary entity, which then pays the service provider. Although different factors are included in the formula devised by the CRA for remunerating the concessionaire, it is possible to say that the kilometers traveled to transport the waste from house to landfill are the determining factors for the price of the contract. The business of waste collection and transport is, then, and mainly, a truck and kilometer-based business: the greater the distance traveled from waste source to the final destination, the greater the payment. The waste collection and transport concessionaires are not, therefore, in clear and direct competition with informal street waste picker, unless the concessionaires are ceding or selling their collected waste to third parties on their way to the landfill, which would be, in fact, a breach of contract and in the margins of the policy envisioned in Decree 1713 of 2002. Nevertheless, their contracts include *de jure* the possibility of operating a selective route for door to door recyclables waste collection, although *de facto* concessionaires cannot effectively do so as, on one hand, there are no destination points for recycling and, on the other, there is no origin point where source separation is taking place. It is worth saying however, that the tariff formula design the National Government through CRA treats recycling as an incentive. As explained by waste pickers, these means then that when, for instance, China buys scrap metal, it raises the market price of the recyclable material, and concessionaires will try to recycle also; but if prices go down, they will abandon any recycling efforts and continue their normal collection and transport operations, burying all waste, organic or recyclable. In contrast, waste pickers recycle daily and constantly for income generation while rendering a climate and environmental service to the planet and the urban population. As an economic incentive, recycling is then merely an option for the concessionaire, and all certainty and efficacy of counting on an integrated waste management public service and soundly ensuring environmental sanitation is put at risk by this incentive-based mechanism in the formal waste economy.

B. THE BUSINESS CONTRACT FOR THE FINAL DISPOSAL OF WASTE

The second contract of interest to private actors is for the final disposal of a city's collected waste. This contract requires the responsible entity to bury all collected waste in a sanitary landfill and is a long-term contract lasting twenty years. In addition to its primary responsibility of final disposal, this contract sometimes includes responsibilities associated with transfer stations, where waste collected from cities' zones are transferred to trucks capable of transporting larger quantities of waste to the designated landfill. There, waste transported from city households and establishments to site is bulldozed, buried and covered for a sanitary final disposal. Payment for this type of contracts is based,

mainly, on the weight of the waste buried, proportional to the kilograms of waste that are finally disposed. Since there is normally only one landfill where all collected waste is disposed, there is normally only one final disposal contract available, unlike the plurality of waste collection and transportation contracts usual to large Colombian cities. Recently, however, a trend is emerging to create inter-municipal landfills, operable for a collection of several municipalities. Because this business remains a kilogram-based business, an inter-municipal arrangement will be more attractive to private companies looking to maximize their profits by disposing of a greater quantity of waste for a designated area. Quite possibly, it will also represent an increase in kilometers traveled by each of the waste collection concessionaires, and, therefore, a raise in the bill that is issued to citizens, the end users of the public service.

Of particular concern to dump waste pickers, according to Decree 805 of 2005, Article 24, sanitary landfills may not be accessed by the public.¹⁴⁰ This applies to all members of the public, and waste pickers¹⁴¹ are no longer allowed to work in these areas where trash is disposed. It is important to note that when public dumps are closed to create sanitary landfills – without envisioning any alternatives for the populations of waste pickers who have been living in and off these dumps – the affected waste pickers suddenly find themselves homeless, jobless, and in an immediate and acute crisis of survival. Indeed, the closures of the Doña Juana dump in Bogota and the Navarro dump in Cali were implemented without foreseeing or providing for the situations of the thousands of people living and working there. Although the creation of sanitary landfills in place of these dumps serves a legitimate public health and cleanliness purpose, their closures prompted protests and public interest litigation to protect the rights of these informal workers. With respect to the Navarro dump closure, the Constitutional Court's decision T-291-2009 found the State responsible for closing the dump without making any provision for the 1200 people living and working there, and, further, ordered the State to address this issue through tailored policy solutions that would include these workers in the formal waste management economy. The Court recognized the Navarro dump waste pickers as *entrepreneurs in the waste trade* who had been completely cut off from their livelihood by the State.¹⁴²

140 Article 10, numeral 8 and 9 of decree 805 of 2005 // *Artículo 10. Criterios operacionales. La persona prestadora del servicio público de aseo en la actividad complementaria de disposición final, deberá garantizar, entre otras, el cumplimiento de las siguientes condiciones durante la fase de operación: (...)8. Control del acceso al público y prevención del tráfico vehicular no autorizado y de la descarga ilegal de residuos. 9. Prohibición de la realización de reciclaje en los frentes de trabajo del relleno. (...)*

141 *Idem, Artículo 24. Restricción a la recuperación en rellenos sanitarios. Se prohíbe el desarrollo de las actividades de recicladores en el frente de trabajo de los rellenos sanitarios. Parágrafo transitorio. Esta prohibición empezará a regir a partir de la puesta en marcha del PGIRS. No obstante, los municipios o distritos podrán hacer efectiva esta prohibición antes de la elaboración y desarrollo de los respectivos PGIRS, siempre que en la ejecución de sus programas de recolección y aprovechamiento, como alternativa de trabajo se considere la participación de los recicladores.*

142 Please see: Constitutional Court of Colombia Ruling T-291-09 in English : <http://www.scribd.com/doc/31696786/CiViSOLs-Case-on-Formalizing-Waste-Pickers-Constitutional-Ruling-T-291-09#fullscreen:on> and in Spanish: <https://docs.google.com/viewer?a=v&pid=sites&srcid=Y2l2aXNvbC5vcmd8bGEtYmFzdXJhLWVzLXZpZGF8Z3g6NmViOWZiMTl3NzcwZTYxYw>

2.4.3. AUTHORIZED ORGANIZATIONS UNDER LAW 142 OF 1994.

Under Law 142 of 1994, community organizations, typically civic-solidarity organizations or non-profits are authorized to provide public waste management services in minor municipalities, small specific urban zones and rural zones.¹⁴³ Thus, foundations, cooperatives, associations, neighborhood-based charities and waste pickers' organizations are authorized by law to enter the waste economy of small settings. In these areas, door to door waste collection, recycling and the final disposal of waste, among other services, are commonly performed by members of the local community. In fact, many rural communities and small neighborhood organizations came to rely on these entities' participation in waste collection and recycling services as a primary source of income, even as the private sector's involvement and co-optation of the waste management economy flourished in large cities. But, given the trend in developing inter-regional or inter-municipal landfills,¹⁴⁴ these communities' reliance may be misplaced. In fact, this trend toward inter-regional or inter-municipal cooperation may threaten the community organizations' continued participation in the waste economy as small communal operations are absorbed by larger scale inter-municipal operations. Indeed, their *de jure* space in the municipal waste management economy, as authorized organizations under Law 142 of 1994, seems to be progressively disappearing *de facto*.

WASTE PICKERS' COOPERATIVES AND OTHER NONPROFIT ORGANIZATIONS AS AUTHORIZED ORGANIZATIONS

Lacking investment capital for incorporating as equity owned corporations or as any other typical commercial company such as an LLP or LLC, but quite strong in numbers, labor capacity and cooperation potential, own account waste pickers usually seek to organize, participate and develop through not-for-individual-profit organizations,¹⁴⁵ and civic-solidary organizations such as cooperatives, charities or foundations. In this order of ideas, when waste recycling workers organize and incorporate, they create and populate a legal person that has a non-profit nature and thereby enter into the idea of "authorized organizations" enshrined in Law 142 of 1994 that may provide domiciliary public services to Colombian citizens. They, as any other public waste company, must distinguish themselves by adding to their name E.S.P., Empresa de Servicios Publicos or Public Service Enterprise.

However, and as with all other "authorized organizations" by Law 142 of 1994, waste pickers organizations were originally relegated to the less attractive market places of the waste economy: specific urban zones such as slums, minor municipalities and to the harder to reach rural zones. At

143 Decree 421/ 2000

144 For example the new interregional sanitary landfill of Yotoco operated by the private concessionaire Interaseo.

145 Although organizations such as charities and foundations, should not be channels for intra-solidarity among members but inter-solidarity to others ie altruism and philanthropy, the lack of design, clarity and enforcement in third sector policy and studying of civic-solidary or nonprofit law results in people using and populating the legal person *shell* that is less cumbersome and costly, everything they need is a legal vehicle to insert themselves into deliberative democracy and/or include into mainstream formal development. This is a central hypothesis of PhD research: Ruiz-Restrepo, Adriana, Recherches de thèse sur *La nature juridique et le rôle politique du Tiers Secteur*, Panthéon-Assas, Paris 2, 2005

least, this was the case until 2003, when Bogotá's waste pickers were trying to grow and develop their trade by bidding for one of the Bogota District ASEs. While preparing their bid with their for-hire lawyers, the waste pickers realized they could not move forward, because they were not organized as equity owned corporations as required by law. Regardless of their experience in Bogota, in nearby municipalities, or as a recent joint venture, the nonprofit nature of their organizations prevented their participation in the larger, more lucrative waste economies of Colombia's more populated cities. After realizing there was no way forward, their lawyers voluntarily and in a pro-bono capacity teamed with the waste pickers and filed a plea of unconstitutionality in front of the Constitutional Court of Colombia. In judicial decision C-741-2003, the Constitutional Court reinterpreted the provision of Law 142 of 1994: the rule could no longer be understood as a market barrier to nonprofits, and accepted that nonprofits as acted as vehicles of inclusion for the poverty trapped in the realm of formal development opportunities and work. Waste pickers were then re-positioned in the marketplace by the Court so as to be treated equally as for-profit corporations and with at least the capacity to compete beyond the restrictive borders of rural zones, urban slums and minor municipalities. The Constitutional Court of Colombia decided that there was no reason to believe that equity- owned, capital- driven organizations were more efficient than cooperative solidarity-economy driven organizations, as was argued by the voluntary lawyers working on the waste pickers' case. This was the beginning of what may be referred to as the waste pickers' body of law in Colombia.

2.4.4. WASTE RECYCLING BUSINESSES

Contrary to what law and policy makers have decided *de jure in* Decree 1713 of 2002, governmental negligence and/or corruption has *de facto* left open the operational space required and allowed for the emergence of different private business investors that recycle by choice as opposed to need. Rather than ensuring the development and provision of an organized and accountable municipal public service for the collection of separated solid waste so as to promote a culture of Zero Waste, sound environmental sanitation and finding advantageous uses and value out of collected trash, the National Government has left the waste recycling market to grow wildly in an unregulated environment where the strongest in capital or influence wins. Now that recyclable trash has commercial value and there are so many stakes that have grown strong in and around it, It will be extremely difficult to re-route and organize the waste public service. As in many countries around the world, private businesses and entities have detected and seized this opportunity to create income for profit, while own account waste pickers are struggling to survive in waste recycling.

Within this category of waste recycling business owners, the predominant subcategories are:

(I) NATIONAL AND INTERNATIONAL INDUSTRIAL SECONDARY COMMODITY OR WASTE BUYERS

Both in Colombia and abroad, scrap metal, paper/cardboard, plastic and glass buyers acquire recyclable waste collected that is collected for the most part by families of waste pickers living in poverty. Poverty trapped populations have pulled, pushed or carried their trash for miles to the satellite or independent ware houses that buy these collected materials. This salvaged waste serves as

inexpensive secondary commodities that buyers turn into recycled goods for the market, e.g., recycled paper, recycled carton/cardboard, recycled metal and recycled glass.¹⁴⁶ As proposed by the CiViSOL Foundation, it would be advisable to trace the origins of recyclables-based goods, cross-check with corporate social responsibility commitments and eventually develop a free seal of waste picker non-exploitation to certify that the social ethics underlying our recycled good complement their environmentally-inspired green intentions.

(II) WARE HOUSES WITH LOCAL, NATIONAL AND INTERNATIONAL TRANSACTIONS IN WASTE

Including former waste pickers who have progressed and managed to rent or buy some space to stock waste, those looking for a non-technical, non-complex business opportunity, the licensed industrial employee now running a warehouse to gather solid industry specific waste for a former employer-company,¹⁴⁷ the philanthropic organizations or foundations informally collecting, stocking and trading in waste for additional income (while rather unphilanthropically competing with the poverty trapped informal wastepickers), and the high-tech waste recycling plants operating, for example, in tax-free Special Economic Zones (Zona Franca), a constellation of waste warehouses are cropping up all over Colombia's unregulated waste market. Some of these are actually individually owned businesses of families of former waste pickers.

Waste warehouses either buy waste from own account impoverished waste pickers or their cooperatives, or engage directly with large establishments that generate a significant amount of waste. At one point, these larger establishments might have once given their recyclables to waste pickers,¹⁴⁸ but they now prefer to engage with the investment-driven competitors of waste pickers. Starting with Decree 1299 of 2008, every single industry in Colombia is obligated to have an in-house environmental department for taking care of all possible environmental issues, including the disposal of industrial waste. So as to not create an excessive burden on the industry, the Decree expressly states that such services may be outsourced or provided by an external environmental services company. This market for environmental and waste services, a market-made by decree, facilitates waste and environmental consulting companies that advise Colombian industry in environmental efficiency matters. Naturally, capital-intensive or otherwise influential companies develop mega-networks of medium, small and micro-scale warehouses to the point of controlling the secondary commodity business in Colombia. Although not the only one, *Residuos Ecoeficiencia Ltda*, the company owned and operated by two sons of former President Uribe, is the recycling competitor that most enrages the waste pickers' organizations,¹⁴⁹ they claim, Ecoeficiencia has been coincidentally taking advantage of the provisions

146 CiViSOL's *Trash is Life* initiative is currently exploring ways to develop and advocate for a CSR label that will stress that the recycled good for sale like office paper or glass bottle "is a eco & human friendly product of dignified waste recycling work.

147 Silvio Ruiz / rra interview / 2009 / Bogotá D.C.

148 It would be worth analyzing if the establishments that used to give away their waste to waste pickers are now giving it away to their capital driven competitors and still claiming be companies with social responsibility.

149 Please see: <http://www.semana.com/galeria-problemas-sociales/marcha-recicladores/413.aspx>

for waste and environmental services¹⁵⁰ created by Decree 1299 and issued in 2008 very close to the date of the creation of the presidential family company.

(III) OWN-ACCOUNT WASTE PICKERS

Working alone or in family units, or cooperating through a civic-solidary organization, the hard work of waste recycling in the cities of Colombia is performed by own account workers living in poverty, as described in the following section.

(IV) ILLEGALLY ARMED GROUPS

Not informal but completely illegal in means, cause and object, it is worth noting that, through interviews and other sources,¹⁵¹ it appears that illegally armed groups have developed interests in the waste recycling business. Although it is uncertain whether they are trading in waste, their presence should not come as a surprise, because any multi-million dollar business will be attractive to fund the activities of any illegally armed groups of any political orientation. In countries like Colombia, these groups are always found close to the sources of big and fast cash, whether it comes from illicit coca crops, gold and emerald mining or urban waste management.

2.5. THE LABOR AND THE MARKET OF INFORMAL WASTE RECYCLING WORKERS

The primary market for waste pickers has and remains to be commercializing recyclable waste, i.e., plastic, glass, scrap metal and paper. Until recently, they had not attempted to enter the core waste management collection and transport business of this economy. Rather, they continued to earn their income within the recycling economy, creating value out of the modern commodity that trash had become – while they once recuperated materials for households and small establishments like pharmacies use, they now recuperate materials that are bought by national and foreign major industries as secondary commodities for large scale production or construction.¹⁵² Waste pickers remain dependent on the availability and access to waste and, more importantly, the market interest and need in their recuperated materials. Their dependence, in fact, inextricably links them to the modern commercialized recycling economy, even though they lack the capital, resources and visibility to influence the market's characteristics. Their muted role highlights the fact that, as the recycling economy grows, the waste pickers face the very real risk of being left behind without any due considerations, resources, or safety nets.

2.5.1. The labor of waste recycling workers

150 Please see: <http://www.ecoeficiencia.com.co/es-html/consultoria.html>

151 Please see: <http://www.verdadabierta.com/paraeconomia/1469-el-empresario-william-velez-salpicado-por-memos-de-paras>

152 Such is the case of the dam construction in China that determined the market price and trade for scrap metal for several months.

According to Nohra Padilla from the ARB, while the human capacity of walking, moving, collecting, carrying/pushing/pulling, separating, gathering and packaging separated waste material varies according to age and strength of the person, it may be approximated to an average of 30 kilograms per person per day.¹⁵³ The membership of the ARB alone manages to recover approximately 700 tons of recyclable waste per day in Bogota.¹⁵⁴ Ms. Padilla explains further that only 10 percent of waste should be finally disposed of in landfills, thereby implying that 90 percent of all waste is recyclable. The materials they work with are simply thrown into one trashcan with all other domestic trash and collected by the responsible waste management authorities. Occasionally, drivers of waste collection trucks will separate some cardboard or scrap metal in gestures of solidarity with waste pickers, but more often, the waste pickers first appear on the recycling value chain when recuperating waste materials directly from trash bins.¹⁵⁵ Waste pickers may be involved in either the general collection of many kinds of reusable materials (glass, plastics, metals, etc.) or in the specialized collection of certain materials (cardboard, etc.). Most likely, there will be great variety in the materials they have recuperated – both in terms of the kinds of recyclables collected as well as the quality of the particular categories of recyclable materials. To maximize the value of the hours spent laboring in recuperation, collection and transportation, waste pickers must meticulously separate the salvaged materials. This process occurs in whatever space is available to them – most usually in public space like sidewalks or parks, in the warehouses where buyers will receive and pay for the recuperated stock, and, exceptionally, in their own homes.

This step in the recycling value chain raises an important point about the necessity of private property in the lives of the working poor. Space is a valued commodity for those living and working in poverty. Without private property, the waste pickers must separate their materials in warehouses owned by other people, often paying some kind of rent that is discounted from final price paid in exchange.¹⁵⁶ Thus, counting on space as a manifestation of the private property (that they do not have) is not only crucial for gathering, communicating and collective cohesion for participatory governance and inclusion it is also means to enter and scale up into the economy; premises are crucial for building and sustaining work and entrepreneurship for those in poverty.¹⁵⁷ Without space of their own, the

153 Nohra Padilla / rra interview / 2009 / Bogotá D.C.

154 Nohra Padilla / rra interview / 2009 / Bogotá D.C.

155 CiViSOL Foundation. To be clear, this describes the situation of street waste pickers. Since X%X dump waste picking in sanitary landfills is illegal and no longer exists in Bogota or Cali, the field areas for this report.

156 In the GERT ware house created by the several Cali industries of plastic, it is 20 % off the price. GERT closed months ago apparently because of cash flow problems to pay the waste pickers. It is worth noting that, according to Cali waste pickers, the plastic industry is are obtaining recyclable plastic through an agreement with the new concessionaire of zone 1 (*Promoambientales*) that should be allied exclusively with Ufprame waste pickers coop (as they won the recent bid), but via a temporary job agency for waste pickers and a nonprofit corporation apparently. Apparently there is once again no Municipal or SSPD control when in refers to respecting the legal entitlements of the constituent poor. CiViSOL foundation is currently verifying such version and deciding a course of action.

157 rra (Public Law + Social Innovation) thinktank / LEP LAB; On the notion of Legal Empowerment of the Poor, Working Document # 3, 2007 (unpublished)

waste pickers cannot stock material, let alone count on a place to separate and sort their materials, and therefore, have even less ability to negotiate the terms of their wares in the market.¹⁵⁸

2.5.2 The entrepreneurialism of waste recycling workers

Organized waste pickers may be able to amass the resources necessary to acquire their own space in the form of warehouses; unfortunately, just as it was 10 – 20 years ago, the vast majority of waste pickers remain unorganized.¹⁵⁹ Most waste pickers must, therefore, engage with intermediaries who rent this space to them. The owners of these warehouses are intermediate actors in the waste economy. Warehouses may be of varied size – small (100 sq. meters), medium (100-200 sq. meters) or large (over 200 sq. meters)¹⁶⁰ – and to secure a small warehouse requires approximately 5 million Colombian pesos (approximately 2500 USD), with the price increasing relative to the size of the space.¹⁶¹ Warehouse owners may be industry outsiders entering this economy as business investors, successful waste pickers who have managed to save or acquire money for space of their own, or an industry-owned warehouse or warehouses requiring recycled material.¹⁶²

In Bogota, some of the organized waste pickers who have formed cooperatives operate a warehouse under the umbrella of the ARB. They own and manage this warehouse and sell directly to industrial buyers of recyclable materials. As a second degree association, the ARB represents a large membership and has been able to negotiate the following prices for their materials (unless noted otherwise, all prices are per kilogram and for the first quarter of 2009)

Material	Price (Colombian Pesos)	Final Disposition of Materials
Paper	500	Placed in client's industrial plant
Cardboard	270	Placed in client's industrial plant
Print, folded Cardboard	100	Placed in client's industrial plant
Ferrous scrap tin	100	ARB's warehouse
Ferrous scrap tin rods	270	ARB's warehouse
Ferrous thick tin	400	ARB's warehouse

158 “The majority of experiences for bettering the conditions of bargaining show the importance of accumulating volume. In this sense, the creation of warehouses constitutes an important strategy.” Fundacion Social, p. 45

159 Nohra Padilla / rra interview / 2009 / Bogotá D.C.

160 Nohra Padilla / rra interview / 2009 / Bogotá D.C.

161 Nohra Padilla / rra interview / 2009 / Bogotá D.C.

162 Birkbeck, Chris, *Garbage Industry and the “Vultures” of Cali*, p.13

Non-ferrous scrap aluminum	1200	ARB's warehouse
Non-ferrous scrap tin	1000	ARB's warehouse
Non-ferrous angled (?) aluminum	2000	ARB's warehouse
Non-ferrous copper	14,000	ARB's warehouse
PET	890	Placed in client's industrial plant
High-density polyethylene	550	Placed in client's industrial plant
Low-density polyethylene	550	Placed in client's industrial plant
Polypropylene	400	Placed in client's industrial plant
Flexible plastic (e.g., bags, etc.)	250-300	ARB's warehouse
ABC and plaster	450	ARB's warehouse
Glass	110	Placed in client's industrial plant
Electric cable, telephone cables	350	ARB warehouse
Car batteries	13,000 / unit	ARB warehouse
Newspaper	80	ARB warehouse
Glass bottles or jars	80 each unit	ARB warehouse
<i>Aguardiente</i> or rum bottles	150 each unit	ARB warehouse

The prices the ARB is able to negotiate are put into perspective when compared to the prices in Cali, as noted below.¹⁶³ These prices show the buy and sell prices of a middleman in waste picking with a small operation in Cali¹⁶⁴ for the same quarter in 2009, and are listed per kilogram unless otherwise noted.

Material	Buying Price (Colombian pesos)	Selling Price
PVC	200	450
Paper	300	450
Scrap Metal	150	200
Copper	7000	10,000
Bronze	3000	4500
Plastic mixed	300	520
Clear plastic	400	600

163 Nohra Padilla / rra interview / 2009 / Bogotá D.C.

164 Hector Manuel Cárdenas / rra interview / 2010 / Cali

Colored plastic	300	520
Glass mixed	10	30
Glass bottles	4 bottles/ 100 or, 50 per unit	100 each
Aluminum	1500	2400
Tin and cooking pots and pans	1300	1800

As indicated by the pricing structure, the market for recuperated materials is a volume-based market. More waste means more income; more space to accumulate waste means more income; and more physical ability to carry waste means more income. Consequently, young men have a competitive advantage over children, women and the elderly. An elderly man from Cali wearing a child's backpack would not earn more than the equivalent of a dollar for his work; yet, at 82 years of age, he cannot physically carry any more than that backpack's worth of materials. The most valued qualities in waste pickers will be their strength, capacity to carry weight, and capacity to accumulate volume. Here, again, organization will yield greater income than remaining an individual, atomized waste picker.

The ARB – due to its organizational capacity and resources – has the leverage to not only deliver the quantity and quality of desirable materials, but also to influence their market prices, at least among the buyers who are directly engaged with the ARB. For unorganized waste pickers, this is not the case. In Cali, and with the support of the Cali municipality, 17 of the largest actors in the plastics industry of the city created a consortium – GERT LLC – and bought a warehouse where waste pickers could bring and sort their plastics for the GERT membership to buy. In exchange for providing this space, GERT charges a fee amounting to a 20 percent reduction in the market price for plastics – what would have been 100 pesos outside of GERT's warehouse is 80 pesos at the GERT warehouse.¹⁶⁵ Clearly, GERT – through its industrial warehouse – retains all market leverage. They only buy from waste pickers who agree to their prices, and, since they are comprised of the largest plastic industries in Cali, have cornered the market price for recuperated plastics.



Photo by: Shailly Barnes ©

This relationship between the industrial buyers of recuperated materials and those who spend countless hours engaged in the physical task of identifying, collecting, transporting and sorting them, highlights the extraordinary asymmetry in the waste pickers' market. As noted by Chris Birkbeck, writing on the paper and carton market in Cali in the 1970s, the waste pickers are neither entirely own

165 Luz Angela, Milena, Helider, Espolito, Alfonso, Marta / rra interview / 2009 / Tienda frente GERT / Cali

account workers, nor employees. According to Birkbeck, they might be better characterized as informal, disguised employees, who work in the recycling value chain well beyond the formal mechanism of employment, but completely subordinated to the industrial buyers.¹⁶⁶ As the example of GERT illustrates, this ambiguous relationship persists for waste pickers in Cali and, most likely, everywhere else where waste pickers remain unorganized. A lack of appropriate and enforced regulation to create a recycling market (as a component of Integrated Waste Management) to protect its most vulnerable actors – those at the very bottom of its value chain – allows oligopolies to continue imposing their prices on the market, rather than allowing competition to find a more equitable equilibrium.

In fact, waste pickers' access to waste has been a major challenge in the last decade or more. Law, policy and regulatory frameworks issued have been, by negligence or corruption, designed and drafted in a way that rules are fully dislocated from both the reality lived by constituents in poverty and Colombia's Constitutional Social Rule of Law orienting and informing the whole normative order. In other words, law and public policy have, sadly, resulted in the *legal impoverishment of the poor*.¹⁶⁷

2.5.3. THE LEGAL IMPOVERISHMENT OF THE POOR PORTRAYED BY ARTICLE 28 OF DECREE 1713 OF 2002; NOW JUDICIALLY REDRESSED.

With regard to access to waste, former Article 28 of Decree 1713 of 2002 ceded the property of waste left by individuals and establishments on the sidewalk for collection to the private concessionaires of the public cleanliness service. By doing so, when street waste pickers were sorting and recuperating recyclable solid waste from trash cans, they were no longer informally scavenging through abandoned property (*res derelictae*), but illegally taking, or stealing, private property of the concessionaires, which by extension criminalized their livelihood, labor and trade.

After waste pickers' friends intensely advocated against this provision, Article 28 of Decree 1713 of 2002 was derogated by Decree 1505 of 2003. Following a case presented by waste pickers and an administrative attorney, justices of the Administrative State Court (*Consejo de Estado*), who are responsible for examining the legality of Colombian Decrees, stressed *obiter dictum* that once the original private owner of a good discards it totally or partially and leaves it out on the public sidewalk for public service collection, and prior to the direct or indirect waste collection, that waste is an abandoned thing (*res derelictae*). The abandoned or refused waste belongs to nobody and can therefore be appropriated by any third party.

While the waste pickers' access to waste was once again possible, this was not the only legally impoverishing barrier that the waste pickers had yet to surmount.

¹⁶⁶ Please read Chris Birkbeck on *Self-Employed Proletarians in an Informal Factory: The Case of Cali's Garbage Dumps*

¹⁶⁷ See Supra # 6

2.5.4. THE LEGAL IMPOVERISHMENT OF THE POOR PORTRAYED BY ARTICLES 6 AND 14 OF LAW 1259 OF 2008; NOW JUDICIALLY REDRESSED.

In December 2008, Law 1259 of 2008 was enacted. It created environmental sanctions to protect and promote a green environmental culture in Colombia. Among its many rules, Article 6, numerals 6 and 15, imposed a sanction on persons who opened and totally or partially removed contents of a trash bag in public spaces such as street sidewalks, and that would move those contents on non-ideal means of transport. Considering that there were already existing sanctions in the Police Code for creating mess and disorder with trash bags or using public space for sorting waste, this new legal prohibition of mere opening a trash bag was taken by waste pickers as a direct attack on their livelihood, labor and trade. Further, and taking into account that according to the law the ideal means of waste transport was via a motorized, fully covered loading truck, the legal attack on the waste pickers' trade was confirmed. Waste pickers' voluntary attorneys and friends were called in by the ARB and, in two separate legal actions against Law 1259 of 2008; the provisions were brought to the attention of Colombia's Constitutional Court.

These arguments on Law 1259 of 2008 were brought by the CiViSOL Foundation into their arguments for the Navarro waste pickers' loss of access to waste in Cali, which requested the preemptive suspension of the tender in Cali's Zone 1 and a writ of protection through a socially inclusive privatization of waste solution. By bringing in Law 1259 of 2008, the CiViSOL Foundation brought in arguments relating to all Colombian street waste pickers, so as to argue for an overarching determination of waste pickers' rights under Colombian law. The arguments against Law 1259 were hinged on the human right to survival, the development of street waste pickers, and the appearance of protection or preferential treatment for capital-intensive waste businesses that need not rely on public space to work, that can afford private property and waste separation space and that owned motorized vehicles for transporting waste. The waste pickers, on the other hand, pushed or pulled or navigated horse-driven wooden carts with their collected materials. In short, it was argued that Law 1259 specifically targeted those workers who were not only traditionally engaged in recycling work, but who were also doing so out of conditions of extreme poverty and exclusion. Several journalists in the country to whom the case was presented and explained joined in advocacy efforts to make the law work for all rather than for just a few.¹⁶⁸

A separate action presented by one of the voluntary attorneys and friends of the waste pickers concentrated on the unconstitutionality of the problematic articles in Law 1259 in relation to the waste pickers' right to work. CiViSOL adhered to this separate litigation action through an *amicus curiae* brief advancing arguments on the legal impoverishment of the poor, due process and evidence gathering for imposing sanctions, the nature and scope of the administrative policing of the State and the utility and budgeting reasonability for policing trash in the country.

168 For instance, and among others, Daniel Samper Ospina, Daniel Samper Pizano, Pirry, Ramiro Bejarano, Rafael Orduz, Veredicto, The Economist, Carlos H. Andrade, Jairo Aristizabal, among many others.

Ruling T-291-09 of the Constitutional Court responded to the arguments regarding the Cali case and Navarro waste pickers and authorized the Mayor of Cali to not apply those provisions of Law 1259 of 2009, effectively leaving it unimplemented on the ground. Later, in ruling C-793-09 and following the separate litigation action, the Constitutional decided to condition the interpretation of Law 1259 of 2009 on a constitutional reading in which the relevant provisions will never have the capacity to impede informal recycling work. Two justices reserved their votes and expressed their belief that the articles should have been declared plainly unconstitutional and removed from the juridical order¹⁶⁹.

The Government developed Law 1259 of 2008 through Decree 3695 of 2009, without substantially reducing or impeding its negative social effects on waste pickers. Other than the fact that the Decree amends article 77 of Decree 1713, and, therefore, the ideal transport vehicle for waste need not necessarily be motorized, it still created an infraction for the total or partial removal of waste from a trash bag. The sanction is imposed and justified on waste pickers and others engaged in this activity as an “instrument of civil culture” to promote good environmental practices. Fortunately, those provisions may also not be applied pursuant to rulings T-291-09 and C-739-09 of the Constitutional Court of Colombia

2.6. WASTE PICKERS’ OWN ACCOUNT LABOR AND ENTREPRENEURIALISM

It is only in conceptualizing and articulating how the waste pickers operate within this market, and in light of law, that policy makers and consultants, human rights defenders, public interest litigation attorneys, civil society organizations and the waste pickers themselves may advance their capacity to better protect their trade and livelihood on the ground, while at the same time continuing to contribute to environmental sanitation. From a constitutional perspective, every constituent of a democratic State must enjoy the guarantee of his or her right to work. Any constituent may claim from the State, i.e., the duty bearer, the possibility of the right to life, as well as the possibility of sustaining that life, in other words, the right to work. The law understands this as the freedom to enterprise and/or the freedom to sell both personal labor and capacity to an employer; thus, the right to work manifests itself as protecting the individual’s ability to apply either her entrepreneurial capacity or her labor capacity to produce income.¹⁷⁰

Any constituent may choose the kind of work they will engage in to support their lives and those of their families. The waste pickers are engaged in a labor activity, most of them as regular workers at the lowest level of the recycling value chain, to earn an income and live from day to day. As workers, and constituents of the Colombian State, waste pickers are therefore entitled to opportunities and protections created by law. What becomes difficult in this analysis with the waste pickers – and in defining the most effective and relevant law and policy strategy or agenda to pursue with respect to

169 On decision C-793-09, and the two votes saved by Justice Maria Victoria Calle and Justice Jorge Ivan Palacio. Please read <http://www.corteconstitucional.gov.co/comunicados/No.%2048%20Comunicado%2004%20de%20Noviembre%20de%202009.php>

170 rra (Public Law + Social Innovation) thinktank / LEP LAB; On the notion of Legal Empowerment of the Poor, Working Document # 3, 2007 (unpublished)

securing their rights to work – is that, as own account workers, they fall in the crossroads between employees and entrepreneurs. Identifying what capacity (either employee or entrepreneur) provides the greatest opportunity for the greatest benefit requires a consideration of their context, i.e., the context of Colombian culture, society, politics, and business environment.¹⁷¹

Waste pickers usually hesitate between claiming entrepreneurial rights or labor rights. While they want to retain their individual freedom and capacity for invention, they also want to ensure stability and security.¹⁷² As own account workers they are in the middle of both. On one hand, they work in the worst of the entrepreneurial world – without stability or security, while being fully and wholly liable for any losses or gains, as well as the responsibilities of securing resources and adding value to them. And on the other, unless they are extremely well organized, they also suffer the worst part of an employee's world – income subordination to another actor's will, as they are unable to dictate prices for their salvaged materials. Most of them are also extremely vulnerable in other dimensions, with little to no capital to rely upon in contingency circumstances.¹⁷³

Legally and strategically, then, it is difficult to identify what aspect of the waste pickers' own account worker status to advance: the entrepreneur own account venture or the workers stability side. According to Birkbeck and *Fundacion Social*, the commercialization of waste will not take waste pickers far enough in terms of securing an important degree of stability and security. From both scholarly understanding and field experience, they conclude that waste pickers must expand their market niche to both secure their access to waste and increase their ability to raise their productivity and negotiate with the commercial, industrial actors who currently dictate the waste market conditions. Birkbeck further analyzes the consequences of securing an employee-employer relationship between the waste pickers and industrial buyer: if employed, the costs of maintaining that relationship will make their added value, i.e., recuperated materials, more expensive and, therefore, less of a valuable market commodity than primary resources; if they begin to earn higher wages, which employers will be required to do under Colombia's labor and employment laws, there will be a migration into the waste picker trade and more waste pickers to choose from, thus greater competition among the possible population of waste pickers, leading to a decline in wages.¹⁷⁴

In this sense, and when building the legal arguments for the Navarro waste pickers' case in Cali, the CiViSOL Foundation concluded that employment would, at best, secure an intermittent minimum wage, and that, too, for only some of Cali's waste pickers, especially given the current trend of the de-

171 CiViSOL explained that it cannot claim that this conclusion applies to all Colombian waste pickers, but that it does apply for the majority of waste pickers in Bogota and Cali

172 Conversations with Waste Pickers in India, Colombia, Egypt, Argentina, Brazil, USA, Ecuador, Niger, Venezuela

173 These circumstances, exacerbated by extreme poverty, in part explain why reducing the percentage of workers who were own account workers was included in 2008 as a target under MDG 1, reducing extreme poverty.

174 Please read: Birkbeck, Chris, *Self-Employed Proletarians in an Informal Factory: The Case of Cali's Garbage Dumps*

laborization of work and the limited public budget for new job creation. Instead, and in light of their entrepreneurial history and skills – waste pickers had been surviving in this trade long before it became a major international business – and following their claims, decisions and development aspirations, the CiViSOL Foundation decided to argumentatively seek and secure entrepreneurial space and rights for waste pickers.¹⁷⁵ This does not imply that waste pickers should somehow discard their worker status; it only implies that their entrepreneurial capacity as own account workers typically, and conceived within a solidarity based organization or enterprise, might provide a greater possibility of securing a more ample and better future for their dignified life, work and development in Colombia. While structuring the legal arguments of the case, CiViSOL characterized the waste pickers as own account workers and highlighted their role as micro-entrepreneurs in a lucrative waste economy.¹⁷⁶ As waste was now a successful business, and following Colombia's Social Rule of Law, it was necessary to secure the waste pickers' place as entrepreneurs in the waste economy and to ensure their access to waste so as to develop and nurture their traditional entrepreneurial initiative, innovation, organization, waste and recycling know-how and labor capacity.

2.7. WASTE PICKERS ORGANIZATIONS FOR ECONOMIC INCLUSION AND PARTICIPATORY GOVERNANCE

In our contemporary and very legally sophisticated environment, organization depends on three resources that are very scarce when living in poverty: time, space and money. The person living in poverty invests all available time seeking some income to ensure personal and family survival; lack of land and/or housing translates to an absence of permanent premises where to convene and gather easily, periodically and collectively, in view of communicating to build trust and uniting with like-minded workers, citizens or trade partners; any income created is money that is primarily used for satisfying pressing basic needs and, hence, never enough so as to invest in creating and running a business establishment or a civic-solidary organization, whose utility is still an unproven risk.¹⁷⁷ In fact, from finding the spare time to walk to a meeting place, and, in the absence of private premises, looking for a public space to collect and work, engaging in organizational discussions and strategizing, navigating and understanding the legal process of incorporation and registration, finding trusted help and resources for the appropriate type of legal personhood and drafting good bylaws, legally incorporating and registering the organization, managing finances, paying the extraordinarily high costs of banking in Colombia, declaring and or paying monthly taxes to the national and municipal government at the appropriate times, the transactional costs to incorporate a formal and sound organization is almost an insurmountable challenge to poverty-trapped constituents of the State who are willing to empower collectively.

175 CiViSOL, Arguments to the Constitutional Court of Colombia / Judgment T-291-09

176 Ibid.

177 rra (Public Law + Social Innovation) thinktank / LEP LAB; On the notion of Legal Empowerment of the Poor, Working Document # 3, 2007 (unpublished)

Precisely “due to the lack of capital for ease of legal incorporation and even more so for actually running a capital based organization like an LLC, people living in poverty, and, generally, all citizens who are not organizing in view of an individual-return-of-investment logic, but for civic-solidary purposes, tend to rely on non-profit organizations for channeling their general and collective interests as citizens in democracy and for development. These organizations largely and vaguely known also as civil society organizations, NGOs, NPOs or the Third Sector...should be, at least in light of law and its underlying value of certainty for ensuring social peace and progress, positively defined as civic-solidary organizations instead of merely indicating what they are not. The use of a negative definition of these organizations...merely provide hints on their juridical nature and political role; a powerful reason for the extensive suspicion of governments who limit their space based on the fear of imperialism of ones and terrorism the others. Civicness and solidarity based organizations, and the law and policy that frame their space and accountability duties, are also definitive in democracy and for development. As overlooked and understudied as they are in many disciplines, but particularly in law, Civic-Solidary Organizations are *de facto* pivotal for participatory governance and poverty reduction strategies.”¹⁷⁸

When these civic-solidary organizations are chiefly created for producing goods and services, they belong to the realm of Solidarity Economics¹⁷⁹.

2.7.1. NONPROFIT LEGAL PERSONS OF SOLIDARITY ECONOMY IN COLOMBIA

In Colombia, SEOs or Solidarity Economics Organizations are framed by Law 454 / 98. It is only when organic profit exceeds the operation and purpose of the organization, and its diverse organic collective funds for education and protection purposes are covered, that operational remainders (“excedentes”) can be re-distributed among the organization’s associates or members. This is in contrast to the profit that is distributed as payment of dividends to shareholders in capital-based organizations. Colombian waste pickers, like most workers in poverty and in need of an organization to strengthen their production and stakes, rely on such organizations¹⁸⁰ to advance their development and inclusion in democracy. Despite the socio-economic obstacles they face, waste pickers in Colombia have very developed organizations to advocate for their advancements. They rely primarily on organizations

178 Ruiz-Restrepo, Adriana, « Nature juridique et rôle politique des organisations sans but lucratif du Tiers Secteur » document de recherche pour une thèse doctorale en droit public de l’université Panthéon-Assas. 2000 (Sans publier)

179 Solidary Economics or Solidarity Economy “is not a common expression in English speaking countries, though it is gaining acceptance such as U.S. Solidarity Economy Network (SEN) and Asian Alliance for Solidarity Economy (AA4SE), while in countries speaking Latin languages (French, Italian, Spanish, Portuguese...) it is a motto for thousands of organizations, small, medium and big, helping them to recognize themselves as part of a common movement. This short paper tries to give the main characteristics of this movement, and an update on its activities as a global movement.” http://en.solecopedia.org/index.php?title=Solidarity_Economy

180 In Colombia the creation of a non-profit organization is fairly simple when compared with other countries: anyone can create a non-profit organization for any purpose. Since 1995, the process takes in the best case three days from start to finish. The individual or group filing the application must produce and register bylaws, claim the appropriate tax status, and establish a legal personhood, which is automatically created at the end of the three days or in the worst case, if corrections are needed, a week or so.¹⁸⁰ This legal personhood establishes the responsibility of the organization to the law of the country and its membership, although there is no rigor on what kind of personhood is created or the control or oversight of the organization.

within the solidarity economy such as cooperatives and mutuels. (Contrarily, Employees Thrifts¹⁸¹ do not work for them due to the fact that this organizational form depends on an employment relationship and institutes itself primarily within employers' organizations.) Scholars and practitioners at WIEGO would likely refer to these organizations in the realm of development and the informal economy as the membership based organizations of the poor – MBOPs.¹⁸²

In Colombia, the promotion of Solidarity Economics is the responsibility of DANSOCIAL, a national technical ministry or Administrative Department. The *Consejo Nacional de la Economía Solidaria* (CONES) is, in its turn, the national entity responsible for designing and coordinating the national system of the Solidarity Economy. The Superintendent of the Solidarity Economy is the national executive entity responsible for inspecting and controlling the cooperatives active in the real or financial sector,¹⁸³ i.e. special, multi-active and integrated types of cooperatives providing credit and loan services to the public. Because this legal and economic domain is barely known, especially when compared to private commercial or public administrative law, it is difficult for any citizen to navigate this sector; it is even more so for Colombians living in poverty with scarce time, space, and money resources and limited education opportunities.

Among the array of diverse cooperative types available in Colombia, the Associated Work Cooperative or *Cooperativa de Trabajo Asociado* (CTA) is the ideal legal personhood type for people working in poverty in the informal economy. According to Article 70 of Law 79 of 1988, and Articles 3 and 13 of Decree 4588 of 2006, a CTA is a cooperative that associates individuals to simultaneously manage an enterprise, economically contribute to it and directly compromise labor capacity for the development of economic, professional or intellectual activities. In short, a CTA demands reciprocity and mutually advantageous work for the communal production of goods, execution of works or provision of service to either satisfy their own needs or provide for those of the community at large. Consequently, the objective of this type of cooperative is to create and sustain work opportunities for its members: all members are owner-manager-workers of an autonomous, auto-determined and auto-governed

181 Understanding by thrift, “an organization formed as a depository for primarily consumer savings. Savings and loan associations and savings banks are thrift institutions. <http://financial-dictionary.thefreedictionary.com/Thrift+Institution>

182 On this notion, please read Martha Chen et al. : “Membership Based Organizations of the Poor: Concepts, Experiences and Policy”

183 De conformidad con las leyes 454 de 1998 y 79 de 1988 y los decretos 1333, 1480, 1481 y 1482 de 1989, las siguientes entidades se encuentran bajo la supervisión de la Superintendencia: a) Sector cooperativo. - Las cooperativas de base o de primer grado. - Los organismos cooperativos de segundo y tercer grados. - Las instituciones auxiliares del cooperativismo. - Las pre-cooperativas. - Las empresas de servicios en las formas de Administraciones públicas cooperativas. b) Otras formas asociativas. - Fondos de empleados. - Asociaciones mutuales. - Instituciones auxiliares de la economía solidaria. - Organismos de integración de la economía solidaria - Otras formas asociativas solidarias innominadas que cumplan con los requisitos previstos en el Capítulo Segundo del Título Primero de la Ley 454 de 1998. c) Las organizaciones de la economía solidaria que mediante acto de carácter general determine el Gobierno Nacional. Estas entidades son objeto de supervisión por parte de la Superintendencia de la Economía Solidaria, siempre y cuando no se encuentren sometidas a la supervisión especializada de otro organismo del Estado, de conformidad con el artículo 34 de la Ley 454 de 1998.

organization. Given that an organization cannot be employed, but its products or services may be bought or hired, CTAs engage with third parties only through a service contract, if at all.

When legitimate in nature and purpose, and well managed, CTAs are, according to waste pickers,¹⁸⁴ ideal vehicles for collective development. Clearly informal workers, particularly own account workers, may unite both voice and efforts to jointly control trade and better identify income opportunities and avenues for innovation. Unfortunately, when misunderstood, understudied and thus poorly regulated or enforced, CTAs can be grossly distorted. As with any for or not-for-profit organization, they may become corrupt, irresponsible or co-opted and instrumentalized by more powerful and influential interests. Colombian CTAs have been used by capital-driven corporations to reduce costs and labor obligations with respect to their employees by forcing them to leave the company to create a cooperative they the corporation would later hire as a service provider. Legal outsourcing or the “tertiarization” of the Colombian economy has ended up burdening CTAs and excessively restricting the organizational space for poverty-trapped constituents.

Consequently, and until recently, the CTA enjoyed preferential treatment for both taxpaying and public contracting purposes.¹⁸⁵ Currently, however, CTAs must enroll each and every individual member in a State pension fund, and provide for work-related injury insurance, to comply with Colombia’s integrated Social Security System. CTAs must also make para-fiscal contributions to the State that will go to support the Colombian child welfare agency (ICBF), as well the national agency for vocational and technical education and training (SENA), and the Family Compensation Funds (*Cajas de Compensación Familiar*).

These obligations, imposed by Decrees 2996 and 3555 of 2004, were brought down by a ruling of the Colombia’s State Council (*Consejo de Estado*). However, Law 1233 of 2008, intending to settle the CTA crisis,, instead burdened the CTAs by reviving the previously derogated para-fiscal contributions. The official solution was then to treat both capital and solidarity economics organizations the same and impose equal obligations on both. This had a detrimental effect on CTAs, through which many poverty trapped constituents like waste pickers had been channeling informal initiatives into mainstream development to amplify their voice in democratic deliberations.

In response, organized waste pickers migrated to form different types of nonprofit organizations concretely, foundations and charities. They do so to avoid the fiscal burdens out of necessity, not choice: on average, waste pickers earn approximately 70-80 percent of the minimum wage and cannot meet the financial floor upon which all of these State burdens, from pension to para-fiscals are calculated.¹⁸⁶ What is paradoxical is that CTAs that receive less than the equivalent of 475 minimum in

184 Silvio, Dario, Nohra, Maria Eugenia, Ingeniero / rra interview / 2009 / Bogotá D.C. And Espolito, Omar, Edgar, Luz Angela, / rra interview / 2010 / Cali

185 See Article 19 of the Colombian Tax Code, and Decree 777/92 on the law framework applicable to civil society organizations of a civic solidary nature.

186 Nohra Padilla / rra interview / 2009 / Bogotá D.C.

legal wages are exempted from this contributory burden. Those that do not even reach the floor on which all legal and formal existence and operation is premised are not even thought of, they are outsiders of the formal law realm.

Because the nonprofit sector in Colombia is not well understood and, further, poorly regulated, in the *praxis* there is little substantive difference and minimal control to maintain rigor, order and regularity among the different non-profit organizational types. The upside of this is that people in poverty, always adapting for survival, will take advantage of such flexibility and migrate when necessary from one type to another; the downside is national lack of certainty, planning, progressing and inclusive development for the poverty trapped constituents. Seeking to protect their very much required nonprofit tax prerogatives, waste pickers' organizations will rapidly shift from a cooperative a foundation. Such is the case of part timer and/or informally employed domestic workers who had to shift a few years ago from their "mutuales" (mutual associations) organizations to cooperative organizations when by Decree policy makers imposed an operational minimum budget of several millions of pesos.

Such intra-sector migration from one type of legal organization to another to avoid legal impoverishment effects results in an absence of pertinence and utility of the legal person on the ground. It also explains why in Colombia there are many *de jure* philanthropic foundations, cooperatives and charities that are actually *de fact* commercial for-profit organizations merely incorporated as non profits organizations and taking advantage of the poor regulation and enforcement of the sector.¹⁸⁷

2.7.2. EVOLUTION OF WASTE PICKERS ORGANIZATIONS AND LEGAL EMPOWERMENT OF COLOMBIAN WASTE PICKERS

Although Colombia is home to the ARB, one of the strongest and well-known organizations of waste pickers in the world, most of the country's waste pickers remain unorganized. In 1995, less than 10 percent of the waste pickers' population was organized; today, this number may be as high as 20 percent, but still hardly representative of the waste pickers' conditions in the country.¹⁸⁸ While the majority of Colombia's waste pickers remain unorganized, the organizational history of Colombia's waste pickers is notable and may be divided into four distinct periods: pre mid-eighties or the unorganized waste pickers phase; mid-eighties to mid nineties or the organization and capacity building phase of waste pickers; mid-nineties until 2003 or partnering for the fighting the legal impoverishment of the poor; and, 2008 and forward or the empowerment of waste pickers as entrepreneurs in the Colombian waste economy.

187 Please see: <http://www.wmd.org/documents/DCS/09ColSP.pdf>

188 *Los Recicladores y el Desarrollo Sostenible: la construcción del actor social*, p. 28.

