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Resource Transfers and their Relationship with Territorial Development in Colombia

Las transferencias de recursos y su relación con el desarrollo territorial en Colombia

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Abstract

With the Political Constitution of 1991, progress has been made in the administrative decentralization of the country, avoiding more and more the centralization that governed us with the Magna Carta of 1886. However, in fiscal matters, with the transfers, it is aimed more at a centralized system than a decentralized one. Likewise, the development of the regions in Colombia is inseparably tied to the economic policy of the Colombian State to stimulate their development. From this perspective, it is intended to show the reader, within the various factors that affect regional development in Colombia, the impact of the legal evolution, through legislative acts, that the transfers have had on the territorial development of the different regions of the country.

Keywords: Transfers, regional development, region, legislative acts.

Resumen

Con la Constitución Política de 1991 se ha logrado el avance en la descentralización administrativa del país, evitando cada vez más la centralización que nos gobernaba con la Carta Magna de 1886. Sin embargo, en materia fiscal, con las transferencias, se apunta más a un sistema de carácter central que a uno de carácter descentralizado. Asimismo, el desarrollo de las regiones en Colombia está atado de forma inescindible a la política económica que el Estado Colombiano tiene para estimular su desarrollo. Desde esta perspectiva se pretende mostrar al lector, dentro de los diversos factores que inciden en el desarrollo regional en Colombia, el impacto de la evolución legal, a través de actos legislativos, que las transferencias han tenido en el desarrollo territorial de las distintas regiones del país.

Palabras clave: Transferencias, desarrollo regional, región, actos legislativos.

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1. PROBLEM STATEMENT

Transfers are the resources that the Nation provides to the territorial entities; part of these monies are destined to the departments and another part to the municipalities. The purpose of the delivery of these resources from the central sector to the decentralized sector is to be invested in health, education and environmental sanitation.

In order to address the issue of transfers and their impact on regional development in Colombia, it is necessary to determine whether these are variables of economic growth between which there is a direct relationship. For this purpose, it is necessary to carry out a historical analysis of the implementation of the transfer system in our Constitutional framework together with economic elements. This, taking into account that the distribution that the nation makes of its current income to the territorial entities for the attention of services for which they are responsible has its origin in the current constitution.

With the 1991 Constitution, the figure of transfers was created to stimulate the administrative decentralization process and the still unfinished project to organize Colombia territorially into regions and provinces in accordance with Article 286 of the National Constitution¹.

1 NATIONAL CONSTITUTION. ARTICLE 286. Territorial entities are departments, districts, municipalities and indigenous territories.

For this reason, the analysis we intend to carry out starts with how the transfers were conceived in the 1991 Constitution, covering the modifications they have undergone, together with their evolution, the ways of distributing them, calculating them and ordering their use, in order to determine whether there is any incidence between them and the regional development of the country. Establishing, from the economic point of view, the situations that originate the growth or development in the Colombian regions, in order to establish if, on the contrary, their backwardness is the result of a decrease in the transfer of these resources in comparison with other areas of the country. Finally, pointing out some situations that could have a positive impact on the relationship between both concepts, in case it exists.

2. THE CONSTITUTIONAL REGULATION OF TRANSFERS IN COLOMBIA

Taking into account the above, it is pertinent to remember that the income that the nation transfers to the municipalities in Colombia was created by the 1991 constitution in chapter IV of the distribution of resources and competences in articles 356²

The law may give the status of territorial entities to the regions and provinces that are constituted under the terms of the Constitution and the law.

2 The original text, without modifications, of Article 356 of the National Constitution, reads as follows:

"ARTICLE 356. Except as provided by the Constitution, the law, at the initiative of the government, shall establish the services to be provided by the Nation and the

and 357³, the ways to calculate the value of these values are resources, the forms of allocation

territorial entities. It shall also determine the "situado fiscal", that is, the percentage of the current income of the Nation to be assigned to the departments, the Capital District and the special districts of Cartagena and Santa Marta, for the direct attention, or through the municipalities, of the services assigned to them.

The resources of the "situado fiscal" will be used to finance preschool, primary, secondary and middle school education, and health, at the levels established by law, with special attention to children.

The "situado fiscal" shall increase annually until it reaches a percentage of the current income of the Nation that allows to adequately cover the services for which it is destined. To this end, the withholding of the sales tax and all other resources that the Nation transfers directly to cover the expenditure in the mentioned levels of education will be incorporated to it.

The law shall set the terms for the assignment of these revenues and the transfer of the corresponding obligations, shall establish the conditions under which each department shall assume the attention of the mentioned services and may authorize the municipalities to provide them directly on an individual or associated basis. Responsibilities may not be decentralized without the prior allocation of sufficient fiscal resources to understand them. Fifteen percent of the situado fiscal will be distributed equally among the departments, the Capital District and the districts of Cartagena and Santa Marta. The remainder will be allocated in proportion to the number of current and potential users of the aforementioned services, also taking into account the weighted fiscal reinforcement and the administrative efficiency of the respective territorial entity.

Every five years the law, at the initiative of the members of Congress, may revise these distribution percentages."

- 3 The original text, without modifications, of Article 356 of the National Constitution, stated the following:

"ARTICLE 357. The municipalities shall participate in the current income of the Nation. The Law, at the initiative of the Government, shall determine the minimum percentage of such participation and shall define the priority areas of social investment to be financed with such resources. For the purposes of this participation, the law shall determine the indigenous reserves that shall be considered as municipalities.