2.7.2.1. PRE MID-EIGHTIES OR THE UNORGANIZED WASTE PICKERS PHASE:

During this first period, waste pickers' organizing efforts were driven mainly by local charitable organizations or resulted as pointed and reactionary social movements. In Cali during the mid 1970s, it became increasingly difficult for waste pickers to work in the Carmelo waste dump outside the city and organization was called for to band together in protest. As reported by Birckbek, a Junta of waste pickers was created to protect the waste pickers' continued access to the Carmelo dump and its trash. This was not an effort aimed to increase their economic status or organized production, but essentially to secure their fundamental right to work in the same conditions in which they have been working for years. In fact, at this time the waste pickers did not even share a collective identity either within or outside of their trade. Publicly, they were called "disposables" or "vultures," both of which fostered a feeling of shame and low self-esteem among the waste picker population, who had no reason for wanting to stand-up, claim and establish any garbage-related social identity, naturally dampening any organizational effort. .

2.7.2.2. MID-EIGHTIES TO MID NINETIES OR THE ORGANIZATION AND CAPACITY BUILDING PHASE OF WASTE PICKERS:

Starting in the mid-1980s and until the closure of its project in the nineties, Fundacion Social, a Colombian faith based Jesuit oriented foundation, engaged in supporting the waste pickers' work by promoting their organization. While Fundacion Social wanted to reduce the waste pickers' conditions of poverty, they began their engagement by affirming the waste pickers' self-esteem and social identity and advancing them towards establishing a collective trade identity. From 1986 – 1990, Fundacion Social initiated this process and then slowly transitioned the waste pickers to a position where they could begin to negotiate for more economic stability with the recyclable buyers in the industry.

From 1986 – 1990, Fundacion Social initiated this process and then slowly transitioned the waste pickers to a position where they could begin to negotiate for more economic stability. This process peaked in 1990, when Fundacion Social sponsored the first meeting of Colombian waste pickers, bringing together individuals and organizations from across the country. Over 27 organizations attended, representing 20 different cities in Colombia, as well as a representative from the Ministry of Health, relevant industries and academia.¹⁸⁹ The Asociacion Nacional de Recicladores (ANR) was created after this meeting and from 1990 onwards, the ANR began to support and build second-degree organizations around the country to better articulate local and regional needs to the national movement. As ANR and its membership grew, and as it received greater attention from the public and State authorities, waste pickers began to build their organizational legitimacy, as well as their trade identity and self-esteem. At the same time, this growth attracted the international attention of bilateral cooperation agencies, as well as from the national private sector, all of which ended up fostering the creation of regional and local organizations capable of entering into contracts with the private sector, most notably in the glass and paper industries. The challenge at this point in the waste pickers' organizational history was that they lacked both teamwork and strategic capacity to take advantage of opportunities made available via the private sector. On the one hand, the waste pickers' work has always been characterized as individual labor: it is own account work paid in piecemeal and thus highly competitive. This does not mean that individuals or families are or were in conflict, but it

189 The Ministry of Health attended the meeting because at this time, waste was more of a public health concern rather than as aspect of an international environmental agenda.

certainly does mean that, in general, waste pickers were not working in cooperation. This, combined with the excessive accumulation of power in some of their organizational leadership, led to internal strife in some organizations during the mid-1990s. On the other hand, contracts with the industrial sector that had been secured by the waste pickers' leadership in the 1990s could not be executed. Sometimes their leadership offered more than what their membership could collect, sometimes they faced administrative complications, but the heart of the issue was that during the initial growth period of the waste pickers' organizations, they lacked installed capacity to collectively build their trade.

Nonetheless an important event happened during the years 1994-96: the government decided to terminate Bogota's cleaning and waste management public company –EDIS– and its public workers went on strike. The Bogota Administration of Jaime Castro turned to waste pickers in the ARB to mitigate the sanitary impact of this strike on the public health and sanitation. With the acquiescence of the public servants on strike, waste pickers stepped in and organized themselves in response to the city's plea to redress what could have been a major sanitary problem. While the waste pickers wanted to seize this opportunity and remain as public waste service providers, the municipality agreed only if Fundacion Social participated in a joint arrangement, which was impossible for several reasons. However, this experience allowed the waste recyclers to realize their business and public service provision capacity and potential. They knew how to fully take care of the activities of collection, transport, processing and of course the recycling of solid waste. Following the dispositions of Law 142 of 1994, the ARB became an authorized organization for public service provision, an E.S.P., and was determined to progressively enter the formal business of public waste management in Colombia.¹⁹⁰ By 1995 the organization of waste pickers, which was more or less fragile in some ways or another, was in process around the country, and some were even working as public service providers in smaller municipalities such as *La Plata* and *Chiquinquira*.¹⁹¹

By 1996, Fundacion Social's closed its project on waste pickers' community and capacity building; some waste pickers welcomed this decision in view of their own autonomy, while others felt abandoned by the organization. Even though they continued to receive some support from the State and other actors for a period of time, i.e. NOVIB, from 1996 onwards, the waste pickers were basically on their own. Unfortunately, the movement suffered some setbacks, especially where there was greater organizational dependence on Fundacion Social, as with the regional organization FERESURCO in Cali. The ARB, however, continued to be very active and became a leading organization among waste pickers' organizations in the country. Waste pickers eventually became recognized as a "social group" and as more relevant, respected and visible actors in society, even earning international attention; second and third level organizations– most notably the ARB and the ANR – became known as some of the strongest waste pickers' organizations in the region. This attention advanced the process of building internal cohesion and trust and consolidating the overall organizational landscape of the waste pickers in the country.

2.7.2.3. Mid-Nineties until 2003 or Partnering To Fight against the Legal Impoverishment of the Poor

190 Colombian consultants on behalf of the Mckinsey Foundation.

191 Silvio, Dario, Nohra, Maria Eugenia, Ingeniero / rra interview / 2009 / Bogotá D.C.

Between 1996 to 2003, with more consolidated organizations and a clear occupational identity and trade, Colombian waste pickers began meeting with their peers abroad and approaching the formal economy as actors with their own place. In other words, it is during this third phase that waste pickers' began their process of legal empowerment. In 1998, the First International Latin American Congress took place in Ecuador and, after the infamous murders of "disposable" people such as waste pickers took place in Barranquilla, national indignation and the waste pickers' public outcry resulted in Law 511 of 1999. This law was the first step to the increased legal recognition of their social identity and trade. It established March 1st as Colombia's National Day of Waste Pickers, while extending certain housing benefits, which, among other promised benefits, have barely been implemented.

With the experience of 1994 in Bogota and other municipalities, an established identity and the first recognition in law of their labour and contribution to society, waste pickers were convinced of their business potential and the need to expand from their trash recycling niche to the broader waste management industry. Seeking to secure more income for more waste pickers, the ARB decided to step into the formal economy of waste by preparing to bid for one of the ASEs in which Bogota was going to divide the provision of a privatized cleanliness service. The barriers the ARB faced and regulatory voids they discovered along their way revealed to them the importance of participatory governance and the impact of law on their livelihoods and trade. This effort – spearheaded in 2003 by a group of professionals teaming voluntarily with the ARB, which was and continues to be led by Nohra Padilla and Silvio Ruiz – began to legally pave the way for their participation in the waste management economy of Colombia.

Between 2002 and 2003 the ARB and its voluntary professional advisers and friends ensured (i) the right of waste pickers cooperatives to compete and therefore bid in a waste tender process by building a case on nonprofit discrimination and obtaining a favorable ruling of the Constitutional Court (C-741-03); (ii) the clarification of the legal nature of the waste that is left on the sidewalk for public collection and transport, whether directly or indirectly delegated to private waste operators and the corresponding right of waste pickers to access that trash, as well as a heightened legal recognition by a Council of State ruling by Decree 1505 of 2003; and (iii) the right to formally access waste through public contracting through a case arguing for the constitutional right to survival at a vital minimum, which was jeopardized by waste privatization schemes that restricted (by an exclusivity contract to a private operator) the access to the waste material on which poor constituents work, trade and survive, in ruling T-724-03. A synthesis of these achievements attaining policy reform, from the bottom-up through the judiciary branch of political power, follows below:

Colombian Constitutional Court Ruling C-741-2003: Protecting poverty-trapped constituents' right to compete in the market

In 2002/2003, waste pickers' organizations in Bogotá attempted to enter the public tender process to compete for one of the six waste collection and transportation contracts of the city, which was opening up the municipal service of waste collection to private operators. The waste pickers, however, were

precluded from competing for these contracts because they were not equity-owned corporations, but rather, non-profit and solidarity-based organizations of the working poor, such as co-operatives. The Constitutional Court agreed with the waste pickers and their lawyers that the public tender process could not exclude waste pickers' cooperatives from competing for these contracts.

Colombian Constitutional Court Ruling T-724-2003: Protecting poverty-trapped constituents' right to enter the market

The terms of the tender that came out after C-741-2003 formally allowed the waste pickers to compete; however, the conditions issued by the municipality of Bogotá were so narrow as to exclude organized waste pickers from materially competing. The Court again accepted waste pickers and their lawyers' arguments. However, before any preemptive measures could be taken by the Court with respect to the terms of the tender that had already been issued, the municipality of Bogotá closed the tender process. Nonetheless, in its decision, the Court required an affirmative action for the inclusion of waste pickers' organizations in future public tender processes related to the cleanliness public service, given that their activities fall within the realm of public cleanliness, and, in fact, include waste management. Further, based on the right to equality within Article 13 of the Colombian Constitution of 1991, the Court also exhorted the municipality to include affirmative actions for marginalized and discriminated groups (nonprofit organizations of disadvantaged populations) in the administrative procurement processes of this territorial entity.

Administrative Supreme Court Ruling (Consejo de Estado) of November 13, 2003 - Administrative Contentious Chamber, First section: Protecting waste pickers' legal access to trash

The third challenge facing the waste pickers in 2002 was Article 28 of Decree 1713 of 2002, which ceded the property rights in waste to the municipality once the waste was presented for collection on public sidewalks; further, unless otherwise determined by the municipality, this property right was ceded by the municipality to the private waste operator or concessionaire. The effect of this provision would have been to render the waste pickers in violation of private waste operators' property rights while recuperating recyclables from waste that was awaiting collection. Although the Court did not accept the argument that Article 28 amounted to a double payment for the single service being provided to the public, i.e., a monetary payment from the waste contract rewarded to the private waste operator and the in-kind value of the ceded waste, now valued as a secondary commodity, the Court clarified that when trash was presented on public sidewalks for collection by the State or its concessionaires, the waste contained therein was abandoned property. The waste pickers could, therefore, legally appropriate that trash, and through parallel advocacy efforts by waste pickers and their professional friends, Article 28 was derogated by Article 10 of Decree 1505 of 2003.

Although establishing a *de jure* space for inclusion in the public procurement process for waste management contracts, this opportunity to develop did not materialize *de facto*. The municipality accelerated and closed the tender before the affirmative action was established by ruling T-724-03,

and, in fact, the foreseen and contractually included second selective route to collect door to door recyclable materials per ASE was never implemented. With the exception of a small pilot project in *La Alqueria*, no formal recycling routes or waste separation plants were established and, thus, most or practically all of Colombia's recycling has continued to happen informally through waste pickers. Realizing this would be a long-term process of empowerment, and with the legal path paved by the Court, Colombian waste pickers, and concretely those of Bogotá organized around the ARB, started preparing for the following waste tender of 2010.

2.7.2.4. 2008 AND FORWARD: THE EMPOWERMENT OF WASTE PICKERS AS ENTREPRENEURS IN THE COLOMBIAN WASTE ECONOMY

The years before the opening of the new tender in 2010 revealed a trend in the globalization of waste pickers' voices and the establishment of waste pickers' rights and the struggle to enforce them. There has been a strong degree of internationalization of the ARB and its leadership through the "Inclusive Cities" global project and the ARB is now a member of the Latin-American secretariat of waste pickers created under this project, a refurbished network of waste pickers in the region and around the world. This trend began with the Latin-American congress of waste pickers, sponsored by WIEGO, AVINA, the Ford Foundation and *Natura Cosmetics*, among others, which became also the first global congress of waste pickers in Bogota in 2008. Joined by Gaia and other organizations, the Inclusive Cities project has helped raise the voice of waste pickers in international forums as well, such as those relating to the climate change and the Kyoto Protocol, in Copenhagen and elsewhere. It also fosters global and regional meetings that reunite waste pickers and other informal leaders to learn via exchange and emulation.

At the national level, the CiViSOL Foundation for Systemic Change¹⁹² brought a strategic litigation case through *Amicus Curiae* in front of the Constitutional Court of Colombia in 2009. While referring to the waste privatization process in Cali and the Navarro Dump waste pickers' expulsion, it built on the previous arguments and ruling in T-724-03 and was strategically designed to claim protection for the survival and work of waste pickers through access to waste and to proactively propose paths for their entrepreneurial inclusion in the waste economy. Through this case, CiViSOL intended to obtain clarification, once and for all, of the scope and breadth of all waste pickers' rights in Colombia, whether in Cali or in Bogota, whether surviving through recycling in a waste dump or by street collection, and to shift waste management policy towards becoming an *inclusive* waste management policy in accordance with the reality of the waste pickers' poverty and trade in Colombia.

192 The CiViSOL Foundation for Systemic Change was founded by one of the attorney friends of the waste pickers since 2002 and now, with additional members, funnels and advances, the higher need for civism and solidarity to operate bottom-up systemic change by redressing exclusionary or impoverishing legal rules or cultural norms.

With evidence and arguments, CiViSOL proved to the Court that that there had been a *legal impoverishment of the poor*¹⁹³, i.e., the poor were poorer after an array of public decisions created by bad public policy and contracting. CiViSOL's brief stated that access to waste equated with the waste pickers' access to survival and that law 1259 of 2008, which prohibited the opening of a trash bag or can on the streets and moving trash through non motorized vehicles, the privatization of all waste, including potentially recyclable material that was ceded to private waste operators, and the prohibition of waste pickers' work in sanitary landfills, were, regardless of necessity and efficacy considerations, negligent and perverse in that they did not consider the effects of these decisions on those who continue to survive from trash. It also stated that the recycling business of the Uribe presidential family represented extreme competition between the powerful with the powerless. In terms of relief, CiViSOL requested not only protection by preventing adverse action or operation in terms of these policy decisions, but also respectfully suggested solutions that would incentivize the inclusion of waste pickers into the formal waste economy and the provision of public waste services. The solutions were oriented to recognize the waste pickers' entrepreneurial work in a traditional and customary niche of the waste market and to promote socially inclusive competition among corporate bidders, without prejudice to the possibility of organized waste pickers competing in their own right and through their own organizations. Constitutional Court ruling T-291-09 found in favor of these arguments, declared waste pickers to be entrepreneurs in waste and ordered their inclusion in the formal economy through the terms of reference of waste management tenders, the facilitation of waste pickers' bidding in waste management tenders and through policy reform in the city of Cali to effectively include waste pickers in the cleanliness or waste management provision. This last order was to be implemented via an Ad hoc Committee that included national, regional and local government representatives as well as waste pickers coops, and by invitation of the Court, CiViSOL. In September 2009, the inclusive waste management policy was agreed to by consensus, but the mayor of Cali, Mr. Jorge Ivan Ospina, and his cabinet have diverted the policy from realizing its agreed-upon scope and impact. Further, many NGOs contracted by all levels of public authority have stepped in to provide an array of training courses, brochures and programs that have also detoured and fractured the cohesive base of waste pickers that was developed during the building of the CiViSOL arguments for the Navarro waste pickers' case. The CiViSOL Foundation has remained deliberately at the margins of what they describe as the "fair" of local NGO contracts and the co-opting of a landmark human rights ruling on inclusion and poverty reduction by political ideology and projects of the mayor and his staff; CiViSOL and several waste pickers may even request all authorities to be found in contempt of court and ruling T-291-2009.

In Bogota, the new waste management tender process under Major Samuel Moreno for the privatization of Bogotá's Doña Juana Sanitary Landfill ignored the relevant jurisprudence, just as it did

193 The *legal impoverishment of the poor* notion, advanced by the rra thinktank in its effort of propounding for the use of law as a poverty reduction strategy, was tested by the CiViSOL foundation in this case. The CiViSOL foundation for systemic change is a strategic ally of rra (public law + social innovation) thinktank and many of the private consultants of rra are either members or funnel their *pro bono* work through CiViSOL and other partnering civic-solidary organizations of the consultancy thinktank

in Cali. Consequently, the now legally empowered waste pickers from Bogotá, i.e., the ARB, and after seeking legal strategy advice of the CiViSOL Foundation, challenged the Bogotá administration's failure to implement the inclusion orders given seven years ago in ruling T-724-2003 in this new competitive bidding process. Anchoring their arguments in what had been reiterated and further developed in ruling T-291-2009, the ARB filed for a contempt hearing before the Constitutional Court of Colombia. The court found in favor of the ARB and determined that the administration had, in fact, failed to meet the inclusion standard articulated in T-724-2003 and suspended the tender until its terms of reference were amended to be effectively inclusive of waste pickers. Since then the waste pickers, and diverse new and old lawyers and interveners of both private and public nature, have initiated litigation (in some cases strategically and in others frivolously) to make the tender reflect exactly what the waste pickers want. However, the CiViSOL Foundation is concerned that the Constitutional Court will limit its support of the waste pickers, in part a response to the excessive litigation aiming to supersede the will of the Court.¹⁹⁴ Other than suggesting the original strategy that waste pickers claim the bidding authority recognized within ruling T-724-03 for the Doña Juana tender's terms of reference, CiViSOL has remained on the sidelines during this episode of the waste pickers' legal efforts. It may re-engage in 2011 in the case in Bogotá to ensure that the new tender for waste collection reflects the social rule of law established by the Colombian constitution, which has been imposed by the Court and which the waste pickers so desperately need.

Two final annotations are relevant to conclude this section on participatory governance and legal empowerment. First, it is necessary to note the extraordinary dislocation of the executive branch from established Constitutional precedents, at least with regard to ESCR. Seemingly, a case lost by the authorities in front of the Court is believed and felt by the State as nothing more than a reproach, rather than a binding legal decision. The same attitude applies with respect to judicial writs, which are interpreted as suggestions. This unitary action by the State to diminish these decisions grounded in the Constitution of Colombia effectively restricts their meaning and the impact of law on poor constituents of the State. Neither the SSPD at the level of the national government, when drafting the terms of reference for the Cali tender, nor the mayors of Cali and Bogotá in their respective municipal jurisdictions have acknowledged the existence of constitutional precedents before engaging in their procurement processes. As true as it is that in the civil law tradition judicial systems are more legislated than jurisprudential, rulings are nonetheless a source of law and should be fully enforced, particularly when they are in favor of poverty trapped and vulnerable constituents of the State; it is surprising to observe the negligence, unawareness, or lack of respect of the executive branch of power, both nationally and locally, towards judicial precedent, strict peremptory Court orders and even the Court's understanding of such conduct and/or habits. Even the highest level National Policy Document issued on waste management and various other critical issues, the CONPES 3530, does not even consider the binding effects of jurisprudence ordering wastepickers inclusion and the normative reinterpretation on waste recycling and poverty. In fact, the National CONPES 3530 on recycling does not mention the Court's orders to advance towards inclusive waste management. Quite

194 Please see: <http://www.vanguardia.com/bucaramanga-region/barrancabermeja/76783-confederacion-minera-crea-buena-expectativa-en-pequenos-ext>

possibly, the lack of careful study of the Constitution and the jurisprudence that refines and advances law in its highest constitutional sense, are the root cause for so many problems and cases that might have been prevented if policy making were aware of and acted in light of the relationship between the three branches of public power, and therefore also supported in the normative and jurisprudential study of the complexity of human experience on the ground.

On a more optimistic note, it is worth highlighting that since the CiViSOL case for Cali's waste pickers and ruling T-291-2009, the waste market in Colombia has changed remarkably, as was originally intended by the legal action. Currently, multi-national waste management companies are required by the waste tender terms of reference to reach out to waste pickers' non-profit organizations and seek strategic alliances with them. Since all privatizations have to be inclusive or non-impoverishing. In Cali, in December 2009, the Mexican company *Promoambientales* won the contract for waste collection in Zone 1 in a strategic alliance with the UFPRAME cooperative of former waste dump pickers from Navarro. And in Bogotá, with regard to the terms of reference for the *Doña Juana* Landfill tender, all interested bidders, including those from Korea, Brazil and Spain, were required to seek out, and are now entering into, alliances with waste picker coops in order to be able to bid for and win multi-million dollar waste contracts.

More information on the organizations of waste pickers and their constituencies is found in Annex 3

ANNEX 1. THE CIVISOL CASE ON CALI'S WASTE PICKERS: FROM MARGINALIZED WASTE PICKERS TO ENTREPRENEURS IN RECYCLING¹

On April 23, 2009, the waste pickers of Cali, Colombia – informal workers whose sole earnings come from recyclable materials that they salvage from urban trash and who are among the poorest of the urban poor in Colombia – won an historic victory in front of the Constitutional Court of Colombia. In decision T-291-2009, responding to an *amicus curiae* submitted by the CiViSOL Foundation in support of 25 writs of human rights protection filed by individual waste pickers from Cali, the Court ordered the waste pickers' inclusion into the formal waste management economy as entrepreneurs in recycling. This was the fifth in a line of cases in Colombia that has steadily increased the space for the waste pickers' inclusion in the formal economy of waste management in the country. While implementation continues to prove difficult, this legal history provides a vivid illustration of the ability of law to compel systemic change in favor of the poor, following an approach that may be referred to as the legal empowerment of the poor.

Who are the waste pickers and what do they do?

Waste pickers – or informal recyclers – are men, women and children who collect glass, paper, cardboard, plastic, bottles, metals, i.e., recyclable materials with market value, from trash heaps to sell as secondary commodities to industrial buyers. Paper mills, for instance, will be interested in cardboard for creating mulch to be used in their products. By using cardboard provided by waste pickers, paper mills save on costs – the costs of obtaining and processing raw or primary materials is much higher – and they can then create item that may be sold in the “green” market for earth-friendly products. With the phenomenon of increasing urbanization – and the capital limitations of most municipal waste management public agencies – the services that waste pickers provide are incredibly valuable. They are not only reducing the quantity of trash that is being dumped and buried in landfills, they are in fact reducing the quantity of greenhouse gases being released into the air and accelerating climate warming, they are preventing leachate from contaminating ground water, preventing the destruction of primary resources by providing recyclable materials to industry, and otherwise contributing to a greener environment, all at virtually no cost to public administration in terms of the services they are providing.

Most of these workers have fallen into this trade by circumstance – in Colombia, many of today's waste pickers are the descendants of rural individuals who were internally displaced due to conflict back in the mid XXth century. They came to the cities, often with their animals and other household assets in tow, and settled on the margins of Bogota, Cali and other urban centers. While the men searched for wage labor, the women cared for their children and animals, scouring these trash heaps for fodder and whatever else they might find. In due course, these women (and their children) became the first waste pickers in Colombia, selling, for instance, salvaged glass bottles to pharmacists.

1 This Annex is a working document of the rra thinktank based on information and joint analysis with the CiViSOL Foundation for Systemic Change.

<https://docs.google.com/viewer?a=v&pid=explorer&chrome=true&srcid=0B5pUmay0b4vAYjdiN2YxMjMtMjRmNS00MDE4LWI0YmMtMDdlOWQ3MzUwMzQ0&hl=en>

Eventually, as wage opportunities became scarcer, men also entered this trade and thus grew the presence of waste pickers in the informal waste economy. Despite the fact that they amount to several thousand in Colombia, and it is estimated that up to 2 percent of the population in third world cities engage in waste picking activity, their trade remains informal and most waste pickers live and work in circumstances of poverty.

What is the history of the waste pickers' legal struggle in Colombia?

Under the Constitution of Colombia, municipal waste management is one of the public services encompassed under the umbrella of environmental sanitation, a set of public utilities or services that are essential to the life of citizens. Environmental sanitation includes within it public services related to water, sewage and, of course, trash collection and disposal. While the private sector is welcomed to provide this – and other – public services, the State and public administration never abdicate their mandate to deliver this essential public service to residents and citizens, even if they are being provided by the private sector. Where the private sector is providing these services, the public sector still has the responsibility to oversee or regulate it in a way that ensures the efficient, continuous and universal delivery of the service.

The waste pickers' legal struggle in Colombia has its roots in the privatization of the waste management public service under Law 142 of 1994. Law 142 was passed to reform the provision of public services – including waste management – to address the inefficiency of the public entity that had been responsible for providing these services. It created the space for the private sector in the waste management realm and private sector operators would actually receive exclusive service contracts for waste management: after having obtained a contract through a public procurement process, they would be the exclusive waste management service providers in their particular geographic slice of the city. These are very lucrative contracts – based mainly on distance traveled from waste collection to final disposal and on the weight of waste that is buried or land filled for final disposal – and over the course of the next several years, private waste management operators flourished within the country's waste management economy; meanwhile, waste pickers persisted in the margins of formal waste management economy.

In 2002/2003, in an attempt to improve their conditions, and as Bogota was preparing its public procurement process for the private provision of waste management services, waste pickers organizations attempted to enter the bidding process to compete for one of the 6 waste collection and transportation contracts for Bogota. Specifically, the Association of Recyclers from Bogota or the ARB, which serves as an umbrella organization for more than 20 different waste pickers' cooperatives throughout the city and over 2300 families of recyclers, attempted to submit a bid and compete for one of these contracts. When getting advice and preparing for bidding, they realized that, even though they qualified as authorized providers of the public waste management service, under Law 142 they – as non-profit, solidarity based organizations of the poor – were only able to provide these services in small and rural municipalities. Only **equity-owned corporations** could compete for the larger, more lucrative contracts for waste management in large cities. This is where the “law of the waste pickers” began in Colombia – when the waste pickers' organizations turned to a small group of voluntary lawyers who had been working with them on the bidding process, to challenge their exclusion from this bidding process and from the financial opportunity that was being granted to private equity owned corporations exclusively. In decision C-741 of 2003, the Constitutional Court determined that there was no legitimate reason to exclude non-profits or community based organizations from entering the

urban market for waste services, the ARB must be given equality of opportunity to compete for one of the contracts for Bogota, and the first legal barrier to the waste pickers' inclusion in the formal waste economy was resolved in their favor.

Of course, this was only the beginning of their struggle. When the terms of the tender process came out after the Court's decision and allowing coops bidding too, the conditions issued by the municipality of Bogota were so narrow as to effectively exclude organized waste pickers from materially competing – requiring, for instance, that winning contractors have experience in *directly* operating waste management services for very *large cities* for a *notable amount of time*. Building a human rights case out of a public procurement tender process to take in front of the Constitutional Court was a complex matter, but there was an real life-or-death need to persuade the Justices that the tension between privatization of waste and survival of the poor waste pickers was not an administrative matter but a constitutional and human rights protection matter. The Constitutional Court accepted the case and concluded that the terms of reference for the waste management bidding process did not incorporate any effective measure to include the participation of the ARB and, in fact, continued or perpetuated their circumstances of marginalization. In decision T-724-2003, the Court confirmed that if the right of waste pickers to compete, and following Ruling C-641-03, was respected *de jure* by Bogota's Mayor, the conditions of the tender present were so narrow that waste pickers' real possibility to compete and bid for a contract that would give them access to waste was inexistent *de facto*, and thus Bogota's total privatization of all (recyclables included) threatened the waste pickers' fundamental right to life or survival, their vital minimum, by lack of access to the waste they work and create income from. It is worth noting that before any tender suspension measures could be taken by the Court for an order of redress, the municipality of Bogota closed the tender process and signed waste management contracts with 6 operators for 6 exclusive waste management zones in Bogota. At this point, the Court could have declared the issue moot, but in its decision, the Court required an **affirmative action** for the inclusion of waste pickers' organizations in all **future** public tender processes of Bogota that are related to the cleanliness public service i.e., waste management.

Around this same time, Colombian waste pickers were facing an additional and very different challenge: their very access to the trash that they relied upon was being threatened by Decree 1713 of 2002. Article 28 of this decree extended a private property right to the concessionaires of door to door waste collection. That is, as soon as garbage was placed on the curb for collection, and even before it was actually collected, it was deemed the private property of the waste management operator for that geographic area, making any waste picker *de jure* a thief. This provision was eventually derogated by a subsequent decree, Decree 1505 of 2003 with the lobbying of waste pickers and their professional friends. And, the State Council (Administrative Court) to which this argument was presented stated *obiter dictum* that when trash was being presented for collection (in trash cans) on public sidewalks for the State or its concessionaires to collect, the waste contained therein constituted abandoned property *res derelictae* until the moment it was collected; thus, it could be legitimately appropriated by waste pickers during this time.

For the next several years, the waste pickers continued in their trade, while the private waste management operators who procured contracts via public procurement process continued to expand and grow.

Six years later, by 2009, not only Bogota began preparing for the 2010 new round of public procurement for waste management, but the south western city of Cali moved towards privatization of

its waste economy following the financial intervention of the National Government (Superintendence of Domiciliary Public Services) to the Cali's municipal public company EMSIRVA, which finally was ordered by the National Government to be dissolved and terminated.

What prompted the Cali waste pickers' case in 2009?

Cali is one of the four largest cities in Colombia, among Bogota, Medellin and Barranquilla. Like in most of the cities around the developing world, there have historically been two groups of waste pickers in Cali: street waste pickers or urban waste pickers, who collect recyclables from trash that has been placed on the curb or sidewalk for collection by formal waste management operations, and waste dump waste pickers who salvage trash from public waste dumps, often living on or near the premises with their families.

The first challenge facing Cali's and in fact all Colombian waste pickers was Law 1259 of 2008, which prohibited the opening of trash from bags or cans in public space and the transportation of trash in non-motorized vehicles. Because most waste pickers are poor and do not have their own premises where they may legally open and extract waste, and since most of them use horse or hand-pulled carts to move their recyclables from the point of collection to separation to sale, Law 1259 had a specific and disparate impact on this group of marginalized and discriminated workers.

The second challenge concerned specifically the waste pickers living in the Navarro waste dump, Cali's primary public waste dump since 1967 and home to about 600 families of waste pickers (at least 1200 individuals). In 2009 the city of Cali ordered its closure, claiming legitimate environmental concerns about leachate and water and soil safety; however, in its plans to close the dump and create a sanitary landfill, the Yotoco landfill, there were neither any *real* provisions made for the population of 1200 individuals who were currently living at the Navarro dump and surviving from the trash there, nor was the authorities' plan to transition them into other livelihood alternatives ever implemented. Besides the National Government, acting through its Superintendence of Domiciliary Public Services advanced the waste privatization of 3 out of 4 zones of Cali, disregarding the jurisprudence of the Court that had in T-724-03 unequivocally requested the inclusion of waste pickers in all waste procurement processes for ensuring them space to work and ensure their survival or vital minimum.

Earlier in 2008, one of the voluntary lawyers who had been with the waste pickers since 2002 – Adriana Ruiz-Restrepo – founded the CiViSOL Foundation, which, from this point on, assumed the waste pickers' case. The 2009 Cali waste pickers is, a good example of a litigation victory that was deliberately built not only for protection but for proactively advancing development solutions, using law for poverty reduction or systemic change.

After being evicted from Navarro and realizing that both the national and local governments twice failed to fulfill their promises of protection, 25 individual waste pickers from the Navarro dump requested *tutela* or writs of human rights protection from the Constitutional Court. In this first stage, they were assisted by a voluntary lawyer of Senator Alexander Lopez' team. Most of the cases and petitions were either denied by some judges or received but didn't grant an effective protection in both first and second instance. Due to the gravity of the waste pickers' situation, the Constitutional Court detected the need of reviewing the previous rulings and thus selected and accumulated all the cases in one single *tutela* or plea for immediate human rights protection. In March 2009, The CiViSOL

Foundation for Systemic Change learnt about this 25 waste pickers accumulated for Court review and decided to intervene through an *amicus curiae* aimed at restructuring the Navarro waste pickers' case around (i) a *legal impoverishment of the poor argumentative* strategy and (ii) an inclusive development set of proposal to the Court as systemic solutions for amending and bettering the waste pickers legal space for life, livelihood and development. Due to the urgency of protecting space for inclusion in the contractual process that was taking place, CiViSOL requested the suspension of the tender process of Zone 1 in Cali, as a preemptive measure; the Court agreed and suspended the only bidding process that had not yet been closed and awarded by the national Government (SSPD) to a private operator.

One month later, on April 23, 2009, the Court confirmed the suspension of the tender process for Zone 1. It found entirely in favor of waste pickers and the protection and inclusion arguments of CiViSOL from the premise that public policies and contract processes must also be guided by constitutional values and provisions so as to protect all constituents equally, and to -in light of a social rule of law- eradicate present injustices in Colombian society while refraining from exacerbating the impoverished conditions of the poor. The Court held the following:

(1) With regard to the Navarro waste pickers' impending impoverishment, the Court recognized that their fundamental rights to a life with dignity in connection with their right to work, as well as their rights to health, education, food, and dignified housing, and equal treatment were materially harmed due to impoverishing policy and private contracting schemes and therefore ordered the municipality of Cali to immediately adopt urgent measures to ensure the effective enjoyment of the constitutional rights to food and housing of the former Navarro dump waste pickers.

(2) The Court took note of arguments and evidence presented on waste pickers' history in the waste trade and public service context, their recycling know-how, their solidarity production capacity through nonprofit organizations and collective participation efforts, their vast recycling activity in waste dumps and urban informal routes which represented a contribution to society albeit informally and under incredibly adverse circumstances, and thus the Constitutional Court decided to protect them in policymaking and the marketplace by recognizing them as *entrepreneurs in waste* in both waste privatization processes and municipal cleanliness policy.

This means that their survival options would not be any longer restricted to work in precarious jobs around public or semipublic waste companies or initiatives nor as employees of the recently appeared capital intensive recycling companies and having to cede their tradition, knowledge, labor and innovation and reduce to basic labor for third parties in view of survival. In other words, the waste pickers constitutional entitlement to livelihood and entrepreneurship i.e. entering the waste economy as entrepreneurs in their own right was confirmed by the Court. Thus, on one hand the National government's (SSPD) pending tender process was suspended for a period of three months, during which time it was required to re-draft the terms of reference to make them waste picker inclusive and in their capacity as entrepreneurs and not only by requesting a few jobs for waste pickers to the bidders. And, on the other, Cali's local Government lead by the Mayor of Cali was ordered to reform the municipal waste policy of Cali in view of formalizing the "entrepreneurs in waste" within Cali's public service provision within the Ad-Hoc Committee that was created by the Court for such purpose.

With regard to the SSPD decision of waste privatization in Cali, the Court, in order to ensure effective inclusion established that the terms of reference of the Waste tender for privatization needed to (a)

ensure the effective and real participation of waste pickers organizations in the competitive bid for public cleanliness contracts making it reachable, (b) make the public tender procurement process *reachable* to organized waste pickers willing to compete in the procurement, and (c) include a scoring criterion that would incentivize large-scale corporate bidders' inclusion efforts, i.e. the tender terms of reference would have to provoke substantial and permanent social waste pickers inclusion in the private waste management operations. Terms of Reference must now reflect through contracting conditions preference for those private operators that, aligned with the State in inclusive development efforts, enter into strategic alliances or partnerships with waste pickers' organizations for waste management rather than just giving them a few individual jobs. The intention both of CiViSOL in presenting arguments and of the Court accepting them and developing them to full extent was to strengthen the right to livelihood, the efforts of collective organization of waste pickers and to protecting their customary space in the recycling waste marketplace now that trash is becoming very profitable.

With regard to Cali's waste management policy, the Court prohibited the exclusion of the waste pickers from any public procurement for contracts regarding the design or implementation of the "advantageous uses" of waste, which includes, among other things, recycling and composting, that is to say, the Court recognized the waste pickers as preferential actors in the waste recycling component of the cleanliness public service or municipal waste management. In accordance with this objective, the Court ordered **the formalization of all waste pickers in Cali** within the public cleanliness economy and requested an *ad-hoc* committee that would work on re-designing and implementing a socially inclusive waste management policy for the city of Cali within six months, due November 23, 2009. The committee included seven seats for public servants, four waste pickers' representatives, and, by direct invitation of the Court, the CiViSOL Foundation. (4) Finally, the Court authorized the authorities to unapply the provisions of Law 1259 that made the waste pickers' trade legally impossible, later confirmed in ruling C-793 of 2009.

(3) The Court also invited Cali's civil society to step in and promote waste separation and to cede their recyclable trash to waste pickers so they would continue to have income for survival and until the Municipal Government and the Ad hoc Committee would have within six months the new inclusive waste management policy ready and set in place.

This one decision (1) situated a pro-poor, poverty-reducing recycling niche firmly within the waste management public service and one that was, thus, duly able to be regulated by the State so as to be inclusive of waste pickers, (2) addressed the informality of the waste pickers' working conditions, and (3) secured the space within the formal waste economy for them to develop their recycling activities even further. In doing so, the decision created the opportunity for Civic-Solidary² organizations of waste pickers to engage in the formal waste economy in a capacity equal to large capital-intensive waste management operators. This market and private driven inclusion created by the State's regulation capacity, was a deliberate objective of CiViSOL and given (a) the clear non-compliance of inclusion rules and ruling by all State authorities and (b) prior knowledge and experience of corporate instrumentalization of the poor that only sought a social-coating of their business instead of engaging in

² *Civic-Solidary Organizations* is a term proposed to designate nonprofit organizations in positive sense instead of a negative or residual one. Ruiz-Restrepo, Adriana, *Nature Juridique et Rôle Politique des Organisations Sans But Lucratif du Tiers Secteur*, Document de recherche pour une thèse doctorale en droit public de l'Université Panthéon-Assas. 2000 (Sans publier)

real systemic social inclusion and development impact.³ CiViSOL had been deliberately aiming for the creation of a market driven incentives structure that would provoke market competition for social inclusion, a sort of recognition of human rights and corporate social responsibility to those bidders that were aiming or were ready to substantially advance the social inclusion of the poor in their industry and operation.

Legal Empowerment and Legal Impoverishment of the Poor

The approach that CiViSOL used to develop and craft its arguments may be called a legal empowerment of the poor approach. It aimed to create formally recognized and protected space for the lives, livelihood and development of poverty trapped waste pickers while teaming with them in the process of replacing emotions of anger, frustration and despair fueled by ideological revindications for arguments of systemic change, reasons for inclusion and evidence on the urgent need of judiciary protection based on the text of the Constitution and the rule of law. Borrowing the term from the former commission on the legal empowerment of the poor the actual empowerment of the poor process is based on the rra think-tank's understanding of legal empowerment of the poor⁴; rra understands it as an improvement on Overall it is about using to use the constituency status of the poor to compel State authorities to be made accountable to them, to the individuals who, although living and working in poverty, are equally constituents of the State and thus deserving of State attention, action, and accountability. When a person has no capital resources, work opportunities, social security or safety nets to rely upon, it is in this moment that she must reclaim her constituency status and demand that the State focus its attention on her and her condition and the condition of others like her. Indeed, "in light of law, poverty is above all a lack of interconnectedness between an individual and the State and the rights that follow, to live unplugged from the mainstream of public decisions, but nonetheless to be forced to comply and cope with what others have decided."⁵ This governance gap, or this distance between the poor constituent and the decision-making mechanisms of the State, contributes to her circumstances of poverty. And it is in bridging that gap that the State may be re-directed to address the grievances of the poor.

Yet, before the legal empowerment of poverty-trapped constituents may be fully realized, it is important also to recognize that there may be impoverishing conditions that must first be addressed. The rra think tank refers to these conditions of bad law and negligent policy making as "the legal impoverishment of the poor," recognizing that a poorly-informed or distanced governing authority may negligently, or sometimes even deliberately, institute laws, regulations and policies that exacerbate the circumstances of poverty within which some constituents live and work. For instance, Law 142's provision that the only entities that could compete in the public procurement process for large municipalities were equity owned corporations; or the provision of Decree 1713 that extended to these corporations a property right in the trash left out curbside for collection; or, Law 1259 that prohibited even the opening of trash cans to partially extract food leftovers or plastic bottles for sale as well as the transportation of trash in manually pushed or horse-pulled carts. These laws actually

³ On incentives and opportunities for business community and civil society alliances for social innovation aiming for inclusive development within a zero waste culture : rra (Public Law + Social Innovation) thinktank / SOCIAL INNO LAB; *CSR & CSOs for Poverty Reduction through Inclusive Waste Management Policy and Public Cleanliness' Choices* , Working Document, 2006 (unpublished)

⁴ idem

⁵ idem

impoverished the waste pickers further – or would have, if implemented as conceived and unchallenged. Consequently, identifying, dismantling and redressing the legal impoverishment of the poor, must be the first phase of a legal empowerment approach to poverty reduction and inclusive development.

The implementation of Inclusive Waste Management Policy orders of the Court in the City of Cali.

After the historic legal victory came the challenges of implementation, which persist to this day. As mentioned earlier, the Court required the city of Cali to design and begin implementation of an inclusive waste policy by mid-November 2009. An *Ad Hoc* Committee was convened to this effect and, although on track to meet this obligation, it was derailed by both political and social forces, possibly well intentioned but with a very reduced capacity to respect the rule of law, understand the *leit motif* of policy reform and empowering waste pickers in the waste and recycling market place and complying to orders of the judiciary.

The meetings of the *Ad Hoc* Committee were extraordinarily tense. Not only they began later than ordered by the Court, in July 2009, and with the Mayor and local authorities trying to exclude CiViSOL from the Committee, to which it had been expressly invited by the Court in ruling T-291-09 to ensure that the waste pickers stakes' continued to enjoy support and technical defense from CiViSOL but also to oversee and report to the Court on the implementation of the policy reform for inclusion and the impact of other orders given in the judgment. Although, Mayor Jorge Ivan Ospina was and still is subject to the direct order of the Court by virtue of ruling T-291-09 and thus had to convene the *Ad-hoc* Committee meetings the Mayor, was always too busy to attend, and furthermore delegated his one seat in the Committee, after splitting it in three seats, a decision that substantially affected the equilibrium of the Committee's meetings. Besides, the 3 Mayor's delegates, and the other municipal agencies' delegates to the Committee, rotated their presence in each meeting which broke the continuum of discussion and policy elaboration, as every meeting had new Committee members with new ideas and resistances to reform, which created a great degree of tension with the waste pickers and CiViSOL.

In addition, waste pickers were fighting between themselves to determine who should be replaced as a representative, who would attend the Committee meetings on behalf of all; there were only 4 seats available and predesignated by the Court based on what appeared on the files. Some desperately sought out participation to voice their frustrations and dreams, others were seeking positions of leadership and recognition, and others just wanted to be sure that they would not be betrayed or sold out by colleagues they didn't trust. CiViSOL's work then extended way after the Committee preparation or meetings as it had to try to educate the waste pickers as fast as possible on representativity, communication, and trust and union or group cohesion, to effectively seize the opportunity and materialize it on the ground. Not breaking apart and strengthening their position vis-à-vis the government was crucial for the implementation phase. CiViSOL and waste pickers would often meet until late in the night in the open, in the municipal park in front of City Hall. These meetings were convened by word of mouth. During this time, one of the conclusions made by CiViSOL was the utmost importance of having a place where to conduct meetings and deliberations and where to promote social dialogue, nurture trust and attain social cohesion and unify stakes and priorities among waste pickers. CiViSOL repeatedly requested the Mayor to lend a temporary meeting place, an old house for holding waste pickers meetings, another request that never materialized; the Mayor's

office found one excuse after another. It is precisely the lack of meeting premises for waste pickers communication for cohesion, to which CiViSOL attributes the beginning of all derailment, manipulation and cooptation of the implementation process for ruling T-291-09.⁶

From the first months of the Committee, it became clear that there was no unified response of the State: the rightist-oriented national government and the leftist-oriented local government were in political tension and additionally amidst an electoral season. At the personal level, the advisors and public servants of the Mayor's office were tacitly organized in two groups competing for personal reputation, public image (for potential votes or endorsement in the future) and for winning the political favor of Mayor Ospina. This translated into a dispersed environment of tension and difficulty of negotiation because the common good and social inclusions were the last concerns of many of the public servants. Waste pickers and CiViSOL faced in the Committee a multi-faceted political arena rather than a single unified, coordinated exchange with a responsive State. It is worth noting that the highest obstacle faced by CiViSOL was to keep cohesion and focus of waste pickers as there were competing under-the-table contracts and income opportunities offered by public agencies and servants to curry the favor of a few waste pickers to make them look good in front of their superiors and in the public opinion. This had a devastating effect on waste pickers, who themselves started breaking apart into smaller factions that, in turn, directly contracted work opportunities or other favors with each of the seven agencies that were represented in the Committee.

With the mounting pressure of the time limit imposed by the Constitutional Court to finalize and begin implementation of an inclusive waste management policy for Cali, and amidst such unorganization and alignment for devising an inclusive waste management policy that would positively impact on the city and the lives of more than 2500 waste pickers in the city, the public servants seating at the Committee table requested CiViSOL to facilitate a one day policy-making workshop in September 2009. Having built collectively a deliberation framework in an earlier preparatory meeting, CiViSOL facilitated a workshop for legally and technically guiding the efficient, sustainable and scalable inclusion of waste pickers in Cali. The Committee reached consensus on the principles, contents, budgets, core tasks, responsible agenda and scope on the 23 of September at 10 pm.

The main agreements reached by consensus at that session, i.e. the draft inclusive waste management policy for the city of Cali, are the following:

- The main objective of the policy was the inclusion of former Navarro dump waste pickers and urban/ street waste pickers in the provision of public cleanliness services or waste management of Cali, as decided and oriented by ruling T-291-2009. The policy would, however, be made progressive and scalable until the inclusive policy was fully operational and capable of including all. It would begin by what was deemed a humanitarian measure for the former Navarro dump waste pickers who were in a desperate condition with no access to waste and income after the waste dump closure. For preserving peace they would not attempt to access waste and thus compete with the street pickers on their existing informal routes, instead the more than 600 families would receive minimal subsistence income in exchange of their activities of cleaning river banks, preventing mountain fires and educating the city's population on the importance of waste separation for recycling and educating also on entrepreneurial skills for their upcoming role as cooperative-service providers of recycling services and trade.

⁶ It is worth noting that CiViSOL works *gratis*, relying only on the voluntary time and contributions of its members and has received no national or international funding through grants, nor any remuneration of services through governmental public contracts so as to ensure independence and strategic legal maneuverability.

- Having ensured the requisite budgetary needs for this humanitarian measure and programmed budget for 2010 -and until the full inclusive policy was set in place- social peace among the two large groupings of waste pickers was established and the humanitarian crisis of the Navarro waste pickers temporarily resolved. More than 600 families started receiving and equivalent of 250 USD in exchange for learning and civic teaching on waste recycling and mountain and river preventive cleaning.
- Because in Cali there were no existing formal recycling routes *de facto* and despite having them awarded *de jure* in the Terms of Reference for Waste Privatization and subsequent 7 years contracts, it was agreed in the Ad hoc Committee that the National Government (SSPD) would request the new private waste operators to renounce or cede their *de jure* right to potentially operate an additional selective route for waste recyclables in favor of organized waste pickers of Cali. This agreement was possible because formal recycling had never been implemented and, thus, carried no economic harm to the private waste concessionaires. Alternatively, and if the social responsibility justification was not strong enough to support this request, the State would utilize its public contracting prerogatives to unilaterally modify the existing public service contract and take away from the concessionaries *the de facto* idle selective recyclable route and cede it to the organized waste pickers of Cali as a poverty reduction and municipal zero-waste strategy.
- In line with this agreement, the suspended tender process for Zone 1 would be amended to exclude a second selective recyclable route in its Terms of Reference or procurement contract like it had previously done. From now on that route will be operated by the organized waste pickers of Cali. The National Government (SSPD) agreed to exclude the selective route for recyclables of Zone 1 and only open the bidding for an ordinary route for collection of organics (non-recyclables) to transport for burial at the landfill, which it did in December 2009.
- In fact, in the amended version of the ToRS⁷, all bidders had to present their offers in a strategic alliance or partnership with a waste picker cooperative or similar nonprofit, for waste management. Besides imposing social inclusion on corporate bidders' for entering the tender, the ToRs also promoted inclusion by establishing that in case of a tie position⁸ it would award the contract to the bidder that would attain the highest social impact in the *vital minimum* of individual waste pickers.
- It was also agreed that once recovered, all the *de jure* created routes for collecting the trash of the city in Zones 1, 2, 3 and 4 of Cali, would be unified and privatized under a 5th public service contract for waste recycling. Only that this one would be awarded (a) by direct adjudication instead of an open competitive process and (b) to a private operator of a solidarity economics nature, instead of a capital economics one, that would be created by union and cooperation of all waste pickers organizations. Otherwise, waste recycling contracts for the 4 zones would be awarded in a closed tender or competitive bid among waste pickers' cooperatives or other nonprofits, only. These measures were inclusion devices in light of the affirmative action and the new preferential status of waste pickers as formal entrepreneurs to be. In synthesis, all that the policy reform and amended tender were going to

7 The amendment of the tender process was a complex one also. The SSPD's amended tender opened only for 10 days for presenting bids. This did not make the ToRs "reachable" for anyone and particularly for the poverty-trapped waste pickers. Due to this irregularity a political control session of the to President Uribe's Superintendent Eva Maria XX, was conducted in the Senate by Senator Rodrigo Lara Restrepo which helped to postpone and redress the process in line with the Court's orders in ruling T-291-09.

8 Only because waste pickers' time and preparation was not ideal and in this occasion they were not going to use their newly acquired right to compete by bidding for the waste management of zone 1, waste pickers and CiViSOL didn't fight back SSPD's decision to reduce the incentive ordered to the most inclusive private operator from giving extra points to breaking a tie position in favor of the most waste picker inclusive offer.

do was to recognize and organize formally, the vast waste recycling routes and efforts that had been already operating informally; it would benefit the city, better their recycling work, dignify their livelihood and preserve their right to entrepreneurship instead of necessarily subordinating them to the capital and/or political powerholders who had never entrepreneured in waste but had detected a multimillion waste recycling business recently.

- It is worth noting that the waste pickers' poverty and vulnerability triggered special constitutional protections and granted the Ad hoc Committee and the Municipal Administration the authority (and responsibility) to affirmatively act in the waste pickers' favor. Thus, it was agreed by the Committee in the draft public policy that waste pickers would not only operate the waste recycling routes of Cali as new formal public service providers, they would also have a right to the recyclables they collect from trash, akin to a property right: they would rightfully own whatever recyclables that they collected, thereby allowing them the ability to both earn income from (1) the recycling service, i.e., door to door collection of recyclable trash and their separation of recyclables in a recycling plant or municipal warehouse, and (2) from the secondary sale or provision of recyclables to industrial buyers in Cali, so as to encourage their entrepreneurial initiative.
- To ensure the waste pickers' sense of autonomy, and the business and entrepreneurial rights of the poverty-trapped, ruling T-291-2009 declared the waste pickers "entrepreneurs in waste" (as opposed to subordinate employees or semi-employees) in order to facilitate that process and ensure efficiency in service provision to the city, the Ad Hoc Committee agreed to promote the creation of an umbrella organization of waste pickers, temporarily named ARCA ("Ark") or Association of Recyclers of Cali. Under ARCA, and pivoting on the principles of solidarity economics, all existing waste pickers organizations and individuals would organize, cooperate and even receive training, plus child care and other social safety nets. It was agreed that with external management advise and capital investment, ARCA would function as an umbrella cooperative and would be in the position to formally operate the newly created and privatized waste recycling route that the over 2000 waste pickers were already operating informally and atomized in Cali.
- Only by formally ceding to waste pickers the entirety of the recycling routes of Cali, and giving property rights to the collected recyclable waste, could the Ad Hoc Committee ensure that there would be enough income and redistribution for the more than 2000 waste pickers in Cali. ARCA's bylaws would be tailored to create an umbrella cooperative capable of redistributing income among all cooperatives and waste pickers assumed therein. Special attention would be paid to balancing the internal power distribution among leaders, protecting ARCA from external political influence or corruption, and devising mechanisms for enhanced representation and protection of the elderly, the handicapped and women heads of household.
- The draft public policy agreed to by consensus also envisioned the need to conduct a waste pickers' census, providing some premises for meetings, building a municipal plant for waste recycling that would be concessioned directly to ARCA and the construction of at least four warehouses to stock materials for recycling at the plant. The Mayor's representatives agreed on plot of land in the *La Corbata* neighborhood for the recycling plant and provided a list of municipal plots where the warehouses might be built, allowing for budgetary restrictions limiting the number of warehouses to two during the first phase of implementation.

Following the unanimous consensus at the policy-making workshop, the office of Mayor Ospina had only to pass the preliminary version of the draft policy to all members of the Committee to detail plans of action and prepare it for signature and submission to the Court before the November 2009 deadline. It was then to be adopted before year-end 2009. Despite repeated demands by CIVISOL and the waste

pickers, this never happened. Days after the Court-imposed deadline had expired Mayor Ospina and his advisor, Mr. Millan, sent a legal advisor to inform the Committee that a new policy – created by a consultant hired by the Mayor and his advisors – would substitute the agreed-upon draft policy. It became clear that what the Mayor wanted was full control over the waste recycling trade and, thus, the livelihood of thousands of poor waste pickers, rather than having an autonomous population of waste pickers, independent of political power and capable of enjoying and realizing their own livelihood and entrepreneurial rights. CiViSOL and waste pickers protested that the Mayor respect the contents of the agreed-upon inclusive policy, with no luck.

Replacement of the agreed-upon policy by the Mayor's unilaterally created policy violated not only the Court's order and terms, but also the principles of civil society participation and good faith. In its place, the Mayor's policy was completely contrary to democracy, the law and the sense of the Court ruling in every dimension. In its capacity as overseer of the implementation of ruling T-291-09, granted by ruling T-291-09, CiViSOL has submitted five reports to the Court monitoring this process and requesting urgent intervention to protect both the ruling and the waste pickers. The waste pickers have also submitted several letters to this same effect. However, these pleas have been insufficient to provoke action or reaction by the Court, vis-à-vis derailment of the implementation of ruling T-291-09 and the policy-making process, to the detriment to the waste pickers' rights.

One year later, the initial draft policy has still not been enforced, articulated or implemented. There has been, sadly, a great absence by the Court to see that its ruling was, in fact, implemented. Recognizing the extraordinary burden of work that the nine justices on the Court are responsible for, this has been a disappointment for the waste pickers, their newly acquired faith in the rule of law, and CiViSOL's efforts in using law for poverty reduction. While the Court was there to create the historic opportunity for the waste pickers, up until this point, it has not been capable of finding the time or mechanisms to ensure its application and realization, nor did it necessarily have the resources or capacity to do so.

Mayor Ospina of Cali and his advisor David Millan have managed to twist a fast-tracked poverty reduction and human rights case to advance their own ideology and redress previous political losses imposed upon them by the national government. Cali's municipal waste public company, EMSIRVA, had been intervened and liquidated by the national government, as represented by the Superintendent of the Domiciliary Public Services of Colombia, due to its financial insolvency and inefficiency. Free-riding on ruling T-291-09, Mayor Ospina and Advisor Millan decided to resuscitate the defunct EMSIRVA municipal company by changing its name to "Girasol", re-hiring its old personnel, and creating within it a *recycling business unit*, through which they will *bring in* waste pickers work. (It is not clear if, at least, they will be creating more than 2000 decent jobs) This is, in their interpretation, is due compliance with the Court's ruling, a decision that specifically recognized waste pickers as entrepreneurs in waste, for whom the Court supposed that employee status would not be sufficient for further development and growth in the trade they had been cultivating for generations. Indeed, the horizon of inclusion for the poor into mainstream development, by recognition of their right to livelihood, entrepreneurialism and development has been reduced the Mayor's policy to what has always been the perception of many: the poor, unlike other constituents of the State, cannot entrepreneur. They are entitled to, at most, the right to survive through a precarious job and a minimum wage, no more. They are not entitled to grow beyond that minimum level of existence, to entrepreneur collectively or to develop their knowledge, livelihood and trade. The poor must remain small.

In addition to this affirmation of the belief in the waste pickers' minimum rights to survival, national, regional and local governments have contracted with their preferred NGOs to engage the waste pickers in relevant or irrelevant training activities, brochure production and manuals. From courses that are intended to reduce stress on waste pickers to those for financial accounting, ruling T-291-09 was twisted in the field to create a "contract fair" among opportunist lawyers, politicians and even NGOs that continue to present themselves as independent philanthropic foundations or nonprofit organizations, when, in fact, they are engaging with waste pickers under contractual orders of the government. Meanwhile, the waste pickers, in their persistent circumstances of poverty, have been running from the promises of one politician to another, from one NGO-by-hire course to another, afraid to lose any opportunity to better their lives and provide for themselves and their families. Their time to work in their trade has been drastically reduced, and consequently, their income as well, and the certainty that the CiViSOL case and ruling T-291-09 had achieved completely lost. There has been a conspicuous absence of monitoring and evaluating implementation of the Court's order and, despite its landmark recognition of waste pickers' rights to livelihood, development and entrepreneur; the ruling has, to date, been incapable of systemically reducing the waste pickers' poverty on the field. Making matters worse in the realization that, for poverty-trapped constituents, the law must always be respected and obeyed, whereas a decision in favor of these constituents may be effectively disregarded. This is the very heart of the problem with law and the rhetoric of rights; too often, they remain in name only, in paper and ink, rather than made into a tangible reality.

Lessons Learned

Legal impoverishment of the Poor is a useful notion to explain a current trend in contemporary law making processes in many countries around the world. Micro and Small scale Artisanal miners in Colombia are prohibited by the Mining Code from pursuing their mining activities in a commercial capacity; farmers in the United States and around the world are prohibited by law from saving seeds and must buy new seeds every year or risk intellectual property-based litigation against them; and, in West Virginia it was at one time impossible for someone on welfare to enroll in an higher education program without losing their welfare benefits.

At the same time, through the waste pickers' cases, it is evident that even if these impoverishing conditions are identified and brought down, without a responsive and accountable State mechanism that is driven by a common purpose of delivering the common good, the reality of poverty will persist. It is the State and only the State that can and must ultimately retain this responsibility, because no other institution carries the same mandate towards its constituents. Broadly speaking, the private sector operates from a profit-driven motive, the international development institutions cannot legitimately interfere in sovereign domestic affairs, and while the non-profit/third sector operates from an ostensibly social motive, it either lacks resources or capacity, or in the case that these do exist, the non-profit entity is beholden to donors and donor agendas, rather than the poor and excluded. While CSR and venture philanthropy offer some incentive for private sector action, and recognizing that many non-profit organizations do remain highly motivated and committed to their organizational missions, the State remains the only entity engaged in a relationship in which it is obligated by law – domestic or international – to respect, protect and fulfill the human rights of its citizens. In other words, the State is the only actor who remains **accountable** for the poverty of individuals.

From this perspective, the neoliberal trend of minimizing State responsibility is very troubling. Commercial and service delivery responsibilities of the State are being *privatized*, while the social agenda and response is being *non-profit-ized*, thereby hollowing out what the State is and what it can be for its citizens. What the rra think tank observed in Colombia was that after the judicial decision ordering redress and effective response from the executive branch of power i.e. local, regional and national State government, was an increased presence of private and non-profit engagement, but many of these entities were ultimately self-serving or ineffective at reducing the poverty of the waste pickers. Both the governmental contractors and their hired NGOs don't distinguish appropriately the moment for public response and rights fulfillment from the philanthropic response and development assistance, confounding rights with help. For instance, one important Cali corporation started appearing through its prominent foundation around the waste pickers' case, highlighting its efforts to help the waste pickers, while seemingly the corporation itself has been giving all of its recyclable corporate waste to one of the major private-sector competitors of the waste pickers, a capital-intensive private recycling company owned by the sons of former President Uribe. So the corporation was benefitting from the public perception of its foundation work, but actually doing business with the waste pickers' competitors. Meanwhile, the nonprofit actors who became involved not through philanthropy-based initiatives, but, rather through contractual arrangements with the national government, were developing trainings after trainings for waste pickers, whose time is already limited, and not actually improving their daily conditions at all and worse bifurcating and diverting the institutional channel of the Ad Hoc Committee for Policy Reform. And as for the State, it was paralyzed by political division. The local mayor was politically situated to the left, the national government – from the president to the authorities who determine the terms of public procurement processes – were to the right, and this ideological division prevented any real implementation of the decision and change in the waste pickers' lives from taking place.⁹ Consequently, the waste pickers were and continue to be somewhat disoriented – they no longer know who to turn to for what. In this confusion, they have ended up turning to whoever approached them with dream opportunities and offers. Unfortunately, the people they turned to were not always interested in the waste pickers' fight so much as their own prominence.

As these events continue to transpire unfold, we continue to learn from them - about poverty, about legal empowerment and legal impoverishment, and about political and nonprofit, and corporate politics.

⁹ This was one of the reasons that CiViSOL has requested intervention of the Court, because, according to what has been assessed in the ground, all of the activity from diverse actors orbiting around waste pickers is primarily a simulation of solidarity and compliance, rather than an effective State response and true not-for-profit interests. CiViSOL expects the Court to enforce the indicators of effective enjoyment of human rights that it had imposed earlier on the local government of Major Ospina of Cali.

ANNEX 2. MAPPING OF WASTE PICKERS ORGANIZATIONS

Please refer to a separate Excel Document with the same title attached to this document.

3. COLOMBIA'S RURAL MINE WORKERS IN POVERTY

This chapter engages in a law and policy analysis of own account rural mine workers in Colombia. While mine workers are susceptible to vulnerability in their trade, own account rural mine workers are especially so due to their cultural, geographic and political isolation, most notably the two ethno-cultural minorities focused on in this chapter – indigenous and afro-Colombian mine workers. Section 3.1 sets forth the public policy framework governing the mining industry, beginning with the Constitutional provisions relating to mine work, natural sub-surface and non-renewable resources, and ethno-cultural minorities, then continuing on to the seminal legislation currently governing the mining sector: the Mining Code of 2001. Section 3.2 explores the trade context of mine workers, including the history of international mining interests in Colombia and other actors in mine work. Section 3.3 considers specifically the livelihoods of the two ethno-cultural minorities in poverty who work as own account rural mine workers, indigenous and afro-Colombian individuals and communities. This section sets forth their centuries-long history in mine work, the role of communal lands to their history of mine work, as well as constitutional and legal protections over their communal lands that impact these mine workers' trade today. Finally, it analyzes the particular challenges facing two additional sub-groups of own account mine workers – women who are found in large, medium, small and micro-scale mining operations and children – and issues relating to mine workers' overall health and social protection. Section 3.4 continues to analyze the question of own account mine workers' access to mine work, especially given the particular scheme of the concession contract as set forth in the Mining Code of 2001 and its provisions and implications on indigenous and afro-Colombian rural mine workers. Section 3.5 presents three examples of artisanal and small-scale miners placed in poverty traps through the law that illustrate the range of labor issues impacting own account and self-employed mine workers in poverty. Section 3.6 follows with a coherent analysis of illegality, informality and poverty for mine workers, emphasizing the need to distinguish between informality by choice and informality by need for mine workers, the impoverishing conditions of the Mining Code on indigenous and afro-Colombian constituents in mine work, and the absence of a legitimate labor identity for artisanal mine workers. Finally, Section 3.7 considers the role of organization among own account mine workers to facilitate inclusion in development and participatory governance, highlighting the particular difficulties facing this occupational group given their socio-political isolation and the competing interests of the State as sole owner of all subsoil rights and as the rule-maker of the common good. In a separate Annex to this chapter a synthetic explanation of the notion of Artisanal and Small Scale Mining is presented and complemented by the Authors' understanding based on the Colombian field and policy context.

This chapter of the WIEGO report aims to understand the law and policy framework applicable to workers in poverty within the mining sector in Colombia. Without prejudice to the importance of the environmental disequilibrium created by and through mining interventions, this chapter will focus only on the negative economic impacts caused by unregulated or poorly regulated social stakes in the mining industry. The focus of this law and policy analysis is to establish the level and quality of formal protection and opportunities that the Colombian State delivers to its poverty-trapped constituents working and living in the mining trade. In other words, by navigating through the applicable law and policy, this chapter attempts to appraise the formal space that the State is granting to its constituent mine workers and their rights to life and survival, to work and to entrepreneur, and their right to develop within their mining culture and traditional or ancestral work and trade.

As opposed to the extraction of oil and natural gas, where the level of investment required for the necessary equipment precludes individuals from informally engaging in small or micro-scale mining for oil and gas activities, the extraction of minerals – from sea salt to sand, clay, gold, platinum, emeralds and more – still presents income opportunities for poverty-trapped informal workers. Most notably, accessing these resources is not prohibitively expensive as it does not require any particular or mechanized equipment. While there is a significant informal mining presence in Colombian cities like Cali, Medellin and Bogota, this report focuses on the situation of *rural* mine workers for the following reasons: (1) they live in villages far removed from the political and legal capital of Bogota, and are more politically isolated for participatory governance purposes; (2) as afro-Colombians and indigenous people, rural mine workers' relationship with natural resources differs remarkably from urban Colombians and has special relevance in terms of mineral extraction; and (3) informal mine workers in Colombia's rural zones will necessarily turn to informal extraction to earn a meager income from the mountains and natural resources around them, while lacking other substantive income opportunities besides artisanal agriculture, to create income in their rural settings.

Because of its focus on poverty this report will necessarily highlight the difficulties of indigenous and afro-Colombian men, women and children who are involved in mining and who work alone or in proximity to large mining operations in Colombia. Being rural and belonging to ethno-cultural minorities, they are even more excluded and vulnerable than other mine workers. While mine workers engaged in formal employment contracts with industrial mining companies may also be living in poverty, they are at least protected under existing Colombian labor law provisions and the negotiations of their labor unions. Or, if informally employed, they may at least lawfully claim that their informal employment, in light of the principle of reality in labor, is part and parcel of a formal employment relationship.

Further, and as grave as the recruiting, transporting, transferring, harboring or receiving of a person through the use of violence, coercion, manipulation or other deceptive means to exploit them in mines is, this report does not focus on the link between mining and human trafficking. As much as this connection is very much deserving of attention, human trafficking pivots around the criminal exploitation¹ of the labor capacity of human beings and/or their physical and sexual integrity, and thus implies a personal and civil rights analysis in light of criminal law, rather than the economic and social rights analysis in light of development law upon which this report is based.

1 On delimiting the boundaries between the human exploitation that is relevant to labor law, labor inspectors and judges and the exploitation that further implies a criminal reproach and is thus relevant to penal law, prosecutors and criminal judges, and incarceration as the legal sanction, please read : UNODC, *Niños, Niñas y Adolescentes Víctimas de Trata de Personas y Explotación Sexual / Laboral* p. 48 http://www.casacidn.org.ar/media_files/download/ManualAntitrata.pdf

Mining is particularly relevant for people living in poverty in countries like Colombia, where the Andes mountain range meets with the Caribbean, after having split into three different mountain ranges that separate the Orinoco plains to the East and the Pacific Ocean to the west, towards the northwest of Colombia's Amazon jungle. The geology of having three mountain ranges and the geographical diversity of a country packed with rivers and valleys explain the legendary mineral wealth of Colombia, the land of *El Dorado*, and its lure to the Pirates of the Caribbean. Found on the soil's surface, directly underneath, or even gently washed away by the thousands of rivers that extend across the country, Colombia's natural wealth and diversity provides an easy and handy source of survival to its inhabitants who micro-extract minerals in an artisanal mode. This is especially relevant for those Colombians living in the country's rural zones, where mining is still perceived as a legitimate (traditional or ancestral) activity for subsistence and community development. Just as many of their indigenous or African enslaved ancestors worked with mineral extraction for centuries, these Colombians continue to mine the country's wealth, although every day their trade becomes more and more difficult, as informal mining is barely tolerated by law, and sometimes is even plainly branded as illegal by the government. Without developing appropriate policy and regulatory criteria capable of distinguishing between informality by need or due to poverty from informality by choice or for convenience, poor mine workers -informal by need- end up excessively burdened by law and with a very reduced formal space for survival, livelihood and development. In fact some estimate that in Colombia, 80 percent of mining is informal². Informality is then such a persistent and widespread reality that to wonder "is informal normal?" as the OECD entitled one of its recent reports³, becomes a very relevant question to ask.

In fact, instead of the government seeing an opportunity for widespread and far-reaching poverty reduction strategies via organized artisanal and small-scale mining, which is not possible for oil and gas extraction, there appears to be some degree of official regret for the abundance of minerals and their ease of extraction. In an interview with officials from the former Uribe Administration who worked in Colombia's Mining Ministry, the interviewees appeared disappointed that mineral resources may be extracted easily without any investment in machinery. They seemed disheartened that the disorderly way of extraction (actually, and as understood by the authors of this report, an expression of intense and immediate survival needs of many) exceeded the rule of law. A different analysis, such as assessing the mining law's normative positive impact on the ground and/or its capacity to effectively reach the rural poor to deliver and ensure formal opportunities and protection for these Colombian constituents also, did not surface the conversation, as much as it should, in light of accountability to the poverty-trapped constituents of the State.

3.1. PUBLIC POLICY FRAMEWORK OF MINING

3.1.1. THE CONSTITUTIONAL FRAMEWORK

In Colombia, all policy norms, including those impacting the mining trade, must be developed in accordance with the State's Social Rule of Law. With regard to mining, Article 8 of the Constitution establishes that the duty to protect the cultural and natural wealth of the country lies with both the

2 Marco Aurelio Hurtado and Edward Caicedo / Gremivalle / rra interview / 2009 / Cali

3 Please see: http://www.oecd.org/document/54/0,3343,en_2649_33935_42024438_1_1_1_1,00.html

State and persons of Colombia.⁴ At the same time, Article 332 establishes that the State is the sole owner of all subsoil and natural non-renewable resources in Colombia.⁵ Pursuant to Article 360, the exploitation of these resources, as well as the rights that Colombian territorial entities will have over them, is governed under Colombian law.⁶ And, as sole owner of these energy and mine resources, the State will receive royalties earned from the exploitation of the country's non-renewable natural resources.⁷ Departments and Municipalities, as well as all maritime and fluvial ports impacted by the mining industry vis-à-vis transportation needs, also have a right to royalties and compensations from the exploitation of these resources. For this purpose, the National Royalties Fund was created by Article 361, to promote mining, preservation of the environment, and financing of regional investment projects identified as development priorities by the relevant territorial entities.⁸ The fund is sourced by royalties that are not assigned to the various departments and municipalities where natural resource exploitation is taking place. It is worth noting that, currently, a draft bill proposed by recently elected President Santos is being studied in the Colombian Congress; it aims for a better distribution of royalties throughout the country.⁹

Other constitutional provisions that are relevant to oil and mineral extraction are those referring to Colombia's population of indigenous people. Article 7 establishes the State's obligation to recognize and protect Colombia's ethnic and cultural diversity; Article 171 defines the existence of additional exclusive indigenous representation in the Senate body, and Article 246 recognizes indigenous jurisdiction and its parameters within their territorial realm, insofar as they do not conflict with the Constitution or the laws of the State.¹⁰ Further, Article 329 creates indigenous *resguardos*, a type of

4 **Article 8** It is an obligation of the State and the persons to protect the cultural riches and natural riches of the Nation. // **Artículo 8.** Es obligación del Estado y de las personas proteger las riquezas culturales y naturales de la Nación.

5 **Article 332** "The State is the owner of the subsoil and of the natural, nonrenewable resources, without prejudice to the rights acquired and perfected in accordance with preceding laws." // **Artículo 332.** El Estado es propietario del subsuelo y de los recursos naturales no renovables, sin perjuicio de los derechos adquiridos y perfeccionados con arreglo a las leyes preexistentes.

6 **Article 360** The law will determine the conditions for the exploitation of nonrenewable natural resources as well as the rights of the territorial entities over them. The exploitation of a nonrenewable natural resource will produce in favor of the State an economic revenue privilege without prejudice to any other right or compensation that may be contracted. The departments and municipalities in whose territory nonrenewable natural resources are exploited as well as maritime and river ports through which said resources or derivative products are shipped will be entitled to participate in the grants and compensations. // **Artículo 360.** La ley determinará las condiciones para la explotación de los recursos naturales no renovables así como los derechos de las entidades territoriales sobre los mismos. La explotación de un recurso natural no renovable causará a favor del Estado, una contraprestación económica a título de regalía, sin perjuicio de cualquier otro derecho o compensación que se pacte. Los departamentos y municipios en cuyo territorio se adelanten explotaciones de recursos naturales no renovables, así como los puertos marítimos y fluviales por donde se transporten dichos recursos o productos derivados de los mismos, tendrán derecho a participar en las regalías y compensaciones.

7 Ibid.

8 **Article 361** With revenues originating from the royalties that are not allocated to departments and municipalities, a National Royalties Fund will be created and its resources will be destined to territorial entities within the limits stipulated by the law. These funds will be applied to the promotion of mining, the preservation of the environment, and to financing regional projects of investment identified as having priority in the development plans of the respective territorial entities. // **Artículo 361.** Con los ingresos provenientes de las regalías que no sean asignados a los departamentos y municipios, se creará un Fondo Nacional de Regalías cuyos recursos se destinarán a las entidades territoriales en los términos que señale la ley. Estos fondos se aplicarán a la promoción de la minería, a la preservación del ambiente y a financiar proyectos regionales de inversión definidos como prioritarios en los planes de desarrollo de las respectivas entidades territoriales.

9 Please see: <http://www.reuters.com/article/idUSN3124571720100831>

10 Article 7. The State recognizes and protects the ethnic and cultural diversity of the Colombian nation. // **Artículo 7.** El

indigenous reservation of collective and non-transferable property for indigenous communities that, for the purposes of public administration, serves as the equivalent of a municipality¹¹. Finally, Article 330 of the Colombian Constitution¹² establishes both the existence of Indigenous Councils that govern these indigenous territories and two constitutional rules applicable to mining in those territories: the first refers to the obligation of exploiting natural resources in indigenous territories without harming the cultural, social and economic integrity of indigenous communities; the second establishes that the government must foster the participation of the respective indigenous communities' representatives in decisions made with regard to mineral exploitation on their territories. Afro-Colombian ethno-cultural communities enjoy similar treatment as indigenous Colombians, as defined in Law 70 of 1993 through Provisional Article 55 of the Constitution.

Estado reconoce y protege la diversidad étnica y cultural de la Nación colombiana.

11 Article 329. The configuration of the indigenous (Indian) territorial entities will be developed subject to the provisions of the Organic Law of Territorial Planning, and their determination will be effected by the national government with the participation of the representatives of the indigenous communities following, the plan of the Commission of Territorial Planning. The reservations constitute collective property and are inalienable. The law will define the relations and coordination of these entities with those of which they form a part. Paragraph. In the case of an indigenous (Indian) territory that includes the territory of two or more departments, its administration will be implemented by indigenous councils in coordination with the governors of the respective departments. In case that such territory should decide to constitute itself as a territorial entity, this will be done in compliance with the requirements established in the first clause of this article. // **Artículo 329.** La conformación de las entidades territoriales indígenas se hará con sujeción a lo dispuesto en la Ley Orgánica de Ordenamiento Territorial, y su delimitación se hará por el Gobierno Nacional, con participación de los representantes de las comunidades indígenas, previo concepto de la Comisión de Ordenamiento Territorial. Los resguardos son de propiedad colectiva y no enajenable. La ley definirá las relaciones y la coordinación de estas entidades con aquellas de las cuales formen parte. **Parágrafo.** En el caso de un territorio indígena que comprenda el territorio de dos o más departamentos, su administración se hará por los consejos indígenas en coordinación con los gobernadores de los respectivos departamentos. En caso de que este territorio decida constituirse como entidad territorial, se hará con el cumplimiento de los requisitos establecidos en el inciso primero de este artículo.

12 Article 330: "In accordance with the Constitution and the laws, the indigenous territories will be governed by councils formed and regulated according to the customs of their communities and will exercise the following functions: 1. Supervise the application of the legal regulations concerning the uses of land and settlement of their territories. 2. Design the policies, plans, and programs of economic and social development within their territory, in accordance with the National Development Plan. 3. Promote public investments in their territories and supervise their appropriate implementation. 4. Collect and distribute their funds. 5. Supervise the conservation of natural resources. 6. Coordinate the programs and projects promoted by the different communities in their territory. 7. Cooperate with to maintain public order within their territory in accordance with the instructions and provisions of the national government. 8. Represent the territories before the national government and the other entities within which they are integrated; and, 9. Other matters stipulated by the Constitution and the law. Paragraph. Exploitation of natural resources in indigenous territories will be done without detriment to the cultural, social, and economic integrity of the indigenous communities. In the decisions adopted with respect to the said exploitation, the government will encourage the participation of the representatives of the respective communities." // **Artículo 330.** *De conformidad con la Constitución y las leyes, los territorios indígenas estarán gobernados por consejos conformados y reglamentados según los usos y costumbres de sus comunidades y ejercerán las siguientes funciones: 1. Velar por la aplicación de las normas legales sobre usos del suelo y poblamiento de sus territorios. 2. Diseñar las políticas y los planes y programas de desarrollo económico y social dentro de su territorio, en armonía con el Plan Nacional de Desarrollo. 3. Promover las inversiones públicas en sus territorios y velar por su debida ejecución. 4. Percibir y distribuir sus recursos. 5. Velar por la preservación de los recursos naturales. 6. Coordinar los programas y proyectos promovidos por las diferentes comunidades en su territorio. 7. Colaborar con el mantenimiento del orden público dentro de su territorio de acuerdo con las instrucciones y disposiciones del Gobierno Nacional. 8. Representar a los territorios ante el Gobierno Nacional y las demás entidades a las cuales se integren, y 9. Las que les señalen la Constitución y la ley. Parágrafo. La explotación de los recursos naturales en los territorios indígenas se hará sin desmedro de la integridad cultural, social y económica de las comunidades indígenas. En las decisiones que se adopten respecto de dicha explotación, el Gobierno propiciará la participación de los representantes de las respectivas comunidades.*

As explored in the preceding chapter of this report, the underlying interest of the State in accordance with waste management law and policy is to ensure environmental sanitation for all Colombians. In contrast, the State's underlying interest in mining, according to the relevant law and policy, is the extraction of surface and subsurface wealth for social reinvestment at a later time, assuming, of course, that corruption does not re-route that wealth away from its intended, legitimate destination. In very blunt terms, mining may be described as a normative authorization for cashing-out as much money as possible from the natural environment; because of the temporary mandate of governments, this will be done by each successive government as fast as legally and technically possible to do. In other words, the long term stake of the State's own survival through natural conservation and social development is subordinate to the short term needs of the government in turn of quickly drawing financial resources from the land and soil it governs over. In few domains of civilization are law and regulation as crucial for controlling temporary political power for the long term sake of the country and its people as in mining.

3.1.2. THE COLOMBIAN MINING CODE OF 2001

The Colombian Mining Code defines the law and policy framework governing the lives and livelihoods of Colombian mine workers. It was proposed and approved as Law 685 of 2001 and is the basis of all mining regulations, decrees and technical resolutions developed thereafter. The Code is divided into eight titles and begins by establishing its public interest mandate, and setting its regulatory objectives: (a) promoting the technical exploration and exploitation of the mineral resources of State and private ownership, and (b) incentivizing these activities in order to satisfy the requirements of its internal and external demands. To ensure that the Code is carried out under the principles and norms relating to the rational exploitation of non-renewable natural resources and of the environment, these objectives are to be developed "within the integrated concept of sustainable development and economic and social strengthening of the country."¹³

The first title of the Code's 362 articles regulates everything from the State's proprietary interest and right in subsoil resources, mining prospecting, and the rights to explore and exploit to the reserved, excluded and restricted mining zones in the country. The second title of the Code is entirely devoted to determining all foreseeable terms, conditions and eventualities of the concession contract through which mining is officially carried out in Colombia. The third title concerns special regimes, such as those referring to the mining of construction materials for public roads, marine mining and mining undertaken by ethnic groups in Colombia. Its fourth title exceptionally authorizes mining without formal title and includes chapters on occasional mining, illicit exploration and exploitation of mines, and the external aspects of mining, such as the ease of access right to entering mines, expropriation or

13 **Article 1. Objectives** The objective of this Code of public interest is to promote the technical exploration and exploitation of the mineral resources of State and private ownership; to incentivize these activities in order to satisfy the requirements of its internal and external demands and to see that its use is carried out in a harmonious manner by making use of principles and norms of rational exploitation of non renewable natural resources and of environment, within the integral concept of sustainable development and economic and social strengthening of the country. // **Artículo 1. Objetivos.** El presente Código tiene como objetivos de interés público fomentar la exploración técnica y la explotación de los recursos mineros de propiedad estatal y privada; estimular estas actividades en orden a satisfacer los requerimientos de la demanda interna y externa de los mismos y a que su aprovechamiento se realice en forma armónica con los principios y normas de explotación racional de los recursos naturales no renovables y del ambiente, dentro de un concepto integral de desarrollo sostenible y del fortalecimiento económico y social del país.

environmental issues. The sixth title regulates the economic and social aspects of mining and includes a chapter on associational regimes, tax and economic aspects, as well as a chapter on the social aspects of mining. The seventh title regulates the procedural aspects of mining, including rules of procedure, opposition, administrative protection, standing, and creates the National Mining Register, the National System of Mining Information, and the Advisory Council on Mining Policy. The eighth and last title contains the provisional articles of the Code.¹⁴

While extensive and comprehensive, the Mining Code has not been without controversy. On the one hand, mining companies and the Colombian government hail the Code as a modern piece of legislation that has reduced red tape and bureaucracy in the mining sector by establishing only one kind of contract – the concession contract – to grant all exploration, exploitation and developing rights over minerals found in up to 5000 hectares of water or 10,000 hectares of land. These concession contracts enjoy a 30-year lifetime, are extendable to up to 60 years, and allow the concessionaire to extract both the mineral that gave rise to the contract as well as all other minerals associated with the extraction of the contracted mineral and found on the conceded area. The Code also legally ensures that the principle "first in time, first in right" applies for awarding a mining title, and creates different tax and royalty benefits and miscellaneous prerogatives for attracting investors in the mining sector. In the Colombian government's assessment,

"The legal framework created by this code establishes clear limits to the State's intervention sphere to the extent it is essential, while determining the necessary autonomy that, in terms of economic management and entrepreneurial initiative, investors require to develop a given mining project. In this way, a management model is set up where the State acts as a facilitator of the mining operator work belonging to the private investor."¹⁵

Meanwhile, on the other hand, labor unions, medium and small-scale miners, and national and international nongovernmental organizations have strongly criticized the Code for being "regressive" and tailored by foreign advice and interests.¹⁶ They explain that,

14 At the time of writing this report, thirty articles of the Mining Code had been recently amended by the initiative of the Ministry of Mines and Energy and after two years of congressional debate. (Law 1382 / 2010)

15 República de Colombia, Ministerio de Minas y Energía, UPME- Unidad de Planeación Minero Energética, *Mining an Excellent Choice for Investing in Colombia: Investor's Guide*, Bogotá, 2005, p.7

<http://74.125.47.132/search?q=cache:RA9WN9Vp6ZYJ:www.monaminas.com/InvestorsGuide1.pdf+the+colombian+mining+code&cd=3&hl=en&ct=clnk&client=firefox-a>

16 - "We had a five-year, \$11-million project in Colombia, which ran from 1997 to 2002," said a senior official with the Canadian International Development Agency (CIDA), who spoke on condition of anonymity. "Basically, it was to help Colombia strengthen its institutional capacity in both the Ministry of Mines and Energy and the Ministry of the Environment and the regulatory agencies these agencies worked with," said the CIDA official in a phone interview." <http://www.britannica.com/bps/additionalcontent/18/27237373/Digging-up-Canadian-Dirt-in-Colombia>

- "In Canada, criticisms of CIDA's role were raised in 2002 by Ottawa's North-South Institute, an independent international development organization that had been working in Colombia at the time of the CIDA project." Our project partners in Colombia regard CIDA as having played a large role in supporting and promoting a 'regressive' mining code that has weakened - rather than strengthened - democratic procedures," the institute's president, Roy Culpeper, told a foreign affairs committee. The project "has left a vital element of Colombian society feeling that their interests are excluded from the new mining regime," he added.

<http://www.thecanadianencyclopedia.com/index.cfm?PgNm=TCE&Params=M1ARTM0012939>

- As explained by a Canadian source, "From the beginning, the aim [of the Mining Code] was far from altruistic: Canadian energy and mining sector companies with an interest in Colombia will benefit from the development of a stable, consistent and familiar operating environment in this resource-rich developing economy," read CIDA's summary of the project. <http://www.thecanadianencyclopedia.com/index.cfm?PgNm=TCE&Params=M1ARTM0012939>

“Through its Energy, Mining and Environmental Project, the Canadian International Development Agency (CIDA) provided technical and financial support to redraft Colombian mining legislation. The revised 2001 Mining Code (Law 685/01), which was adopted without consulting with potentially-affected indigenous communities, created investment conditions that are extremely favorable to foreign companies. The Code weakened a number of existing environmental and social safeguards and created significant financial incentives for companies including dramatically reduced mining royalty and tax rates. This reduces the resources available to the Colombian State for local social and developmental purposes. Indigenous groups in Colombia argue that the lack of consultation on this new legislation contravened International Labour Organization Convention 169, which was ratified by Colombia and formally adopted into national legislation in 1991. They argue that the new Mining Code places limitations on citizens’ ability to claim rights to indigenous territory, which are accorded under the Colombian Constitution. Moreover, the legislation eliminates prior requirements that local communities receive economic benefits deriving from mining activity.”¹⁷

Although controversy continues and implicates the very purpose of the Mining Code itself, this analysis focuses on the existing protections and opportunities granted to mine workers in poverty under the Code, as it remains the applicable legal and policy framework for this trade, regardless of its genealogy. While complemented by regulations, decrees and resolutions adopted after 2001, the Mining Code of 2001 governs the lives of the men and women in the mining trade. For Colombia’s poverty trapped constituents, it is extremely difficult to achieve an integrated and consolidated understanding of the rules of the mining game so as to, at the very least, always be in compliance with the applicable laws and regulations, and, at the most ambitious, to make an argumentative analysis to assert their participation in a legal empowerment-based strategy for inclusive development. The possibility that these constituents remain updated on the various law and policy provisions emanating from the Mining Code to facilitate their engagement in actually governing the mining realm is very unlikely. Given that internet connectivity in Colombia’s rural zones is far less than the 35 percent connectivity rate in 13 of its cities, even a wide public effort to make the Mining Code and relevant norms available online (www.simco.gov.co) would scarcely reach the men and women mine workers working informally in those zones.¹⁸

Even if access to updated legal information was not a barrier, the technical complexity of mining and the Code and its diverse regulations present yet another challenge. The Colombian government has attempted to bridge this knowledge gap by means of Decree 2191 of 2003, which established and adopted the Mining Glossary that defines the 2222 technical terms found in the Mining Code and related legislation. While knowing these numerous definitions may be one step in acquiring a comprehensive understanding of applicable law and policy in the mining trade, it is clearly insufficient in terms of participatory and inclusive governance in mining, and raises questions about the intrinsic difficulty in making the Mining Code and rules understandable. Further, the Glossary does not offer much clarity or certitude for the millions of informal miners working outside the industrially driven world of big concession contracts around which the entire Code pivots. Indeed, informal mine workers have much work ahead of them in disentangling the overlapping ideas in the Mining Code to discern

17 From the series Dirty Business, Dirty Practice Author Canadian Network on Corporate Accountability : http://www.ccic.ca/files/en/working_groups/003_apg_2007-07-10_case_studies_mining.pdf

18 Only 35% of Colombian population can access internet (mainly through internet coffee shops) and this only in the 13 main cities of Colombia: <http://www.gobiernoelectronico.org/node/5056>

their particular trade identity and niche. Consider, for instance, the different possibilities of mining under the Code:

Illegal Mining:¹⁹ The mining that is carried without having being registered in the National Mining Register and, therefore, lacks a mining title. The mining that is developed in an artisanal and informal manner, outside the law. Includes exploration labor and work without a mining title. Includes mining that is covered by a mining title, but where the collection, or part thereof, is done outside the area granted by the license.

Legal Mining:²⁰ The mining that is covered by a mining title, which is the written administrative act by which the right to explore and exploit the mineral soil and subsoil of national ownership is granted, in accordance to the Mining Code. The mining title must be registered in the National Mining Register.

Formal Mining:²¹ Integrated by exploitation units of variable sizes, exploited by legally incorporated entities.

Informal Mining:²² Constituted by small and medium exploitation units of individual property without any accounting records.

Subsistence Mining:²³ 1. Mining developed by natural persons [as opposed to legal persons] who devote their force of labor to the extraction of some mineral through rudimentary methods, that, in association with some family member or other persons, create subsistence income. 2. This name is given to the exploitation of small alluvial mining, better known as *barequeo* [panning], and to the occasional extraction of clays, in its various forms, and construction materials.

Barequeo:²⁴ The activity that is constricted (sic) to sand washing by manual means and without any help of machinery or mechanical means and with the purpose of separating and collecting precious metals contained in those sands. The collection of precious and semiprecious stones by similar means is also permitted.

In addition to the difficulty of discerning where mine workers, who are not employees or subcontractors of industrial mining concessions, fall under the Mining Code, the Glossary suffers from at least one other gap that is worth mentioning in this analysis: the absence of the terms “Duty” and/or “Right to Consultation.” Among the 2222 terms defined in the Glossary, this glaring void looms

19 **Minería ilegal:** Es la minería desarrollada sin estar inscrita en el Registro Minero Nacional y, por lo tanto, sin título minero. Es la minería desarrollada de manera artesanal e informal, al margen de la ley. También incluye trabajos y obras de exploración sin título minero. Incluye minería amparada por un título minero, pero donde la extracción, o parte de ella, se realiza por fuera del área otorgada en la licencia.

20 **Minería legal:** Es la minería amparada por un título minero, que es el acto administrativo escrito mediante el cual se otorga el derecho a explorar y explotar el suelo y el subsuelo mineros de propiedad nacional, según el Código de Minas. El título minero deberá estar inscrito en el Registro Minero Nacional.

21 **Minería formal:** Conformada por unidades de explotación de tamaño variable, explotadas por empresas legalmente constituidas.

22 **Minería informal:** Constituida por las unidades de explotación pequeñas y medianas de propiedad individual y sin ningún tipo de registros contables.

23 **Minería de subsistencia:** 1. Minería desarrollada por personas naturales que dedican su fuerza de trabajo a la extracción de algún mineral mediante métodos rudimentarios y que en asocio con algún familiar o con otras personas generan ingresos de subsistencia. 2. Se denomina así a la explotación de pequeña minería de aluvión, más conocida como barequeo, y a la extracción ocasional de arcillas, en sus distintas formas, y los materiales de construcción.

24 **Barequeo:** El barequeo se entiende que es la actividad que se contrae al lavado de arenas por medios manuales sin ninguna ayuda de maquinaria o medios mecánicos y con el objeto de separar y recoger metales preciosos contenidos en dichas arenas. Igualmente es permitida la recolección de piedras preciosas y semipreciosas por medios similares.

large and illustrates a particular and significant weakness in the Code – it does not define or refer to the fundamental right of minorities within the mining trade following international treaties and standards of the ICCPR, ICESCR, ILO Convention 169, or the Paragraph of Article 330 of the Colombian Constitution that protects a democratic, pro-poor, inclusive process in the mining sector. Indeed, under the Code and its Glossary, even the definition of “Ethnic Minority” is desperately lacking, portraying instead a degree of negligence on behalf of the Ministry of Mines and the Colombian Government in relating to the indigenous and ethnic minorities working in and around the mining sector. An ethnic minority is not objectively defined under the Code, but referred to as a “condition,” which, antithetically, recalls inferiority and subordination.

Ethnic minority.²⁵ An ethnic community that is constituted as a specific community that occupies a position of subordination or social marginalization. Therefore, the key (sic) for constituting ethnic minorities is the rapport they establish with the population’s majority. In this case the term “minority” does not refer to the numerical aspect, but to the condition of inferiority.

3.2 THE TRADE CONTEXT

Since 2001, and in order to better focus the Colombian State’s efforts to attract and facilitate investment in its national mineral resources, the Colombian government and Congress have decided to refrain from any State driven mining at any scale. This restraint has been more explicit in recent years, especially since 2006, and, based on the State’s role as facilitator in the mining sector, the National Development Mining Plan (*Plan Nacional de Desarrollo Minero - PNDM*) has claimed that: “By the year 2019 the Colombian mining industry will be one of the most important in Latin-America and meaningfully increased its participation in the Colombian Economy.”²⁶

The country’s natural abundance and diversity lend itself to this objective. Colombia’s mineral wealth results directly from its varied geological environment and its mineral potential in iron, gold, aluminum, platinum, diamonds, emeralds, rare earths and even uranium. According to the Fraser institute, Colombia could be a great mining economy in Latin American, second only to Brazil.²⁷ In 2005, 35,783 kgs of gold, 1082 kgs of platinum, 162,941 tons of rock salt, 311,055 tons of solar or sea salt, 8,814,774 kilotons of cement-destined limestone, 5800 tons of copper concentrates, 498,623 tons of iron ore, 52,749 tons of nickel (ferronickel), 59,064 kilotons of coal, and 6764 kquil of emeralds were [officially, formally] mined in Colombia.²⁸ Colombia’s unique geographic location enhances this inherent mining potential – it is the only country in South America with port access to both the Caribbean and the Pacific Ocean, thus opening up trade and shipping routes to North and South America, Europe and Asia.

In an effort to attract foreign capital and technology, the Ministry of Mines and Energy stresses in its *Investor’s Guide to Mining in Colombia* that its mineral potential is “ready for use and profit”²⁹ through

25 “**Minoría étnica:** Comunidad étnica constituida como comunidad específica, que ocupa una posición de subordinación o marginación social. Por tanto, la clave para la constitución de minorías étnicas es la relación que establecen con la población mayoritaria. En este caso el término “minoría” no se refiere al aspecto numérico, sino a la condición de inferioridad”

26 Please see: [http://www.upme.gov.co/Upme12/Colombia Minera PNDM 2019.pdf](http://www.upme.gov.co/Upme12/Colombia%20Minera%20PNDM%202019.pdf)

27 Please see: http://www.dinero.com/edicion-impres/a/caratula/futuro-minero_49367.aspx

28 República de Colombia, Ministerio de Minas y Energía, UPME- Unidad de Planeación Minero Energética, *Plan Nacional Para el Desarrollo Minero Visión 2019*, Bogotá, 2006, P.20

29 *Mining an Excellent Choice for Investing in Colombia: Investor’s Guide*, p.3, 7

Foreign Direct Investment (FDI). It highlights the existence of particular “zones of interest” where the country’s mineral resources have yet to be fully exploited and developed.³⁰ Further, the State encourages the “reasonable development/exploitation of State-owned and private mining resources...,” in part by restricting State intervention unless where “essential,” i.e. to protect natural parks, ethnic group rights to certain lands or resources or State security interests.³¹ Following these objectives of restraining its public involvement in mining to the bare minimum and welcoming private investment to the maximum,³² FDI in Colombia’s mining sector has increased dramatically over the past fifteen years. In 1996, there was virtually no FDI in Colombia’s mining sector; by 2005, it surpassed USD \$900 million.³³ In 2007 and 2008, FDI in mining increased 92.3% from USD \$1.1 billion to \$2.114 billion. By the first quarter of 2009, it had already reached USD \$866 million. And, the mining export market grew correspondingly, jumping 17 percent in just one year, from USD \$6.399 billion in 2007 to USD \$7.447 billion in 2008.³⁴

As envisioned and desired by the former Pastrana and Uribe Governments, the role and presence of foreign companies in the exploration, exploitation and development of the mining sector has mushroomed. In October 2007, thirteen foreign companies were awarded mining titles for the exploration of precious metals. Only five of these companies actually presented formal proposals for exploration. By 2008, there were over 50 foreign companies requesting exploration titles, with a combined total of USD \$150 million ready for direct investment in the industry. In 2008 Colombia’s mining industry accounted for 2.6 percent of the country’s GDP, mainly due to the coal mining sector,³⁵ and has the potential to double if the production of other metals, such as copper, gold and zinc, grows as forecasted.

In December, 2007, *Anglo Gold Ashanti* – the second biggest multinational corporation based in Colombia, where it has been active since 1999 – discovered a natural deposit of 13 million ounces of gold, after having invested USD \$70 million in its *La Colosa* exploratory operations in Cajamarca, Tolima Department. This mine is nearly one quarter the size of the Yanacocha gold mine in Peru, the biggest gold mine in the world. Following this discovery, *Anglo Gold* moved its Americas headquarters from Peru to Colombia where it is now working on 19 different mining prospects with 900 staff, personnel and contractors in the region. They cover 500 points for gold and metal mining in alliance with other corporations, such as *Glencore*, *B2Gold* and *Mineros S.A.*³⁶ *Mineros S.A.*, formerly known as *Mineros Colombianos S.A.*, is a private Colombian mining company whose income tripled in less than ten years, from COP \$25.33 billion in 1999 to COP \$99.937 billion in 2007.³⁷

The fact that international mining operations dominate the mining industry in Colombia is a long established pattern and practice in the country. Since the legend of *El Dorado* that drew thousands of Europeans to seek for the lost treasures of the *Guatavita* lagoon in Boyacá, the emerald crafted challis named “the lettuce,” or the platinum first found by Spaniards mining for gold in the pacific Chocó corridor, foreigners have had a long and conspicuous history in Colombia’s mining trade. And, large

30 Ibid, p. 3

31 Ibid, p. 7, 9

32 Ibid, p. 7

33 Ibid, p. 11

34 Text of the speech of the Minister of Mines and Energy in the V International Mining Fair- Colombia Minera, Medellin, September 9, 2009; please see: <http://www.minminas.gov.co/minminas/downloads/archivosEventos/5299.pdf>

35 Please see: http://www.dinero.com/edicion-impres/a/caratula/futuro-minero_49367.aspx

36 Please see: http://www.dinero.com/edicion-impres/a/negocios/mineria-colombiana-diamante-bruto_45711.aspx

37 Please see: http://www.dinero.com/edicion-impres/a/caratula/futuro-minero_49367.aspx

scale U.S. and British mining corporations have been operating in Colombia since the 19th century. They are not even that “foreign” to Colombia’s traditional mine workers who persist in an incredibly harsh trade and policy environment.

“ (...) [an] example is the arrival of the *Chocó Pacífico* Company, which entered the region in 1916 by the rivers Condoto, Itsmina, San Juan and Iró and by dredging these rivers obtained very important amounts of gold and platinum, which in no way contributed to prosperity of the region or the country. On the contrary, the dredging of rivers and monopoly reached there by the company led to intense social conflict. The company prevented people from rowing along those rivers and prevented the exploitation of the mineral deposits. After negotiations in 1974 *Mineros Colombianos S.A* Colombian Mining SA Pacific bought the *Choco Pacífico*, creating *Mineros del Chocó S.A* that had a crisis in 1986. The government established the *Metales Preciosos del Chocó S.A* and liquidated the previous one, by scamming workers and pensioners by compensating their work and pension rights with shares. The liquidator manager of this operation was the current president Álvaro Uribe Vélez. "We still have the structures, machinery and ruins of what was that company, one that by case was liquidated towards the 80s by Álvaro Uribe Vélez the President currently in office. So around this area, we already knew this sir before he became president because besides he is also one of the biggest landowners of this department, he has many farms in Nuquí, and Belen de Bajirá (Choco limits with Antioquia’s Uraba) "Aurelino said.”³⁸

The Colombian State has reduced its own investments in the sector down to only those required for basic soil exploration. Nor does it discriminate between foreign and domestic investors when rewarding mining titles or concessions, although its flexible regulatory environment makes it a particularly attractive opportunity for FDI.³⁹ For instance, FDI in the mining sector is only subject to the rules and regulations in the Mining Code and private arrangements between the investor and its contracting partners.⁴⁰ And, the concession contract is the only legal mechanism for doing mine work in Colombia; legal licenses for exploration and exploitation of smaller quantities of minerals were derogated by the 2001 Code. Under these neutral rules in mining policy, the principle “first in time, first in right” applies equally to big capital intensive global mining companies, small labor intensive Colombian companies, and traditional or native mine workers seeking to legally explore, exploit and develop their natural resources. Yet, access to information and greater resource capacity translates quickly into wealth in this industry, benefitting the corporate mining operation over the traditional mine workers, and the large-scale foreign investors over the smaller scale domestic investors. This accumulation of wealth is compounded by provisions such as Article 61 -, entitling concessionaires to exploit other minerals found during its exploration and exploitation of the mineral found in its concession contract, so long as it is possible to prove that these other minerals are “intimately linked” or “associated” to the contracted mineral, or, finally, that they are obtained as by-products in the



Panned gold with associated platinum.
Photo by: Fundación Oro Verde®

38 Please see : <http://www.periferiaprensa.org/joomla/index.php/ediciones-antiores/57-edicion-40/230-choco-resiste-al-saqueo-y-al-conflicto>

39 *Mining an Excellent Choice for Investing in Colombia: Investor’s Guide*, p. 13, 14.

40 *Ibid*, p. 14

exploitation of the mineral in the contract.⁴¹ For instance, in the Pacific Corridor, platinum may be collected as a by-product of alluvial gold-mining.⁴²

Work contracts for mining operations may be fixed term contracts not longer than three years, contracts for a specific task or duration of time, or for an indefinite term, and concessionaires may hire national or foreign workers; however, if both Colombian and non-Colombian workers are employed, the law establishes that Colombian personnel must receive at least 70 percent of the total payroll for specialists, directors or trust and reliance staff, and at least 80 percent of the ordinary workers' payroll.⁴³ Also, the Colombian State retains royalty rights over the estimated value at the edge of any mine, an obligation that begins when the exploitation contract is executed and remains throughout the duration of the contract.⁴⁴

The mining trade environment in Colombia reveals the existence of many more actors than the State and its concessionaires, they are the following:

- The State in its intermingled roles of law maker and sole owner of all minerals in Colombia;
- Private landowners of the properties on or under which minerals are found and will be exploited, who must allow the exploration and exploitation of the minerals, as these are owned by the State; proprietors may collect a rent per hectare that is explored in their land. Among these landowners, there will be (a) individual and family owners of private property, (b) municipal or departmental public property, and (c) afro-Colombian and indigenous communities that are private, but collective property owners.
- Large-scale national industrial mining companies
- Large-scale foreign industrial mining companies
- Emerging medium-scale national industrial mining companies
- Emerging medium-scale foreign industrial mining companies
- The small scale mining operations of national mine working families and communities that persist in this industry as (a) a traditional way of livelihood and/or (b) an ancestral ethno-cultural identity and way of livelihood
- Individual, family and communities engaged in own account artisanal mining who are (a) exercising their constitutional right to work and entrepreneur for a life with dignity and development and/or (b) exercising their constitutional rights and preserving their ethno-cultural identity and livelihood.
- Market intermediaries such as individuals buying emeralds on a small scale or gold shops in villages buying from both informal and formal mine workers at any scale.
- Industrial buyers from industrial mine concessions in Colombia or abroad
- Small and medium commercial buyers and users like jewelers and other manufacturers
- The end-consumer of extracted minerals or metals

41 Ibid, p. 8

42 Jorge / Jewelry Shop Owner / rra interview / 2010 / Cali

43 *Mining an Excellent Choice for Investing in Colombia: Investor's Guide*, p. 19.

44 Ibid, p.16

In 2007, the Ministry of Mines and Energy developed an administrative strategy to create mining districts throughout the country; this strategy was finally incorporated into the Mining Code through Law 1382 of 2010.⁴⁵ Following the strategy, Colombia is divided into 31 mining districts spaced out mainly in the western part of the country around the Andean mountain ranges. These districts are strategic zones of geological interest where mining constitutes an important socio-economic activity. In any mining district, producers and contractors involved in legal, competitive and sustainable mining businesses (and excluding informal businesses) – among other stakeholders, such as CSOs, CBOs, trade-unions, academia, and territorial institutions, such as the relevant Departments and Municipalities – carry out the planning and management of mining production in the district, as well as act as the sustainable authority of all mining in the production and value chain, “all in light of territorial development and focusing on mining businesses, simultaneously with the institutional part, whilst pointing out the vision, the political outlook and the “Development Planning” of the Country itself.”⁴⁶

A Mining District is identified first by the presence of mineral production chains, which establish the characteristics of each of the processes developed, the technologies used, the variables controlled, the human talent involved, as well as the markets and institutions that participate in their development and that impact the social, economic and environmental issues of the territory. With this information, the Ministry of Mines and Energy, together with the departmental and municipal authorities, the producers, the business owners, the service providers in the region, will determine the characteristics and parameters of the territory forming the Mining District. Parameters must refer to common geological features and biophysical aspects of the territory, as well as common social, cultural, political and economic problems and opportunities.⁴⁷

Evidently, the trade environment for mine workers living and working in poverty is diverse in terms of actors involved, as well as the minerals and wealth being extracted; even more, it is driven by a global competitive force and a law and policy framework that only acknowledges and serves the concessionaires, producers and contractors who are deemed to be involved in legal, competitive and sustainable mining businesses. Meanwhile, the lives and livelihoods of mine workers living in poverty – although *de jure* and *de facto*⁴⁸ illegal and thus nonexistent in the policy – is, in fact, persistent and comes from a long, involved history in Colombia.

3.3. LIVELIHOOD OF RURAL MINE WORKERS

3.3.1 ETHNO-CULTURAL MINORITIES

Without prejudice to the important mine work of Colombian mestizoes⁴⁹ (who are unidentifiable as a specific ethno-cultural community) and who may also carry own account mine work as a traditional

45 Law 1382 de 2010

46 República de Colombia, *Distritos Mineros* – CD/ cartilla

47 Ibid

48 Please see: <http://www.imcportal.com/contenido.php?option=shownews&newsid=5695&render=page>

49 “(...) probably more than any other Latin American people, Colombians remained conscious of their Spanish heritage. The persistent supremacy and relative purity of the Spanish heritage was brought about by a combination of factors. The indigenous population was sparse, heterogeneous, and thus relatively easily subdued, driven into less accessible and less

occupation, it is Colombia's indigenous and afro-descendant constituents who have the higher and more direct stakes in the public-decision making processes related to mining. This is due to the fact that their livelihood and religious beliefs strongly depend on their territorial ancestral lands, which is often where valuable minerals may be found. These groups are made more vulnerable in terms of their capacity for governance, due to their distance from the decision-making circuits in Bogota and the possibility for ethno-cultural discrimination and even of self-discrimination. At the same time and throughout Colombian history, it is in their labor identity that indigenous and afro-descendant Colombians have held higher stakes in the legal and political framework. Thousands of generations of indigenous communities working in gold-smithing and later in Spaniard-owned mines, and five centuries of Africans and afro-Colombians doing the same, have created an identity in the mining culture that is historically justifiable. Indeed, when analyzing ethno-cultural rapports with the livelihoods of informal mine workers in poverty, Colombia's indigenous and afro communities hold a place of their own.

3.3.2. THE INDIGENOUS MINE WORKERS HISTORY

After Columbus' arrival to the Americas, two arguments were advanced to support Spanish colonization in the region, synthesized frankly: (1) the land was empty and first discovered by them, because (2) the indigenous found living on those lands were not persons⁵⁰ This formally authorized the taking of that land and turning its inhabitants into Catholics i.e. servants for the glory of both the Spanish crown and the Catholic Church. Within the Meso-American Pre-Hispanic *Chibcha* culture (also known as the Muisca) there were many organized communities and tribes living in agricultural economies; their political organization was that of the *cacicazgo*, as they were ruled by the cacique, and had a well-established social hierarchy. In fact, the "discovered" land was not,, discovered; it had just been unknown to the Europeans. The Chibchas or Muisca were linguistically, culturally and politically organized and traded with other autochthonous communities up to the Mayan and down to the Incan empires north and south of what is now known as Colombia.. Among other occupations and skills, Chibchas performed salt, emeralds and gold mining. Salt, which was a very valuable commodity (to the point that it is at the origin of the word "salary" from the Latin *salarium*) was used for trade, while silver, emeralds and gold were collected and extracted for crafting objects that were usually associated with political power⁵¹ Gold, in fact, represented the sun, and silver the light of the moon,

desirable areas or absorbed by the Spanish population during the colonial era. Blacks, viewed as slaves until the mid-nineteenth century and as manual laborers thereafter, remained segregated economically, geographically, and socially. Although Indians and blacks outnumbered whites and people of mixed blood in certain regions, they remained minorities without shared identity or cohesion on the national level. The lack of immigrants from other European nations and the emphasis on traditional Spanish institutions--particularly Roman Catholicism-- helped white Colombians retain their Hispanic identification. Finally, a diverse geography and resultant regionalism exacerbated the lack of communal feelings among the masses and provided little basis for national cohesion within any group except the tightly knit white elite. As Colombian society developed, there was little change in its rigid stratification. Various intellectuals, clergy, and politicians unsuccessfully attempted to debate the status of Indians and blacks and to prevent discrimination against them. Being a recognized member of the national society and thereby eligible for its benefits and a chance at upward mobility required allegiance to a culture and a behavioral pattern based almost entirely on traditional Spanish values. (...)" <http://www.country-studies.com/colombia/race-and-ethnicity.html>

50 Roberto Carlos Vidal / rra interview / 2009 / Bogotá D.C.

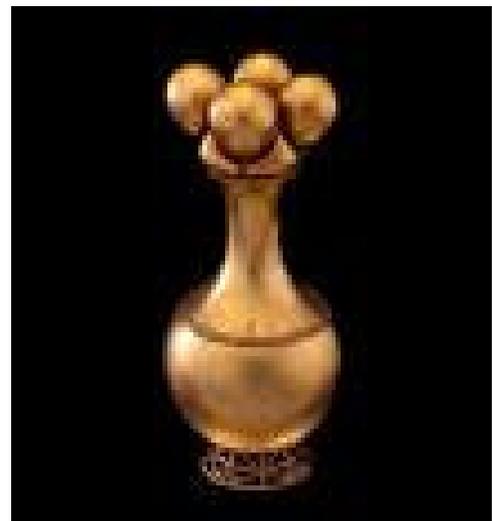
51 The salt and emerald mines of the *cacicazgo* that were located around where Bogota exists today played significant roles in these Mesoamerican communities. The sea salt mines/extensions of the *Wayuu* community in the Guajira Department, are still active today and under the rule of the Colombian State that currently has an exceptional type of public-private concession for operating them through artisanal mine work. (Concession Salinas)

both of which were linked to these communities' and people's religious beliefs, traditions and practices. Although the primary emphasis on gold and silver, and perhaps other minerals, was socio-political rather than economic, the extraction of gold was common. Gold-smithing reached its pinnacle in the Americas among the *Quimbayas*, whose pieces were so appreciated that they have been found as far as Peru and Mexico⁵². During colonial times, Colombia produced 40 percent of the world's gold.⁵³

In the early 16th century, the Spanish entered Colombia by way of the Caribbean coast and founded their first cities – Uraba and Darien – in 1509. Later, as their need for conquering greater lands grew, along with evidence of Colombia's abundant gold and the legend of El Dorado, these conquerors moved inland. Modern Bogota was, in fact, the Spanish pronunciation of the *Chibcha* word *Bacata*, and was founded as the capital of the kingdom of New Granada (a direct allusion to the province of Grenade in the south of Spain) in the quest for a route to El Dorado, which was supposedly found at the bottom of the Guatavita lagoon. Because they used gold for artistic-religious purposes and not as a commodity, the Europeans thought the indigenous people were profoundly uncivilized:

"So great are the treasures that in these parts are lost, and what has been had, if the Spanish had not have had it, certainly the majority of all of it will be offered to the devil and their temples and tombs, where they buried their dead, because these do not even want it nor seek it for anything else (..)."⁵⁴

Although tightly and culturally linked to minerals and with their tradition of mine work, the beliefs of indigenous peoples even today relate differently to minerals than other cultures in Colombia. *Grosso modo* it is possible to say that opening Mother Nature to extract and exploit minerals on a massive scale for profit accumulation is against their beliefs and cosmology; however the respectful collection and extraction of minerals for spiritual-artistic purposes is possible and justifiable. The Spaniards' expansive mining operations for producing and exporting commodities created then a tremendous physical and cultural shock; the indigenous people's bodies were not fit for intensive mine labor and the aggression to their autonomy and beliefs explained why many committed mass suicide. Despite the good intentions of



the Spanish Law of Burgos, which intended to respect and was aimed to protect the natives of the Americas, indigenous peoples became enslaved in their own ancestral territories, put to work mining gold and producing gold coins and ingots that were later shipped from Cartagena to Seville and Lisbon via the Atlantic Ocean. Meanwhile, the legend of *El Dorado* and its extraordinary wealth spread throughout Europe, beckoning thousands of European pirates to the Caribbean coasts of Colombia and the Americas. These European invaders grew wealthy off the sweat and labor of indigenous workers, who mined the gold treasured by the Spanish and coveted by the French, Dutch and English pirates. The rush for gold was such that in February 1586, Sir Francis Drake, enjoying the protection of Queen

52 The *Quimbaya's* most famous symbol is the poporo, a device used by indigenous cultures in present and pre-Columbian South America for storage of small amounts of lime (mineral). It is constituted by two pieces: the recipient and the lid that includes a pin that is used to carry the lime to the mouth while chewing coca leaves. Since the chewing of coca is sacred for the indigenous people, the poporos are also attributed with mystical powers and social status. <http://en.wikipedia.org/wiki/Poporo>

53 Javier Ocampo Lopez, *Tesoros Legendarios de Colombia y el Mundo*, Plaza & Janes, Bogotá 2004, p.13

54 Pedro Cieza de León, *Crónica del Perú*, in *Tesoros Legendarios de Colombia y el Mundo*, p. 72

Elizabeth I, attacked and sited the city of *Cartagena de Indias* with 19 black flagged ships for nearly two months.

In Colombia, colonization advanced through three Spanish institutions that allowed the exploitation of indigenous people for agricultural and mining activities: the *encomienda*, the *mita* and the *resguardos*.⁵⁵ The *encomienda* was intended to develop the land, civilize the people and spread the Catholic faith. In the *encomienda*, which was a kind of land assignment or concession under the Law of Burgos, the Spaniards who had sufficient economic capacity and knowledge of land distribution and management were entitled to Indians “working” for them in exchange for accommodation and food. While in theory the law of Burgos recognized the property and respect due to indigenous people in their capacity as loyal subjects of the crown, in practice the law was twisted and the *encomenderos* ended up owning the land of the indigenous and exploiting their free labor. The *encomenderos* were sent to inhospitable areas, where even the Catholic Church missions would not go, and it was possible for several thousand indigenous people to be living under one single Spanish *encomienda*. These Spanish territorial organizations eventually turned into settled villages. The indigenous became vassals under the *encomiendas*, which eventually became the backbone of the Spanish economic administration of agricultural and mining activities in its American colonies. Annexed to *encomiendas*, mines and imposed mine work on indigenous people were a separate and distinct socio-economic organization developed under the form of *mitas*. And, finally, the *resguardo* or “shelter” was a self-governed indigenous space created by the colonial authorities where indigenous communities working in the *mita* were to sleep and rest. *Resguardos*, although administered by the indigenous people, were still subordinate to the *encomienda* and to its Spaniard *encomendero* ruler.

As mining became an economic institutional practice of the Spanish colonial administration, the indigenous mining practices, which had been developed over centuries for religious, artistic and political purposes, were forcibly translated into hard core mine work for exploitation and commodity export. The related pre-Colombian arts and crafts, such as gold-smithing, soon disappeared as indigenous communities and culture were destroyed. The indigenous population itself diminished drastically due to their resistance to the conquerors, their enslaved work in the mines and the illnesses introduced by the Europeans. In short, the Spanish managed to master a quantitatively important group, that of the *Chibcha* [Culture] and established their dominance at the expense of a further decline of the indigenous group but without destroying it altogether in territories of the indigenous *Pastos* and *Quillacingas* and some parts of the upper Valle del Cauca. In almost all other regions the groups disappeared under the process of domination (...).⁵⁶

3.3.3. THE AFRO-COLOMBIAN MINE WORKERS HISTORY

Facing a diminishing population of indigenous workers, the Spanish began to “hunt” and traffic Africans to Colombia, who were believed to be physically stronger than the indigenous. This practice began in 1533, peaked in the 17th century and ended in 1810⁵⁷ with the abolition of human trafficking in the

55 Please see http://www.colombialink.com/01_INDEX/index_historia/02_la_conquista/0_0003_indigenas_epoca_conquista.html : see

56 Please see : http://www.colombialink.com/01_INDEX/index_historia/02_la_conquista/0_0003_indigenas_epoca_conquista.html

57 Please see: <http://www.banrepcultural.org/blaavirtual/revistas/credencial/marzo2010/antioquia.htm>

<http://www.todacolombia.com/etnias/afrocolombianos/manumision.html>

19th century under the efforts of Jose Felix Restrepo and Jose Manuel Restrepo. While the British and other European countries were trafficking Africans to the Americas, the Spanish and Portuguese made the Colombian port of Cartagena the main Hispanic trade port for African slaves in the 17th century. Lusitania (Portugal) had been annexed to the Spanish empire in 1580 and, subsequently, Spain strengthened its trafficking capacity with human resources, naval capacity and knowledge based on what the Portuguese had developed on Africa's West coast. The mining culture of these West African peoples – who had been extracting gold that was sent to Europe via ancient Saharan trade routes – made them especially attractive human capital for the Spanish and Portuguese colonial operations in the Americas. Spanish King Felipe II decided to complement the diminishing indigenous labor force in his American colonies with this African labor force,⁵⁸ one that was quite possibly already well-experienced in mining. This West African population was eventually brought to the mines and sugar mills of modern Colombia and other regions of the Kingdom of New Granada.⁵⁹

The first Africans that arrived to Colombia were mainly from the Guinean river zone, Cape Verde and the lands between Senegal and Sierra Leone. In later years, Africans were enslaved and trafficked from the Volta river region around what are known today as the countries of Ghana, Togo, and Benin; and, later still, Africans from the island of Tome, and the countries of Congo, Angola, and the old kingdom of Kongo, were brought to work in Colombia.⁶⁰ Their presence grew significantly over time. In 1618, the



Painting of San Pedro Claver in Cartagena de Indias.

Photo by: Adriana Ruiz-Restrepo

Jesuit Carlos de Orta described to his father his first impressions when arriving to *Cartagena de Indias*:

"These places are so hot, that right now being in the middle of winter, it feels hotter than in summer heat. Black slaves are around 1,400 and they go around the city almost naked. Human bodies are constantly bathed in sweat. Foods are coarse and insipid. There is a severe shortage of fresh water, and drinking water is always warm ... As for foreigners, no city in America, to

58 Introducing African labor force in the Americas was even considered by Fray Bartolomé de las Casas, a priest based at what is now known as Mexico, who in its desperation for protecting the diminishing indigenous, supported the introduction of African labor force. However when he later learnt in 1540 of the suffering of the trafficked Guinea slaves through the Franciscan priests in Spain, he then turned into an enemy of any type of slavery. In his "History of the Indies" he deeply regrets his mistake: "No and one thousand times no, peace everywhere and for every man, peace without difference of race! There is only one God, unique and true to all the peoples, indigenously, pagan, Greeks and barbarians for all of whom he suffered and died. You can be sure that the conquest of these territories overseas was an injustice, you act as tyrants! You have proceeded with violence and have covered all with blood and fire, you have made slaves, you have taken treasures and taken the life and land of men who lived here pacifically. Do you think that God has preferences for one people over the others? Do you think that he has favored you with something additional that that generous nature concedes to all? Would it be at all fair that all the graces of heaven and all the treasures in the earth would be destined only to you? (...) I thought that blacks were more resistant than the indigenous that I saw dying along the streets and pretended to prevent a bigger suffering with a lesser one..[my thought] has been a mistake and is an unforgivable guilt, that was contrary to all law and all faith, as it in fact deserved all condemnation to hunt the blacks in the coasts of Guinea as if they were wild animals, put them in ships, transport them to the western indies and sell them there as it is done every day and in every moment" (Translation of the authors) <http://mgar.net/var/lascasas.htm> and http://www.cervantesvirtual.com/bib_autor/bartolomedelascasas/pcuartonivel.jsp?conten=autor

59 Please see: <http://www.lablaa.org/blaavirtual/ayudadetareas/geografia/geo101.htm>

60 Please see: <http://www.lablaa.org/blaavirtual/geografia/afro/demograf.htm>, and <http://www.lablaa.org/blaavirtual/geografia/geofraf1/huellas.htm>

what is said, has so many as this, it is an emporium of almost all nations; from here they part to negotiate to Quito, Mexico, Peru, and other kingdoms, there is gold and silver. But the most common merchandise is black slaves. Merchants go to buy them at most vile prices to the coasts of Angola and Guinea, bring them in overloaded ships to this port, where they make the first sales with incredible profit; those who are not sold are re-embarked."⁶¹

In Cartagena, Africans were sold to those in need of workers for their sugar cane plantations, domestic servants, or mine workers, in other words, to the owners of the lands that are demarcated today as the departments of Valle del Cauca, Cauca, Antioquia and Chocó. There was, however, a considerable volume of "illegal" human trafficking carried out in informal ports along the coasts of Colombia.

More than 500 years later, and after the departure of the Spaniards following Colombia's independence in 1810, most of the descendants of these indigenous and African slaves, together with the European race of the Spaniards, became mestizoes. Others, who are more pure in their ethno-cultural origin, remain identified as members of indigenous or Afro-Colombian communities. In either case, all are constituents of the contemporary Colombian State. As much as their culture and heritage was merged into the now predominant mestizo race⁶² of Colombians, strong and distinct indigenous and African languages, cultures and religions are still found in Colombia. The descendants of indigenous communities that moved far away from the *encomiendas* centuries ago and the descendants of former slaves that sought refuge or turned inland to Colombia's humid jungles are today fully and legally entitled constituents of the Colombian state, and constitutionally protected ethno-cultural communities. In light of mining law, it should then be expected to see clear and solid formal opportunities and protection for the mine work of these communities, especially considering their strong and long history and identity with mine work. Whether for art and religion or enslaved for satisfying the greed of slave masters, Colombian indigenous and afro-descendants are all linked not only to the lands they originally owned or were dragged to by the Spanish conquistadors, but also to mine work as a form of livelihood.

In fact, then and now, and for any given community, land grants both individuals and communities a space for living, developing a livelihood, earning income and creating wealth and welfare, as well as the possibility of nurturing a collective cultural identity. This is especially true when a community's social, economic and cultural traditions are intrinsically linked to land, as is the case with many indigenous and afro-descendant communities in Colombia. Indeed, throughout Colombian history and its numerous political administrations, these two ethno-cultural communities of Colombia have claimed recognition of their ancestral and communal land rights. The Colombian Political Constitution of 1991 affirms that their claims are legitimate and addresses two different communal land regimes, one for indigenous people and the other for afro-descendant communities or afro-Colombians.⁶³

3.3.4. INDIGENOUS RESERVATIONS LAND REGIME OR RESGUARDOS

Several articles of the 1991 Constitution establish indigenous peoples' right to land. Articles 329 and 330 are worthy of special mention – Article 329 establishes the indigenous territories, known as

61 Please see: <http://www.lablaa.org/blaavirtual/geografia/afro/demograf.htm>

62 Colombian mestizoes are a combination of Spaniard, Indigenous and African blood.

63 The Political Constitution of 1991 and pursuant legislation refers to Afro-descendant or Afro-Colombian communities as "black communities." In this report, references to "black" communities are only used to indicate the exact wording of the 1991 Constitution; otherwise, we use the terms Afro-descendant or Afro-Colombian in substitute thereof.

resguardos, and Article 330 clarifies how these territories will be governed; Article 330 also establishes other protections for indigenous rights over the *resguardos*, including, for instance, the right to prior consultation, which is discussed in greater detail below.⁶⁴ In addition to these constitutional norms, Article 2 of Decree 2164 of 1995 further defines *resguardos* within the law, while Decree 2164 of 1995 and Chapter 6 of Law 1152 of 2007 also regulate these communal indigenous lands (see paragraph 231). These *resguardos* are home to a large number of Colombian constituents: there are over 567 *resguardos* covering approximately 36,500,416 hectares in Colombia, where 67,503 families live, totaling just less than a million people. In the Amazon department, there are 120 *resguardos* where 56 indigenous peoples communities live⁶⁵. And in the Pacific region, there are 104 *resguardos* in Chocó, 37 in Antioquia, 36 in Cauca, 34 in Nariño and 17 in Valle del Cauca, totaling over 20,000 indigenous families in this region alone.⁶⁶

For the purposes of this report, Law 21 of 1991 is worthy of great attention, as it is the domestic legislation ratifying ILO Convention 169 regarding the rights of indigenous people, including their right to collective property. Article 13 of Law 21 of 1991 explains that the government must acknowledge the special importance that indigenous people, in accordance with their cultural and spiritual traditions, give to land.⁶⁷ And, Article 14 of Law 21 of 1991 places governments under an explicit obligation to recognize indigenous communities' right to property and possession over land and territories that they have been traditionally occupying.⁶⁸ Article 14 also provides for indigenous access to land that has not even been exclusively and traditionally occupied by them.⁶⁹ Article 15 defines their right to prior consultation with regard to decisions concerning natural resources on their lands; in Colombia, this right has been raised to the status of a fundamental right under the jurisprudence of the Constitutional Court, which has also extended this right to afro-Colombian ethno-cultural communities.⁷⁰

64 Articles 329 and 300, Political Constitution of Colombia of 1991

65 Please see: http://www.corpoamazonia.gov.co/Region/Jur_resguardos.htm

66 Please see: <http://www.colombiabuenas.com/colombia/tag/resguardos-indigenas>

67 Article 13, Law 21 of 1991 is article 13 of the ILO convention that establishes that: 1. In applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship. 2. The use of the term lands in Articles 15 and 16 shall include the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use.

68 Article 14, Law 21 of 1991 is article 14 of the ILO convention that establishes that: 1. The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognized. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect. 2. Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession. 3. Adequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned.

69 Ibid, Article 14

70 Article 15, ILO 169 and Law 21 of 1991: 1. The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources. 2. In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programs for the exploration or exploitation of such resources

3.3.5. AFRO-COLOMBIANS COMMUNAL LANDS REGIME OR TERRITORIOS COMUNITARIOS

Although the Constitutional Court has extended certain provisions of Law 21 to afro-Colombian communities' rights to land, there is an entirely separate legal framework under Colombian law that is designed to protect the land rights of these communities in particular. This legal framework emanates from the Constitution, specifically; Provisional Article 55 of the Constitution establishes a legislative obligation to create a special law relevant for afro-Colombian territories. This Article states that by 1993, or within a two-year period from the time the Constitution was promulgated, the Congress shall create a law recognizing the collective property rights of "black communities" that have been occupying non-private State land in the rural zones and river shores of Colombia's Pacific basin or other zones with similar conditions.⁷¹ Under Article 55, the communities' collective property rights are linked to their traditional production practices, in other words, their livelihoods are recognized as being related to their cultural identity, which enjoys a special relationship to the land and territories they occupy, own and access. Article 55 evidences the constitutional will to create a special body of law recognizing the property and land rights of afro-Colombian communities, with the intention of promoting their socio-economic development, while safeguarding their own cultures and traditions, just as it was decided for ethno-cultural indigenous peoples

Provisional Article 55 of the Colombian Constitution was promulgated through Law 70 of 1993, which applies broadly to the Pacific basin region of Colombia.⁷² Under Law 70, Article 1, "black communities" who have been occupying State lands in rural zones in the Pacific basin, following their traditional means of production, enjoy a right to collective property over these lands.⁷³ Article 1 establishes certain mechanisms protecting these communities' cultural identities and promoting their socio-economic development, so that these communities may enjoy equality in terms of access to opportunities for development that have been made available to other segments of Colombian society.⁷⁴ The land subject to the protections and measures in Law 70 are termed *territorios comunitarios* or communal territories. These *territorios comunitarios* are the equivalent of the *resguardos* in that they are the lands worthy of special protections under Colombian law due to their socio-cultural, economic and traditional importance to a group of people, i.e., afro-Colombians or indigenous people, respectively. And, as with *resguardos*, the *territorios comunitarios* may not be mortgaged or sold, precisely because of the relationship between the land and the cultural identity of afro-Colombian communities and the collective nature of property land.⁷⁵

pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.

71 Political Constitution of Colombia , Article 55: "Within the two years following the entering into effect of the present Constitution, Congress will issue, following a study by a special commission that the government will create for that purpose, a law which will recognize the right to collective property of the black communities which occupy uncultivated [non-private State land] in the rural zones adjoining the rivers of the Pacific basin in accordance with their traditional means of production. This law will apply to the area stipulated there in (...) property that will be recognized will only be transferable within the limits stipulated by the law (...).The same law will create mechanisms to protect the cultural identities and the rights of these communities to foster their economic and social development."

72 The department of Chocó, is one of the most biodiverse places in the world, is located in this region and is home to X%X million of Colombia's Afro-descendant population. Due to its biodiversity and vast natural resources, this region has also been the focus of intense mineral extraction and exploitation, prompting some Colombian legislators (Senator .Odin Sanchez) to present a bill pursuant to declare the Biogeographic Chocó Region in an environmental crisis warranting additional official government protection.

73 Law 70 of 1993, Article 1

74 Ibid

75 Ibid, Article 7

Under Article 3 of Law 70, the lands that were collectively occupied – or occupied historically as ancestral settlements of afro-descendant communities within Colombia, used collectively as their habitat and where these communities developed and continued to practice their traditional economic means of production – warrant special protection.⁷⁶ These lands are where communities of afro-Colombians developed and practiced economic activities and techniques for agriculture, mining, timber and forest extraction, animal farming, hunting, fishing, and gathering natural resources to preserve their way of life.⁷⁷ Relating the importance of work and livelihood to these occupied lands clarifies that, as portrayed by Law 70, Colombian lawmakers understand that the survival of afro-Colombian communities' is related to their traditional socio-cultural economic activities, including, among other things, mining. In other words, mining is one of the traditional economic activities (livelihoods) of afro-Colombian communities that is tied to their cultural identity. The law establishes that within these *territorios comunitarios*, there will be legally recognized community councils, which will work as internal administrative organs of the people living within the designated lands.⁷⁸ These councils will have, among other functions, the ability and responsibility to demarcate different areas within the communal land to facilitate, for instance, the use of the communal land for family farming units and other economic activities taking place within the *territorios comunitarios*.⁷⁹ Of particular importance is that although this provision does not create individual land titling regimes within the *territorios comunitarios*, it does authorize the demarcation of communal land, thereby recognizing the discrete economic needs and diverse economic activities that will be taking place internally.

As may be expected, there are various provisions within Article 70 relating to the resources found on *territorios comunitarios*. Article 6 clarifies that whatever rights may be extended to afro-Colombian communities vis-à-vis their communal lands, the renewable and non-renewable resources existing or found on that land are NOT encompassed within those rights, excepting topsoil and forest timber.⁸⁰ The Colombian government retains sole ownership over the other natural resources, even if located on the communal lands of afro-Colombians.

At the same time, Chapter 4 of Law 70 recognizes that afro-Colombians have been using their natural resources and their territorial environments to sustain and develop their social, cultural and economic traditions. Article 19 of Chapter 4, for instance, refers to the traditional practices exercised by afro-Colombian communities on the waters, beaches and shores of the Pacific basin and the flora, fruits and fauna of the forests and waters for food, housing, domestic or work-related construction (e.g., canoes, tools, etc.).⁸¹ Because these uses are recognized under law, they do not require any official permission or licenses from the central administration for their continued practice. These natural resources may be used in these discrete ways so as to guarantee their persistence in quantity and quality over time, as well as to preserve the economic and cultural traditions of the communities living in the *territorios comunitarios*. In fact, hunting, fishing and the gathering of produce and fauna for subsistence purposes are given preference over any other commercial, semi-industrial or industrial use of the natural resources found on these designated lands.⁸² Despite its intention, this empowering provision

76 Ibid, Article 3, Definition 6

77 Law 70 of 1993, Article 3, Definition 7

78 Ibid, Article 5

79 Ibid

80 Ibid, Article 6

81 Ibid, Article 19

82 Ibid

of Law 70 is, unfortunately, not practiced in reality, especially considering the Mining Code of 2001 and the persistent violence in the Pacific basin. Indeed, one of the consequences of this violence is the displacement of communities and the large swaths of land left unoccupied in their wake. Even if this land is technically designated as *territorios comunitarios*, few afro-Colombian inhabitants remain to take advantage of the protections granted by Article 19 of Chapter 4 of Law 70; many have migrated to cities like Cali seeking better opportunities and protection.

Law 70 contains several provisions relating specifically to mining on *territorios comunitarios*. Article 26 of Chapter 5 of Law 70 says that the Ministry of Mines and Energy may, on its own initiative or by petition, identify mining zones within these communal lands.⁸³ These mining zones will be for the exploration and exploitation of natural non-renewable resources, which will occur under special conditions to ensure the protection and participation of afro-Colombian communities in these mining operations and, above all, to preserve the cultural and economic characteristics of these communities, without prejudice to any rights acquired by third parties thereto.⁸⁴ This article in effect says that the Ministry of Mines and Energy may impose certain conditions for mining operations on *territorios comunitarios*, and these conditions may be specifically aimed at preserving the social, cultural and economic traditions of the afro-Colombians living on those lands. That this concern is expressed in Law 70 – the comprehensive law created pursuant to the Constitutional will expressed in provision Article 55 of the 1991 Constitution to protect afro-descendant communities in Colombia – illustrates that the connection between land, mining and these ethno-cultural minorities was not only well known to policy makers, but recognized as necessary for their cultural identity and their survival as a distinct people. Article 27 of Chapter 5 of Law 70, in fact, states that afro-Colombian communities will enjoy the *preferential right* to special licenses for mineral exploration and exploitation on their *territorios comunitarios*.⁸⁵

Eight years after Law 70 was published, the Colombian Mining Code was entered into effect by Law 691 of 2001. Not only did it amend existing laws, legislation and regulation applicable the mining industry, it eliminated the provision for preferential licenses granted to Afro-Colombians under Law 70. Under the Mining Code of 2001, there is now only one legal contract for mining – the concession contract – and licenses for exploration and exploitation no longer exist. A concession creates a completely different relationship than a license; the concession is a *bilateral* contract, in which each of the contracting parties gives and receives an equivalence of effort, goods or wealth. The license, on the contrary, is a *unilateral* permission that benefits only one party, that to which the permit or license is awarded. This means then that the overall conception of new Colombian Mining Code is that of formally or legally advancing and protecting the mine work that creates gain (as opposed to benefit) for the State, i.e., that primarily creates material or financial profit for the State. Mine work that is developed in view of Colombians' cultural and material survival at the ground – work that develops their lives and livelihoods through specifically mine work – by permit to work or license to mine, and even if the royalties for the State are minimal, is not even a subsidiary concern of the State; it is actually prohibited. Concession contracts are the only legal way to develop mine work for any Colombian at any scale in any part of the territory. The State in its role as sole mineral-owner subsumed its role as ruler-for-the-common-good. The old legal framework reserved contracting for only those medium and large mineral deposits that justified the clear participation and control of the State, as sole owner of all subsoil rights and fiduciary acting in the nation's interests, while still allowing

83 Ibid, Article 26

84 Ibid

85 Ibid, Article 27

or licensing mine workers' explorations and extraction of small deposits that did not hold any justifiable business interest for the State⁸⁶. However, under the 2001 Mining Code, any mining contract is in the business interests of the State, regardless of whether it refers to a small, medium or large mineral deposit.

Other relevant provisions of Chapter 5 of Law 70 include Article 28, which acknowledges that there are (i) indigenous mining zones, (ii) afro-Colombian mining zones, and (iii) mixed mining zones where the rights of both these groups are equally respected.⁸⁷ The respect for these groups' rights is also reflected in the autonomy granted to afro-Colombian communities to develop according to their own traditions and standards. Article 47 States that the Colombian government shall grant certain measures to afro-Colombian communities guaranteeing their right to develop socially and economically according to their autonomous cultures.⁸⁸ This article indicates that these communities may develop along a separate trajectory than mainstream Colombian culture, and, in this way, recognizes the cultural autonomy of afro-Colombian communities to develop as they believe is best suited to preserve their cultural identity.

At the same time, the Colombian State remains under certain obligations to encourage the participatory socio-economic development of afro-Colombian communities. Article 49 states that representatives of afro-Colombian communities must be included in development programs and projects planned by the government and acting with international cooperation; one of the stated goals of this participation is that poverty reduction programs and projects respect the social and cultural identities of the targeted population.⁸⁹ Likewise, under Article 52, the government is obligated to design special financial and credit mechanisms that will facilitate the creation of associations and solidarity-based organizations within afro-Colombian communities.⁹⁰ Having recognized that these associations are useful in engaging with the private sector and, subsequently, in bringing in greater resources and access to opportunities to communities, Article 52 places an affirmative obligation on

86 The legal framework that preceded the current Mining Code -issued under the Pastrana and Uribe Administration- were Decrees 2655, 2656 and 2657 of 1988; issued under President Virgilio Barco's Government. The rules reflect a more balanced role between the State-Asset-Investor and the State-Arbiter-for-the-Common Good; concession contracts gave way to a formal title for big and medium mining and a license or permit gave way to a formal title small scale mine work of Colombians. In fact, Article 6 of Decree 2655/88 (Abrogated) established: "ACQUIRED OR ESTABLISHED RIGHTS AND MERE EXPECTATIONS. For the purposes of this Code, the following are acquired and established rights only: 1. The concession contracts signed and duly solemnized by a public deed, which have been published in the OFFICIAL GAZETTE. 2. Permits and licenses granted by order duly executed, to retain their full force and effect from the date of issue of this Code. 3. The contributions given to entities bound to the Ministry and the contracts based on them have been concluded. 4. To existing rights under articles 3 and 5 of Act 20 of 1969 and other special provisions, as expressed in resolutions of the Ministry duly executed. Other legal situations contained in pending applications embodied in external arrangements, will be deemed for all purposes as simple expectations." // Artículo 6º del Decreto 2655/88 (Abrogado): DERECHOS ADQUIRIDOS O CONSTITUIDOS Y MERAS EXPECTATIVAS. Para efectos del presente Código, son derechos adquiridos y constituidos solamente: 1. Los contratos de concesión suscritos y debidamente solemnizados por escritura pública, que hayan sido publicados en el DIARIO OFICIAL. 2. Los permisos y licencias otorgadas mediante resolución debidamente ejecutoriada, que conserven su vigencia y validez a la fecha de expedición de este Código. 3. Los aportes otorgados a organismos adscritos o vinculados al Ministerio y los contratos que con base en ellos se hayan celebrado. 4. Los derechos vigentes al tenor de los artículos 3º y 5º de la Ley 20 de 1969 y las demás disposiciones especiales, que consten en resoluciones del Ministerio debidamente ejecutoriadas. Las demás situaciones jurídicas contenidas en solicitudes en trámite consagradas en disposiciones exteriores, se considerarán para todos los efectos como simples expectativas.

87 Law 70 of 1993, Article 28

88 Ibid, Article 47

89 Ibid, Article 49

90 Ibid, Article 52

the government to find innovative financial mechanisms to ensure that afro-Colombian communities may participate in these kind of entrepreneurial transactions and ventures with private actors.⁹¹ And, in an effort to protect any innovations that afro-Colombian communities and individuals have created or cultivated in different vegetable varieties or otherwise relating to crop production, Article 54 protects the intellectual property of afro-Colombians with respect to medicinal, alimentary, artisanal, animal or industrial innovations and use.⁹² These articles must be read in conjunction with Article 55, which requires the government to allocate the appropriate financial and technical assistance to address the particular environmental and socio-economic conditions of afro-Colombian communities – that is to say, the government may not merely apply its urban development programs and projects to these communities, rather, it must design contextualized programs and projects that keep the characteristics of the communities living in Chocó, Antioquia, Nariño, Cauca and Valle de Cauca in mind.⁹³

Perhaps recognizing that these characteristics may be difficult to discern from a distance, and that engaging the leadership of afro-Colombian communities in the development of these programs will not be easy to achieve due to geographical distance, Articles 57 and 61 require the government to both create a development plan for afro-Colombian communities as well as to appropriate the necessary economic resources to develop and institute Law 70.⁹⁴ These articles require the government to, once again, affirmatively reach out and include the remote, geographically isolated communities of its afro-Colombian constituents and attempt to bridge the distance between them through infrastructure development.⁹⁵ At the very least, the towns of the Pacific basin will thereby enjoy physical access to the rest of the country and, more importantly, its political and administrative center in Bogota.

3.3.6. LAND ISSUES REGARDING ETHNO-CULTURAL AUTONOMY AND COLLECTIVE PROPERTY

Historically, indigenous and afro-descendant communities have engaged in mine work for both their survival and development, as well as through their cultural identity in Colombia. In this sense, ethno-cultural communities' rights to their collective lands – either as *resguardos* or *territorios comunitarios* – and the resources available and potentially mined on them relate back several generations and have great significance to their survival as a people. But, and even if constitutionally granted, the reality of collective property is very controversial.

One source of conflict throughout Latin America, and especially with the indigenous people in Peru, Ecuador, Bolivia and Colombia, is that their collective lands may not be used as collateral or sold for profit. In Colombia, neither the *resguardos* nor the *territorios comunitarios* may be leveraged for credit or financial gain. While they may use these lands and resources for hunting, mining, and other traditional means of production, their inhabitants are restricted from using them to participate in contemporary banking mechanisms that have been used by other segments of society to facilitate socio-economic development. Thus, rather than serving as pathways out of poverty traps, and for development, these communal lands further entrench indigenous and afro-Colombians in subsistence-driven modes of existence. This conflict highlights the problem with implementing the current law and policy regimes regulating communal lands for indigenous and afro-Colombian communities. For

91 Ibid, Article 52

92 Ibid, Article 54

93 Ibid Article 55

94 Ibid Article 57

95 Ibid Article 57

instance, with respect to afro-Colombian communities, Law 70 aims to protect their social, cultural and economic traditions – which are understood as being linked to land – by preventing them from selling this land. Yet, the government is also obligated under Article 52 of Law 70 to make financial services available to afro-Colombian communities. And, Article 47 of Chapter 5 of Law 70 says that afro-Colombian communities may follow a different trajectory for development. The tensions within these different provisions are exacerbated when they are applied in reality, off the paper of law in theory and in the reality of law on the ground.

Second, and as much as the law intends to protect and preserve these communal lands, enforcing the law remains difficult to do, in part due to the socio-cultural, political and geographic distance between the communities living on these lands and the central government. The people living on the *resguardos* and *territorios comunitarios* will most likely be living in a world that is very much removed from contemporary Colombian society. This distance from mainstream society makes them very vulnerable when external third parties – such as national and multi-national corporations operating separately or in joint ventures at a large scale, or even illegal mid-size operations owned by foreigners⁹⁶ – enter the scene. Driven by their own economic ambitions and feeding off the wealth of resources made available under globalization and neo-liberal economic policy, these corporate entities bring in great capital and resources to the region. The influx of foreign investment in mining has tripled over the past few years. Unfortunately, illegal operations and legal corporations operate on their own profit motives and are only as accountable to the people and communities living on the *resguardos* and *territorios comunitarios* as the government requires them to be. Some of them actually come to indigenous and afro-Colombian lands and begin their operations without any legal permission or legitimate rights whatsoever. While the people living there may raise some kind of resistance, without the force of government behind them these powerful corporate or illegal actors will more often than not impose their ambitions on these communities, even if they are operating extra-legally in constitutionally protected communal lands.

A third complication arises when considering the nuanced relationship of the cultural identity of an ethno-cultural community between the individuals and families comprising that community. On the one hand, the community acts as a singular unit, whose members have together decided to preserve their social, cultural and economic traditions. Communal lands, both *resguardos* and *territorios comunitarios*, offer a means by which these communities may preserve their collective identities; indeed, and as recognized under the relevant legal and policy framework, it is absolutely critical that these communal lands be held collectively, otherwise, individual property owners may choose to sell their lands and, in this way, place the collective cultural identity of the group in jeopardy. Yet, on the other hand, within their communal lands there is a considerable degree of individual autonomy. As mentioned above, the internal administrative authority of the communal lands – the community or communal councils – will actually demarcate property within the territory for family-based production and the varied economic activities taking place in the community⁹⁷. As explained by the *Fundación Oro Verde* (Green Gold Foundation) and anthropologists, in Afro-Colombian territories in particular, these divisions are often associated with family lines that date back to times of slavery.⁹⁸ When trafficked to Colombia, African slaves had to necessarily reconstitute their social and family groups, and being

96 Please see, for instance: <http://www.caracol.com.co/nota.aspx?id=690124>, <http://www.semana.com/noticias-medio-ambiente/incautan-24-dragas-oro-choco/123118.aspx>

97 Political and Civil Leaders of Tadó, Chocó / rra interview / 2010 / Bogotá D.C.

98 Clara Hidrón, Fundación Oro Verde / rra interview / 2010 / Skype

enslaved in mine work, they did so around the only space they occupied, that is, the mines where they lived and worked most of their lives. The clear boundaries established around these mines became ancestral family “trunks” that are inscribed in the communities’ collective knowledge of the territory; over time, as families multiplied, these trunks grew “branches,” and now have “leaves.” Access to and rights over this land are traceable in what might be described as “mine genealogy”. The contemporary relatives of those former slaves have customary access to the lands of mines where their ancestors were enslaved generations ago, and their ancestral African names remain tied to these same mines even today. The *Lucumí*, *Macondo*⁹⁹ and *Mina* are examples of places and surnames that belonged to communities and tribes from Africa who were brought to Colombia. It is, in fact, through their association with the mineral extraction from those lands, the mines, that they remember and preserve their collective history and social identity. An afro-Colombian individual who left her ancestral village and settled in one of Colombia’s cities may still return to her village and tie herself once again to her ancestral family “trunk”, for mine work purposes. She may even continue to work in the same mine that her ancestors worked generations ago.

The complication is that, although the internal authority has demarcated the land within the communal territory to families, and individuals of those families exercise a degree of autonomy over these identified plots, they do not fully enjoy individual property rights that allow a person to own and dispose of a plot of land as they see fit. In fact, the land is still part of the *territorios comunitarios* and *is collectively owned*, even if individuals retain some culturally legitimate authority over their family plots. Even afro-Colombians voluntarily or forcefully displaced from their communities to urban cities may retain an intuitive sense of individual or familial ownership over their lands and resources on the *territorios comunitarios*. Acting on this sense of authority and ownership, some urban afro-Colombian believe that they have a right to legitimately transact and cede her or his right to access and pursue mine-work to third parties. Yet, this is not the case under either the formal laws of the Republic or formal customary rules.¹⁰⁰ These informal leases on family plots within the communal lands contribute to the further breakdown of the ethno-cultural group’s collective identity that gave rise to their constitutionally recognized right to communal property in the first place.¹⁰¹

A fourth complication facing the people from rural zones of Colombia is the continuing violence propagated by irregular armed forces. This violence will have touched the lives of indigenous communities, afro-Colombian communities, and non-indigenous, non-afro-Colombian peasant communities, all of whom have been subject to considerable internal displacement. Separated from their land and, as a consequence, unable to access the natural resources found on that land, these

99 “(...) Porque antes de ser capturados con destino a América, los africanos se conocían unos a otros con los nombres de sus etnias: Biohos, Cabindos, Mandingos, Balantas, Macondos, Kimbundus o Basongos (Friedemann y Arocha 1.995: 64).(...) Pero en el mundo contemporáneo, el vocablo africano que honra a Colombia como emblema de nacionalidad es Macondo el nombre que Gabriel García Márquez (1967) escogió como escenario para su obra "Cien años de soledad", premio Nobel. Makondo, es un lugar en Angola y un fitónimo bantú (De Granda 1978) que designa al plátano y conlleva significados mágico-religiosos. Es preciso anotar que la obra se desenvuelve en tierras de plátano y ganado del Caribe continental colombiano donde durante varios siglos muchos descendientes de africanos se arraigaron como cimarrones, criollos o libres.” : <http://www.lablaa.org/blaavirtual/geografia/geofraf1/huellas.htm>

100 Political and Civil Leaders of Tadó, Chocó / rra interview / 2010 / Bogotá D.C. and Clara Hidrón, Green Gold Foundation / rra interview / 2010 / Skype

101 Of course, not all mining in Colombia is taking place in resguardos or territorios comunitarios. What is unique about these lands is that ethno-cultural communities that own this land in common are not individual land owners, even if they retain some ancestral claim to work or access specific areas within the communal territories. Alternatively, non-indigenous and non-Afro-Colombian people engaged in mining activities will not retain collective rights over their land or resources; they will, in fact, require individual titles to the land they are mining.

people often flee to Colombia's urban zones, conveniently leaving acres upon acres of unoccupied, resource-rich land behind.

This situation of lands abandoned due to internal violence places an ethical burden on the large-scale extractive industries and timber concessionaires whose entrepreneurial ventures in mining are supported through international investment law. These companies and their mining operations may very well be taking advantage of the principle "first in time, first in right," on lands that have been left vacant due to violent or forced internal displacement. To relieve any suspicions arising out of their profitable mining operations, i.e., the belief that they may be benefitting from this displacement and the violence that caused it or, at the very least, that they are not discouraging the irregular armed forces who have cleared the region of its ancestral and traditional indigenous, afro-Colombian and rural peasant inhabitants, these companies should act with great human rights caution and social responsibility. Unfortunately, there are many who fail to do so. In fact, some academics¹⁰² and social activists in internal displacement have expressed the view that some degree of displacement is often tolerated, and even sponsored, by private investors who proceed to then take advantage of the cleared territories. An Op-ed, for instance, denounces that:

"Great land extensions, including those taken from the now more than three million displaced people, are part of the macro project that aims to destroy Colombian peasants, indigenous and afro-Colombian [communities], relegating them to broaden the slums in the cities because their presence in the rural zones is more a hindrance than an inconvenience. The map of displacement in Colombia is also the map of big business: the oil palm, sugarcane, oil, mines and coca plantations are behind the great waves of violent evictions. [The] victims [of these evictions are victims] of an economic rather than a political conflict. Therefore, it is not surprising that national and transnational economic groups, drug traffickers, political military and the paramilitaries concurred to promote a strategy of territorial control under the guise of fighting guerrillas. For some time now and turning its back to the country's interests, our government has forgotten agriculture as a food source and is instead turning it into **green deserts** destined to meet the energy needs of the great powers and feed the enormous business of multinationals and a few national entrepreneurs. In this new [place] for Colombia in the international order, peasants have no place. (...)"¹⁰³

102 For instance, Professor Roberto Carlos Vidal, Universidad Javeriana.

103 *Las grandes extensiones de tierras, incluidas las que se les arrebató a los hoy más de tres millones de desplazados, hacen parte del macroproyecto que pretende destruir al campesinado colombiano y a las comunidades indígenas y afro-Colombianas, relegándolas a engordar los cinturones de miseria en las ciudades porque su presencia en el campo más que incomodar, estorba. Por esto, el mapa del desplazamiento en Colombia es también el mapa de los grandes negocios: la palma africana, la caña de azúcar, el petróleo, las minas y el mismo narcotráfico, están detrás de las grandes olas de desalojos violentos que han sufrido nuestras víctimas. Víctimas de un conflicto más económico que político. Por esto, no es extraño que grupos económicos nacionales y transnacionales, narcotraficantes, políticos y militares concurrieran a impulsar el paramilitarismo como estrategia de control territorial bajo la excusa de la lucha contraguerrillera. Desde hace un tiempo y a espaldas de los intereses del país, nuestro gobierno ha renunciado al agro como despensa alimentaria y pretende convertirlo en un desierto verde destinado a suplir las necesidades energéticas de las grandes potencias y alimentar los enormes negocios de las transnacionales y unos pocos empresarios nacionales. En esta nueva vocación para Colombia dentro del orden internacional los campesinos no tienen cabida. Y como son estos los que mayor número de víctimas aportan a nuestro infame conflicto, una ley que pretenda repararlos integralmente, empezando por la devolución de las tierras, es un absurdo o un barril sin fondo como lo mencionó Holguín el día que pidió hundir el proyecto en la plenaria del Senado de la República. Contrario a las recomendaciones de organismos internacionales de derechos humanos, a las peticiones de entidades como la Procuraduría General de la Nación, a las exigencias de las organizaciones sociales, al llamado de las víctimas, e incluso, oponiéndose al apoyo, que al proyecto de ley han dado los partidos políticos, incluidos los uribistas, el gobierno insiste en no permitir que se apruebe y ha elevado sesenta objeciones al mismo. Por esta vía, ya logró que se eliminara el concepto de víctimas del conflicto armado y con esto le dio un*

It is important to highlight that, because under the current policy framework of the 2001 Mining Code mineral exploitation may only be realized through concession contracts, ethno-cultural minorities willing to work in mining the natural resources found on or under their collective property must also request a concession to do so. Actually article 125 of the Code specifically states that the concession requested for exploiting mineral within a specific afro-Colombian, indigenous or mixed mining zone, is a communal concession granted to the collectivity and not to its individual members.

Article 125. Concession. The concession will be granted at request of the community or Indigenous group and in its favor and not of the individuals that form part of it. The manner in which they participate in the mining works and in its products and yields and the conditions of how those can be substituted in such works within the same community, will be established by the Indigenous authority that governs them. This concession will not be transferable in any case.

Not surprisingly, this constitutes a tremendous challenge for communities that are economically vulnerable and isolated, especially after former President Uribe's mining sector reforms. After these reforms, there are no longer any public industrial or commercial enterprises or mining agencies of the State to promote, invest, lever or partner with traditional or ancestral mine workers in poverty who are of a mestizo or ethno-cultural origin. The Uribe mining reforms closed all institutions engaged in field mining development and focused all efforts on developing contractual relationships for large-scale extraction and income generation. These reforms have left no formal place for the ancestral indigenous and afro-Colombian mine workers, who have no capacity to plan, request and operate a mining concession contract on their own.

It is worth noting that as much as the Mining Code, its glossary and the recent Law 1382 of 2010 modifying the Code affect small scale and artisanal mine workers, the norms do not address, recognize or try to protect and frame their work in the least. The authors of this report believe that under the Colombian policy framework the indigenous, "black" and mixed mining zones provisions and chapters could be better identified as provisions related to ancestral mining. And that what is referred to as "traditional mining" would be a type of non-ethno-cultural mining that is also poverty related, small in scale and thus informal, but this labor is not connected to the history or inherited livelihood of enslaved Africans or indigenous ancestors mining for art and religion. Thus the mining of Colombian mestizoes or peasants in rural and peri-urban areas is just a matter of informal mine work that have been traditionally exploited over time and not of a cultural heritage. In fact, article 31 referring to informal mining work in areas that justify the State declaration of a Special Mining Project has been further developed by Law 1382 of 2010, which finally attempts to define what traditional mining means¹⁰⁴. As revealed by the definition set forth therein, there is no ethno-cultural factor that has

duro golpe a la finalidad del proyecto de velar por el respeto y las garantías de las víctimas dentro del derecho internacional humanitario, que es el que regula el respeto de los derechos humanos en medio del conflicto. Y al mismo tiempo, insiste en darle status de delincuentes políticos a los grupos paramilitares, para poder plantear un proceso de amnistía e indulto (ley de punto final) en el marco de un conflicto armado ante el fracaso de la ley de justicia y paz.

http://pastaaldia.com/index.php?opcion=ampliar_noticia&id_noticia_relacionada=&idn=635&fechaindex=2009-11-14

104 ARTÍCULO 1, Adicionase el artículo 16 de la Ley 685 de 2001 Código de Minas con el siguiente párrafo. Párrafo Primero. Los solicitantes de propuesta de contrato de concesión deberán señalar si dentro del área solicitada existe algún tipo de explotación minera, indicando su ubicación y metodología utilizada para conocer la existencia o no de dicha minería. La Autoridad Minera en un plazo no mayor a tres (3) meses deberá certificar, si la hubiere, el tipo de minería. Si hubiere minería tradicional, se dará aplicación a lo previsto en los artículos 31 y 248 Y las demás disposiciones aplicables del Código de Minas y en su defecto a poner en conocimiento de las demás autoridades competentes de las ramas ejecutiva y judicial para que se adelanten las acciones administrativas y penales previstas en los artículos 159 y 164 del Código de Minas y las

been considered. There are at least three reasons to distinguish the mining by mestizo mine workers in poverty or informality who are usually found in urban or peri-urban areas and ethno-cultural mine workers in poverty or informality who continue their ancestral mine work legacy: first, and under the Mining Code of 2001, a concessionaire must notify the authorities if there is some kind of traditional mining going on in the concession territory (a concession would not otherwise be granted if there is no prior information and safeguarding of the collective property of indigenous or afro-Colombian communities engaged in traditional mine work); second, the Code always names and identifies the ethno-cultural communities as being specifically indigenous, afro or mixed instead of just plainly mentioning “the communities;” and, third, the provision for traditional mining does not recall or refer to any prerogative or right to prior consultation of ethno-cultural communities, which these communities are constitutionally and legally entitled. Therefore, the authors of this report believe that it is safe to understand that that traditional mining is a distinct notion from that of Afro or indigenous ancestral mine work¹⁰⁵.

3.3.7. WOMEN RELATED LAND ISSUES: ETHNO-CULTURAL COMMUNITIES, CUSTOMARY LAW AND COLLECTIVE PROPERTY

One complicated aspect of communal land rights – whether in the context of the indigenous *resguardos* or *territorios comunitarios* – is women’s access to, control over and use of land and the natural resources available on that land. Land regimes in every corner of the world are often dominated by andro-centric or patriarchal cultural characteristics where “women’s ownership or access rights to land are rarely as firmly designated as that of men...”¹⁰⁶ In the case of individually held private property, women may be, among other things, excluded from inheritance mechanisms, not listed as the joint owner of any property acquired during marriage, or simply not recognized as the *de facto* head of household and thus unable to access legal protections over household land and property. As is often the case of communal lands granted to ethno-cultural minorities around the world, women within those groups may not be able to exercise rights over that land unless they are incorporated into a patriarchal social structure, i.e., a male-headed household. Women may also be under-represented in the decision making process of indigenous or ethno-cultural bodies of government.

demás disposiciones aplicables del Código Penal. En caso que el solicitante de contrato de concesión no informe sobre la existencia de minería, dará lugar al rechazo de la solicitud, o multa en el caso de contar con contrato de concesión, si la Autoridad Minera detecta que existe minería y que el concesionario no ha procedido, en el último caso, de acuerdo con los artículos 306, 307 Y siguientes del Código de Minas. De existir minería tradicional constatada por la Autoridad Minera y de no haber sido informada por el solicitante y encontrándose en ejecución el contrato de concesión, se suspenderá el contrato por el término de seis meses para el área en discusión, dentro de los cuales las partes procederán a hacer acuerdos. De no llegar a acuerdos se acudirá a mecanismos de arbitramento técnico previsto en el artículo 294 del presente código, cuyos costos serán a cargo de las partes. El tribunal de arbitramento definirá cuál es el mejor acuerdo que será de obligatorio cumplimiento. Se entiende por minería tradicional aquellas que realizan personas o grupos de personas o comunidades que exploten minas de propiedad estatal sin título inscrito en el Registro Minero Nacional y que acrediten que los trabajos mineros se vienen adelantando en forma continua durante cinco (5) años, a través de documentación comercial y técnica, y una existencia mínima de diez (10) años anteriores a la vigencia de esta ley. Parágrafo Segundo: El tiempo máximo para que la autoridad minera resuelva la solicitud de contrato de concesión será de ciento ochenta días (180) calendarios, entendidos éstos como aquellos atribuibles a la institucionalidad minera. En caso de incumplimiento, dicha mora será causal de mala conducta para el funcionario responsable.

105 This understanding was verified through: Oficina Ingeominas Cali / rra phone interview / 2010 / Cali, and Marco Aurelio Hurtado / Gremivalle / rra interview / 2010 / Cali, although it was not possible to refer to a legal provision concluding so, that would give enough certainty to such interpretation.

106 Peña, Nuria, Maiques, Mar and Castillo, Gina E., *Using rights-based and gender-analysis arguments for land rights for women: some initial reflections from Nicaragua*, Gender & Development, 2008, 16:1, p. 55 — 71

At this point of the analysis it is important to highlight that in policy making, respecting communal land rights must not come at the expense of women's rights to equality, both of which are enshrined in international and domestic law and policy as well under the human rights principles of non-discrimination, interdependence and universality. Under CEDAW, the following articles are of specific relevance: Article 14 states the government's obligations to ensure that rural women enjoy "equal treatment in land and agrarian reform," and highlights women's access to agricultural credit and loans, technology and basic social services; Article 16 requires states to establish equal property rights for women in relation to marriage, divorce and death; and, although non-binding, General Recommendation 21 of the CEDAW Committee emphasizes the interdependence of women's right to property with their rights to earn a livelihood, right to housing and food security, health and labor rights. At the same time, a government must respect indigenous and other ethno-cultural minorities' cultural and land rights under various international norms adopted and ratified under domestic law.

The balance that a government chooses to adopt between these sometimes conflicting bundles of rights will be informed by local, national and international law and policy, as well as the predominant political culture at the time of the decision. For instance, in the 1999 *Magaya v. Magaya* case, the Supreme Court of Zimbabwe ruled on the side of customary rights, deferring to the ethno-cultural community's tradition of favoring male inheritance over female inheritance.¹⁰⁷ There, a woman had been evicted by her brother from their father's land after his death. The Court affirmed the Community Court's decision in favor of the applicable customary laws, even though the Court had "broad discretion" to decide matters involving customary law and constitutional law. The petitioner, *Zania Magaya*, was left with no further recourse and ended up living in a shack on her neighbor's back yard. While there was much outcry following the *Magaya* decision – within the indigenous group, domestically and internationally – the conflict between communal/indigenous rights and women's rights remained unresolved from a policy perspective, because the Zimbabwean State continued to espouse two sets of legal norms.

Reconciling these competing bundles of rights, or, at the very least, developing the principles of non-discrimination, interdependence and universality within a community's social, cultural and economic traditions may best be advanced from its own membership.¹⁰⁸ Non-indigenous, non-national and international women's movements speaking in terms of individual rights will not necessarily articulate the precise concerns of indigenous women, who will often attempt to "theorize about women's rights without abandoning their collective and communal interests."¹⁰⁹ Women members of ethno-cultural communities experience an amalgam of gender, race, ethno-cultural, national, and class discrimination in a way that compounds their marginalization and they must be the ones whose voices are solicited and included to address this marginalization.¹¹⁰ "By relying on [an indigenous] worldview and their day to day experiences, [indigenous] women are able both to theorize what makes their rights different from women's rights and to articulate demands for changes in their own communities," in part by

107 Bigge, David M., von Briesen, Amelie, *Conflict in the Zimbabwean Courts: Women's Rights and Indigenous Self-Determination in Magaya v. Magaya*, p. 289-313; <http://www.law.harvard.edu/students/orgs/hrj/iss13/bigge.shtml>

108 It is important to note that a community's social, cultural and economic "traditions" are not necessarily static over time; rather they reflect what the community values, which may change as the community's needs change and may even reflect shifting social paradigms of a larger collective.

109 Richards, Patricia, *The Politics of Gender, Human Rights, and Being Indigenous in Chile*, p. 199-220. Richards writes about the struggles of *Mapuche* indigenous women in Chile and their particular challenges in asserting their rights within the larger movement for indigenous collective rights.

110 Ibid

emphasizing their cultural and collective rights.¹¹¹ In this way, women's rights and indigenous rights may be reinterpreted to "simultaneously respect cultural difference and honor universal principles."¹¹²

Regardless of the spokesperson, there is very little official data on the extent and practices of indigenous women's ownership, access and control over land and natural resources in general. To this end, and recognizing the importance of land as a livelihood, food security, social capital and financial asset, some women's rights groups have advocated for acquiring greater information on land tenure and establishing a baseline for the land rights of women, with an emphasis on ethno-cultural origin and *dalit* women, as one of the targets of the MDGs goals and targets for eradicating poverty and reducing gender inequality.¹¹³ Of course, these groups must act with the cooperation, leadership and participation of the indigenous women whose lives they are attempting to improve.

3.4. WOMEN MINE WORKERS LIVING IN POVERTY

Without disregarding that women are victimized in the mine industry in various ways – e.g., enslaved for mine work, forced into prostitution around mines and mining operations, or into bonded labor through familial ties – this report focuses on the women in mining who work in near invisibility due to their poverty and informality and own account status. It will not consider the situation of women who are formally engaged in the mining sector or the migration of women who are lured to mining communities to provide goods and services to the men living and working there. Instead, it highlights the case of



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women whose work in mining is virtually unknown, a knowledge gap that results from the lack of considerable research in this field and the underrepresentation of mine working women in national statistics.

The anonymity of these women's work in mining is explained in part by gender discrimination, but also by their rural livelihood and ethno-cultural origins. Women who fall under these minority groups will be found in small and micro scale mining operations, carried out by either mestizoes in traditional mining, i.e., peasants in rural or peri-urban areas, or ethno-cultural mine workers in Colombia's rural zones.¹¹⁴ In other words these women will be found in the informal mining sector rather than the large-scale mining operations, although they will be present in this sector to a much larger degree. In contrast to large-scale mining, where women may constitute only five to ten percent of the mining workforce, the involvement of women in small-scale mining activities is generally much higher, amounting to approximately thirty percent of the world's artisanal and small-scale miners.¹¹⁵ In Guinea, women comprise seventy-five percent of those involved in the sector, while in Madagascar,

111 Ibid

112 Ibid

113 Please see ; <http://www.hic-net.org/articles.php?pid=1731> ,
<http://www.corpoamazonia.gov.co/Noticias/2010/Febrero/Minero.html> and
<http://www.corpoamazonia.gov.co/Noticias/2010/Febrero/Minero.html>

115 Jennings, *Addressing Labor and Social Issues, SSM in Developing countries*, Hilson, p. 154; Hinton et al, p. 196.

Mali and Zimbabwe the figure is around fifty percent, and in Bolivia forty percent;¹¹⁶ as far as the authors of this report know there are no figures for Colombia. According to ILO estimates, about twenty percent of small-scale miners in Latin American are women.¹¹⁷ Yet, when asked about women mine-workers, union leaders or public servants answer that there are none or, if acknowledged to exist, that they will be panning gold with their families in Chocó.

Through the information gathered for this report, it became clear that women emerge in the mining value chain at all levels of industrial, small-scale and micro-scale mining. Generally the bigger the mining operation, the smaller the proportion of women in the mining trade, with women's presence in micro-mining being significant and considerable. As this type of mining is usually practiced in an artisanal fashion, it is the least capital intensive of all mining operations. Yet, women are virtually ignored in all mining regulation. For instance, although women make, very clear, albeit small, contributions to the gold and platinum exports from Colombia the Colombian mining code does not include a single gender oriented provision in any of its 362 articles, nor was it possible to detect an official plan or initiative specialized for women mine workers. It is, therefore, logical to conclude that the Colombian State may be remiss in the protections and opportunities afforded to women mine-workers and those impoverished women working around industrial mining operations.

3.4.1. WOMEN IN LARGE AND MEDIUM SCALE MINING OPERATIONS

The women found working around industrial mining operations in Colombia include internally displaced women, women heads of household, and young and old women living in poverty near the country's mountain mines. In the gold mining towns of Segovia and Zaragoza in the department of Antioquia, after man or machine has cleared the way for tunnels reaching into the rich mountain resources, women work through the piles of discarded rocks searching for traces of gold, hammering away at the hardened, mineral waste. These women, known as "*chatarreras*," work in harsh and extenuating conditions around the waste of large and medium scale mining operations. As far as the authors of this report are aware, their labor and marginal work conditions remain undocumented in Colombia; however, through comparative research, the authors were able to discern that this labor is performed by a significant proportion of women in Colombia and throughout the region. Men who are engaged in this particular kind of work are either very young or elderly, both looking for some means of survival income.¹¹⁸

In Peru, the "*chatarreras*" are better known as "*pallaqueras*," who work doing "*pallaqueo*," or identifying and selecting valuable minerals from rocks and ore that are piled outside mines. These minerals are recovered, processed and sold in local markets for cash incomes. Women predominate in this mining activity, some as heads of household and others to supplement their family's household income. The work opportunity presented by *pallaqueo* is significant. In a survey conducted in Peru, 60 percent of women explained that they were living in the mountain mining town for the work (i.e., *pallaqueo*); 25 percent were there to be with their husbands; and 11 percent for both their husbands and their work. Peruvian *pallaqueo* work may be of a permanent nature, organized by groups who work in shifts, or it may be done by itinerant women who look for work opportunities on their own. In

116 Hentschel, Thomas, Hruschka, Felix, and Priester, Michael, *Global Report on Artisanal and Small-Scale Mining*, p. 21

117 Tallichet, Suzanne, Redlin, Meredith, and Harris, Rosalind P., *What's a Woman to do? Globalized Gender Inequality in Small-Scale Mining*, p. 209

118 Sintramineros de Segovia, Frontino Gold Mine, Antioquia / rra interview / 2010 / Bogotá D.C.

general, *pallaqueras* are new to the mining industry – in the same survey cited above, 58 percent had been involved in this work for 1 to 4 years and 22 percent from 4 to 8 years; on average, they worked 5 days per week and 7 hours per day.¹¹⁹ In Bolivia, “*palliris*” perform the same kind of informal, own account work.

The *chatarreras* of Colombia, the *pallequeras* of Peru and the *palliris* of Bolivia all suffer from occupational health and safety hazards, as well as the trade-related costs of processing and selling the small quantities of gold they are able to amass through their labor. A recent press account noted that:

Poor and sick with rheumatism, in Bolivia more than three thousand women search mountains of mine waste looking for rocks with some value. They are the *palliris*, or “the seekers” in Quechua language, in a country in which mining had its golden age centuries ago. A *Palliri* is a woman mining to help the economy of her home, scratching among the thousands of tons of rock debris in search of a few kilos of ore that can be sold to the same company that lets her access the mining camp.

In Bolivia, there are some 5000 miners working for the State and private mines, while more than 50.000 workers are members of the mining cooperatives in the country. Within these figures, a minority of women end in this type of sub-work because they want to help their husbands. In addition, many are *palliris* because their husbands are ill or died and they must feed sons and daughters. (...)The husband of Margarita is sick due to a mine accident that damaged his spine; she has replaced him for many years now to support him and their four children.

“I have worked in *desmontes* (piles of mine refuse) scavenging for lead, silver and agglomerates of zinc and stain, and I have also had to be in the interior of a mine by necessity” she explains. (...) Hammer is the most utilized tool by these women.(...) ¹²⁰

In addition to this kind of mine work, ¹²¹ women may also be found requesting permission to wash the sacks used by men to carry ore out of the tunnels built into the mountains for large-scale mining operations. Specifically, at the *Frontino Gold Mine* in Antioquia, women have been known to ask to recover trace amounts of valuable ore from the fibers of these sacks.¹²² The Superintendent of Commercial Societies in Colombia, who has been intervening and controlling the *Frontino Gold Mine* operation, has granted these women permission to continue in this activity.

While mining has been traditionally a male-oriented job, women are also entering industrial mining through operational jobs, especially now that mining is highly mechanized (and less demanding in terms of physical strength)¹²³ even though women’s presence in underground mining activities is

119 Please see: <http://mineriartesanalperu.pe/MUJERES.html>

120 Please see: <http://www.mundosolidario.org/mon.php?var=75> and <http://www.ens.org.co/fotos.htm?x=20151617>

121 Besides the gold *chatarreras* in large scale mining as raised in: Gustavo, Cundinamarca / rra interview / 2010 / Ubaté, apparently there is also work for women in separating carbon mines, separating coal from *peña* (rock) within medium scale mines the Cundiboyacense region of Colombia. It coincides with the “*coleros*” work mentioned in Marco Aurelio Hurtado / Gremivalle / rra interview / 2009 / Cali

122 Sintramineros de Segovia, Frontino Gold Mine, Antioquia / rra interview / 2010 / Bogotá D.C.

123 Please see, for Chile: http://www.paritarios.cl/actualidad_mujeres_manejan_camiones.htm and http://www.aminera.com/index.php?Itemid=5&id=10343&option=com_content&task=view; and for Argentina: <http://rse.larepublica.com.co/archivos/TENDENCIAS/2007-11-15/mujeres-conducen-pesados-camiones-mineros-con->

expressly prohibited under Colombian law. Article 4 of Decree 1335 of 1987 explicitly states that the presence of “women of all ages and men under 18 in underground work related to mining is forbidden.”¹²⁴ The only exception to this rule is women working in supervisory positions. It is worth noting, however, that women are now claiming their equal right to work. Some of them are, in fact, arguing that provisions such as Article 4 of Decree 1335 of 1987 for gender protection is actually detrimental for them, as it excludes and prevents them from entering into formal mining operations and, thus, relegates them to informal mine work ancillary to the formal mining sector.

3.4.2. WOMEN IN MEDIUM SCALE (SOLIDARITY BASED) MINING AND SMALL SCALE MINING

Although unverifiable without previously conducting a field census, it is still possible to say that, based on the information gathered and the understanding built through the research for this report, women family members of small scale mining operations or members of wives, sisters and daughters of miners’ cooperatives are directly engaged in their predominantly male family members’ work¹²⁵. In small-scale coal¹²⁶ or sand river mining operations,¹²⁷ women are very much involved in the mine work of the household, although their work is not formally considered labor, but part of their natural responsibility and duties of women to their families.¹²⁸ Consequently, cooking for a self-employed miner husband and his informal employees, or for the small miners’ cooperative seeking coal or river sand, will not be considered work, but familial duty. While this duty is usually compensated with some kind of tip, it does not receive the same quality or quantity of remuneration and protection as other mine work. These ancillary roles of Colombian women providing food, drink, tools and other services are common to women all over the world. The trade-related services provided to support the mine-workers are, in many cases, integral to the functionality of the mine work taking place in a small miner’s household or around the middle miners’ cooperative operation. Yet, because the work is designated as duty or “help,” and so deeply embedded in patriarchal culture, these women’s economic contribution to the mining value chain is completely disregarded and often remains unacknowledged in their households, their communities and by the State.¹²⁹

Of particular interest in this subsection is an organization that represents women’s stakes as ancillary actors in medium- and small-scale cooperative based mining. According to the Bolivian press, *CONACMIN*, the Confederation of House Women in the Mining Sector (*Confederación de Mujeres Amas de Casa del sector minero*) attended the tenth meeting of the RIMM held in Bolivia. The president of the Bolivian Network, Ms. Rosario Layme, from Potosí, expressed the need to recognize the role of

[suavidad_12481.php](#); Colombia : [www.eltiempo.com/.../mineros-y-aprendices-de-acerías-paz-del-rio-ya-cuentan-con-una-escuela_4846779-1](#); and [http://rse.larepublica.com.co/archivos/TENDENCIAS/2007-11-15/mujeres-conducen-pesados-camiones-mineros-con-suavidad_12481.php](#); Spain:

[http://www.elpais.com/articulo/reportajes/igualdad/mujer/llega/mina/elpepusocdmg/20060514elpdmgrep_6/Tes?print=1](#)

124 Decree 1335 of 1987. Article. In Chile a similar oriented provision was derogated in 1993.

125 Gobernación del Valle – Asunto Mineros / rra interview / 2009 / Cali; Marco Aurelio Hurtado/ Gremivalle / rra interview / 2010 / Cali; Noelio and family / rra interview / 2009 / Juanchito; Gustavo, Cundinamarca / rra interview / 2010 / Ubaté, Clara Hidrón, Fundación Oro Verde / rra interview / 2010 / Bogotá D.C

126 Gustavo, Cundinamarca / rra interview / 2010 / Ubaté

127 Marco Aurelio Hurtado and Edward Caicedo / Gremivalle / rra interview / 2009 / Cali

128 Noelio and family / rra interview / 2009 / Juanchito

129 In the mining inspections carried by the State to mine exploitations, an appraisal of the labor recognition of women’s work could be implemented.

women in the houses of miners and in the mines themselves, as well as their important contribution in mineral production and Bolivian GDP.¹³⁰

It is also worth noting that, as in Nicaragua, it is possible that women headed households in Colombian that are living in poverty will, in the absence of alternative labor opportunities, descend the deep tunnels to work informally in small-scale mining operations.¹³¹

3.4.3. WOMEN IN MICRO SCALE MINING

For the purposes of this report, artisanal mining is defined as non-industrial mining carried out primarily in micro-mining operations. Although not exclusively, in many cases the artisanal mining mode and techniques originate in an ancestral know-how linked to indigenous or afro-Colombian communities' livelihoods. Artisanal mining also takes place outside of these ethno-cultural parameters, sometimes around large and medium-scale mining operations, where mestizo, afro-Colombian or indigenous women are searching for some additional sources of income. Indeed, while mestizo mine working women (e.g., *chatarreras*) should be analyzed under the rubric of national and multi-national large scale mining operations for their inclusion into the value chain and development of their labor identity, the work they are engaged in, their access to the market and available legal opportunities and protections are the same as those available to an artisanal mine worker.

Artisanal mining requires little to no capital investment and provides ample opportunity for women with limited means, capacity and resources to find some additional source of income, even if this income is meager in comparison to the labor required and the work does not offer any social protections. Indeed, "the extent of women's involvement in small scale mining has been steadily increasing, and is inversely related to the size of the mining operation."¹³² Both the direct and indirect involvement of women in artisanal and small-scale mining (ASM) is believed to be on the rise, due to the escalation of rural poverty, the increase in opportunity in the artisanal sector as male miners leave to work at large scale mines, and the lack of other employment opportunities in other sectors. In Latin American countries, where there is limited social mobility,¹³³ it is not surprising to find that the continent's afro-descendant and indigenous people remain outsiders to mainstream development, including mining, and work as a matter of survival rather than for economic progress.

In Colombia's remote rural regions and where its rich mineral resources are found, large numbers of women miners work in artisanal mining, many of whom are afro-Colombian or indigenous.¹³⁴ Whether panning for gold and platinum, mining for emeralds as their *Muisca* ancestors or for salt as with the *wayuus indigenous* community in the Caribbean Guajira department¹³⁵, these women rely on their artisanal mining knowledge as a primary asset and survival skill for themselves and their families. Out of the several traditions and cultures of the women engaged in this work, Afro-Colombian women

130 Please see: <http://www.lapatriaenlinea.com/?nota=21218>

131 Please see: <http://www.radiolaprimerisima.com/noticias/7815>

132 Tallichet *et al.*, p. 206.

133 IDB outsiders quote on limited social mobility

134 Please see photos in: <http://acomunidad.elpais.com/latin-america/2009/9/2/las-mujeres-mineras-colombia->

135 Paradoxically the Salinas or salt mines in *Manauare* are artisanal mining done mostly by women but in a large scale operation tailored and driven by the State. Under the new Miner Colombia vision in which the State cannot directly develop the mining industry but only concession it through third parties, the State is willing to terminate the agreement. The *Wayuus* are currently contesting this decision in front of the Courts.

living in poverty represent the majority of women artisanal miners in Colombia, most notably in Chocó, the poorest department of Colombia.

Afro-Colombian women work in the same or slightly higher proportion as afro-Colombian men in many different livelihoods, from fishing, industrial mining, and timber exploitation or in urban centers. When panning for gold and platinum in or near the Chocó Rivers,¹³⁶ these women work in family units and are usually accompanied by men family members and their children.

Already, around the year 1890, a scholar described that:

“(...) along the rivers (...) crowds of workers with pan in hand...go to the middle of the river and wash out the sand (...) despite the current crashing in vain against their back. What is most particular about this is that although this is one of the hardest works in mining, it has lagged as a tacit agreement to be generally left to women. The robust and courageous black Antioquia women are able to compete successfully in this and other exercises, with more than one man to whom nature has not given very strong constitution.”

Generally, gold panning consists of bending over, filling and then spinning a pan with sand and some water so that lighter material will be flattened and pushed towards the outer border of the pan, while the heavier gold and platinum nuggets remain in its center. This mining method is carried out in large part by Afro-Colombian women,¹³⁷ who will work to amass gold and platinum from river beds while carrying the weight of their babies tied to their backs.¹³⁸

Although women artisanal miners are in great need of organization, the characteristics of artisanal mining makes this difficult and efforts to organize artisanal and small scale miners are nascent at best and nonexistent at worst. Despite this gap in organizational capacity for artisanal mining, there are international networks of mine workers that do provide some forum for these miners. Among these networks is the International Women in Mining Network (*Red Internacional de Mujeres y Minería-RIMM*), which supports the struggles of indigenous communities, women workers and activists in the mining sector of member countries. According to a RIMM assessment, the only labor space offered to women in the mining sector is in informal mining, where legislative protections do not exist and organizational efforts are near impossible, especially for women in artisanal mining who may be working as part of informal family operations. To this end, and to protect women mine workers from further exposure to harmful toxins, disease, exploitation, and vulnerability, RIMM supports the rights demands that: (1) mining companies immediately cease the marginalization of women mine workers and end contract labor for women; (2) women mine workers be granted formal employment opportunities, with labor protections to safeguard their dignity from exploitation and special protective equipment especially designed for women; (3) equal pay for equal work and a safe, healthy work environment (4) women mine workers be granted access to education opportunities on par with men

136 Clara Hidrón, Fundación Oro Verde / rra interview / 2010 / Bogotá D.C ; Marco Aurelio Hurtado and Edward Caicedo / Gremiville / rra interview / 2009 / Cali; Gustavo, Cundinamarca / rra interview / 2010 / Ubaté; Luz di Nora / rra interview / 2010 / Skype ; Senator Odin Sanchez / rra interview / 2009 / Bogotá D.C; Clara Hidrón, Fundación Oro Verde / rra interview / 2010 / Bogotá D.C Senator Jorge Robledo's Staff / rra interview / 2009 / Bogotá D.C.; Political and Civil Leaders of Tadó, Chocó / rra interview / 2010 / Bogotá D.C.

137 Luz di Nora / rra interview / 2010 / Skype

138 “(...) *Simón, el viejo, con sus 87 bien vividos, había sido minero en el río Nequí. Mazamorero, quizá el único, porque ahora el mazamorreo o el barequeo es asunto de mujeres.*(...)” http://www.soho.com.co/wf_InfoArticulo.aspx?IdArt=8067 and <http://www.imcportal.com/contenido.php?option=shownews&newsid=4203&render=page>

in mine engineering and related fields; (5) prohibitions on child labor in all mining activities be enacted and enforced, recognizing the link between economic insecurity and child labor; and (6) women mine workers be granted the right to association and organization and adequate maternity and child care benefits.

RIMM also emphasizes the experience of indigenous people in mining and demands that governments, the mining industry, international financial institutions and existing international laws recognize indigenous people's citizenship and the individual and collective rights of indigenous people and women to self-determination, to ownership and control over their lands, natural resources and territories. RIMM demands that their rights to the land they live on not be compromised by public or private mining activities. RIMM specifically demands that artisanal, traditional and community mining – where indigenous women are more prominent – receive economic support, development facilities, technological support, safety measures, training and market linkages.

What remains unaddressed, however, is the specific situation of violence plaguing many Colombian women living and working in mining towns and villages in the most violent regions of the country. In these zones, indigenous and afro-Colombian rural inhabitants confront combat from the extreme left armed illegal groups, extreme right armed illegal groups, and transnational drug crime driven by illicit coca crop production, as well as the tensions and conflicts discussed above relating to aggressive mineral exploration and exploitation carried out by large and medium national and multi-national corporations. The layers of conflict, violence, privatization, patriarchy, and exclusion, combined with the State's utter absence and enforcement of law, have multiplicative effects on the women working in artisanal mining. As recognized in the Declaration of the Departmental Encounter of Women for Peace, Interethnic Forum "Chocó Solidarity"¹³⁹:

"(...) exclusion, discrimination and marginalization of women in public spaces, and private organizations, the different forms of violence against women (...) by all armed groups, legal and illegal, the deepening and expanding forms of domestic violence(...) influenced by (...) those involved in armed conflict, the practices of discrimination against indigenous people and particularly indigenous women, the existence of government programs(...) which do not include a differential approach to gender, the absence of public policies that protect women's rights, the suicide and suicide attempts of the indigenous girls, the mining practices that pollute rivers and affect the health of the women, men, girls and boys...the sexual abuse of girls by members of mining companies...[all] demand respect for women.... to participate in training, mobilization, and construction of better life and peace...."

3.5. CHILDREN IN MINE WORK

In addition to representing free unpaid work and being in great "supply", poor children are also in demand for mine work because of their vulnerability and size. Ideal for human traffickers and convenient for mining companies in violation of human rights and mining regulation, the small thin bodies of children living in poverty are very useful for accessing tight spaces in mines and quarries. Most of the attention on illegal child labor in mining focuses on small and micro-scale mining or artisanal mining. The discussion about child labor in small-scale mining started some years ago,

139 Please see : <http://www.aecid.org.co/2008/uploads/declaracionmujereschoco.pdf> and http://www.fischoco.org/noticias_content.html

instigated by international press reports about child labor in Colombian coal mines.¹⁴⁰ Despite regional and country-specific variations, there are certain conditions of an artisanal mining mode that, chiefly, although not exclusively, give rise to child labor in the mining sector:

The lack or limited use of mechanization and the use of physically demanding work, for which children are employed;

Low occupational safety and health standards, accompanied with high safety and health risks, which pose even greater risks to children in mining;

Low qualifications for personnel at all operational levels, allowing for employers, parents and family members to use children to perform needed work;

Low-recovery value and the inefficiency of exploitation and processing the recovered minerals, forcing families to employ their children to save on operational costs;

Mining in regions that are not exploitable by mechanized mining, in part because of their marginal or small anticipated recovery - the low return to the investment will often mean that the tunnels to access the mineral resources will be so small that only children may fit through them;

Low productivity relative to anticipated return, thus employing children saves on operational costs;

Low income and salaries, sometimes less than \$US 1 per family member per day, convincing family members to increase the household income by employing their children;

Periodic rather than continuous operations, contributing to the migration of families and the pulling of children out of schools and social networks;

Lack of social security and health care benefits, which, in the case of accident or injury, may result in adult incapacitation, forcing children to work in their stead;

Insufficient knowledge or concern about environmental hazards common in mining zones, exposing children working in mines and living in mining camps to environmental, social and health hazards; and,

Chronic lack of working and investment capital, compensated by using unskilled workers, including children.

Another consideration is that, as with urban waste pickers, poverty-trapped artisanal mine workers are usually self-employed or own account workers. The absence of child-care services or formal educational opportunities explains in part why children accompany their parents and family members to the workplace.¹⁴¹ While it is regrettable that these children will consequently become involved in

140 *Global report on ASM*, p. 23

141 It is not that there are no schools but that the schools and libraries if so, are many hours far away to go walking alone or for the working parents to take them instead of working for breadwinning. In other occasions the regions are so far or set in conflict zones that if there might be a building but no teachers. Precisely on the problem of child care and education public policies with lack or weak reach out capacity to rural poverty trapped constituents, a Mexican voice raised within the global national consultations exercise of the Commission on the Legal Empowerment of the Poor explained that there is "an anecdote illustrating the relationship between basic skills and poverty traps.[In an interview] to Xochitl Galvez, an architect of Indigenous origin, when she received an international award for her design of intelligent buildings. The interviewer praised saying it must be very difficult for a woman and in particular for an indigenous woman arriving to earn a doctorate. The answer of the interview was enlightening. She said that no, that was really hard for her was having to study

their parents' mining activities, this situation is one that is in many ways imposed upon poverty-trapped families who cannot access greater opportunities or protections for themselves or their children.¹⁴²

According to the studies assessed for this report, children may begin working in mine work as early at the age of three, when they may begin washing gold; from six years on they can be seen breaking rocks with hammers or washing ore. Children as young as nine can be observed underground, and at twelve, boys are widespread working underground in many countries, doing the same work than adults. In the Cerro Rico in Potosi, Bolivia half of the total amount of 8000 miners is children and adolescents.¹⁴³ And, in general¹⁴⁴, the average time dedicated to mine work increases as children age. In Colombia, children between the ages of five and seven work about 11.6 hours per week; this increases to 21.7 hours per week for adolescents over fourteen years of age.¹⁴⁵ Further, many children working in mining also have responsibilities at home, bringing the total number of hours dedicated to mine and house work over more than thirty hours per week.¹⁴⁶ This workload will have detrimental effects on their performance in school, if they are fortunate enough to be enrolled.



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In addition to the variation by age, the work that children will be doing in mining will also vary according to the kind of mining activity that is taking place. In underground mining, the only mining where the population of children will be almost exclusively boys,¹⁴⁷ they may be found doing any of the following activities: ore extraction (by hammer and chisel, pick and shovel, etc.), assisting in drilling, hauling ore, pushing carts, cleaning galleries, and piling mined ore. In open case mines, both boys and girls may be found digging pits, removing excess materials and pushing carts. In alluvial/river mining, they will be found digging for sediment, assisting in diving for sediment, sieving ore and sediment, washing and drying collected minerals, and pushing carts and transporting collected sediment. In mineral concentration and stone crushing, they may be involved in piling ore and crushed stones, milling ore, carrying stones from the mines or rivers, crushing rocks, picking out gemstones, washing gold, amalgamating gold, or fetching water for processing the ore. In clay extraction and brick making,

in primary school because he had to walk several hours to the village where the school was found." In a very magic realist approach to solving problems, the *biblioburro* or "*donkbrary*" is the way a Colombian peasant teacher found to take books closer to the rural poor. <http://www.nytimes.com/2008/10/20/world/americas/20iht-20burro.17088328.html>. On the issue of higher wages for parents in order to reduce child labor a suggested reading is "the economics of child labor" by Kaushik Basu and Pham Hoang Van and debates that followed there on.

142 It is also worth noting that there are differences on child-raising in the ethno-cultural communities where children are participating in artisanal mining (see ILO extensive research on this topic). In part because of limited educational opportunities, in part because of a history of poverty and exclusion generation upon generation, it is not surprising to find parents training their children as apprentices in their own trades, even if this is contrary to the norms espoused in contemporary international and domestic norms relating to human and children's' rights.

143 *Global report on ASM*, p. 23

144 The actual number of children working in the mining areas is only established for small and stable mining centers. In most cases figures on the children employed were only indicative or based upon estimates.

145 ILO/IPEC - ILO/SECTOR *Thematic Evaluation on Child Labour in Small-Scale Mining & Quarrying*, May 2004

146 *Ibid*

147 *Ibid*; Other than in underground mining, the proportions of boys and girls in mining in Colombia is virtually equal.

they may be drying green bricks, turning bricks so they dry evenly, stacking bricks, transporting green and fired bricks, and stacking and unloading kilns. And, in general, in a mining environment and in the household, children may be involved in preparing and providing food for miners, washing clothes, selling food to miners, fetching drinking water and food, working in bars and restaurants serving the mining community, fetching fire wood, and forced prostitution.

Unfortunately, because there is little governmental interest and attention with regard to small and artisanal mining, there is little reliable data on the extent of child labor and, more importantly, accidents and injuries that these young workers experience. Children themselves regard mining to be a very difficult, risky and frightening occupation¹⁴⁸, but wherever poverty and mining coincide, children will be present and active.

3.6. HEALTH AND SOCIAL PROTECTION

Mining is one of the most dangerous activities that men, women, and children engage in for a living. Artisanal mining in particular, which, due to the miners' scarce resources is performed without modern, standardized equipment,¹⁴⁹ let alone adequate safety equipment, results in several ergonomic illnesses due to the intense force and effort expended. The *chattarreras'* continuous bending over to break ore by smashing her hands with the hammer that accompanies her, the alluvial gold miners' skin disease brought on by mercury contamination in river water, the lung and respiratory damage due to long hours spent diving in rivers are all common to these informal mine workers. They are also at constant risk death by miscalculating land and resource capacity in removal, wrongly wired explosives, or inhaling toxic gases underground.

Despite these health risks, Colombian artisanal miners working mainly in micro-scale mining operations fall outside the traditional employer-employee relationship that would otherwise ensure them access to the contributory scheme and grant them health, occupational accident and pensions protection. Artisanal mine workers may qualify for the subsidized health care program, which, although it is not as good quality as the contributory regime, does provide some degree of social protection.¹⁵⁰ As with the urban poor, access to the subsidized health system is contingent upon a formal poverty assessment and SISBEN certification and requires a SISBEN beneficiary ID card. While rural artisanal mine workers may obtain these SISBEN cards and certifications, it is difficult to discern their ability to use the health coverage they enjoy, particularly if many of them fear that claiming any

148 Please see: http://www.ilo.org/public/libdoc/ilo/2004/104B09_399_engl.pdf

149 Re. Gold panning. It is worth noting that if equipments are to be introduced to make work less risky and hard, the legal presumption adopted by the Code is that the person is no longer mining for subsistence and thus under a tolerance permit but is now some kind of industrialized miner abusing of the tolerance permit and is illegal as it should be thus under a concession contract. If you don't break your column then you are not artisanal. The house vacuum cleaner machine used by an old Afro-Colombian miner for underwater sand extraction from the river bed instead of diving up and down carrying sand, would make him then an industrial miner? *"También minero: tuvo una dragueta construida con un motor de aspiradora. Y fue buzo también, lo que equivale a decir "dragas humanas": Ellos se meten en los ríos con un pitillito en la boca conectado al aire y una aspiradora en sus manos, escarban en la profundidad del río y ponen la aspiradora. Lo que se succiona llega a una canoa en donde lavan a ver qué queda. Pero los buzos se entierran y se entierran: hacen profundos huecos bajo el agua y, en ocasiones, no salen nunca más. Se les viene la tierra encima en esas cuevas subacuáticas y punto"* http://www.soho.com.co/wf_InfoArticulo.aspx?IdArt=8067.

150 However the Colombian Constitutional Court ordered recently in ruling T-760-08 the unification of the subsidized and contributive health systems. Read excerpts of the Court's translated decision in <http://www.cmi.no/file/?964>

legal entitlements from the State would make them more vulnerable to being branded as illegal mine workers.

3.7. ACCESS TO MINE WORK

Rural Colombians rely on access to nature for the lives, work and livelihoods. And, Colombia's three Andean mountain ranges, vast waterways and systems, and rich natural and mineral resources continue to support the lives and livelihoods of those people and communities. Indigenous, afro-Colombian and mestizo communities cut timber, collect fruits, fish, farm and extract and collect minerals like gold, clays, salts and stones. Mineral extraction is not only an industrial activity, it is also an artisanal activity supporting a trade on which many of the people living in Colombia's rural zones rely. These individuals work on small-scale and micro-mining operations as either self-employed or own account miners.

Certain minerals – most notably alluvial gold and platinum in rural river beds and shores, salt mining and other sand river mining – offer work opportunities for people living in poverty whose only mining skills come from their artisanal knowledge and manual labor. These miners work primarily in micro-mining operations (authors' term).¹⁵¹ Mining in or near water bodies grants these workers access to sand to be sold to the construction industry, marine salt for the food industry and for export, and gold and platinum for intermediaries who sell to industrial buyers or export to the international commodities market. Since the returns to this labor are relatively small, this work is primarily done through own account work or self-employment, with the number of hands and bodies available being the only tools of the trade. In contrast, hard-rock surface mining and underground mining (for coal, salt and gold) is nearly impossible without the appropriate machinery – to clear the area, open tunnels for access, and perform the mining extraction and collection.

It is important to note that, for the purposes of understanding the legal conditions of mine workers in poverty, a distinction must be made between the size and the mechanisms or tools of mining operations. To indicate the size or scale of operations, the authors use the categories of large, medium and small-scale mining, and introduce the notion of micro-mining operations to describe minimal extractive operations that are performed by individuals or micro-work units. When describing the ways to extract minerals and resources, the authors will only refer to two mechanisms – (1) industrial mining, where the work is performed as a set of operations of an industry to obtain, transform, and transport one or more natural products, and (2) artisanal mining, where the work is performed with the understanding of art as the virtue, disposition and ability to do something.¹⁵² Mining, in large, medium, small or micro scale operations has the potential to pollute the air, contaminate the rivers, degrade the flora and the fauna, and, by so doing, negatively impact the environment, and this impact itself corresponds to the size or scale of the mining operation.

151 This doesn't mean that because the ease of access favors the poverty-trapped, industrial mining for alluvial gold, platinum sand or salt will not happen, it is quite the contrary. Colluvial extraction which is connected or fingered-from alluvial deposits in rivers is also of easy access and thus a good work option for the mine workers in poverty with little or no investment capital. For instance, in the Chocó Biogeographic region, gold is extracted both from land and water: there is *minería de agua corrida* (running water mining) and *minería de zambullidero* (in-water mining) which includes plunging into the river.

152 Definition taken from the *Real Academia de la Lengua*

In terms of the policy framework impacting Colombian mine workers in poverty, it is important to recall that land rights are not necessary to pursue and carry out mine work. Article 332 of the Colombian constitution retains all surface and sub-surface non-renewable and natural resource rights for the State. As the sole mineral owner, it is only by the will of the Colombian State that anyone – or any entity – may enter and develop mine work.

The legal provisions governing mine work in any scale or mode, and applicable to ancestral Afro-descendant and indigenous mine workers, are cited below. These grant formal access to State-owned minerals through concession contracts initiated by private or public actors, and, exceptionally, by the authority of the State.

3.7.1. THE ORDINARY MINING CONCESSION: ACCESSING MINERALS THROUGH A CONTRACT FOR A MINING TITLE

Chapter 2 of Law 685 of 2001 (the Mining Code) regulates the right to explore and exploit mineral resources through the following provisions and subsequent articles.

Article 14. Mining title¹⁵³. From the coming into force of this Code, it can only be constituted, declared or proved the right to explore and exploit the mines of State's ownership by means of a contract for mining concession, duly awarded and registered at the National Mining Register.

The rights coming from the exploration licenses exploitation permits or licenses, concession contracts and contracts celebrated on mining contribution areas, prevailing when this Code enters into effect, maintain their validity by disposition of this Article. Also the individual, subjective and concrete legal situations related to the private mining ownership, prevailing before this statute comes in force.

Article 15. Nature of the Rights of the Beneficiary¹⁵⁴ The concession contract and all other titles emanating from the State which are referred to in the above Article, do not transfer to the beneficiary the right of ownership over minerals "in situ" but establish, in an exclusive and temporal manner within the area granted, the existence of minerals in a quantity and quality that can be usable, and take possession by means of its extraction or capture of them, and impose on third parties' properties with necessary easements for an efficient exercise of such activities.

Article 16. Validity of the Proposal¹⁵⁵ The first application or proposal for a concession, while in process, does not confer in itself, before the State, the right to celebrate a concession contract. With regard to

153 **Artículo 14. Título minero.** A partir de la vigencia de este Código, únicamente se podrá constituir, declarar y probar el derecho a explorar y explotar minas de propiedad estatal, mediante el contrato de concesión minera, debidamente otorgado e inscrito en el Registro Minero Nacional. Lo dispuesto en el presente artículo deja a salvo los derechos provenientes de las licencias de exploración, permisos o licencias de explotación, contratos de explotación y contratos celebrados sobre áreas de aporte, vigentes al entrar a regir este Código. Igualmente quedan a salvo las situaciones jurídicas individuales, subjetivas y concretas provenientes de títulos de propiedad privada de minas perfeccionadas antes de la vigencia del presente estatuto.

154 **Artículo 15. Naturaleza del derecho del beneficiario.** El contrato de concesión y los demás títulos emanados del Estado de que trata el artículo anterior, no transfieren al beneficiario un derecho de propiedad de los minerales "in situ" sino el de establecer, en forma exclusiva y temporal dentro del área otorgada, la existencia de minerales en cantidad y calidad aprovechables, a apropiárselos mediante su extracción o captación y a gravar los predios de terceros con las servidumbres necesarias para el ejercicio eficiente de dichas actividades.

155 **Artículo 16. Validez de la propuesta.** La primera solicitud o propuesta de concesión, mientras se halle en trámite, no confiere, por sí sola, frente al Estado, derecho a la celebración del contrato de concesión. Frente a otras solicitudes o frente a terceros, sólo confiere al interesado, un derecho de prelación o preferencia para obtener dicha concesión si reúne para el efecto, los requisitos legales.

other proposals or third parties, it only grants to the interested party a right in time or preference to obtain such concession, if it complies for that effect, with all legal requirements.

Article 17. Legal Capacity.¹⁵⁶ The legal capacity for submitting a proposal for getting a mining concession and to celebrate the respective contract is regulated by State Contracting general provisions. If such capacity refers to legal persons, public or private, it is necessary that they expressly and specifically have included within its object mining exploration and exploitation activities.

When joint ventures are granted concessions, they shall incorporate as a society Company, with the same share distribution as that of the submitted proposal.

Consortiums may also present proposals and celebrate concession contracts, in which case their members will respond to liabilities *in solidum*.

Article 18. Foreigners¹⁵⁷ The natural and legal foreign persons acting as proponents or contractors of mining concessions will have the same rights and obligations as Colombian nationals. The mining and environmental authorities cannot, in their field of competence, request from them any additional or different requirements, conditions and formalities, besides those expressly established in this Code.

Article 251. National Human Resource¹⁵⁸ The title holders of concession contracts will prefer the national individual persons in the execution of studies, mining and environmental works and installations, as long as such people are qualified workers. These obligations will cover also people hired by independent contractors. The labor authorities, as well as the Mayors, should restrain minors from working in mining labors and works, as is stated in the dispositions on this matter.

(It is worth noting that, following article 9 of the recent amending Law 1382 of 2010, Article 112 of the Mining Code shall now include a new cause for declaring the lapse of the concession contract (...) (k) [w]hen companies or natural persons in the exercise of mining activities, hire persons younger than 18 years old to realize open or underground mining labors.¹⁵⁹)

Article 252. Use of National Goods¹⁶⁰ In the execution of mining projects, the concessionaires will prefer in its acquisitions of goods and services those of national industry, as long as they offer similar conditions in quality as well as in opportunity and security in their deliveries.

156 **Artículo 17. Capacidad legal.** La capacidad legal para formular propuesta de concesión minera y para celebrar el correspondiente contrato, se regula por las disposiciones generales sobre contratación estatal. Dicha capacidad, si se refiere a personas jurídicas, públicas o privadas, requiere que en su objeto se hallen incluidas, expresa y específicamente, la exploración y explotación mineras. Cuando Uniones Temporales reciban concesiones deberán constituirse en figura societaria, con la misma participación que se derive de la propuesta presentada. También podrán presentar propuestas y celebrar contratos de concesión los consorcios, caso en el cual sus integrantes responderán solidariamente de las obligaciones consiguientes.

157 **Artículo 18. Personas extranjeras.** Las personas naturales y jurídicas extranjeras, como proponentes o contratistas de concesiones mineras, tendrán los mismos derechos y obligaciones que los nacionales colombianos. Las autoridades minera y ambiental no podrán, en el ámbito de sus competencias, exigirles requisitos, condiciones y formalidades adicionales o diferentes, salvo las expresamente señaladas en este Código.

158 **Artículo 251. Recurso humano nacional.** Los titulares de contratos de concesión, preferirán a personas naturales nacionales, en la ejecución de estudios, obras y trabajos mineros y ambientales siempre que dichas personas tengan la calificación laboral requerida. Esta obligación cobijará igualmente al personal vinculado por contratistas independientes. Las autoridades laborales así como los alcaldes deberán impedir el trabajo de menores de edad en los trabajos y obras de la minería, tal como lo prevén las disposiciones sobre la materia.

159 (...) **(k)** Cuando empresas o personas naturales en ejercicio de actividades mineras, contraten a personas menores de 18 años para desempeñarse en labores de minería tanto de cielo abierto como subterráneas

160 **Artículo 252. Utilización de Bienes Nacionales.** En la ejecución de proyectos mineros, los concesionarios preferirán en

In the acquisitions, which are referred in this Article, due segregation will take place in order to facilitate the concurrence of the national industry.

Article 253. Participation of the National Workers.¹⁶¹ Subject to the obligations indicated in Articles 74 and 75 of the Substantive Code of Labor, the mining concessionaires should pay the Colombian staff, as a whole, not less than seventy percent (70%) of the total value of payroll of qualified or of skilled personnel, of upper management or senior level staff, and no less than eighty percent (80%) of the value of payroll of the subordinates.

The previous concept of the mining authority, the Ministry of Labor and Social Security, may authorize, at the request of the interested party, that the maximum time limit permitted may be surpassed, for the time strictly necessary to give a suitable training to Colombian personnel.

For the granting of this authorization it will be necessary that the interested party agree with the Ministry in contributing or participating in specialized training of Colombian personnel.

Article 254. Local Labor Force.¹⁶² In the mining and environmental works of the mining concessionaire, once the interested party has been heard, the mining authority will appoint the minimum percentages of workers originated from the respective region and domiciled in the area of influence of the projects that should be hired. Periodically, these percentages will be checked.

Article 256. Mining and Community Works and Installations.¹⁶³ The instructions and installations different from those required for the extracting operations and ore storage may be located outside the area of the contract. The works the concessionaire carries out in the municipality or municipalities

sus adquisiciones de bienes y servicios a la industria nacional siempre que los mismos ofrezcan similares condiciones tanto en la calidad como en la oportunidad y seguridad de las entregas. Se estimará que hay igualdad de condiciones para la industria nacional en cuanto al precio, si el de los bienes de producción nacional no excede al de los de producción extranjera en un quince por ciento (15%). En las adquisiciones de que trata este artículo se procederá a efectuar la debida desagregación que facilite la concurrencia de la industria nacional.

¹⁶¹ **Artículo 253. Participación de trabajadores nacionales.** *Sin perjuicio de las obligaciones señaladas en los artículos 74 y 75 del Código Sustantivo del Trabajo, los concesionarios de minas deberán pagar al personal colombiano en conjunto, no menos del setenta por ciento (70%) del valor total de la nómina del personal calificado o de especialistas, de dirección o confianza, y no menos del ochenta por ciento (80%) del valor de la nómina de trabajadores ordinarios. El Ministerio del Trabajo y Seguridad Social, oído el concepto de la autoridad minera, podrá autorizar, a solicitud del interesado y por el tiempo estrictamente indispensable para la preparación idónea de personal colombiano, se sobrepasen los límites máximos permitidos. Para el otorgamiento de esta autorización será necesario que dicho interesado convenga con el Ministerio en contribuir o participar en la enseñanza especializada de personal colombiano.*

¹⁶² **Artículo 254. Mano de obra regional.** *En los trabajos mineros y ambientales del concesionario de minas la autoridad minera, oídos los interesados, señalará los porcentajes mínimos de trabajadores oriundos de la respectiva región y domiciliados en el área de influencia de los proyectos que deberán ser contratados. Periódicamente estos porcentajes serán revisables.*

¹⁶³ **Artículo 256. Obras e instalaciones mineras y comunitarias.** *Las construcciones e instalaciones distintas a las requeridas para la operación de extracción o captación de los minerales, podrán estar ubicadas fuera del área del contrato. Igualmente podrán ubicarse fuera del área del contrato las obras destinadas preferencialmente a la salud, la educación y el saneamiento básico, que el concesionario realice en el municipio o municipios donde se localice el proyecto minero durante el período de construcción y montaje. La naturaleza y características de las obras de beneficio común antes mencionadas se deberán acordar entre el concesionario y las autoridades municipales, quedando entendido que la cuantía de las inversiones requeridas, que no podrá exceder del cinco por ciento (5%) de la inversión en la infraestructura destinada a la extracción de minerales, se imputará como anticipo o deducción de los impuestos municipales a cargo del concesionario, previa autorización de las entidades competentes. La realización de la inversión en las obras de beneficio común de que trata este artículo será condición para disfrutar, por parte del concesionario, de la deducción por agotamiento contemplada en el artículo 234 de este Código.*

where the mining project is taking place during the period of construction and building and that are mainly destined to welfare, education and basic sanitation can also be located outside the area of the contract.

The nature and characteristics of the works of common benefit previously mentioned, will be agreed upon between the concessionaire and the municipal authorities, being understood that the amount of the investments required, which cannot exceed to five percent (5%) of the investment in infrastructure destined to the extraction of minerals, will be considered as a prepayment or deduction of the municipal taxes on account of the concessionaire, previous authorization of the competent agencies.

As simple as it may seem to establish that the only way to access mining is through a concession contract, it is worth noting that the process of requesting and acquiring such a contract in the practice of law and in the reality on the ground is neither easy nor inexpensive. All interviewees agreed that it such condition is, *de facto*, unattainable, for Colombians living in poverty, especially for those who have been ancestrally or traditionally mining in the informal economy, that it is to say that the concession contract as a title-granting modality is an insurmountable barrier to mine workers without capital resources. For many workers, this is the legally sophisticated way of ending all small and micro level mine work and mine culture in Colombia and reserving it only for large-scale national and multinational investment operations. For the State to act only in its capacity as mine proprietor and investor, and not in balance with its role as the rule-maker for the common good, is a breach of its authority, particularly in a State that is subject to a Social Rule of Law by virtue of its Political Constitution.

Overall, and among many other prerequisites, formalities, and conditions to be fulfilled in person and over the internet, a non-investor or poor mine worker willing to get a concession contract in order to legally work in mineral exploration and exploitation, must perform the following tasks.¹⁶⁴ First, assuming that the mine worker or the ethno-cultural mine worker community has already assessed his, her or their capacity to pay the price of surface rent per hectare of exploration, it is necessary to also hire professionals (topographers, mining engineers, etc.) capable of establishing the exact coordinates for the proposed mineral extraction. An inexpensive professional service will not be an option for the concession requester, because if the coordinates are incorrect or lacking in any way then they will have not only lost the opportunity of the concession contract they applied for and need to amend, but they will also have disclosed the positioning of the mineral deposit they were interested in exploiting. Considering that the principle of “first in time, first in right” applies to all mining in Colombia, to pay high quality professional services is an important investment, especially for the powerless poverty trapped trying to land a mining concession.¹⁶⁵ Second, after having drafted exploration blueprints, and setting a cost and time schedule for each mining phase, the mine worker/community must, if willing, request the concession remotely through internet and purchase a personal identification number (PIN) for 597.400 pesos (\$USD 300) from a specific bank (*Banco de Bogota*). If personal orientation is sought for preparing the solicitation, the concession requestor might need to travel to one of the seven regional Ingeominas offices in the country, not one of which is in the Chocó region. (This is an impressive paradox considering that Chocó is both the poorest department and one of the richest mineral deposits in the world.) If the mine worker person, company or community requesting the

164 Ingeominas Cali / rra phone interview / 2010 / Cali; Gustavo, Cundinamarca / rra interview / 2010 / Ubaté; Political and Civil Leaders of Tadó, Chocó / rra interview / 2010 / Bogotá D.C.

165 Apparently the corruption affecting mine workers living in poverty is intense, vast, and not documented. The mineral deposit information seems to be not only abusive and corrupt but exploitative as much as the power of controlling the queue on which the first in time, first in rights mining principle pivots.

concession cannot afford these travel expenses, they will “invest” in the services of yet another professional to take care of orienting and navigating clients through all the complex and diverse procedures, conditions, formalities and technicalities needed to become a legal and formal miner, one who is a formal right holder of a mining title.¹⁶⁶

Third, after having established these parameters and conditions, they must be relayed via internet, with access granted by the PIN number acquired earlier (a PDF handbook for facilitating the internet registration of the concession proposal is offered by the government¹⁶⁷). Three days later, a printed copy of the internet submission for a concession contract proposal must be presented personally, along with the maps and blueprints, signed by the technical professional author and accompanied by a photocopy of his professional license, to the central or regional Ingeominas office. Under Law 1382 of 2010, this concession request will be decided within 180 days,¹⁶⁸ a considerable improvement in the 5-10 years that the average time has been for effectively receiving a mining concession title.¹⁶⁹

If the concession is not rejected for reasons established in article 274 that, since law 1382 of 2010, also include a lack of evidence of having paid the first year of the surface rents in advance¹⁷⁰, and the proposal is accepted, this will indicate that the concession does not overlap with an indigenous or afro-Colombian mining zone, or, if it does fall in an ethno-cultural mining zone, that the community has decided to not use its “first in right” preferential mining prerogative.

Then, with an accepted concession proposal, it will now be necessary to initiate the request for an environmental license, which has its own sets of difficult conditions to fulfill, especially for those living in poverty who cannot afford unnecessary time or expense. The license must be presented to the mining authority, along with the definitive work and mining management plan, to finally begin the exploitation phase of the mining operation.

Article 84. Works and installations Program¹⁷¹. As a result of the studies and works of exploration, before the overdue date the concessionaire will present for approval of the granting authority or the

166 In the case of Gustavo, he had to cooperate and join efforts with other fellow mine workers to gather the 300.000.000 pesos (150.000 USD) that were necessary to get a formal mining concession contract, a title for coal mining.

167 Please see: http://www.ingeominas.gov.co/component/option,com_docman/task,doc_view/gid,6731/

168 Law 1382 of 2010, Article 1, second paragraph

169 Marco Aurelio Hurtado and Edward Caicedo / Gremivalle / rra interview / 2009 / Cali; Noelio and family / rra interview / 2009 / Juanchito

170 Artículo 274. Modificado por la Ley 1382 de 2010, Artículo 20. **Rechazo de la propuesta.** La propuesta será rechazada en los siguientes casos: 1. Si el área pedida en su totalidad se hallare ubicada en los lugares y zonas señaladas en el artículo 34 de este Código siempre que no hubiere obtenido las autorizaciones y conceptos que la norma exige. 2. Si se superpone totalmente a propuestas o contratos anteriores. 3. Si no cumple con la presentación de todos los requisitos establecidos en el artículo 271 del presente Código. 4. Si no se cumple el requerimiento de subsanar las deficiencias de la propuesta. 5. Si no se acredita el pago de la primera anualidad del canon superficiario.

171 Artículo 84. Programa de trabajos y obras. Como resultado de los estudios y trabajos de exploración, el concesionario, antes del vencimiento definitivo de este período, presentará para la aprobación de la autoridad concedente o el auditor, el Programa de Trabajos y Obras de Explotación que se anexará al contrato como parte de las obligaciones. Este programa deberá contener los siguientes elementos y documentos: 1. Delimitación definitiva del área de explotación. 2. Mapa topográfico de dicha área. 3. Detallada información cartográfica del área y, si se tratare de minería marina especificaciones batimétricas. 4. Ubicación, cálculo y características de las reservas que habrán de ser explotadas en desarrollo del proyecto. 5. Descripción y localización de las instalaciones y obras de minería, depósito de minerales, beneficio y transporte y, si es del caso, de transformación. 6. Plan Minero de Explotación, que incluirá la indicación de las guías técnicas que serán utilizadas. 7. Plan de Obras de Recuperación geomorfológica paisajística y forestal del sistema alterado. 8. Escala y duración de la producción esperada. 9. Características físicas y químicas de los minerales por explotarse. 10. Descripción y localización de las

auditor, the Program of Works and Installations of exploitation, which should be attached to the contract as part of the obligations. This Plan should contain the following elements and documents:

Definite delimitation of the area of exploitation.

Topographical map of the mentioned area.

Detailed cartographic information of the area and, when if it deals with marine mining, the bathymetrical specifications.

Location, estimate and characteristics of the reserves that should be exploited in development of the project.

Description and localization of the installations and mining works, mineral storage, beneficiation and transportation, and if it might be the case, the transformation facilities.

Mining Plan of exploitation, which will include indication of the technical guides that will be used.

Work's plan for the geomorphologic recuperation, landscaping and re-vegetation of the altered system.

Scale and duration of the expected production.

Physical and chemical characteristics of the minerals to be exploited.

Description and localization of the necessary installations and works for the exercise of the rights corresponding to the mining operations.

Plan of closure of the exploitation and abandonment of the assemblies and installations and of the infrastructure. (Added by Law 1382 of 2010, article 7) The Ministry of Mines shall design a special template for the elaboration of the Work and Installation Program for Emerald Sector, as these minerals are not quantifiable as all the rest.

Article 85. Study on the Environmental Impact¹⁷². Simultaneously with the Plan of Works and Installations, the study that demonstrates the environmental feasibility of such program should be presented. Without the express approval of this study and the issuing of the corresponding Environmental License, the initiation of the installations of works of the mining exploitation cannot start. The works of geomorphologic recuperation, landscaping and re-vegetation of the altered ecosystem will be executed by experts in each one of these labors. Such license with the restrictions and conditions imposed by the concessionaire will make part of the contractual obligations.

obras e instalaciones necesarias para el ejercicio de las servidumbres inherentes a las operaciones mineras. 11. Plan de cierre de la explotación y abandono de los montajes y de la infraestructura. Parágrafo. Adicionado por la Ley 1382 de 2010, artículo 7º. El Ministerio de Minas deberá diseñar un formulario especial para la elaboración de los programas de trabajo y obras (PTO) para el sector de las esmeraldas, toda vez que estos minerales no son cuantificables como los demás.

172 Artículo 85. Estudio de Impacto Ambiental. Simultáneamente con el Programa de Trabajos y Obras deberá presentarse el estudio que demuestre la factibilidad ambiental de dicho programa. Sin la aprobación expresa de este estudio y la expedición de la Licencia Ambiental correspondiente no habrá lugar a la iniciación de los trabajos y obras de explotación minera. Las obras de recuperación geomorfológica, paisajística y forestal del ecosistema alterado serán ejecutados por profesionales afines a cada una de estas labores. Dicha licencia con las restricciones y condicionamientos que imponga al concesionario, formarán parte de sus obligaciones contractuales

Article 86. Corrections.¹⁷³ If the granting authority finds great deficiencies or omissions in the Plan of Works and Installations or the environmental authority in the Environmental Impact Study that cannot be corrected or added officiously, the concessionaire will have to correct them. The observations and corrections should be detailed completely only once.

The corrections or additions in simple form cannot take place, or those that do not fully influence the requirements and substantial elements of the Plan of Works and Installations and of the Environmental Impact Study or that might not prevent to establish or evaluate its components.

All of the complexity and expense necessary to obtain a mining title under Colombian law explains to a large degree why eighty percent of Colombian mining work is informal.

The challenges in obtaining a formal concession contract are even greater for ancestral and traditional mine workers living in remote areas, some of whom live with language barriers, as well as for mestizo rural and urban workers engaged in traditional mining activities who are willing to formalize. Without granting an easy, navigable, development-oriented contract or license (such as one even recognizing the presence of small and micro scale mining operations) the Mining Code of 2001 creates an ethno-cultural adjusted type of concession only, explored in further detail below. As much as it intends to be aware and respectful of ethnic specificity, this provision is neither adjusted nor proportionate to the economic level or vulnerability of indigenous and afro-Colombian constituents of the State.

Law 685 of 2001 or the Mining Code also creates the institution of Special Reserves to develop State-led initiatives for encompassing all informal workers who have been mining around traditional deposits of minerals under Special Mining Projects. In more of a permission state of authority, the Code concedes an authorization for the occasional extraction activities of clays, gravel and rocks for building personal homes or repairing the homes of landowners who are living on the land where the mineral or material is found. The Code also concedes an authorization to afro-Colombians in the Chocó biogeographic region of the Colombian Pacific to pursue occasional river sand washing (*barequeo*) for gold and platinum collection as a form of subsistence mining.

Prior to the 2001 Mining Code, a concession contract was not the only legal opportunity to live and develop through mine work. The previous law and policy framework granted exploration and exploitation licenses to mine workers who had less producer capacity than large and medium scale industrial mine operations.¹⁷⁴ In other words, earlier mine regulation recognized that small and micro-scale mine workers would not have the investment or resource capacity to enter into privatization schemes (nor profit making was the only interest of the State), but who, nevertheless, retained the right to live and develop through ancestral or traditional mine work. When the controversial Mining Code was passed in 2001 under the Pastrana administration, and following institutional reform and legal amendments under the Uribe Administration, these licenses were no longer granted and thus all lawful access to pursue mine work was conditioned on winning a private concession contract from the State.

¹⁷³ **Artículo 86. Correcciones.** *Si la autoridad concedente encontrare deficiencias u omisiones de fondo en el Programa de Trabajo y Obras o la autoridad ambiental en el Estudio de Impacto Ambiental, que no pudiese corregirse o adicionarse de oficio, se ordenarán hacerlo al concesionario. Las observaciones y correcciones deberán puntualizarse en forma completa y por una sola vez. No habrá lugar a pedir correcciones o adiciones de simple forma o que no incidan en el lleno de los requisitos y elementos sustanciales del Programa de Trabajo y Obras y del Estudio de Impacto Ambiental o que no impidan establecer y valorar sus componentes.*

¹⁷⁴ Please see *Supra*: footnote 86

ON THE GOVERNMENT'S OBLIGATION TO ENSURE THE ETHNO-CULTURAL COMMUNITIES' FUNDAMENTAL RIGHT TO CONSULTATION BEFORE GRANTING ANY ORDINARY CONCESSION TO A NATIONAL OR MULTINATIONAL MINING OPERATION

As much as the Code barely stresses in article 259¹⁷⁵ the obligation of the government to ensure the right of consultation to indigenous and afro-Colombian peoples prior to the development of any national or multinational mining operation within their collective properties, this report includes this obligation under the ordinary concession section in order to state that, in Colombia, any concessions for mining activities within ethno-cultural lands are subject to prior consultation. And, if necessary, these concessions must be adjusted to the conditions required by those ethno-cultural communities. This is a particularly relevant obligation for national and multinational corporations interested in developing medium and large-scale mining operations in a constitutional, legal and legitimate manner.

The right to prior consultation is both a constitutional obligation required of the government under Article 330, and also an international obligation following the ratification of ILO Convention 169 by Law 21 of 1991, as well as a domestic obligation the country under Article 92 of the Colombian Constitution, which gives preeminence to international treaties on human rights. The relevance of land to indigenous and afro-Colombian communities, the history of mining as a traditional livelihood in these communities, and the fact that most mining in Colombia is taking place in the country's rural zones, requires a discussion of both ILO Convention 169 and Law 21 of 1991 that ratified this convention under Colombian national law.

Under Article 6 of ILO Convention 169, all governments shall consult with indigenous people that are affected by any legislative or administrative measures - such as mining concessions - within their collective properties, by using the appropriate procedures and the indigenous communities' representative institutions. This same article also states that the State is obliged to establish the means by which all indigenous people may freely participate in an equal way as other "sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programs which concern them."¹⁷⁶ In Colombia, for instance, the Constitutional Court of Colombia has reiterated jurisprudence on the fundamental¹⁷⁷ right to prior

175 **Article 259. Audience and Participation of Third Parties.** In the cases that within the procedure previous to the concession contract, the third parties, community representatives and social groups should be heard, it will be necessary that they receive real and effectively a call or communication, through appropriate means, to make an appearance within the terms indicated by law. // **Artículo 259. Audiencia y participación de terceros.** *En los casos en que dentro del procedimiento que antecede al contrato de concesión deba oírse previamente a terceros, a representantes de la comunidad y a grupos o estamentos sociales, se buscará que estos reciban real y efectivamente, por los medios apropiados, el llamamiento o comunicación de comparecencia dentro de los términos señalados en la ley.*

Article 260. Public Character. The governmental procedure previous to the celebration of the contract is public and any person may have access to it at the offices of the competent or commissioned authority. Copies of all the parts and proceedings can be issued to anyone that requests it. // **Artículo 260. Carácter público.** *El procedimiento gubernativo previo a la celebración del contrato es público y a él tendrá acceso toda persona en las dependencias de la autoridad competente o comisionada. De todas las piezas y diligencias podrán expedirse, de plano, copias a quien las solicite.*

176 ILO Convention 169, Article 6

177 As articulated by the Constitutional Court in the unification ruling SU-039/97 : "(...) In this sense, the fundamental right of the community to preserve its integrity, is guaranteed and becomes effective through another right, that is also fundamental in its character, is the right of the community to participate in the adoption of the referred decisions. The participation of indigenous communities in decisions that may affect them in relation to the exploitation of natural

consultation and has even systematized the rules on its content and scope; further, it has established two levels of analysis¹⁷⁸, the first referring to the differentiation of the general and particular levels of the right to participation of ethno-cultural groups, and the second relating to the conditions and procedural requirements that must be accomplished in order to make their prior consultations adequate and effective mechanisms for the protection of their constitutional rights and the consequences that follow in the case of the State's failure to abide by its duties.

Thus, the lack of an explicit right to prior consultation in the legislation affecting ethno-cultural communities and mining explains the partial unconstitutionality or conditioned constitutionality of the forestry law, the rural development statute and the National Development Plan in Colombia. Besides, incomplete, unsubstantial and superficial prior consultations to mining that have been carried out in many ethno-cultural communities have ended up in the suspension of already granted environmental licenses for oil drilling, hydroelectric dam constructions and mining operations, via writs of protection of fundamental human rights. The most recent consultation that occurred in this way was a result of Constitutional ruling T-769-2009, which ordered the immediate suspension of the Muriel Mining Corporation's activities under the *Mandé Norte* operation. Muriel Mining had been granted a 30 year concession in February 2005 that was potentially extendable for other 30 years as established under the 2001 Mining Code.¹⁷⁹ As per the Court, "it is necessary that the community, represented by its authorities and distinctive institution, gets full knowledge on the projects, this in the sense, that it shall be totally informed and illustrated on the manner in which the execution of these may affect its rights, tradition or habitat and the communication shall open, opportune, free and without any strange interferences, ensuring that attention is given to at all concerns and observations of the community"¹⁸⁰. For instance, the Court found that in this case, the ethno-cultural community had not been informed on the mining operation's impact on their ancestrally sacred *Careperro* mountain.¹⁸¹

resources has the particularity that the participation in question, through the mechanism of consultation, acquires the connotation of a fundamental right, as it stands as an instrument that is essential to preserve the ethnic, social, economic and cultural development of indigenous communities and to ensure, therefore, its survival as a social group. Thus participation is not limited merely to an intervention in administrative actions aimed at securing the right to defend those who are to be affected with the approval of the environmental permit, but has a deeper significance...such as those pertaining to the definition of fate and livelihood security of those communities." // "De este modo, el derecho fundamental de la comunidad a preservar la integridad se garantiza y efectiviza a través del ejercicio de otro derecho que también tiene el carácter de fundamental, como es el derecho de participación de la comunidad en la adopción de las referidas decisiones. La participación de las comunidades indígenas en las decisiones que pueden afectarlas en relación con la explotación de los recursos naturales ofrece como particularidad el hecho de que la referida participación, a través del mecanismo de la consulta, adquiere la connotación de derecho fundamental, pues se erige en un instrumento que es básico para preservar la integridad étnica, social, económica y cultural de las comunidades de indígenas y para asegurar, por ende, su subsistencia como grupo social".

178 Ruling C-175-09 of the Constitutional Court of Colombia

179 Please see : http://www.eltiempo.com/opinion/forolectores/ARTICULO-WEB-PLANTILLA_NOTA_INTERIOR-7502673.html

180 "Resulta indispensable que la comunidad, representada por sus autoridades e instituciones distintivas, tenga conocimiento pleno sobre los proyectos, en el sentido de que sea enterada e ilustrada a cabalidad sobre la manera como la ejecución de los mismos puede afectar sus derechos, tradiciones o su hábitat, y que la comunicación sea abierta, oportuna, libre y sin interferencias extrañas, propendiendo porque las inquietudes y observaciones de la comunidad sean atendidas."

181 A similar situation is lived in many places around the world, for India, please see: <http://censat.org/noticias/2010/2/15/Dont-mine-us-out-of-existence/>

It is also worth noting that Inter-American jurisprudence¹⁸² has also protected the right to prior consultation as with the *Saramaka* decision. The *Saramaka* decision was, in fact, later used by the African Commission on Human Rights in its decision in favor of the *Endorois* peoples in Kenya with regard to a ruby mining operation¹⁸³, clearly illustrating the important migration of constitutional argumentation and global law in efforts to address and reduce poverty among ethno-cultural minorities.

- THE ETHNO-CULTURAL SPECIAL CONCESSION: AFRO-COLOMBIAN, INDIGENOUS AND MIXED MINING ZONES

182 The Case of the *Saramaka People v. Suriname*, decided in the Inter-American Court of Human Rights on November 28, 2007, was a landmark case for the rights of tribal communities to communal property. The Saramaka people, who had been enslaved in the 17th century and brought to Suriname during its colonial period, had preserved their social, cultural and economic traditions, many of which were associated with the territory they had occupied since their freedom from slavery. The prominent role that this ancestral territory played in the Saramaka's tradition compelled the Court to acknowledge that the Saramaka people were a tribal people who enjoyed a collective property right over their land and that this right warranted special protection under the American Convention on Human Rights, specifically Article 21 concerning the right to property. In its earlier decisions, the Court had interpreted this article as protecting not only indigenous peoples' rights to communal property, but also tribal peoples' rights thereto, because the "fundamental basis of their cultures, spiritual life, integrity and economic survival" relied on land.¹⁸² This shared characteristic applied equally to the Saramaka. Consequently, the government of Suriname was under an obligation to abide by three safeguards to ensure the protection of, and prevent the violation of, this right. First, the government must, "ensure the effective participation of the members of the Saramaka people, in conformity with their customs and traditions, regarding any development, investment, exploration or extraction plan...within Saramaka territory." This requires the government to (a) consult with the Saramaka people regularly and beginning in the early stages of any development project, through culturally appropriate procedures, with the objective of reaching and agreement and (b) obtain the community's free, prior and informed consent to proceed with the project in consideration.¹⁸² Second, the government must engage in a reasonable benefit-sharing scheme for any project or development on their territory.¹⁸² And third, the government must engage in environmental and social impact assessments before any concessions are issued for work on the Saramaka's territory. In applying these standards to small-scale gold mining concessions that had been issued by the government of Suriname, the Court found the government in violation of the Saramaka's communal property rights. This was true even though the Saramaka did not use gold in their social, cultural or economic traditions. The Court reasoned that because the extraction of gold would have, and in fact did, impact other natural resources that were necessary for the Saramaka's survival, such as waterways found on their ancestral territory, the government of Suriname was required to abide by the three safeguards listed above.

183 This particular analysis was later applied in the African Commission on Human Rights' 2010 decision in favor of the *Endorois* indigenous peoples' case against the government of Kenya. There, the government had issued mining concessions to extract rubies found on the *Endorois*' territory.¹⁸³ The African Commission relied heavily on the Interamerican Court's *Saramaka* decision to conclude that, although rubies did not play a significant social, cultural or economic role in the *Endorois*' traditions, the extraction of rubies had impacted the *Endorois*' access to water sources that were necessary for their survival; thus, the Kenyan government must abide by certain safeguards to protect the indigenous community's communal land rights.

The implications of this international jurisprudence on mining operations are significant. Not only are governments entitled to abide by certain protections and safeguards created under international law and adopted by domestic legislation – including the right to prior consultation, they must do so even when the resources in question are not those that the communities in question traditionally used. These cases effectively extend the rights of indigenous and tribal communities to communal lands and the natural resources found on that land to, in fact, restrict State rights to subsoil and minerals, as well as commissions or concessions granted based on those State rights. If the extraction of those resources in any way adversely impacts indigenous or tribal people's access to resources that they have traditionally relied upon, e.g., waterways, then the State must abide by certain safeguards created to protect the communal land rights of these people. (Both the *Saramaka* and *Endorois* cases appealed to their access to waterways found on their lands which had been traditionally used by these communities. The *Saramaka* case also considered the use of timber and the issuance of logging concessions granted by the government of Suriname.) This is true even when the community itself chooses to explore and exploit its own resources.

The majority of work in the mining sector – from exploration to exploitation – occurs on rural land. Inclusive policy makers must consider how to prevent, or at the very least mitigate, the negative impact that mining will have on the lives, livelihoods and development of the rural poor living on those lands. While the government’s need to generate income through royalties from mineral extraction is a legitimate State objective, it is also necessary for the State to consider the impact of these activities on both small private property landowners in rural Colombia as well as the large collective territories of Colombians two primary ethno-cultural communities, whose social identity and livelihood are intrinsically tied to land. As the law and policy currently stand, the interests of both the small private property owner and of the indigenous or afro-Colombian communities must yield to the income generation interests of the Colombian State, which has the authority to exploit its exclusive mineral and subsoil rights and has decided to do so only through the mechanisms of the concession contract.

The policy framework introduces a distinction between private and collective land owners: ethno-cultural communities with communal land rights enjoy a “first right to mining” prerogative to exploit sub-surface minerals found on their land under a concession contract. The “first right to mining” rule introduces an exception to the mining principle “first in time, first in right,” or colloquially “first come, first serve,” which tends to advantage the most powerful stakeholders and actors in mining. The fact that the Mining Code of 2001 acknowledges ethno-cultural groups’ “first right to mining” within their communal territories shows that there is a persistent State objective to preserve the link between indigenous and afro-Colombian communities’ social, cultural and economic traditions and their ancestral lands. Yet, if that preferential right is not executed within the established time frame – 30 days according to Article 275 of the Code¹⁸⁴ (instead of the 60 days granted by abrogated provisions) – the State is still within its authority to contract the zone away to third parties or outsiders to the *resguardos* or *territorios comunitarios* of the indigenous and afro-Colombian communities, respectively. Once that right is granted to a third party, the ethno-cultural community living on the lands being mined may claim *surface rents* from the third party per hectare during the mining exploratory phase. These surface rents, however, expire when the third party begins the mineral exploitation phase. From this point on royalties must be paid by the third party to the Colombian State. In this train of thought it is possible, to conclude that Colombian ethno-cultural groups’ rights to collective land entitle them only to surface land rights in Colombia. They cannot sell or use land as collateral and they must still seek permission from the State to take advantage of the mineral riches found in their ancestral lands.

The Third title of the Mining Code, in Chapter 14, referring to Special Regimes regulates in the mining activities relating to ethnic groups, that is, mining activities framed within ethno-cultural communities’

184 **Artículo 275. Comunicación de la propuesta.** *Si la propuesta no ha sido objetada por la autoridad minera, en un término que no supere los quince (15) días contados a partir de la presentación de la misma, dentro de los cinco (5) días siguientes, se comunicará, por intermedio del Ministerio del Interior, a los representantes de los grupos étnicos ocupantes del área. La comunicación a los grupos étnicos tendrá por objeto notificarlos con el fin de que comparezcan para hacer valer su preferencia en el término de treinta (30) días contados a partir de la notificación, si el área estuviere ubicada en zonas mineras indígenas, de comunidades negras o mixtas. Artículo 276. Resolución de oposiciones.* *Vencido el término de treinta (30) días de que trata el artículo anterior, en una sola providencia se resolverán las oposiciones presentadas y se definirán las áreas sobre las cuales se hubiere ejercido el derecho de preferencia de los grupos étnicos. Si las oposiciones y superposiciones que fueren aceptadas comprendieren solo parte del área pedida, se restringirá la propuesta a la parte libre y si la comprendieren en su totalidad, se ordenará su archivo. Artículo 279. Celebración del contrato.* *Dentro del término de diez (10) días después de haber sido resueltas las oposiciones e intervenciones de terceros, se celebrará el contrato de concesión y se procederá a su inscripción en el Registro Minero Nacional. Del contrato se remitirá copia a la autoridad ambiental para el seguimiento y vigilancia de la gestión ambiental para la exploración.*

lands of Colombia. Article 123 defines the notion of “indigenous territories,”¹⁸⁵ and later articles establish that the Ministry of Mines and Energy will determine and demarcate *indigenous mining zones* within those indigenous territories. These indigenous mining zones are afforded special protections and require participatory measures on behalf of the mining operator within that zone. For instance, all mine explorers and exploiters must perform their work in a way that does not weaken the social, cultural or economic values of the ethno-cultural community where the mining is taking place.¹⁸⁶ Further, all proposals for mineral exploration and exploitation must show that they included the participation of the indigenous communities [who would be impacted by the mining activity], without any prejudice to their first-in-right/preferential-mining prerogative on their communal lands.¹⁸⁷ This right is established in Article 124 as the “*derecho de prelación*” in indigenous mining zones and may extend over one or more minerals found in those zones.¹⁸⁸

To preserve the community identity, Article 125 establishes that whatever concessions are given to an indigenous community must benefit that community as a whole and not only some of the individuals who constitute that community, nor may that concession be transferred to another actor.¹⁸⁹ Indeed,

185 **Article 123 Territory and Indigenous Communities** For the effects foreseen in the previous Article, it is understood for Indian territories the areas owned in a regular and permanent manner by the community, partisanship or Indian group, according to dispositions in Act 21 of 1991 and other acts that modify, extend or substitute them. // **Artículo 123. Territorio y Comunidad Indígenas.** *Para los efectos previstos en el artículo anterior, se entienden por territorios indígenas las áreas poseídas en forma regular y permanente por una comunidad, parcialidad o grupo indígena de conformidad con lo dispuesto en la Ley 21 de 1991 y demás leyes que la modifiquen, amplíen o constituyan. (Nota: Este artículo fue declarado exequible por la Corte Constitucional en la Sentencia C-891 de 2002, en relación con los cargos analizados en la misma)*

186 **Article 121. Cultural Integrity** Every mining explorer or exploiter is in the obligation to carry out his activities in a manner that might not affect cultural, social and economic values of communities or ethnic groups, real and traditionally occupants of the area object of concessions or of titles of soil’s private ownership. // **Artículo 121 Integridad Cultural.** *Todo explorador o explotador de minas está en la obligación de realizar sus actividades de manera que no vayan en desmedro de los valores culturales, sociales y económicos de las comunidades y grupos étnicos ocupantes real y tradicionalmente del área objeto de las concesiones o de títulos de propiedad privada del subsuelo. (Nota: Este artículo fue declarado exequible por la Corte Constitucional en la Sentencia C-891 de 2002, en relación con los cargos analizados en la misma.)*

187 **Article 122 Indigenous Mining Zones.** The mining authority will indicate and delimit, based on technical and social studies, within the Indian territory, Indian mining zones in which exploration and exploitation of the mining soil and subsoil should be adjusted to special dispositions of the present Chapter on protection and participation of Indian communities and groups established in such territories. Every proposal of private persons to explore and exploit minerals within Indian mining zones will be solved with the participation of representatives of the respective Indian communities and subject to their right of privilege consecrated in Article 124 of this Code. // **Artículo 122. Zonas Mineras Indígenas.** *La autoridad minera señalará y delimitará, con base en estudios técnicos y sociales, dentro de los territorios indígenas, zonas mineras indígenas en las cuales la exploración y explotación del suelo y subsuelo mineros deberán ajustarse a las disposiciones especiales del presente Capítulo sobre protección y participación de las comunidades y grupos indígenas asentados en dichos territorios. (Nota: Este inciso fue declarado exequible condicionalmente por la Corte Constitucional en la Sentencia C-418 de 2002.) Toda propuesta de particulares para explorar y explotar minerales dentro de las zonas mineras indígenas será resuelta con la participación de los representantes de las respectivas comunidades indígenas y sin perjuicio del derecho de prelación que se consagra en el artículo 124 de este Código. (Nota: Este artículo fue declarado exequible por la Corte Constitucional en la Sentencia C-891 de 2002, en relación con los cargos analizados en la misma.)*

188 **Article 124. First-Right-to-mining of indigenous groups.** The communities and indigenous groups will, with regard to the mining authority, have preference in being awarded a concession over the ore bodies and deposits found in an indigenous mining zone. The contract may encompass one or several minerals. // **Artículo 124. Derecho de prelación de grupos indígenas.** *Las comunidades y grupos indígenas tendrán prelación para que la autoridad minera les otorgue concesión sobre los yacimientos y depósitos mineros ubicados en una zona minera indígena. Este contrato podrá comprender uno o varios minerales. (Nota: Este artículo fue declarado exequible por la Corte Constitucional en la Sentencia C-891 de 2002, en relación con los cargos analizados en la misma.)*

189 **Article 125. Concession.** The concession will be granted at request of the community or Indigenous group and in its favor and not of the individuals that form part of it. The manner in which they participate in the mining works and in its products and yields and the conditions of how those can be substituted in such works within the same community, will be

all participation in the mining work under the concession will be established by the indigenous authority, which presumably acts with the best interests of the community in mind. At the same time, the indigenous authority may hire third parties to complete the work required under the concession, either totally or in part.¹⁹⁰ Article 128 determines that in those cases where outside parties have obtained a concession to mine or explore within an indigenous mining zone, those third parties will give the indigenous community members' preferential treatment in terms of being hired to work on that concession.¹⁹¹ In addition to determining who will be working on an indigenous mining concession in mining zones on the *resguardos*, the responsibilities of the indigenous authority also include identifying where mining exploration and exploitation *may not* take place within the *resguardo*. Article 127 requires the indigenous authority to distinguish territories or areas within the indigenous communal lands that may not be mined due to their cultural, social, or economic significance to the community.¹⁹² Article 129 establishes that the Municipalities receiving royalties from mining exploitation are obligated to return a direct benefit to the indigenous people living in the municipality's territory, in the form of works and services.¹⁹³

The articles regulating mining in the afro-Colombian *territorios comunitarios* follow a similar scheme as those for mining in indigenous *resguardos*. Article 130 of the 2001 Mining Code includes "black communities" under the umbrella of ethnic groups whose ethno-cultural identity warrants respect and

established by the Indigenous authority that governs them. This concession will not be transferable in any case. // **Artículo 125. Concesión.** *La concesión se otorgará a solicitud de la comunidad o grupo indígena y en favor de ésta y no de las personas que la integran. La forma como éstas participen en los trabajos mineros y en sus productos y rendimientos y las condiciones como puedan ser sustituidas en dichos trabajos dentro de la misma comunidad, se establecerán por la autoridad indígena que los gobierne. Esta concesión no será transferible en ningún caso. (Nota: Este artículo fue declarado exequible por la Corte Constitucional en la Sentencia C-891 de 2002, en relación con los cargos analizados en la misma.)*

190 **Article 126. Agreements with third parties.** The communities or Indigenous groups that possesses a concession within the indigenous mining zone, can make contracts of all or part of the corresponding works and installations, with alien people. // **Artículo 126. Acuerdos con terceros.** *Las comunidades o grupos indígenas que gocen de una concesión dentro de la zona minera indígena, podrán contratar la totalidad o parte de las obras y trabajos correspondientes, con personas ajenas a ellos. (Nota: Este artículo fue declarado exequible por la Corte Constitucional en la Sentencia C-891 de 2002, en relación con los cargos analizados en la misma.)*

191 **Article 128. Titles of Third Parties.** In case people alien to the community or Indigenous group might obtain a title in order to explore and exploit within the mining Indigenous zones, delimited according to Article 122, they should preferably be associated to such community or group, to his works and installations and to train its members in order to make effective this priority. // **Artículo 128. Títulos de terceros.** *En caso de que personas ajenas a la comunidad o grupo indígena obtengan título para explorar y explotar dentro de las zonas mineras indígenas delimitadas conforme al artículo 122, deberán vincular preferentemente a dicha comunidad o grupo, a sus trabajos y obras y capacitar a sus miembros para hacer efectiva esa preferencia. (Nota: Este artículo fue declarado exequible por la Corte Constitucional en la Sentencia C-891 de 2002, en relación con los cargos analizados en la misma.)*

192 **Article 127. Restricted Indigenous Areas.** The Indigenous authority will point out, within the Indigenous mining zone, places that cannot be object of mining exploration or exploitation due to special cultural, social and economical meaning for the community or aboriginal group, according to their beliefs, uses and practices. // **Artículo 127. Áreas indígenas restringidas.** *La autoridad indígena señalará, dentro de la zona minera indígena, los lugares que no pueden ser objeto de exploraciones o explotaciones mineras por tener especial significado cultural, social y económico para la comunidad o grupo aborígen, de acuerdo con sus creencias, usos y costumbres. (Nota: Este artículo fue declarado exequible condicionalmente por la Corte Constitucional en la Sentencia C-891 del 22 de octubre de 2002)*

193 **Article 129. Economic Participation.** The municipalities that receive royalties or participations proceeding from the mining exploitation located in the Indigenous territories, mentioned in Article 123, should assign their corresponding earnings to works and services that might benefit directly the communities and aboriginal groups established in such territories. // **Artículo 129. Participación económica.** *Los municipios que perciban regalías o participaciones provenientes de explotaciones mineras ubicadas en los territorios indígenas de que trata el artículo 123, deberán destinar los correspondientes ingresos a obras y servicios que beneficien directamente a las comunidades y grupos aborígenes asentados en tales territorios.*

protection.¹⁹⁴ Article 130, in fact, recognizes that “black communities” in Colombia have traditional mining practices that are tied to their cultural and ethnic values, and, thus, extends the same principle of protection and respect as that afforded to indigenous communities sharing the same link with minerals and resources found on their communal lands. A “black community” is defined under Article 132 as one where afro-Colombian descendants – who share a history and who enjoy their own traditions and customs so as to establish a unique cultural identity that distinguishes them from other cultural groups – are living.¹⁹⁵

It is interesting to note that, as with the indigenous communities, the Mining Code places the burden upon afro-Colombian communities to establish special mining zones within their communal lands. Under Article 131, the Ministry of Mines may establish these zones only when demanded to by afro-Colombian communities.¹⁹⁶ The State will not identify where these zones are on its own initiative and based on its significantly greater ability to access geological information on mineral deposits in the country; thus, if an afro-Colombian community is unaware of Article 131, it may not realize that they bear the burden of protecting the resources found on their own *territorios comunitarios*, even though they retain the first right to mine in their communities.¹⁹⁷ Where these zones are established, and as

194 When the authors of this report use the word “black” to describe Afro-Colombians it is only to remain faithful to the exact wording of the Colombian laws and norms.

Article 130. The Black Communities. The black communities referred to in Law 70 of 1993 or all other Laws that modify, extend or substitute them, for the effects of this Code, are also ethnic groups in relation to which mining works and installations should be carried out, respecting and protecting the values that constitute its cultural identity and its traditional manners of mining production. This principle will be applied to any area of the national territory where the works of the beneficiaries of the mining title are being carried out, as long as these areas has been owned in a regular and permanent manner by a community or a black group. // **Artículo 130. Las Comunidades Negras.** *Las comunidades negras a que se refiere la Ley 70 de 1993 o demás leyes que la modifiquen, amplíen o sustituyan, para los efectos de este Código, son también grupos étnicos en relación con los cuales, las obras y trabajos mineros se deberán ejecutar respetando y protegiendo los valores que constituyen su identidad cultural y sus formas tradicionales de producción minera. Este principio se aplicará en cualquier zona del territorio nacional donde se realicen los trabajos de los beneficiarios de un título minero, siempre y cuando estas áreas hubieren sido poseídas en forma regular y permanente por una comunidad o grupo negro.*

195 **Article 132. Conformation of Black Communities.** The black communities which are referred to in the previous Article, are a set/a joint group of families of Afro-Colombian/Afro-Colombian ascendance that have their own culture, share a history, and have their own traditions and customs within their rapport as a settlement, that reveal and conserve an identity which distinguishes them from other ethnical groups. // **Artículo 132. Conformación de las Comunidades Negras.** *Las comunidades negras de que trata el artículo anterior son el conjunto de familias de ascendencia Afro-Colombiana que poseen una cultura propia, comparten una historia y tienen sus propias tradiciones y costumbres dentro de la relación como poblado, que revelan y conservan identidad que las distinguen de otros grupos étnicos.*

196 **Article 131. Mining Areas of Black Communities.** Within the fallow land of riverbanks, awarded by the Colombian Institute for the Agrarian Reform - INCORA as common property of a black community, at their request, the mining authority may establish special mining areas and will establish the extension and boundary limits of the mentioned areas. Within those areas, the granting authority at request of the community authority, will grant to the mentioned community a concession as its holder, but not to its members individually considered. // **Artículo 131. Zonas Mineras de Comunidades Negras.** *Dentro de los terrenos baldíos ribereños, adjudicados por el Instituto Colombiano de la Reforma Agraria como propiedad colectiva de una comunidad negra, a solicitud de ésta, la autoridad minera podrá establecer zonas mineras especiales; establecerá la extensión y linderos de dichas zonas. Dentro de estas zonas la autoridad concedente a solicitud de la autoridad comunitaria otorgará concesión como titular a la aludida comunidad y no a sus integrantes individualmente considerados.*

197 **Article 133. Black Communities’ first-right-to –mining prerogative.** The black communities will have privileges in order that the mining authority might grant them a concession over the mining deposits and beds located in a mining area of a black community. This concession can include one or several minerals and will be applied the dispositions of the present Chapter. // **Artículo 133. Derecho de prelación de las Comunidades Negras.** *Las comunidades negras tendrán prelación para que la autoridad minera les otorgue concesión sobre los yacimientos y depósitos mineros ubicados en una zona minera de comunidad negra. Esta concesión podrá comprender uno o varios minerales y le serán aplicables las*

with indigenous mining zones, any mining concessions granted in those zones will be for the community at large, rather than the individuals who comprise that community. And, as under Article 127, an afro-Colombian community may seek the help of third parties to work under the mining concessions granted to the community.¹⁹⁸

The Colombian State, in fact, carries a very light burden in terms of affirmatively protecting the rights of both indigenous and afro-Colombian communities to the mineral resources and wealth found on their lands. For instance, under Article 134, the Ministry of Mines and Energy will only establish mixed mining communities on territories where both indigenous and afro-Colombian communities are living when these mixed mining communities are demanded by the people living there.¹⁹⁹ Again, the task or public burden remains on the minority group to seek protection under their minority status. And under Article 136, the Ministry of Mines may provide technical assistance for extractive exploration and development on indigenous and afro-Colombian territories only insofar as these projects are advanced by the communities themselves.²⁰⁰

The last article relevant to ethno-cultural communities' mining activities is found in Article 158, which addresses panning (*barequeo*) in afro-Colombian communities. This Article states that panning in alluvial areas in the *territorios comunitarios* may be practiced only by individuals who have received authorization from the mayor of the relevant municipality, who belong to the afro-Colombian community (not indigenous), and in whose benefit the mining zone of the communal territory was established.²⁰¹ Thus, once again, the idea is that the benefits of the mining zone of the *territorios comunitarios* extend to all individuals living in the *territorios comunitarios*, even if they are not necessarily living in the particular area demarcated as the mining zone of the collective land.

disposiciones del presente Capítulo.

198 **Article 135. Agreements with Third Parties.** The community or black groups that have been granted a concession within the black communities' mining zone can contract all or part of the corresponding works and installations with persons alien to them. // **Artículo 135. Acuerdo con terceros.** La comunidad o grupos negros que gocen de una concesión dentro de la zona minera de comunidades negras, podrán contratar la totalidad o parte de las obras y trabajos correspondientes con personas ajenas a ellos.

199 **Article 134. Mixed Mining Zones.** The mining authority will establish within the territories indistinctly occupied by the Indigenous and black communities, mixed mining areas in a joint or shared benefit of these minorities, at request of one or both ethnic groups. In these areas, the dispositions of the present Chapter will be applied. // **Artículo 134. Zonas Mineras Mixtas.** La autoridad minera dentro de los territorios ocupados indistintamente por pueblos indígenas y comunidades negras, establecerá zonas mineras mixtas en beneficio conjunto o compartido de estas minorías a solicitud de uno o los dos grupos étnicos. En estas zonas serán aplicables las disposiciones del presente Capítulo.

200 **Article 136. Promotion and Mining Authority.** The mining authority, with regard to the design and development of mining projects in indigenous and black communities zones, can provide technical assistance in exploration, elaboration of mining plans and their development, as long as such projects are carried out by such communities. Also, they can give the corresponding support for promotion and legalization of the areas. // **Artículo 136. Promoción y autoridad minera.** La autoridad minera cuando se trate de formulación y desarrollo de proyectos mineros en zonas indígenas y de comunidades negras podrá prestar asistencia técnica en materia de exploración, elaboración de los planes mineros y desarrollo de estos, siempre y cuando dichos proyectos sean adelantados por dichas comunidades. De igual manera, podrá prestar el apoyo correspondiente en materia de promoción y legalización de las áreas.

201 **Article 158. Black Communities' Zones.** In the alluvial plots of land declared as mining zones of black communities, in accordance to Article 131, panning can only be practiced by the neighbors of the place who are authorized by the Mayor who belong who belong to the community in benefit of which the zone has been constituted. In these cases, the Mayor will act in coordination with communal authorities beneficiaries of the mining zone. // **Artículo 158. Zonas de Comunidades Negras.** En los terrenos aluviales declarados como zonas mineras de comunidades negras de acuerdo al artículo 131, sólo podrán practicar el barequeo los vecinos del lugar autorizados por el alcalde, que pertenezcan a la comunidad en cuyo beneficio se hubiere constituido dicha zona. En estos casos, el alcalde obrará en coordinación con las autoridades de las comunidades beneficiarias de la zona minera.

Finally it is worth noting that the Code, while aiming to protect ethno-cultural collective properties and preserve communities' autonomy, in fact restricts mining exploration and exploitation activities, as well as free prospecting in Colombia, in articles 35²⁰² and article 39²⁰³, respectively.

3.7.2. MINE WORK THROUGH A STATE-LED SPECIAL MINING PROJECT FOR INFORMAL WORK IN EXISTING TRADITIONAL MINE EXPLOITATIONS

Article 31 of the 2001 Mining Code establishes that, for social or economic reasons and, autonomously or by petition, the government may demarcate an area of *Special Reserve* for reasonably developing the mining industry with the community of miners informally mining in traditionally exploited mineral deposits. New concession requests or proposals will no longer be admitted on the area reserved, but the government will intervene in the community of informal mine workers to either develop a *Special Mining Project* via the competent State agencies and to develop formal mining within it, or otherwise start a labor reconversion project with the informal mine workers laboring on that special reserve.

Article 31. Special Reserves.²⁰⁴ Due to social or economic reasons, determined in each case, by notification or by express request of the mining community, the National Government in the areas in

202 **Artículo 35. Zonas de minería restringida.** Podrán efectuarse trabajos y obras de exploración y de explotación de minas en las siguientes zonas y lugares, con las restricciones que se expresan a continuación: (...) (f) En las zonas constituidas como zonas mineras indígenas zonas mineras de comunidades negras zonas mineras mixtas siempre y cuando las correspondientes autoridades comunitarias, dentro del plazo que se les señale, no hubieren ejercitado su derecho preferencial a obtener el título minero para explorar y explotar, con arreglo a lo dispuesto por el Capítulo XIV de este Código; Una vez consultadas las entidades a que se refiere este artículo, los funcionarios a quienes se formule la correspondiente solicitud deberán resolverla en el término improrrogable de treinta (30) días, so pena de incurrir en falta disciplinaria. Pasado este término la autoridad competente resolverá lo pertinente.

203 **Artículo 39. Prospección de minas.** La prospección de minas es libre, excepto en los territorios definidos como zonas mineras para minorías étnicas tal como lo contempla el Capítulo XIV de este Código. Cuando haya de efectuarse en terrenos de propiedad particular, se requerirá dar aviso previo al dueño, poseedor, tenedor o administrador, directamente o a través del alcalde. Cuando haya de efectuarse en bienes de uso público bajo la jurisdicción de la Dirección General Marítima, de conformidad con lo previsto en el artículo 2 del Decreto-ley 2324 de 1984 y demás normas que lo modifiquen, sustituyan o deroguen, se requerirá su concepto técnico favorable.

204 **Artículo 31. Reservas especiales.** El Gobierno Nacional por motivos de orden social o económico determinados en cada caso, de oficio o por solicitud expresa de la comunidad minera, en aquellas áreas en donde existan explotaciones tradicionales de minería informal, delimitará zonas en las cuales temporalmente no se admitirán nuevas propuestas, sobre todos o algunos minerales. Su objeto será adelantar estudios geológico-mineros y desarrollar proyectos mineros estratégicos para el país destinados a determinar las clases de proyectos mineros especiales y su puesta en marcha. En todo caso, estos estudios geológico-mineros y la iniciación de los respectivos proyectos no podrán tardar más de dos (2) años. La concesión sólo se otorgará a las mismas comunidades que hayan ejercido las explotaciones mineras tradicionales, así hubiere solicitud de terceros. Todo lo anterior sin perjuicio de los títulos mineros vigentes, otorgados o reconocidos. **Inciso adicionado por la Ley 1382 de 2010, artículo 2º.** La Autoridad Minera también podrá delimitar otras áreas especiales que se encuentren libres, sobre las cuales, de conformidad con la información geológica existente, se puede adelantar un proyecto minero de gran importancia para el país, con el objeto de otorgarlas en contrato de concesión a través de un proceso de selección objetiva, a quien ofrezca mejores condiciones técnicas, económicas, sociales y ambientales para el aprovechamiento del recurso. Dentro de estos procesos la Autoridad Minera establecerá las contraprestaciones económicas, además de las regalías previstas por la ley, que los proponentes deban ofrecer. Las áreas que no hubieren sido otorgadas dentro del término de tres (3) años contados a partir de la delimitación del área, quedarán libres para ser otorgadas bajo el régimen de concesión regulado por este Código. La Autoridad Minera señalará el procedimiento general, así como las condiciones y requisitos para escoger al titular minero en cada caso. **Inciso adicionado por la Ley 1382 de 2010, artículo 2º.** La Autoridad Minera a través de los medios de comunicación hablado y escrito informará a los interesados sobre las concesiones a licitar de que habla el presente artículo. **Inciso adicionado por la Ley 1382 de 2010, artículo 2º.** Ingeominas como Autoridad Geológica en minería podrá delimitar áreas especiales, que se encuentren libres sobre las cuales no se recibirán ni se otorgarán títulos mineros, pero se respetarán los existentes, con el fin de que se adelanten procesos para

which traditional exploring of informal mining exists, will delimit areas in which new proposals over all or some minerals will not be temporarily admitted. Its object will be to carry on mining-geological studies and to develop special mining projects and its setting up. In any case, these mining-geological studies and the initiation of the respective projects cannot take longer than two (2) years. The concession will be awarded only to the same communities that have realized the traditional mining exploiting, even if there is a request of a third-party. All the above, notwithstanding current mining titles, awarded or recognized.

Subparagraph added by Law 1382 of 2010, Article 2. The Mining Authority also may define other special areas that are free, on which, in accordance with the existing geological information; one can overtake a mining project of great importance for the country, in order to grant them in concession contract through an objective selection process, who provide better technical, economic, social and environmental resource use. Within these processes the Mining Authority shall establish the economic considerations, plus the royalties provided for by law, proponents are required to extend. The areas that have not been granted within a period of three (3) years from the delimitation of the area will be free to be granted under the concession system regulated by this Code. The Mining Authority will indicate the general procedure and the conditions and requirements to choose the owner mining in each case.²⁰⁵

Subparagraph added by Law 1382 of 2010, Article 2. The Mining Authority will, through the media, communicate by speech and written reports, to stakeholders on how to tender concessions under this article.²⁰⁶

Subparagraph added by Law 1382 of 2010, Article 2. Ingeominas, as the mining Geological Authority, may define special areas that are free on which no grant will be received or mining, but existing ones will be respected, so that evaluation processes to deliver the area for up to five (5) years who offer a better program of geological technical assessment of the area under the terms and conditions established by the Mining Authority. Who gets a contract Technical Assessment when completed has the first option to contract with the Mining Authority on the area under concession contract in the terms provided under this Code.²⁰⁷

*entregar el área hasta por cinco (5) años a quien ofrezca un mejor programa de evaluación técnica geológica de dicha área bajo los términos y condiciones que establezca la Autoridad Minera. Quien obtenga un contrato de Evaluación Técnica una vez terminado, tiene la primera opción para contratar con la Autoridad Minera el área bajo contrato de concesión en los términos que prevé este Código. **Inciso adicionado por la Ley 1382 de 2010, artículo 2º.** Las empresas que hayan sido objeto de incumplimiento de obligaciones del contrato original, declarado el incumplimiento por la Autoridad Minera, no tendrán la capacidad para competir en los contratos mineros, de que trata este artículo. **Inciso adicionado por la Ley 1382 de 2010, artículo 2º.** La delimitación de la que habla el presente artículo será reglamentada de manera previa por la Autoridad Minera.*

*205 **Inciso adicionado por la Ley 1382 de 2010, artículo 2º.** La Autoridad Minera también podrá delimitar otras áreas especiales que se encuentren libres, sobre las cuales, de conformidad con la información geológica existente, se puede adelantar un proyecto minero de gran importancia para el país, con el objeto de otorgarlas en contrato de concesión a través de un proceso de selección objetiva, a quien ofrezca mejores condiciones técnicas, económicas, sociales y ambientales para el aprovechamiento del recurso. Dentro de estos procesos la Autoridad Minera establecerá las contraprestaciones económicas, además de las regalías previstas por la ley, que los proponentes deban ofrecer. Las áreas que no hubieren sido otorgadas dentro del término de tres (3) años contados a partir de la delimitación del área, quedarán libres para ser otorgadas bajo el régimen de concesión regulado por este Código. La Autoridad Minera señalará el procedimiento general, así como las condiciones y requisitos para escoger al titular minero en cada caso.*

*206 **Inciso adicionado por la Ley 1382 de 2010, artículo 2º.** La Autoridad Minera a través de los medios de comunicación hablado y escrito informará a los interesados sobre las concesiones a licitar de que habla el presente artículo.*

*207 **Inciso adicionado por la Ley 1382 de 2010, artículo 2º.** Ingeominas como Autoridad Geológica en minería podrá delimitar áreas especiales, que se encuentren libres sobre las cuales no se recibirán ni se otorgarán títulos mineros, pero se respetarán los existentes, con el fin de que se adelanten procesos para entregar el área hasta por cinco (5) años a quien ofrezca un mejor programa de evaluación técnica geológica de dicha área bajo los términos y condiciones que establezca la*

Subparagraph added by Law 1382 of 2010, Article 2. Companies who have been in breach of obligations under the original contract, the Mining Authority, will have the ability to compete in mining contracts for said failures, under this article.²⁰⁸

Subparagraph added by Law 1382 of 2010, Article 2. The delimitation of this article shall be regulated by the previous manner of the Mining Authority.²⁰⁹

Article 32. Free Areas.²¹⁰ The areas, object of special reserves, which have not been linked to community mining programs and projects, will be free to be awarded to the third-party proponents, under the ordinary regime of concession, regulated by this Code.

Article 248. Special Mining Projects.²¹¹ The National Government, based in the results of mining-geological studies indicated in Article 31 of this Code, through the government's agencies adhered or linked with the Mining and Energy sector, will organize within the areas declared as special reserves, mining projects oriented towards the rational utilization of existing mineral resources, which may be of two types:

1. Special Mining Projects. Those are community mining projects that due to its geologic-mining characteristics make it possible the short, medium and long term mineral usefulness. In these cases, the State will intervene, through the government's competent agency, in training, promotion, transfer of technology, environmental handling, structure, development of mining projects and business development of informal miners already attested, of companies of solidarity economy and of those

Autoridad Minera. Quien obtenga un contrato de Evaluación Técnica una vez terminado, tiene la primera opción para contratar con la Autoridad Minera el área bajo contrato de concesión en los términos que prevé este Código.

208 Inciso adicionado por la Ley 1382 de 2010, artículo 2º. Las empresas que hayan sido objeto de incumplimiento de obligaciones del contrato original, declarado el incumplimiento por la Autoridad Minera, no tendrán la capacidad para competir en los contratos mineros, de que trata este artículo.

209 Inciso adicionado por la Ley 1382 de 2010, artículo 2º. La delimitación de la que habla el presente artículo será reglamentada de manera previa por la Autoridad Minera.

210 Artículo 32. Las áreas libres. Las áreas objeto de las reservas especiales que no hubieren quedado vinculadas a los programas y proyectos mineros comunitarios, quedarán libres para ser otorgadas a los terceros proponentes, bajo el régimen ordinario de concesión regulado por este Código.

211 Artículo 248. Proyectos Mineros Especiales. El Gobierno Nacional, con base en los resultados de los estudios geológico-mineros de que trata el artículo 31 de este Código, a través de las entidades estatales adscritas o vinculadas al sector de Minas y Energía, organizará dentro de las zonas que hubieren sido declaradas reservas especiales, proyectos mineros orientados al aprovechamiento racional de los recursos mineros allí existentes, los cuales podrán ser de dos clases: (1) Proyectos de minería especial. Son proyectos mineros comunitarios que por sus características geológico-mineras posibilitan un aprovechamiento de corto, mediano y largo plazo. En estos casos, el Estado intervendrá, a través de la entidad estatal competente, en la capacitación, fomento, transferencia de tecnología, manejo ambiental, estructuración, desarrollo del proyecto minero y desarrollo empresarial de los mineros informales ya legalizados, de las empresas de economía solidaria y de las asociaciones comunitarias de mineros que allí laboren; en la asesoría de alianzas estratégicas, consorcios o compañías con el sector privado para las actividades de exploración, explotación, beneficio, transporte, transformación y comercialización de los minerales existentes. (2) Proyectos de reconversión. Son proyectos en los cuales, dadas las características geológico-mineras y la problemática económica, social y ambiental, no es posible llevar a cabo el aprovechamiento del recurso minero. Estos proyectos se orientarán en el mediano plazo a la reconversión laboral de los mineros y a la readecuación ambiental y social de las áreas de influencia de las explotaciones. La acción del Gobierno estará orientada a la capacitación de nuevas actividades económicas, o complementarias a la actividad minera, a su financiación y al manejo social. Todas las acciones a que se refiere el numeral 1º anterior, se desarrollarán mediante contratos especiales de concesión, cuyos términos y características serán señaladas por el Gobierno. Dichas acciones, igualmente, se podrán ejecutar a través de los departamentos y municipios si así lo dispone el Gobierno, con la provisión de los correspondientes recursos. (Nota 1: Artículo reglamentado por el Decreto 2809 de 2009. Nota 2: Ver Ley 1382 de 2010, artículo 26.)

community associations of miners that work there; in the counseling of strategic alliances, consortiums or companies with the private sector for the activities of exploration, exploitation, ore dressing, transportation and commercialization of the existing minerals.

2. Reconversion Projects. Are those projects in which, given the mining-geological characteristics and the economic, social and environment problems, it is not possible to carry out the development of the mineral resource. These projects will be aimed on a medium term to the miner's labor restructuring and the environment and social readapting of areas of influence of the exploiting activity. This action of the Government will be aimed towards the training of new economic activities, or complementary to the mining activity, to is financing and the social management.

All the actions, to which the previous number 1 is referred, will be developed by means of special concession contracts, which terms and characteristics will be indicated by the Government.

Equally such actions can be executed through the departments and municipals if the Government so decides, with the provision of the corresponding funds.

Article 249. The Community Developments.²¹² As part of specific plans of development and of special mining projects, the State, through the government's organisms adhered or linked to the Mining and Energy sector, or through the departments and municipals, should carry out the following actions in relation with the mining exploration and exploitation:

To promote the legalization, organization and training of mining contractors of the region or locality in community associations or cooperatives of exploitation and beneficiation of minerals;

Counseling in the technical, economical and legal studies that they may deem necessary for the exploration, the rational exploitation, the beneficiation and development of mineral resources within the plans of community development;

To grant within the special reserved areas, to the associated miners, concession contracts under special conditions. These concessions may be granted to cooperatives or associations or, in an individual manner, to the miners entailed with the community plans.

Article 250. Mining Community Associations.²¹³ The miners that are identified within policies of social support of the Government may be organized in community associations of miners which main object will be to participate in agreements and projects of promotion of investigation and its application,

212 **Artículo 249. Los desarrollos comunitarios.** Como parte de los planes específicos de desarrollo y de los proyectos mineros especiales, el Gobierno, a través de organismos estatales adscritos o vinculados del sector de Minas y Energía, o a través de los departamentos y municipios, deberá adelantar las siguientes acciones en relación con la exploración y explotación de minas: a) Promover la legalización, organización y capacitación de empresarios mineros de la región o localidad en asociaciones comunitarias o cooperativas de explotación y beneficio de minerales; b) Asesorarlos en los estudios técnicos, económicos y legales que fueren necesarios para la exploración, la racional explotación, el beneficio y el aprovechamiento de los recursos mineros dentro de los planes de desarrollo comunitario; c) Otorgar dentro de las zonas reservadas especiales, a los mineros asociados o cooperados, contratos de concesión bajo condiciones especiales. Estas concesiones podrán otorgarse a las cooperativas o asociaciones o, en forma individual, a los mineros vinculados a los planes comunitarios. (Nota: Ver Ley 1382 de 2010, artículo 26.)

213 **Artículo 250. Asociaciones Comunitarias de Mineros.** Los mineros que se identifiquen dentro de las políticas de apoyo social del Estado, podrán organizarse en asociaciones comunitarias de mineros que tendrán como objeto principal participar en convenios y proyectos de fomento y promoción de la investigación y su aplicación, la transferencia de tecnología, la comercialización, el desarrollo de valor agregado, la creación y el manejo de fondos rotatorios. Estas asociaciones comunitarias también serán beneficiarias de las prerrogativas especiales previstas en el presente Código. (Nota: Ver Ley 1382 de 2010, artículo 26.)

transfer of technology, commercialization, development of added value, creation and handling of revolving funds.

These community associations will also be beneficiaries of special prerogatives set forth in this Code.

Article 257. Traditional Exploitations.²¹⁴ The measures and government's actions on the special mining projects, common developments and common associations of miners, referred to in the previous Articles 248, 249 and 250, will be carried out also in those areas in which there are deposits of minerals that are being exploited traditionally by numerous neighboring persons of such place and that, due to its characteristics and socio-economic location, are the only source of regional provision of the extracted minerals.

In these cases, the mining authority will delimit the mentioned areas and within those, a preference will be given to grant the concession contract to the common and/or solidarity associations that the traditional exploiters constitute for such effect. All the above will be executed without prejudice to existing mining titles, granted, recognized or in process.

It is worth noting that the implementation of the Special Mining Agencies and their Projects may not be developed as originally envisioned by the Congress; all State industrial and commercial mineral development and support agencies were dissolved and terminated under former President Alvaro Uribe Velez. The Uribe administration closed all State mining public companies or agencies to focus the State's attentions on attracting foreign investment for private mineral production to be granted under concession contracts.²¹⁵ Actually Decree 2200 of 2001, which was signed three months after the 2001 Mining Code was passed, created ten reserves in three different departments for these Special Mining Projects; their purpose would have been to formalize and develop the small scale and solidarity-based medium scale informal hard-rock mine work that had been taking place around traditional coal and gold deposits (rock encased gold, not alluvial) in those departments²¹⁶. Later, Decree 1494 of 2003

214 **Artículo 257. Explotaciones tradicionales.** *Las medidas y acciones estatales sobre proyectos mineros especiales, desarrollos comunitarios y asociaciones comunitarias de mineros a que se refieren los artículos 248, 249 y 250 anteriores, se adelantarán también en aquellas áreas en las cuales haya yacimientos de minerales que vengán siendo explotados tradicionalmente por numerosas personas vecinas del lugar y que, por sus características y ubicación socioeconómicas, sean la única fuente de abastecimiento regional de los minerales extraídos. En estos casos la autoridad minera delimitará las mencionadas áreas y dentro de ellas dará prelación para otorgar contrato de concesión a las asociaciones comunitarias y/o solidarias que los explotadores tradicionales formen para tal efecto. Todo lo anterior sin perjuicio de los títulos mineros vigentes, otorgados, reconocidos o en trámite. (Nota: Ver Ley 1382 de 2010, artículo 26.)*

215 In Former President Uribe's own words: "Our concept of Communitarian State aims for all government institutions abide to the mission of building an equitable and inclusive society. Minercol's liquidation is part of administrative reform led by this government and which has brought significant savings to the budget, has simplified procedures and has freed resources for social investment. I repeat that State entities should not be in the service of politics or union privileges, but to serve the community. The liquidation of Minercol is part of the Ministry of Mines reform. The reform transferred the power to Ingeominas, and also involves Carbocol, the IFI Salt concession and the Directorate of Mines. Before the reform, these entities had an annual cost of \$ 83,431 million pesos, thanks to the reform; the annual cost is now \$ 18.352 million, ie, the savings is over \$ 65,000 million per year. I understand that the burden of formalities has been reduced to less than a third. Minercol was the result of the merger between Ecocarbon and Mineralco. It was necessary to recognize to all workers the most favorable convention, thus increasing the difficulties in terms of costs and operational expenses. There was duplication between the functions of Minercol and the Ministry. The above considerations and many others that the Honorable Representatives shall learn from the Minister of Mines led this Government to order the liquidation of the company, a process that has been respectful of the Social checkpoint built by this administration, and also protects the mothers householder with no economic alternatives, who are close to pensioners and the disabled." <http://oacp.presidencia.gov.co/snerss/detalleNota1.aspx?id=1975>

216 Please see: http://www.presidencia.gov.co/prensa_new/decretoslinea/2001/octubre/19/dec2200192001.pdf

added other zones and derogated three of the reserves that had already been created²¹⁷. One was derogated because it overlapped with an existing mining title and the others could no longer be considered reserved zones, because the communities of informal miners working in the poverty conditions described in the decrees had been displaced from their territories by the existing violence around the zone. Having been thus abandoned, the special reserves had to be derogated. Possibly, and in accordance with Article 32, those zones became areas free and ready for third party proponents to explore, exploit and develop via private investment concession contracts.

What is important to highlight is that all the approximation of informal mine working communities around traditionally exploited mineral deposits was executed by the State owned *Minercol* Company and territorial entities. Yet, neither *Minercol* nor *Carbocol* exist anymore. In this sense, the development of State Mining Projects is now an abandoned project of the State, as the only possibility for developing, leveraging and formalizing the informal mine worker labor and operations would have been in the hands of the Mining Districts; these, however, are now only available for formal, legal mining operations. Maybe some resources of the National Royalties Fund will be designated to protect the right to work and to entrepreneur of informal mine workers, even if they are the least attractive partners for the new investment-oriented Colombian State. Article 2 of the recently passed law 1382 of February 2010, establishes that the State may also reserve areas of mineral deposits as special economic interest zones, furthering the investment logic of the Colombian State. The concession contracts to explore, exploit and develop these zones would be granted through competitive bidding processes, rather than through the request mechanism that is currently in operation.

3.8 AUTHORIZATION FOR UN-TITLED OCCASIONAL MINE WORK

3.8.1. PERSONAL HOUSE BUILDING AND INSTALLATIONS

Under Article 152 of the 2001 Mining Code and two subsequent provisions, land owners are granted permission to engage in small scale surface extraction of industrial minerals²¹⁸ such as clays and sand for their personal consumption, i.e. house building and repairs, without requiring a concession contract.²¹⁹ This extraction must be carried out using human strength and manual tools only, and it is

217 Please see: <http://www.avancejuridico.com/actualidad/documentosoficiales/2003/45208/d1494003.html>

218 **Article 11. Construction materials.** For all legal effects construction materials are considered to be the petreous extraction in mines and quarries, used in the construction industry as aggregates in the fabrication of concrete pieces, mortars, pavements, ground works and other similar products. Also, for the same effects, dragging materials such as sand, gravel and stones laying in running water beds and shores, flood plains and other alluvial terrains. Materials above mentioned are called construction materials although, once exploited, they might not be destined for this industry. The exertion, awarding and term of the right to explore and exploit construction materials referred in this Article, are entirely regulated by this Code and are of the exclusive competence of the mining authority. // **Artículo 11. Materiales de construcción.** Para todos los efectos legales se consideran materiales de construcción, los productos pétreos explotados en minas y canteras usados, generalmente, en la industria de la construcción como agregados en la fabricación de piezas de concreto, morteros, pavimentos, obras de tierra y otros productos similares. También, para los mismos efectos, son materiales de construcción, los materiales de arrastre tales como arenas, gravas y las piedras yacentes en el cauce y orillas de las corrientes de agua, vegas de inundación y otros terrenos aluviales. Los materiales antes mencionados, se denominan materiales de construcción aunque, una vez explotados, no se destinen a esta industria. El otorgamiento, vigencia y ejercicio del derecho a explorar y explotar los materiales de construcción de que trata este artículo, se regulan íntegramente por este Código y son de la competencia exclusiva de la autoridad minera.

219 **Article 152. Occasional Extraction.** The occasional and transitory extraction of industrial minerals in the open pit mining, that is carried out by the owners of the surface, in small amounts and not much depth and by manual work, will not require of a concession of the State. This occasional exploitation can be destined only to be consumed by the owners in

forbidden for to commercialize the minerals that are thereby extracted. Finally, the extraction itself must be done in a responsible way that repairs, mitigates and substitutes all negative environmental effects.

3.8.2. BAREQUEO: RIVER SAND PANNING AND EXTRACTION OF ALLUVIAL CONSTRUCTION AGGREGATES

Defined in article 155²²⁰ of the Code as a popular “activity” of alluvial regions’ inhabitants, the panning article is essentially a legal provision attempting to recognize the cultural mining inheritance of rural afro-Colombian constituents who continue to live on the same river shores where they were once taken for enslaved mine work by Spaniards. Their mining technique has been described by a North American gold panner (who pans as a hobby rather than for survival) in the following passage:

“(…) gold panning is basically simple, once you realize that you are doing the same thing that the river does when it causes gold to concentrate and deposit during flood storms. The process basically consists of placing the material that you want to process into your pan and shaking it in a left to right motion underwater to cause the gold, which is heavy, to work its way down toward the bottom of your pan. At the same time, the lighter materials, which are worthless, are worked up to the surface of the gold pan where they can be swept away. The process of shaking and sweeping is repeated until only the heaviest of materials are left - namely the gold and heaviest black sand. (...) it is very effective as a gold-catching device; it can only process a limited volume of streambed material. For this reason, the gold pan is normally not used as a production tool in commercial use, other than in the most remote locations where it would be very difficult to haul large pieces of equipment, and where there is only a small

works and repairs of their homes and installations, previous authorization of the owner of the properties. Any other industrial or commercial destination given to the extracted minerals, covered by this Article, is prohibited. In use of the authorization set forth in this Article, owners are in the obligation to preserve, repair, and substitute the negative environmental effects that might be caused and to the readapting of the explored land. // **Artículo 152. Extracción ocasional.** *La extracción ocasional y transitoria de minerales industriales a cielo abierto, que realicen los propietarios de la superficie, en cantidades pequeñas y a poca profundidad y por medios manuales, no requerirá de concesión del Estado. Esta explotación ocasional solamente podrá tener como destino el consumo de los mismos propietarios, en obras y reparaciones de sus viviendas e instalaciones, previa autorización del dueño del predio. Todo otro destino industrial o comercial que le den a los minerales extraídos, al amparo de este artículo, les está prohibido. En uso de la autorización contemplada en el presente artículo, los propietarios están obligados a conservar, reparar, mitigar y sustituir los efectos ambientales negativos que puedan causar y a la readecuación del terreno explotado.*

Article 153. Restrictions. The occasional and transitory exploitation given in the above Article, is not authorized to oppose the proposals to third parties, nor to establish any type of servitudes or easements in its benefit.// **Artículo 153. Restricciones.** *La explotación ocasional y transitoria consagrada en el artículo anterior, no autoriza para oponerse a las propuestas de terceros, ni a establecer servidumbre alguna en su beneficio.*

Article 154. Industrial Minerals. For the effects of the above Articles, the industrial minerals are the clays in its many forms and the construction materials defined in this Code. Are considered small exploitations and of not much depth, those that are carried out with a set of simple tools or implements of manual use, operated by human strength, and which extracted amount does not surpass in any case two hundred and fifty (250) tons of material per year. // **Artículo 154. Minerales industriales.** *Para los efectos de los artículos anteriores, los minerales industriales son las arcillas en sus distintas formas y los materiales de construcción definidos en este Código. Se consideran explotaciones pequeñas y de poca profundidad, las que se realicen con herramientas e implementos simples de uso manual, accionados por la fuerza humana, y cuya cantidad extraída no sobrepase en ningún caso a las doscientas cincuenta (250) toneladas anuales de material.*

²²⁰ **Artículo 155. Barequeo.** *El barequeo, como actividad popular de los habitantes de terrenos aluviales actuales, será permitida, con las restricciones que se señalan en los artículos siguientes. Se entiende que esta actividad se contrae al lavado de arenas por medios manuales sin ninguna ayuda de maquinaria o medios mecánicos y con el objeto de separar y recoger metales preciosos contenidos en dichas arenas. Igualmente, será permitida la recolección de piedras preciosas y semipreciosas por medios similares a los que se refiere el presente artículo.*

amount of streambed material present -- which is paying well enough to make the panning worthwhile.(...)”²²¹

Legally authorized panning in Colombia is a “practice” restricted to washing sand by manual means only; no machinery or mechanical tools are allowed to separate and collect the precious metals found in these sands. The collection of precious and semiprecious stones by washing sands is also permitted by law.

Authorized panning “activities” are presumed to take place in the communal lands of ethno-cultural communities, i.e., the indigenous and afro-Colombian communities. Article 156²²² States that “if” the panning is to be done on private property, then the land owner’s authorization is required. Article 158²²³ then establishes that only the neighbors of the community in whose benefit an afro-Colombian mining zone was authorized can lawfully carry out panning “activities”. These articles act as concrete restrictions for afro-Colombians who are included in the general rule that is imposed upon inhabitants who carry out this “practice,” and who must be villagers or neighbors of the place where the panning “activity” is taking place. In fact, the law creates an obligation on afro-Colombians to register with the mayor of the municipality, who is also the designated arbiter under the Code of conflicts between panners or *barequeros* and mine title holders, as well as land owners and land tenants. As much as *barequeo* may take place in afro-Colombian, indigenous and mixed mining zones, Article 157²²⁴ of the Code prohibits anyone from engaging in this practice within 300 meters of the machinery and installations of the concessionaires,²²⁵ or in forest reserves and National parks²²⁶, within the urban

221 Please see: <http://www.goldgold.com/panninginstructions.htm>

222 **Artículo 156. Requisito para el barequeo.** Para ejercitar el barequeo será necesario inscribirse ante el alcalde, como vecino del lugar en que se realice y si se efectuare en terrenos de propiedad privada, deberá obtenerse la autorización del propietario. Corresponde al alcalde resolver los conflictos que se presenten entre los barequeros y los de éstos con los beneficiarios de títulos mineros y con los propietarios y ocupantes de terrenos.

223 **Artículo 158. Zonas de Comunidades Negras.** En los terrenos aluviales declarados como zonas mineras de comunidades negras de acuerdo al artículo 131, sólo podrán practicar el barequeo los vecinos del lugar autorizados por el alcalde, que pertenezcan a la comunidad en cuyo beneficio se hubiere constituido dicha zona. En estos casos, el alcalde obrará en coordinación con las autoridades de las comunidades beneficiarias de la zona minera.

224 **Article 157. Places not Allowed.** Panning will not be allowed in the following places: a. In those where the mining labor cannot be done, according to Article 34 and numerals a), b), c), d) and e) of Article 35 of this Code; b. In places where the “Territorial Ordinance Plan” forbids, for reasons of peace, public security, ornament and urban development; c.

In places where machinery and installations of concessionaires of mines operate, plus an encircling distance of three hundred (300) meters. // **Artículo 157. Lugares no permitidos.** No se permitirá el barequeo en los siguientes lugares: a) En los que no pueden realizarse labores mineras de acuerdo con el artículo 34 y los numerales a), b), c), d) y e) del artículo 35 de este Código; b) En los lugares que lo prohiban el Plan de Ordenamiento Territorial, por razones de tranquilidad, seguridad pública, ornato y desarrollo urbano; c) En los lugares donde operen las maquinarias e instalaciones de los concesionarios de minas, más una distancia circundante de trescientos (300) metros.

225 The relevant provision establishes a distance of 300 metres : “c) En los lugares donde operen las maquinarias e instalaciones de los concesionarios de minas, más una distancia circundante de trescientos (300) metros”

226 **Artículo 34. Zonas excluíbles de la minería.** No podrán ejecutarse trabajos y obras de exploración y explotación mineras en zonas declaradas y delimitadas conforme a la normatividad vigente como de protección y desarrollo de los recursos naturales renovables o del ambiente y que, de acuerdo con las disposiciones legales sobre la materia, expresamente excluyan dichos trabajos y obras. Las zonas de exclusión mencionadas serán las que se constituyan conforme a las disposiciones vigentes, como áreas que integran el sistema de parques nacionales naturales, parques naturales de carácter regional y zonas de reserva forestales. Estas zonas para producir estos efectos, deberán ser delimitadas geográficamente por la autoridad ambiental con base en estudios técnicos, sociales y ambientales con la colaboración de la autoridad minera, en aquellas áreas de interés minero. Para que puedan excluirse o restringirse trabajos y obras de exploración y explotación mineras en las zonas de protección y desarrollo de los recursos naturales renovables o del ambiente, el acto que las declare deberá estar expresamente motivado en estudios que determinen la incompatibilidad o restricción en relación

perimeter of villages and cities,²²⁷ rural houses and their gardens and orchards (unless authorized),²²⁸ archeological, historic or cultural places (again, unless authorized),²²⁹ in beaches, low-sea areas and fluvial transport routes (unless exceptionally regulated by the competent authority),²³⁰ in public works or public service affected areas,²³¹ and in those places that that - for public safety, urban development, embellishment and tranquility – are forbidden by the Territorial Organizing Plan.²³²

It is important to note that the term “panning” or *barequeo* has become commonly used to describe mining that is performed by untitled mine workers in poverty, and that, although originally and intrinsically linked to alluvial or sand washing, the term has been extended to include the micro-extraction of building material aggregates from rivers, again, most often performed by poverty-trapped families; however, there is no legal provision within the Code officially and formally identifying it as such. Nonetheless, and adding to the gap in policy and the legal “disempowerment” of these citizens, the Mining Glossary includes and explains Artisanal River Sand And Gravel Extraction²³³ as a mining (extractive) activity that is carried out by two or three people (generally members of the same family of “sanders”) on the beach, bank or bed of a river, who use shovels for depositing the material in a canoe or directly on the beach, where the material is collected for later sieving and separation of the finer sands.

Recently enacted Law 1382 of 2010²³⁴ recognizes this activity and, in fact, grants it an un-titled authorization, thereby formally encompassing it under the notion of *barequeo* or panning, although not linking it to the *barequeo* provisions already in force. Thus, amid these conflicting and overlapping provisions, *barequeo*/panning no longer legally means sand washing for gold, platinum and stones only, but also the extraction of construction aggregates (sand and gravel mainly) from rivers, in so far

con las actividades mineras. No obstante, la autoridad minera previo acto administrativo fundamentado de la autoridad ambiental que decreta la sustracción del área requerida, podrá autorizar que en las zonas mencionadas en el presente artículo, con excepción de los parques, puedan adelantarse actividades mineras en forma restringida o sólo por determinados métodos y sistemas de extracción que no afecten los objetivos de la zona de exclusión. Para tal efecto, el interesado en el Contrato de Concesión deberá presentar los estudios que demuestren la compatibilidad de las actividades mineras con tales objetivos.

227 **a)** *Dentro del perímetro urbano de las ciudades o poblados, señalado por los acuerdos municipales adoptados de conformidad con las normas legales sobre régimen municipal, salvo en las áreas en las cuales estén prohibidas las actividades mineras de acuerdo con dichas normas;*

228 **Artículo 35 b)** *En las áreas ocupadas por construcciones rurales, incluyendo sus huertas, jardines y solares anexos, siempre y cuando se cuente con el consentimiento de su dueño o poseedor y no haya peligro para la salud e integridad de sus moradores;*

229 **c)** *En las zonas definidas como de especial interés arqueológico, histórico o cultural siempre y cuando se cuente con la autorización de la autoridad competente;*

230 **d)** *En las playas, zonas de bajamar y en los trayectos fluviales servidos por empresas públicas de transporte y cuya utilización continua haya sido establecida por la autoridad competente, si esta autoridad, bajo ciertas condiciones técnicas y operativas, que ella misma señale, permite previamente que tales actividades se realicen en dichos trayectos;*

231 **e)** *En las áreas ocupadas por una obra pública o adscritas a un servicio público*

232 **b)** *En los lugares que lo prohíban el Plan de Ordenamiento Territorial, por razones de tranquilidad, seguridad pública, ornato y desarrollo urbano;*

233 **Extracción artesanal de piedra y arena de río:** *Extracción realizada por dos o tres personas (generalmente miembros de una misma familia de "areneros") en la playa, la ribera o el lecho de un río, y que utiliza para ello una pala, con la que deposita el material en una canoa, o si está cerca de la playa directamente en ella, donde el material es "arrumado" (acopiado) para ser posteriormente clasificado, al hacerlo pasar por una malla (zaranda) con el fin de separar la arena más fina. La extracción artesanal se realiza, generalmente, en ríos de poca turbulencia.*

234 **Article 12, Second paragraph:** *“Se considerará legal el barequeo consistente en extracción de materiales de arrastre, siempre y cuando se realice con herramientas no mecanizadas y con una extracción que no supere un volumen de 10 metros cúbicos por día, por longitud de rivera de 200 metros de largo.”*

as the extraction is done with non-mechanical tools and the volume extracted is less than 10 cubic meters per 200 meter shore.

3.9. FROM OWN ACCOUNT TO SELF EMPLOYED MINE WORK: THREE ILLUSTRATIVE EXAMPLES OF ARTISANAL AND SMALL SCALE MINERS PLACED IN POVERTY-TRAPS BY THE LAW

- **Lupe** is a young mother and head of household. She is, like most Colombians, mestizo. She fell in love with a 20 year-old soldier who was stationed in the next town. With her dreams of starting a family, neither Lupe nor her soldier took appropriate precautions; she became pregnant and had a little girl. Her lover, however, was sent into a combat zone and Lupe has not heard from him in over one year. Following the advice of her cousins from Antioquia, Lupe left her town with her daughter to work as a *chatarrera*. Her baby stays with a neighbor, who also acts as a community mother, while she and her cousins go to mine ore waste that is piled outside mountain tunnels. She has learned from an old miner, Antonio, how to scan for good rocks, and her cousins have told her who pays the best rates for the ore in the town where she is now living.

Lupe knows that, although she is not a miner and that nobody in her family has ever worked in anything other than agriculture, what she is doing is mine work. She would like to, one day, work in a less difficult and painful trade, but her parents' tomato plantation is simply not doing well. The tomatoes they grow are tasty, but less beautiful than the ones that are favored on the market, the ones that her father claims are not real tomatoes. In any case, they are not paid well enough to support *Lupe* or her daughter. With no farming opportunities, *Lupe* was forced to look for other work options. Even if she breaks her back mining ore, she does not want to follow the path of another woman, a neighbor who went to Spain – this woman may send money back to her family, but she never came back home, and there are rumors that she might be working in prostitution (human trafficking). Nor does *Lupe* want to work at a bar or as a domestic worker; in fact, because she is a young mother, these options may not even be available to her, as she would never leave her daughter behind. Becoming a *chatarrera* did not require a license or an interview. She was just introduced to the workplace by her cousins. While the stability of working in a mine would be a dream come true for *Lupe*, it is only men who work in mines, even though what she is doing is just as difficult as men's mine work. She wonders why she could not perform similar work but in a formal work environment. And she dreams of one day operating a bulldozer...

Lupe represents the informal own account mine worker who is using an artisanal mechanism to mine operational waste around a large scale industrial mining concession.

- **Noelio** is growing old on the same plot of land in which he was born and raised and where he now lives with his family and grand-children. They are all Colombian mestizoes and of a peasant origin. He lives with his wife, daughter, son in law and grandson, two parrots and three dogs, on a plot of land facing the dark yellow river waters, surrounded by all kinds of trees, orchard plants, and two medium-sized mountains of sand. He sells his sand to people who then use it for construction purposes. *Noel* inherited his land from his father who was, according to *Noel*, an informal worker in sand extraction from the river, just like his neighbors. They were all traditional sand miners. He and his father have worked as artisanal sand miners shoveling sand from the river with the help of a rudimentary mechanized platform. *Noel* explains that he has grown into a businessman and has even hired some (informal) employees to operate the platform boats (*malacate*) that they use to extract sand from the

riverbed. He pays them each the equivalent of five dollars per day per day worked. His wife and daughter - who once operated the *pluma* machine - no longer work in the family business, but they do support it through their cooking, selling sand and accounting for the business. His daughter is married to one of Noel's workers, who actually left sand mining to work as an urban waste picker in Cali. He envisions having a pelletized plastic business one day.

Noel represents the small-scale unincorporated self-employed miner working with no title, but operating legally under a provisionary permit that he has been renewing every two months for the last five years, while he waits for approval for a concession title.

-Maria is an Afro-Colombian woman living in the communal lands of an afro-collective territory. She and her family live and work in the fjord found where the black and yellow rivers cross. Anyone in *Kadó* will tell you where this parcel of land is – her family, the *Lucumíi* family, has been mining there for centuries and their ancestral mining “trunk” runs deep. She proudly says that she inherited the same sharp eye as her great-grandfather Silverio, who is said to have found a gold nugget the size of a mandarin in the sands of that same fjord. She admits, however, that her cousins, who live in the city of Cali, exaggerate the legend of Silverio. In fact, three weeks ago when her cousin Aliria came from Cali to pan gold during the weekend, she said that the nugget their great-grandfather found was the size of a coconut. Aliria worked hard that weekend, but she still could not come up with the two grams of gold she needed to collect; she will, therefore, be forced to borrow money to buy some medications that her son needs and that the subsidized health regime does not provide. The hard part is that if Aliria had found just two grams, she would have been able to get more money for that gold than what she will now have to borrow.

Street vending mango and *chontaduro* fruit in Cali is just not a good business, but Maria explains that Aliria could not cope with the anxiety of having industrial miners wandering around their land, and the guerrilla and paramilitary crisscrossing the territory asking questions of the people who lived there. The truth is that the *Bojayá* massacre affected her very deeply, and the illegally armed groups wandering and giving away coca seeds make her nervous; Aliria has nothing against the coca plant, she is used to seeing it chewed by the indigenous communities nearby, but it is that just as Valenciano²³⁵ said: with coca plantations, violence and blood follow this plant.

Maria, however, wants to remain a mine worker. She has a cousin in Pereira who told her that he can get her some kind of vacuum cleaner for more effective sand washing to help her mine for alluvial gold, but the other day she crossed paths with the mayor, who reminded her that if she used this machine, she would actually become an informal, and thus illegal, mine worker. Apparently, Maria says, the government wants to keep her and others like her in manual work, like their enslaved ancestors. For really developing in mining, she must wait and see if the Communitarian Council is fast enough to plan and decide in 30 days whether they are economically and administratively capable of using their first-in-right preferential mining prerogative and move forward while forcing the multinationals out of their territories. Maria wonders how she can grow and develop as a miner when she is neither a gringo nor millionaire; she comforts herself by saying that at least someone (the Civil Society's Oro Verde Program) acknowledges her work and the fact that some artisanal miners prefer not to poison the river with mercury and diesel. For instance, illegal miners almost killed the people in *Amadó* with all their

235 Please see: <http://www.eltiempo.com/archivo/documento/CMS-4465439>

dredges and diesel and if it was not for Valenciano and the press, the government might not have closed the illegal operations. Maria thinks again of the vacuum cleaner offered by her cousin. However, if she buys that machine, the mayor is ready to treat her like an illegal worker and she does not want to have problems with the police or live in intimidation, as if she were a threat to her environment and community. It is as if Bogota is unaware that women mineworkers²³⁶ are the most stable source of survival and income for children. At the same time, the poisoned water means less fish and drinking water for her family... moving to the big city of Cali with her cousin Aliria does not sound so bad, after all.

Maria represents a formal own account mine worker on a micro-scale mining operation laboring in an artisanal fashion and in an environmentally responsible way, who is limited in her right to work and develop formally through artisanal work²³⁷.

- **Gustavo** started working in mine work when he was 10 years old, he has lived all his life in Cundinamarca. He learned this trade from his father, who was also a coal miner who died when a mining tunnel collapsed and trapped him in the mountain. It has been a long journey for Gustavo to get a mining title and formalize his work. Actually he had to join efforts with two other informal miners. He says that if they did not raise the 200 million pesos that were necessary to pay for the titling process, he would remain informal and vulnerable. They also had to pay 3 million pesos for the environmental license and another 2 million pesos for a certification of infrastructure and gases granted by an engineer, who does so the moment he is paid, without even having to go and in fact verify the conditions in the mine. Gustavo, however, resents formalizing because it is so expensive and takes so long – they had to wait for seven years for the entire process; at the same time, he says that if it was not for the request for mining title, it is possible that mine safety would not get enough attention and investment from its owners.



Hard Rock Carbon Mining Photo by: Lina Arbelaez[®]

Once Gustavo and the two other miners obtained the mining title, they all split the concession zone into three portions and started to work separately, Gustavo started his own cooperative. He has eight children, the younger of two girls is finishing school and the oldest is in Bogota working as a domestic worker. The rest of his children are young men working in the mine. He takes pride in saying that his youngest boy has not even set foot in the mine. His eldest is the mine manager. His wife helps the security guard's wife with cooking breakfast and lunch for all the miners. Gustavo provides basic social protection to all workers and pays every two weeks wages based on the amount of coal cars that are packed during the day. This is a piece-meal system of payment and no basic salary is amassed. A small mine can collect from 50 to 100 tons per week, and one ton of coal may cost approximately 70.000 Colombian pesos (350 USD); an average salary might be around one million pesos per month,

236 Please see : <http://www.jansochor.com/photo-essay/women-miners.html> , and <http://www.flickr.com/photos/alejocock/3029377361/in/set-72157594347088246/>

237 It is possible to develop artisanal work in a medium scale not only in small and micro-mining scales, The *Wayuu* indigenous in artisanal salt mining in the Guajira Department constituted an organization , it/was levered by the State, IFI concession Salinas, now also under liquidation and thus in a community dispute. X%X extraer del decreto 2200 las cifras de contribución de informalidad a la economía

representing almost twice the minimum legal wage. Working hours match the obligatory eight hours working day. Gustavo says that the big company in the region is the one that buys coal from all others, and that women working in the region are engaged in big mining establishments; they have women outside the mines separating what is “peña” (a rock with similar characteristics of coal) from the coal itself.. Gustavo’s biggest fear is the many mining titles that big companies are getting around him and closer to his region in Ubate, as he knows he cannot compete with them and will eventually be forced to sell to them, ending up himself or his children as employees after all the years of work and investment in his entrepreneurial efforts and working formally.

Gustavo represents the traditional mestizo peasant or peri-urban mine worker that, although in poverty, managed to transition to formal mine work through cooperation and solidarity.

3.10 ILLEGALITY INFORMALITY AND POVERTY BUILDING BY THE RULE OF LAW

Two conclusions may be made about the conceptual proximity of informality and illegality in mining in Colombia:

1. There appears to be a need within the law and policy framework to introduce an unequivocal, certitude-granting criterion to distinguish acts and conducts that violate the mining law from acts and conducts that are incapable of meeting the law’s lofty conditions. Rather than illegal, this second set of actions is better described as un-legal or informal, in that they fall short of the law’s obligations by virtue of the extraordinary difficulties of meetings those requirements. Legal theory and policy would benefit greatly from a distinction separating *informality for convenience* from *informality due to necessity and being poverty-trapped*.

It is worth noting, also, that large- and medium-scale mining operations working in an industrial mode, as well as small- and micro-scale mining operations and actors, may violate Colombian penal law if they engage in any of the following actions:

Article 329. Violation of boundaries for natural resource exploitation²³⁸. An alien within the country carries out, unauthorized act of exploitation of natural resources shall be liable to four (4) to eight (8) years and a fine of 100 to 30,000 times the legal minimum monthly wage

Article 331. Damage to natural resources.²³⁹ The failure to comply with existing norms that destroy, disable, then disappear or otherwise damage the natural resources referred to in this title, causing heavy damage or they are associated with them or are affected specially protected areas shall be punishable with two (2) to six (6) years and a fine of one hundred (100) to ten thousand (10,000) legal minimum monthly wages.

238 **ARTÍCULO 329. Violación de fronteras para la explotación de recursos naturales.** El extranjero que realizare dentro del territorio nacional acto no autorizado de explotación de recursos naturales, incurrirá en prisión de cuatro (4) a ocho (8) años y multa de 100 a 30.000 salarios mínimos legales mensuales vigentes.

239 **ARTÍCULO 331. Daños en los recursos naturales.** El que con incumplimiento de la normatividad existente destruya, inutilice, haga desaparecer o de cualquier otro modo dañe los recursos naturales a que se refiere este título, causándoles una grave afectación o a los que estén asociados con éstos o se afecten áreas especialmente protegidas incurrirá en prisión de dos (2) a seis (6) años y multa de cien (100) a diez mil (10.000) salarios mínimos legales mensuales vigentes.

Article 332. Environmental pollution.²⁴⁰ Anyone who, in violation of existing norms, pollute the air, atmosphere or other components of air space, soil, subsoil, water or other natural resources in such a way that endangers human health or wildlife resources, forest, aquatic flora or will incur, subject to administrative sanctions that may be due, in prison for three (3) to six (6) years and a fine of one hundred (100) to twenty-five thousand (25,000) legal minimum monthly wages.

When the actions above are carried out for terrorist purposes, the penalty is increased by one-third to one-half of the 50,000 (Colombian pesos) fine that is normally imposed.

Article 333. Environmental pollution by negligent operation of mining or hydrocarbon reservoir.²⁴¹ Who negligently explores, exploits or extracts mineral deposits, hydrocarbons, contaminated water, soil, subsoil or air, may be imprisoned for two (2) to five (5) years and a fine of one hundred (100) to fifty thousand (50,000) legal minimum monthly wages.

Article 337. Invasion of areas of special ecological importance.²⁴² The invading forest reserve, reservations or Indian reservations, land owned collectively by the black communities, regional park, area or ecosystem of strategic interest or protected area as defined by law or regulation, shall be liable to imprisonment for two (2) to eight (8) years and a fine of one hundred (100) to fifty thousand (50,000) legal minimum monthly wages.

The penalty prescribed in this Article shall be increased by one third when the invasion seriously affects the natural components that served as the basis for the classification of the territory concerned; otherwise the penalty is set at 50,000 of the legal minimum monthly wages.

Anyone who promotes finances or manages an invasion or economic use of it shall be liable to three (3) to ten (10) years and a fine of one hundred fifty (150) to fifty thousand (50,000) legal minimum monthly wages.

Article 338. Illegal exploitation of mineral deposits and other materials.²⁴³ The individual who without

240 **ARTÍCULO 33. Contaminación ambiental.** *El que, con incumplimiento de la normatividad existente, contamine el aire, la atmósfera o demás componentes del espacio aéreo, el suelo, el subsuelo, las aguas o demás recursos naturales en tal forma que pongan en peligro la salud humana o los recursos faúnicos, forestales, florísticos o hidrobiológicos, incurrirá, sin perjuicio de las sanciones administrativas a que hubiere lugar, en prisión de tres (3) a seis (6) años y multa de cien (100) a veinticinco mil (25.000) salarios mínimos legales mensuales vigentes. La pena se aumentará de una tercera parte a la mitad cuando la conducta se realice con fines terroristas, sin que la multa supere el equivalente a cincuenta mil salarios mínimos legales mensuales vigentes.*

241 **ARTÍCULO 333. Contaminación ambiental culposa por explotación de yacimiento minero o hidrocarburo.** *El que por culpa al explorar, explotar o extraer yacimiento minero o de hidrocarburos, contamine aguas, suelo, subsuelo o atmósfera, incurrirá en prisión de dos (2) a cinco (5) años, y multa de cien (100) a cincuenta mil (50.000) salarios mínimos legales mensuales vigentes.*

242 **ARTÍCULO 337. Invasión de áreas de especial importancia ecológica.** *El que invada reserva forestal, resguardos o reservas indígenas, terrenos de propiedad colectiva de las comunidades negras, parque regional, área o ecosistema de interés estratégico o área protegida, definidos en la ley o reglamento, incurrirá en prisión de dos (2) a ocho (8) años y multa de cien (100) a cincuenta mil (50.000) salarios mínimos legales mensuales vigentes. La pena señalada en este Artículo se aumentará hasta en una tercera parte cuando como consecuencia de la invasión, se afecten gravemente los componentes naturales que sirvieron de base para efectuar la calificación del territorio correspondiente, sin que la multa supere el equivalente a cincuenta mil (50.000) salarios mínimos legales mensuales vigentes. El que promueva, financie o dirija la invasión o se aproveche económicamente de ella, incurrirá en prisión de tres (3) a diez (10) años y multa de ciento cincuenta (150) a cincuenta mil (50.000) salarios mínimos legales mensuales vigentes.*

243 **ARTÍCULO 338. Explotación ilícita de yacimiento minero y otros materiales.** *El que sin permiso de autoridad competente o con incumplimiento de la normatividad existente explote, explore o extraiga yacimiento minero, o explote arena, material pétreo o de arrastre de los cauces y orillas de los ríos por medios capaces de causar graves*

permission of competent authority or failure to existing norms, exploits, explores or extracts mineral deposit, or sand, stone material for construction or trawling the channels and river banks by means capable of causing severe damage to natural resources or the environment shall be liable to imprisonment for two (2) to eight (8) years and a fine of one hundred (100) to fifty thousand (50,000) legal minimum monthly wages.

As much as these provisions of the penal code regulate illegal conduct of mine workers, the Mining Code and its decrees – most notably the decree adopting the Mining Glossary – create ambiguities and contradictions on what exactly is legal, illegal, formal, informal, irregular, traditional, subsistence, panning, artisanal and *de facto* mining. This broad level of imprecision creates a vast grey area for human rights violations for the populations of Colombian mine workers who are living and working in poverty. In a country where the rural population is almost entirely steeped in poverty, and highly representative of the indigenous and afro-Colombian minority populations, this situation translates into the impossibility of these constituents – who also have reduced connectivity, may not speak Spanish, and are geographically distanced from Bogota – to know with certainty whether their way of life is lawful or not. It certainly makes it extremely difficult for these constituents to appraise their rights and duties to advance, change or confront their legal labor-related limbo.

Thus, law and policy makers should assess and determine whether, for instance, dredging rivers or bulldozing for mining purposes without any title or permit or extracting and exporting sand as a non-specifiable mineral material²⁴⁴ are illegal acts in a different way than the actions of a woman head of household who extracted some mountain clay to sell in the market, the *Wayuu* indigenous family who dried sea salt in a small parcel, the gold panner who introduced a pump to better wash the riverbed sand or the woman who uses oxygen to prevent lung damage from diving into the rivers for sand. When informal mining is equated with traditional mining, when the only foreseeable legal conduct of a mine worker is to enter into a contract, and when the State expresses that all those unwilling or incapable of doing so may not exercise their trade – regardless of their livelihood, cultural traditions or ancestral legacies – the State is not appraising the reality of poverty within the norms. And, the law is not foreseeing that it is criminalizing its most vulnerable constituents, and that it is actually *legally impoverishing the poor*²⁴⁵. For instance, it is worth recalling that the Mining Code Glossary defines illegal mining as:



Revista Semana®, Photo By: xxxxx

daños a los recursos naturales o al medio ambiente, incurrirá en prisión de dos (2) a ocho (8) años y multa de cien (100) a cincuenta mil (50.000) salarios mínimos legales mensuales vigentes.

244 In interviews it was noted that there is enriched sand exportation that leaves the country as sand and in the country abroad a mineral is extracted.

245 Ruiz-Restrepo, Adriana. *A Legal Empowerment Strategy for Latin American Poor: A Reading of the National Consultations for the Commission on Legal Empowerment of the Poor*: http://www.abanet.org/intlaw/fall09/materials/Ruiz-Restrepo_Adriana_166_AR10451028166_CLEMaterials_sysID_1649_733_0.pdf

Illegal Mining:²⁴⁶ mining that is carried without having being registered in the National Mining Register and, therefore, lacks a mining title. It is the mining that is developed in an artisanal and informal manner, outside the law. It also includes exploration labor and work without a mining title. It includes mining that is covered by a mining title, but where the collection, or part thereof, is done outside the area granted by the license.

This equivocal treatment of illegality and informality, with the rural and semirural mine workers in poverty oscillating between these two notions, ends up being amplified by the media, which creates, in turn, a negative impact on the governance micro-structures of culture and education²⁴⁷ Citizens living in poverty might experience greater self-discrimination by resigning themselves to the belief that their activity is inherently illegal, yet, without the luxury of choice, they must persist in that illegal condition. Their fear of being detected in this illegal condition may contribute to limited citizen engagement from these constituents, less of a civic presence, less voice via voting or public actions, and consequently, less participation in governance pursuant to inclusive and equitable law.

A second issue referring to the illegality-informality-poverty equation is that the mining law and policy framework restricts mine workers in poverty who work in an artisanal mode to a subsistence level of labor both in the Glossary (artisanal being encompassed in subsistence mining) and by normatively limiting them to manual work. This has a disparate impact on indigenous and afro-Colombian constituents in particular, given the relevance of mining as a traditional livelihood in their communities and cultural identity. The Mining Code did away with the licensing regime for exploring and exploiting minerals in proportion to the size or scale of the mining operation that existed before the Code. Under the current regulatory environment, mine workers with little or reduced capital may not develop their operational capacity. Consequently, a sand miner who does not have the capital to enter into a concession contract may never expand his operations beyond ten cubic meters of stone or sand; otherwise, he risks being categorized as an illegal miner, subject to legal sanctions and prosecution.

In a far more limiting and burdensome way, an afro-Colombian woman who pans for gold may not take advantage of any machinery or technology, notwithstanding the question of whether the machine complies with environmental standards, and must limit herself to the manual extraction of sand and minerals. This restrains her capacity to progress economically and effectively enjoy her right to development, and forces her to assume all the health consequences of manual labor using a technique that predates mechanization while still contributing to the countries' mineral production and economic growth.²⁴⁸ The law's exceptional permission²⁴⁹ to mine is only intended for this gold panner's subsistence, not her development.

246 **Minería ilegal:** *Es la minería desarrollada sin estar inscrita en el Registro Minero Nacional y, por lo tanto, sin título minero. Es la minería desarrollada de manera artesanal e informal, al margen de la ley. También incluye trabajos y obras de exploración sin título minero. Incluye minería amparada por un título minero, pero donde la extracción, o parte de ella, se realiza por fuera del área otorgada en la licencia.*

247 Ruiz-Restrepo, Adriana. *A Legal Empowerment Strategy for Latin American Poor: A Reading of the National Consultations for the Commission on Legal Empowerment of the Poor*

248 Muscular strain and trauma due to continuous use of strength, dermatological illnesses by excessive water contact and ergonomical related affections due to repetitive movements among others

249 - **Minería de subsistencia (Mining Code Glossary):** 1. *Minería desarrollada por personas naturales que dedican su fuerza de trabajo a la extracción de algún mineral mediante métodos rudimentarios y que en asocio con algún familiar o con otras personas generan ingresos de subsistencia.* 2. *Se denomina así a la explotación de pequeña minería de aluvión, más*

In light of constitutional law, it may be possible to conclude that, since Colombian mining public policy limits the right to develop of certain constituents, and limits their labor to subsistence levels, then these constituents may only exercise their rights to life and survival, but not their rights to progress and development. The mining policy is thereby placing an excessive burden on these constituents, while trying to ensure the State's investment interests, thus imposing unequal treatment. This is particularly true for afro-Colombians, who belong to an ethno-cultural minority that happened to be historically organized around mine work, and who therefore live and understand mine work as an integral part of their culture and livelihood. Beyond the constitutional concern of the right to life, work, entrepreneur, freely choose and follow an occupation or profession, and to develop, it is not difficult to conclude that compelling mine workers to either enter into a concession contract with the State or live in informality and assume an illegal condition further impoverishes these workers within their trade.²⁵⁰

It is also worth noting that, indigenous and Afro-Colombian communities' collective and communal lands, as already explained, are intrinsically linked to mineral extraction and mining operations. But they, too, have an impoverishing effect on individuals belonging to these communities. Indigenous and afro-Colombian individuals performing formal own account work on their communal lands, *resguardos*, or *territorios comunitarios* may not develop their operations without breaking the law. They may not advance beyond subsistence levels in their trade without requesting the Mining Authority to declare a mining zone (mixed or otherwise) to receive a concession from the State to mine within their own lands. The concession is the only way they may exercise their right to develop. This is in part due to the fact that the Colombian State is the sole owner of all subsurface mineral rights²⁵¹ and awards exploration and exploitation rights only by concession, and in part because all concessions in ethno-cultural territories must be awarded to the community only. In other words, members of the community may not receive individual benefit from the concession on their communal lands, which,

conocida como barequeo, y a la extracción ocasional de arcillas, en sus distintas formas, y los materiales de construcción.

- **Bateo (Mining Code Glossary):** Operación manual de lavar las arenas superficiales de los lechos y playas de los ríos y corrientes de uso público y, en general, en otros terrenos aluviales para separar y recoger los metales preciosos que contienen. Se conoce también como barequeo, mazamorreo o lavadero de pobres. De acuerdo con el Código de Minas, el bateo es por naturaleza una actividad permitida como un medio popular de subsistencia de los habitantes de las regiones auríferas; el cual sólo puede practicarse en las áreas que señale el Ministerio de Minas y Energía, y previa inscripción ante la correspondiente alcaldía.

- **Método de explotación por apiques (Mining Code Glossary):** Método utilizado en pequeña minería y minería de subsistencia de oro de aluvión en la explotación de oro, que consiste en la elaboración de pequeños pozos o apiques mediante los cuales se tiene acceso al aluvión, y proceder con la extracción en forma radial. Este método, en algunas zonas de Colombia, se denomina también explotación por "guaches", como en el Departamento del Chocó; en Bolívar se le denomina explotación por "cúbicos".

- **Microminería (Mining Code Glossary):** Actividad que se desarrolla en una mina, que no alcanza niveles de producción superiores a 2.000 (dos mil) toneladas por año; genera rendimientos de 0,5 toneladas/hombre- turno; ocupa un número máximo de 20 personas que alterna las labores mineras con otra clase de actividades; carece de una organización empresarial y constituye una actividad de explotación minera básicamente de subsistencia realizada sin ninguna dirección técnica u operacional.

250

251 Ruiz-Restrepo, Adriana. *A Legal Empowerment Strategy for Latin American Poor: A Reading of the National Consultations for the Commission on Legal Empowerment of the Poor*

according to the intent of the policy, will protect the identity and autonomy of Colombian ethno-cultural communities.

With regard to the mine concessions granted to Colombian ethno-cultural communities, the fact that they must request the declaration of a mining zone within their own territories, and that this declaration will only be granted upon their initiative and not by the State's, imposes a tremendous burden on these communities. Not only must they invest in mineral prospection, professional mining services to identify the areas for extraction and preparing the proposal, they must also procure mining insurance policies and assume other related costs once the State declares the demarcated area as an indigenous/afro-Colombian mining zone. At the same time, the Colombian Constitution obligates the State to act affirmatively in these communities' interests, as they are minority communities.

However, the most unexplainable costs imposed on these communities are the surface rents per hectare of exploration. These rents must be paid even though it is the ethno-cultural communities themselves – who are the constitutional collective proprietors of their communal lands, yet who do not have subsurface mineral rights to what lies beneath their territories – who would pursue mine work within their own lands. The environmental license, which in turn depends on a formal mining title, is not only a complex condition but also an almost prohibitive cost for the formal development of mine work of small and micro mine work of poverty-trapped Colombian constituents. Thus, in reality, the notion of collective property ownership itself appears to be void of any surface or sub-surface entitlements for these communities with regard to mining. If the collective land owners may not exploit their subsurface rights, and must pay surface rents per hectare of mineral exploration and royalties when in the exploitation phase, then the only prerogative that the collective property regime appears to grant to constitutionally protected ethno-cultural communities in Colombia is the right to occupy some space within the national territory.

In light of the above conclusions, and as explained in chapter one of this report, it is more appropriate to refer to these communities and individuals as “poverty-trapped,” rather than poor. People who live in poverty due to their own capabilities may be far fewer than those who have reduced opportunities for development and thus remain entrenched in “legal” poverty traps. Some of the more illustrative examples of this phenomenon are:

The 30 days period²⁵² for an indigenous or Afro-Colombian ethno-cultural community to manifest to the government whether they will use their first-in-right prerogative to exploit a declared mining zone in their communities is also problematic. A proposal for a concession usually begins the 30-day term for the community to act on its prerogative. If not exercised within the 30-day period, the government may continue, for instance, the concession request of a large or medium-scale national or multinational company. The 30-days period was, in fact, a 60-day period before the 2001 Mining Code cut this term in half.

The failure to acknowledge the “work” done by own account mine workers, even if with formal permission, and the lack of a labor identity and ensuing rights, rules and justice. This applies to own account mine workers, as well as small-scale miners who are working in an artisanal mode due to their limited economic resources and/or their cultural traditions. Indeed, the absence of an artisanal and small-scale miner labor identity in Colombian mining policy explains the vulnerability and

252 Colombian Mining Code, Article 275

impoverishment of own account and self-employed mine workers of Afro-Colombian, indigenous, and peasant/mestizo origin who are living in poverty.

While the Colombian State²⁵³ has retained sub-surface mineral and oil rights, this fact implies a dichotomy of overlapping obligations and responsibilities: on the one hand, traditional common-good oriented decisions and actions that the State must envision and pursue, and on the other, the legitimate maximization of profits logic that the State may pursue by exploiting the mineral riches of the country as their sole owner. These riches may only be exploited to their maximum capacity by large and medium scale operations and, in the interest of the existing administration, which may be willing to take advantage of this authority as quickly and as extensively as possible within its four-year term as head of the executive power. The State's incentive to maximize its short-term gain through mining royalties explains the progressive loss of space that small-and micro-scale mining has suffered, even as the policy framework grants larger and broader space to the more lucrative medium and large-scale mining operations emanating from national and multinational actors.

As portrayed by the Colombia Miner vision for 2019 and the mining policy reforms recently implemented, the State remains driven by its profit maximization logic more than common-good development logic. There is, therefore, less public interest in encouraging and promoting the less lucrative mining operations of small-and micro-scale miners, who are operating in an artisanal or traditional mode rather than an industrial one. Placing a subsistence or personal consumption cap on these mine workers – who, in the absence of a concession contract and title, may only practice mining in this limited capacity – and not recognizing their labor as “work” or protecting it as such, allows the authors of this report to conclude that the main reason for the persistent poverty in this sector in Colombia is the lack of a labor identity for poverty-trapped mine workers. These small-and micro-scale miners who, due to a lack of capital, their rural environment settings, and ancestral histories or traditional work in an rudimentarily mechanized or artisanal mode end up relegated to the bottom echelons of the State's priorities, and thus, with the least protections under law and policy. Unless they are legally empowered and raise their stakes and voices for inclusive mining policy, they will remain as they are: poverty-trapped.

3.11. ORGANIZATION AND REPRESENTATION OF INFORMAL POVERTY TRAPPED MINE WORKERS TO INCREASE GOVERNANCE CAPACITY FOR INCLUSION IN MAINSTREAM DEVELOPMENT

4.1.1. SOLIDARITY ECONOMY FOR ASSOCIATED MINE WORK IN MEDIUM- AND SMALL-SCALE OPERATIONS

Due to the capital-intensive operations and required level of mechanization, underground mining is almost impossible to pursue as own account work. And, because of the already mentioned difficulties of requesting and receiving a concession for mineral exploration and extraction, the 2001 Mining Code recognizes that a legal space for cooperatives and associations is necessary for mine work²⁵⁴. Other

253 The State being only an abstract perennial political representation that is actually materialized and driven by a sequence of four- year-government-terms of politicians that won elections.

254 Please see :

http://www.gobant.gov.co/organismos/scompetividad/doc_estudios/practicaspараelmejoramientodelaproductividaddela_mineria/capitulo2.pdf ;

than the social interest implied therein, cooperatives and associations are used in the Code around Special Mining Projects, i.e., converting informal mine workers who are active in the traditional exploitation (mainly of hard rock gold and coal) into a more reasonable mining operation by delimiting it within a special reserve. Through special contracts, the Special Mining Projects develop the mining community within the identified area. Solidarity based work within cooperatives, associations and mutuals is also important in the Code as it authorizes large scale mining operations to partner with these groups of workers within the area that is under a contract of association.²⁵⁵ On cooperated mine work, the Mining Code establishes that:

Article 222. Solidarity Economy Organizations.²⁵⁶ The solidarity economy organizations already constituted or that will be constituted, with the object of carrying out mining activities according with the dispositions hereby established, and all other provisions applicable to this type of entities in reason of its solidarity economy, may obtain mining titles and overtake mining and commercial activities in order to satisfy the needs of its associates and of the community. The balance or profits that can be reimbursed to the associates shall be allotted according to legislation that rules for these entities. The National Government will draw up the respective regulations in order to give them preference.

Article 223. Object of Mining Solidarity Economy Organizations²⁵⁷ The mining solidarity economy organizations should favor the organized commercialization of products exploited by them; allow its associates to work in a joint and participative manner and develop their administrative capacities, promoting the search for solutions to common problems.

The way in which members of an organization may participate in works of exploration and exploitation, the amounts of their salaries and economic benefits accrued, the conditions and methods as they can be withdrawn and replaced by other associates, will be those indicated in their own statutes. On failure of these provisions, the corresponding regulations will be adopted in the associate's assemblies.

<http://www.crc.gov.co/files/ConocimientoAmbiental/mineria/MINERIA%20SUAREZ/DIAGNOSTICO%20%20MINERO.pdf> ;
and <http://www.crc.gov.co/files/ConocimientoAmbiental/mineria/MINERIA%20SUAREZ/DIAGNOSTICO%20SOCIAL.pdf>

255 For instance, the Mutual Association *El Ágape* in the Frontino Gold Mine, Antioquia **Artículo 221. Contratos de Asociación y Operación.** “Los titulares de concesiones mineras podrán celebrar contratos de asociación y operación cuyo objeto sea explorar y explotar las áreas concesionadas, sin que se requiera formar para el efecto una sociedad comercial. Los ingresos y egresos que se originaren en las obras y trabajos se registrarán en una cuenta conjunta y en el contrato correspondiente, que debe constar en documento público o privado, se establecerán la forma de administrar y realizar las operaciones y de manejar la mencionada cuenta.” <http://www.monografias.com/trabajos-pdf2/diagnostico-pequena-mineria/diagnostico-pequena-mineria.pdf>

256 **Artículo 222. Organizaciones de Economía Solidaria.** *Las organizaciones de economía solidaria constituidas o que se constituyan con el objeto de desarrollar actividades de minería, de conformidad con las disposiciones que aquí se establecen y las demás normas aplicables a esta clase de entidades en razón de su naturaleza solidaria, podrán obtener títulos mineros y adelantar actividades mineras y comerciales para satisfacer las necesidades de sus asociados y de la comunidad. Los excedentes o ganancias reintegrables a los asociados, se repartirán con sujeción a la legislación que rija estas entidades. El Gobierno Nacional hará la reglamentación respectiva para darles un trato preferencial.*

257 **Artículo 223. Fines de las organizaciones solidarias mineras.** *Las organizaciones solidarias mineras deberán favorecer la comercialización organizada de los productos explotados por ellas; permitir a sus asociados trabajar en forma solidaria y participativa y desarrollar sus aptitudes administrativas, promoviendo la búsqueda de soluciones a los problemas colectivos. La forma como los miembros de la organización puedan participar en los trabajos de exploración y explotación, la cuantía de las remuneraciones y beneficios económicos que deriven, las condiciones y modalidades cómo pueden retirarse y ser reemplazados por otros socios, serán los que señalen sus propios estatutos. A falta de estas previsiones, se adoptarán las correspondientes regulaciones en Asambleas de asociados.*

Article 224. Special Prerogatives²⁵⁸ The mining solidarity economy organizations and the miner's community associations will have, within others, the following special prerogatives on part of the national public agencies of the mining sector:

Priority in programs of technical assistance and training aimed towards the mining sector;

Special credit programs;

Rights, exemptions and prerogatives that might have been established or that will be established in favor of solidarity economy organizations that carry on mining activities;

Support and technical, legal, financial assistance and organizational training, for the development of integration projects of mining areas.

Article 225. Promotion and Support²⁵⁹. The mining authority, in coordination with the National Administrative Department of the Solidarity Economy or who might assume its duties, and in development of its programs of promotion, will promote and support the creation of solidarity economy organizations, which object is the exploration and exploitation of mines, ore dressing, transformation and provision of materials, equipment and implements corresponding to the mining industry. In the budgets and credit programs that might be approved for the mining industry, a preference will be given to the financing of solidarity economy organizations.

Communal and civic understanding of democracy and development is very important for informal mine workers as it constitutes their primary horizon for inclusion. Cooperatives have even been created to address the labor reconversion of young children miners, and miners' mutual associations to provide funeral assistance for its members. Unfortunately the same importance that informal mine workers give this aspect of their trade has not been granted by the Pastrana or Uribe Administrations' public mining policy efforts. The Pastrana Administration produced the 2001 Mining Code, which did away with all of the cooperative institutional building and legal support of earlier codes and dismantled all the State agencies that studied and leveraged mining cooperatives in medium and small mining operations. All support to such mining is by virtue of the public policy delegated to DANSOCIAL, which, as far as possible, is responsible for the SEOs of the country, but does not have all the specialized mining information, knowledge, skills and capacity, or budget to make them competitive in mining.²⁶⁰ (This does not include the transfers from the National Royalties Fund (*Fondo Nacional de Regalías*) that

258 **Artículo 224. Prerogativas especiales.** *Las organizaciones solidarias mineras y las asociaciones comunitarias de mineros gozarán, entre otras, de las siguientes prerogativas especiales por parte de las entidades públicas nacionales del sector minero: 1. Prelación en los programas de asistencia técnica y de capacitación dirigidos al sector minero. 2. Programas de créditos especiales. 3. Derechos, exenciones y prerogativas que se hayan establecido o que se establezcan a favor de las entidades solidarias que desarrollen actividades mineras. 4. Apoyo y asistencia técnica, jurídica, financiera y de capacitación empresarial, para el desarrollo de proyectos de integración de áreas mineras.*

259 **Artículo 225. Promoción y apoyo.** *La autoridad minera en coordinación con el Departamento Administrativo Nacional de Economía Solidaria o quien haga sus veces, y en desarrollo de sus programas de fomento, promoverá y apoyará la constitución de organizaciones solidarias, cuyo objeto sea la exploración y explotación de minas, el beneficio, la transformación y la provisión de materiales, equipos e implementos propios de esta industria minera. En los presupuestos y programas de crédito que se aprueben para la minería, se dará preferencia a la financiación de las empresas de economía solidaria*

260 Gobernación del Valle – Asunto Mineros / rra interview / 2009 / Cali; Marco Aurelio Hurtado and Edward Caicedo / Gremivalle / rra interview / 2009 / Cali; Marco Aurelio Hurtado and Edward Caicedo / Gremivalle / rra interview / 2009 / Cali

are destined for mining in general. Indeed, given the dearth of funding, the only possibility for a viable project would be through funding from the NRF.)

Finally, and perhaps most critically, there is no labor identity in the Mining Code for Artisanal and Small-Scale Mining. This mining institution does not promote mining in either this scale or through this mode of production, as neither one is legally derogated, nor is there any mining development agency remaining under the State institution, which has essentially morphed into a domestic investor in the country's mining economy.

4.1.2. MINERS' SPACE FOR INCLUSIVE LAW AND POLICY MAKING

In many developing countries, public policy is driven by a financial objective, including, and as indicated in this report, in Colombia's mining sector. Attempting to balance the varied interests in the extraction of oil, gas and mineral resources is difficult to say the least and would be determined by the following: (1) those actors/stakeholders who are interested in accessing wealth immediately; (2) those who would prefer accessing wealth over a period of time; (3) government actors who are interested in mining while they are still in the seats of political power; (4) foreign investors with the capital and resources to exploit mineral and subsoil resources and who enjoy political support, even while the vast majority of its wealth is exported out of Colombia; (5) advocates for the natural wealth in mountains and rivers that is endangered by irresponsible and short-sighted mining operations that do not consider the longevity of human or ecological life; (6) those who cannot provide for their basic needs and who, without access to reliable infrastructure or opportunities, rely on the quick and easy availability of mineral resources, even if they come at the expense of long-term sustainable development; (7) those who prefer to reserve their natural resources for times of scarcity; (8) those who agree to mining activities, but only if it includes their mining niche and provides for their families; (9) those who have been living on the territories where these resources have been found for generations, so long so that the land itself carries a sacrosanct character necessary for the survival of their social, cultural and economic traditions; and (10), finally, those who are merely asking for their minimum right to life and survival, which, by virtue of their ethnic identity, geographic and political circumstance, and culture is inextricably linked to the land they are living on and the resources – the fresh water fish, and timber – found therein. These conflicting interests are magnified when the issue of wealth is presented as a zero-sum game, where some actors will only benefit at the expense of others, instead of envisioning new rules that are tailored to ensure justice for all actors and stakeholders by maintaining equilibrium and preventing crisis from developing out of unattended risks or unidentified needs.

Therefore, and unlike other State driven activities regulated by law and policy, mining is an extremely complex domain from a law and poverty perspective. It demands a higher level of governance in the pre-law²⁶¹ making phase to ensure a reality-adjusted and competent normative engineering and technical drafting, without prejudice to the very much needed accountability, monitoring and evaluation of impact in the field and on the livelihoods of poverty trapped constituents. This is even more relevant in Colombia, where 80 percent of its mining is relegated to the informal economy, and a vast presence of ethno-cultural communities (who are simultaneously land owners and ancestral mine workers) persist. Evidently the executive branch of power and the Congress are not sufficiently

261 (1) Pre-law; (2) Law, and (3) Post- law are the three moments in which the rra thinktank divides participatory governance & and policymakers inclusion analysis.

engaged in what the authors of this report identify as the *prelaw* phase of inclusive policy making which naturally includes the right to prior consultation as reiterated and developed *in extenso* by the jurisprudence of the Constitutional Court. The Court has repeatedly concluded that there is a fundamental right in mining for certain constituents, which require prior consultation. Underpinning the Court's decisions is the understanding that all State actions are, in fact, emanating from the development or execution of public policy, and thus mining concessions, just like waste concessions, are policy implementation from the State authority. Given the Social Rule of Law of Colombia, the progressiveness of the Constitutional Court's jurisprudence, and the reticence on the side of the executive and legislative branches, in Colombia inclusive (pro-poor) governance is happening mainly through constitutional litigation and judicial orders of Constitutional judges conceding writs of human rights protection or abstract constitutional review of the existing laws, rather than through inclusive governmental or parliamentary duties and engagements.

The technicalities of mining make governance in mining an even more challenging task, in part because the technical implementation is occurring in places geographically removed from the administrative center of the country and of little interest or knowledge in the public opinion. As opposed to waste management, mining is not a public service to be delivered to all citizens, and thus, which all citizens will be aware of, involved in or exposed to. The direct stakeholders in mining are involved in this sector by virtue of their work and relationships with other actors in the trade, rather than as citizens in need of essential public services. And, because most of the direct stakeholders of mining interventions are living in the rural zones of Colombia, unless the ideas of democracy and constituency are very clear to them, participatory governance becomes only wishful thinking or is derogatively tagged as social or legal activism. Social protest by these stakeholders may be further weakened by characterizing it as puppeteered by illegal leftist guerilla armed movements, rather than legitimate civic action for inclusive governance.

Another very delicate issue with regard to policy-making in mining is how the State's sole ownership of subsoil and mineral rights translates in reality; the conceptual idea of "the State" acts through a concrete, political administration that will only occupy that position for a set period of time. The acting administration may not have an interest in pursuing a long-term vision of State duties or in making decisions on mineral and natural resources for sustainable, long-term development and conservation. In fact, and unlike other realms of State action that are governed exclusively by a logic of the common good, mining may create tensions within the notion of the State's obligations and duties, especially given the State's interests in all subsoil and mineral rights. Overlapping State interests include its status as business maker, sole owner of all assets, and the common good rule maker of a State guided by a Social Rule of Law.

From a grassroots bottom up perspective, the Mineral State-Owner appears to be so absolute and almost imperial that it ends up, at the very least, discouraging civic participation and empowerment within the constituents working or willing to work in the mining trade, especially those who are attempting to preserve and pursue their ancestral mining legacy and culture. Indeed, it is difficult to imagine for rural citizens living in the field that the State— as the sole proprietor of these resources — is bound to a social rule of law that should grant them opportunities and protections as constituents. It is easier to conceive of the State as a biased, discretionary rule-setter rather than as a regulator of the common good. It is next to impossible for them to imagine that they are the State and that the minerals the State owns actually belong to the nation of Colombia and to its constituents.

The State's exclusive proprietorship, combined with the power of being the only rule maker and entity entitled to exert legitimate force, is a tri-fold combination of power in one single interested actor, embodied in a single political minister of the government. This is not encouraging in terms of developing or engaging in a participatory process for an active and engaged citizenry in the mining realm. Moreover, when the Colombian government can easily tag mining-related protests as illegal or terrorist-guerrilla oriented, self-censorship and communal revolts are extremely common. The internet and greater connectivity have started to open a virtual space for the rural press, blogs and newsletters, especially to small and medium scale operations of self-employed mine workers via solidarity economy cooperatives. Unfortunately, the voices of rural, indigenous or afro-Colombian women in own account mine work or ancillary mining roles, and self employed mine workers in independent informal work, are barely existent, as they carry the stigma of illegality. In this concrete realm, the work of the NGOs FBOs and ODA are extremely relevant for awareness raising, grassroots organizing, building argument articulation capacity, and advocacy strategies for inclusion in development and democracy. Fortunately enough, during the writing of this report the authors learned that an organization of artisanal miners was being formed and incorporated in Colombia.²⁶²

An additional policy challenge related, once again, to the State's role as owner and proprietor of subsoil and mineral rights, is that the current purpose of public policy in mining is not to better provide or administer a public service, but to access and use a source of wealth owned by the State. As much as all Colombians are constituents of that State and, thus, the legitimate right-holders of the wealth buried in the land, it is only the executive branch of the central government that has the most complete access to geological information on the non-renewable resources – its oil, natural gas, and minerals – of the country. The temporal occupiers of the executive branch of the State thereby have an effective and legitimate monopoly over this information. The President, his Mining Minister and subordinate public authorities of the executive branch exert this monopoly for the duration of their four-year term limit. While they may use this period in a frugal or lavish manner, the State they represent still enjoys unlimited rights to exploitation.

Accountability in mining must, therefore, be initiated by demands of the citizenry itself. However, because most mining occurs in territories geographically removed from the central authority and administration in Bogota, and because Colombia's rural constituents are further isolated from the public decision-making process and mainstream media, the information necessary to form and shape public opinion on mining may also be monopolized by the central government. Consequently, public opinion – which will ultimately be the only mechanism to demand inclusion and accountability of the State–, is, in fact, suffering from grossly asymmetric information emanating almost exclusively from the actor most likely to benefit from mining activities. The possibility for a fair and social-oriented mining sector in Colombia thus remains an act of faith – faith that the government will establish inclusive and responsive mining regulations to protect its most vulnerable citizens, despite its financial interest in maximizing the wealth derived from mining.

Given the particular history of mining in Colombia, and the contemporary State's investment and profit driven interests in the country's mining sector, what is evident is that the poverty trapped constituent whose life and livelihood depends on mine work operates within a realm of norms dominated by two

262 Please see: <http://www.vanguardia.com/bucaramanga-region/barrancabermeja/76783-confederacion-minera-crea-buena-expectativa-en-pequenos-ext>

kinds of imperial logics. On the one hand, there is the Spanish colonial logic of being sole owner of all land, including subsurface rights underneath land owned by legitimate private property owners; and on the other, there is the neo-liberal capitalist logic driven by an Anglo-American culture looking for business opportunities wherever they may be found. Under the European colonial logic, everything – land, surface and subsoil minerals and resources, oil, and even water and air – belong to the governing authority or State. Under the neo-liberal capitalist logic of many contemporary states the owner of any resource is entitled to exploit its maximum profit potential.

In the middle of these two logics of the Colombian state, which appears to have effectively merged them in its sole ownership and privatizing initiatives, lies the poverty trapped constituent, trapped by legally impoverishing decisions and norms. People living in poverty neither own the mineral subsoil rights nor have the resources necessary for acquiring a mining concession contract that will grant access to legal, formal mining work. Cross-sector partnerships for catalyzing inclusive governance might be the only possibility for changing a policy framework that creates more poverty for its most vulnerable constituents than the reality in which they were born and live.

ANNEX 3. A BRIEF OVERVIEW OF ARTISANAL AND SMALL-SCALE MINING (ASM) IN INTERNATIONAL POLICY DISCOURSE AND THE AUTHORS' POSITION AND UNDERSTANDING OF ASM

The notion of Artisanal and Small Scale Mining or ASM was first identified internationally in 1972, when the United Nations observed that some of its characteristics warranted distinction among other mining practices and operations.

In most countries, legal definitions of ASM include some or all of the following elements:

- (1) It is limited to the citizens of the country concerned, thereby excluding mining operations in which there is participation of foreign nationals and companies;
- (2) The kinds of machinery or equipment used to perform ASM are limited, namely only simple means and techniques are allowed to qualify as ASM; and
- (3) The output of mineral extracted and the capital used to perform ASM are limited, although these limits not only differ from country to country, but also among different mineral products.¹

Distinctions between the two definitional components of ASM – artisanal mining and small-scale mining – have been less developed. In general, artisanal mining is distinguished from small-scale mining by the number of individuals participating in the activity and the tools used to do the mining activity.

Under these commonly accepted definitional elements, it is estimated that there are “13 million people in about 30 countries directly engaged in small scale mining, a significant proportion of whom are women and children. A further 80 to 100 million people across the developing world could depend on small scale mining for some aspects or their livelihoods.”² In fact, it has been concluded recently that more people are employed in ASM worldwide than in the formal mining industry³. In Africa, for instance, it is estimated that up to four million participate in ASM directly and that it affects the livelihoods of another 16 – 28 million people; in Latin America, there are approximately 3 million people who work in ASM directly, with several million impacted indirectly.⁴ These numbers are expected to multiply due to the continued underperformance of many national economies and the limitations of formal employment. In fact, this economic activity has increased by an estimated 20 percent since the late 1990s and, with the impact of the economic crisis of 2008, will likely increase even more in the near future.⁵

1. Bugnosen, *Small Scale Mining Legislation: A General review and an attempt to apply lessons learned*, Hilson, p. 12.

2. Hentschel, Hruschka and Priester *Artisanal and Small scale mining challenges and opportunities*, International institute for environment and development and WBCSD, London, 2003 pg. vii

3. Please see: http://www.ilo.org/public/libdoc/ilo/2004/104B09_399_engl.pdf

4. D'Souza, *Artisanal and Small Scale Mining in Africa*.

5. Tallichet, Hilson, p. 207.

Because rural populations will work with the resources available to them – including mineral resources found on, underneath, or within the lands, waters, and forests where they live, which are, in many cases the most valuable resources with which they may find sources of income – ASM is naturally linked with population living in poverty. Further, and because the rural poor more often survive via informal work opportunities, ASM has become associated with the informal mining economy. Thus, ASM has primarily been addressed by the domestic legislation of various countries through efforts to formalize existing informal mining practices. Some countries, such as Zimbabwe, Ghana and the Philippines, have introduced legislation especially intended to cover ASM, while others have incorporated ASM into existing mining codes, laws and regulations.

Few countries, however, have distinguished between artisanal and small-scale mining. Brazil distinguishes artisanal mining as “individual work performed by panners with rudimentary forms of mining using manual or portable equipment, and applied only to alluvia, colluvial and eluvial deposits,” while small scale mining may be (1) individual or collective, (2) using rudimentary tools, manual devices or simple portable machinery, (3) for immediate exploitation of a mineral deposit which, (4) by its nature, dimension, location and economic use, can be worked, independent of previous exploration work. Ghana, on the other hand, has no formal definition for artisanal mining, but defines small scale mining as operations of individuals or organized groups of Ghanaians (4-8 individuals), or a cooperative of ten or more individuals entirely financed by Ghanaian resources (and not to exceed a certain amount), carried out on a full time basis using simple equipment and tools.[\[x\]](#)

Yet most small scale miners remain informal, suggesting that the enacting legislation and regulatory measures are not perceived as advantageous, the provisions of the legislation are inappropriate, and/or there is a lack of institutional and administrative capacity and capability to implement the legislation.[\[ix\]](#) Indeed, and as proposed in the re-conceptualized vision of mining as proposed by the authors of this report, government motivation to legislate ASM does not necessarily correspond to the reality of small scale miners or miners working in an artisanal mode, thus creating the potential for large gaps in governance. ASM is in fact the notion that encompasses the unincorporated, individually driven mine workers of the mining industry. Naturally the poverty of these small and micro-scale mine workers orients the ASM notion towards the informal economy; however, since “ASM” is not necessarily a juridical category, the notion of ASM in fact functions primarily as a socio-economic description of the small-time players in the mining sector.

In this order of ideas, it is the work and trade of these small-time players that best describe the informal sector of the mining economy. Informality, with regard to the large and medium scale mining actors, would be interpreted as the absence of formalization in mining operations, where formalization refers to the incorporation of the operating entity and the corresponding compliance of all legal conditions for running a functional business entity, from obtaining environmental licenses and mining titles to complying with labor and tax obligations. Small- and micro-scale miners in poverty would not be in compliance with whatever conditions law and policy have adopted for the formal operations of any mining operations, including industrial, rudimentary, or artisanal and traditional mining.

To address the reality of small-scale miners, it has been proposed that the definition of small-scale mining include “alluvial mining, artisanal and other forms of mining enterprise which involve small numbers of people on a site-by-site basis, and little in the way of expensive or modern technology. In addition, it has to be noted that what may be considered a small-scale mining operation in one country

may well be considered a large-scale mining operation in another country. Hence the United Nations definition, which was accepted and adopted after reviewing the varied factors involved, seems more appropriate. It is the lack of universality in the definition of small scale mining that focus must be drawn on the general characteristics of small scale mining rather than attempting to define the concept.”⁶ For purposes of inclusive policy making, artisanal and small-scale mining should be better understood as including those mining activities “typically practiced in the poorest and most remote rural areas by largely itinerant, poorly educated populace, men and women with few employment alternatives.”⁷ Artisanal and small scale mine workers thus lie at the intersection of human rights, environmental policy, indigenous people’s rights, governance, decent work, and informality.⁸

Therefore, and as much as the authors of this report acknowledge the importance of the notion of ASM in terms of its socio-economic relevance and in portraying its need for policy attention, they have realized that the notion of ASM is *per se* not very useful for legal analysis and possibly for the drafting of rules, regulations or policy. Instead, for ensuring that ASM may become a work identity notion and a potential *labor protection statute* within mining law and policy, the authors of this report commissioned by WIEGO believe that it must be portrayed as the most vulnerable sector within a categorical understanding of mine work. One that differentiates (1) the size of the mining operation and (2) the mode of production, (ASM crosses them both).

In fact, ASM, by virtue of weaving historical, social, anthropological and economic information conflates categories of legal analysis and as a result, legal and policy drafting may be frustrated by a lack of clarity on the types of operations and modes of production that need to be regulated, protected, promoted and developed by law and policy. The urgent need to legally recognize, promote and protect the work carried out through small and micro mining operations that are undertaken in an artisanal or rudimentary mode, so as to complement the industrial mining conducted in large and medium scale operations in a given country, is the precise reason why ASM has carried so much weight as an idea, albeit poorly translated into normative legal and policy provisions.

A differentiation and re-conceptualization of mining of the poverty-trapped in two distinct analytical categories enables a more conducive analysis along additional policy vectors or classifications. For instance, an environmentally safe agenda concerned with natural conservation, public health and climate change will be made relevant for all mine work, regardless of the *size* of the operation (large, medium or small) or the *mode* of production in which it is carried out (industrial or artisanal). In this same way, policy makers may find that for the purposes of strengthening the mining industry of the country, a clear understanding of development through legal personhoods or organizational strategies may upscale mining production, labor protection and strengthen compliance on the decent work agenda, ESCR international obligations and achieving the targets for MDG-1 and MDG-3.

6 M Masialeti, *Small Scale Mining in Zambia*, Department of Mining Engineering, University of Zambia, http://74.125.113.132/search?q=cache:R66Jlx8TFNAJ:www.casmchina.org/attach_view.asp%3FID%3D49+Small+Scale+Mining+in+Zambia+M+Masialeti,+Department+of+Mining+Engineering,+University+of+Zambia,+Lusaka,+Zambia&cd=1&hl=es&ct=clnk&gl=co&client=firefox-a

7 Hilson Gavin, *The Socio Economic Impact of Small Scale Mining in Developing Countries*, Introduction, Part 1, p. 1

8 Ibid, p. 2.

Such an categorization will serve to distinguish the situations where an independent worker (own account or self-employed), might be better promoted and protected if, for instance, scaled up through associated work in a solidarity-based legal person like a cooperative.

<p>Mining operation <i>size</i> criterion:</p> <ol style="list-style-type: none"> 1. Large scale operations 2. Medium scale operations 3. Small scale operations 4. Micro scale operations 	<p>Mining production <i>mode</i> criterion:</p> <ol style="list-style-type: none"> A. Industrial mechanized mode B. Basic rudimentary semi-mechanical help C. Artisanal mode
<p>Potential ways of scaling mining production:</p> <ol style="list-style-type: none"> i. Joint ventures and Consortiums of industrial miners for higher impact operations ii. Cooperative Organizations for associating rudimentary mechanized mining and for industrializing operations iii. Cooperative Organizations for associating own account work and clustering production for the development of miners in artisanal mode 	<p>Environmental classification of mining operations applicable to all sizes and modes of production:</p> <ul style="list-style-type: none"> • Environmentally-conscious operations: Non-degrading mineral exploration and exploitation • Environmentally-unconscious operations: indifferent or aggressive to the environment causing degradation through mineral exploration and exploitation

Aiming for inclusion in mining law and policy, the multi-faceted understanding of mining described in the table below, with one dimension relating to the size of the mining operation (and introducing the concept of micro-scale mining) and the second dimension relating to the mode or mechanism of the mining activities (and highlighting the artisanal option of production) allows a better appraisal of whether ASM (or whatever concept is intended to address and include the working poor) is useful for the informal working poor in the mining economy.

In this sense the following questions might also prove instructive: (1) is the ASM notion defined in the country and used in that country's mining industry? (2) If yes, then has the described notion of ASM translated into legislation and policy? (3) Do such provision(s) entitle micro and small-scale mining as well as cooperative medium sized mine workers producing in an artisanal or rudimentary fashion to obtain certain rights and opportunities to ensure their lives, livelihoods, and their rights to life, work and entrepreneur or is it just a notion in political discourse or a definition in a mining glossary? It is in answering these questions that the functionality and relevance of the normative legal, regulatory and

policy provisions in the mining sector will be revealed, as well as their ability to effectively address the needs and requirements of those workers who remain informal, excluded, and unable to access their rights and opportunities via their culture, trade and work in mining.

MODE SIZE		INDUSTRIAL	RUDIMENTARY	ARTISANAL
		LARGE	National and multinational corporations (anglo gold, muriel, mineros s.a etc..)	Non existent
MEDIUM	National and multinational corporations (frontino gold mine)	Cooperatives of mine workers (gustavo) Self employed mine workers settled and extracting around traditional mineral deposits <i>Illegal operations of business miners of a national or foreign origin</i>	Indigenous Wayuu salt concession	
SMALL	Non existent	Mainly family driven operations of mine workers Illegal operations of business miners of a national or foreign origin	Mainly family driven operations of mine workers (noel) Ethno-cultural mining relating to ancestral culture	
MICRO	Impossible	Forbidden	Concentration of own account female workers (Lupe and maria) Ethno-cultural mining relating to ancestral culture	

Following the separation of the size factor from the mode factor that are intrinsic to the ASM notion, the table above allows a better identification of the actors present in any mining economy, so as to identify the rights and stakeholders for (1) tailoring inclusive policy responses instead of making one-rule-fits-all solutions, as is the case with Colombian concession contracts intended to govern all work situations and livelihoods in the vast and rich mining industry and heritage and (2) for outreach capacity strategies and fostering of participatory or pro poor governance. This differentiated approach to mining in policy- and law-making processes may also contribute to target and dismantle false premises in the industry, such as those that artisanal mining is always detrimental to the environment, and that industrial mining is always safe (re. Chile case). It should also raise the visibility and the existence of micro scale mining operations of rural afro, indigenous, and peasants and their imperative need to access natural resources and minerals not only for ensuring their survival, which is the very least of a legitimate democratic state, but moreover for formally entitling them also to their right to develop and not merely to subsist. This is possible by clustering like micro scale mining production of artisanal mine workers up to medium scale operations (Re. Wayuus' salt concession) and eco-labeling and fair trade branding for environmental and ethical modes of production (Re. Oro verde), among other social innovation strategies.

ANNEX 4. MAPPING OF MINE WORKERS ORGANIZATIONS

Please refer to a separate Excel Document with the same title attached to this document.

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