The resources from this partition shall be distributed by law in accordance with the following criteria: Sixty percent in direct proportion to the number of inhabitants with unsatisfied basic needs and the relative level of poverty of the population of the respective municipality; the remainder based on the total population, fiscal and administrative efficiency and the progress demonstrated in quality of life, assigning exclusively a percentage of this portion to municipalities with less than 50,000 thousand inhabitants. The law shall specify the scope, the distribution criteria herein provided for and shall provide that a percentage of these revenues shall be invested in rural areas. Every five years, the

and their use. This resource transfer system has not remained unchanged; on the contrary, it has been subject to reforms through legislative acts that, in principle, seem to have distorted the intention of the 1991 Constitution.

In this sense, we find that this system was modified for the first time in 1993, with Legislative Act 01, by means of which the city of Barranquilla, capital of the Department of Atlántico, was established as a Special, Industrial and Port District. Then by 01 of 1995, which added Article 357 of the Constitution to the Political Constitution. Subsequently, in principle, "transitorily" by Legislative Act 01 of 2001⁴, and finally by the 04 of 2007, which

law, at the initiative of Congress, may revise these distribution percentages.

PARAGRAPH. The participation of the municipalities in the current income of the Nation will be increased year by year, from fourteen percent in 1993 to at least twenty-two percent in 2002. The law will establish the gradual increase of these transfers and will define the new social investment responsibilities to be assumed by the municipalities and the conditions for their fulfillment. Their authorities will have to demonstrate to the evaluation and results control agencies the efficient and correct application of these resources and, in case of mismanagement, they will be subject to the sanctions established by law.

New taxes shall be excluded from the above participation when Congress so determines and, for the first year of effectiveness, adjustments to existing taxes and those that are arbitrated by economic emergency measures".

- 4 The amendment introduced by Legislative Act 01 of 2001, was only with respect to Section 4 of Article 356 of the Constitution, providing as follows: *"The resources of the General System of Participation of the departments, districts and municipalities shall be used to finance the services for which they are responsible, giving priority to health services and preschool, primary, secondary and secondary education services, guaranteeing the provision of services and the expansion of coverage".*

came into force in January 2008⁵ and which has been subject to some regulation by the national government (Decree 028 of 2008)⁶.

Regarding the concept of what transfers are, we find that this was, in its (original) expression, indicated in Article 356 of the Constitution, which defined the subject as the percentage of the current income of the nation (*situado fiscal*) that was assigned to the Departments, the Capital District of Bogotá, the Special District of Cartagena, and the Special District of Santa Marta for the direct attention, through the municipalities, of the services assigned to them. Resources that were to be destined to finance preschool, primary, secondary and middle school education and health. This destination would later be extended to other items.

In relation to the distribution of the transfers to the territorial entities that received them, it was initially stated that 15% of these resources would be used for the Departments, the Capital District and the Special Districts of Cartagena and Santa Marta in equal parts, and the rest would be distributed according to the number of users of the education and health services that the territorial entities

had. In other words, the criterion for the allocation of these resources was based on equity. A distribution would be made according to the territorial entity that had the largest population using or needing education and health services. In addition to another subsidiary criterion such as efficiency in the administrative management of the entities and of these resources. This went from being a subsidiary criterion for allocating these resources to one of first order, rewarding efficient entities in the management of these resources, but making the distribution of these resources less equitable in proportion to the neediest population.

Regarding the form of distribution, article 357 of the Constitution initially stated that 60% would be allocated in direct proportion to the number of inhabitants with unsatisfied basic needs, and according to the poor population of the territorial entity. While the rest of the resources would be allocated according to the criterion of administrative efficiency. We understand administrative efficiency as the relationship between the resources used in a project and the achievements or results obtained with it.

The objectives pursued with the implementation of the transfers, to eliminate or reduce poverty levels in the regions, and to generate growth in these regions, were achieved, if it is taken into account that these resources initially corresponded to figures between 14% and 22% of the nation's current income in the periods between 1993 and 2002. This was in

5 Article 5 of Legislative Act 04 of 2007 provided the following regarding its entry into force: "Article 5. This legislative act is effective as of January 1, 2008."

6 "By means of which the strategy for monitoring, follow-up and integral control of expenditures made with resources from the General System of Participations is defined" and through the contents of Law 1176 of 2007, by means of which articles 356 and 357 of the Political Constitution are developed and other provisions are enacted.

compliance with the constitutional mandate of transferring resources in a gradual and current manner. That is to say, until then, the economic scheme proposed by the National Constituent Assembly of 1991, in relation to the distribution and distribution of the transfers, fulfilled its objectives.

2. AMENDMENTS TO THE CONSTITUTIONAL REGIME OF TRANSFERS, BY MEANS OF LEGISLATIVE ACTS

Notwithstanding the foregoing, this scheme underwent its first modification with the Legislative Act 01 of 1993⁷, positive from the

point of view of the Caribbean region. by including the city of Barranquilla as one of the Special Districts among which 15% of the total amount of the transfer of the “situado fiscal” was distributed, without modifying any other aspect of the constitutional scheme, until then proposed.

However, through the issuance of Legislative Act 01 of 1995⁸ the purposes for which the

The remainder will be allocated in proportion to the number of current and potential users of the aforementioned services, also taking into account the weighted fiscal effort and administrative efficiency of the respective territorial entity. Every five years the law, at the initiative of the members of Congress, may revise these distribution percentages.”

7 The text of Article 356 of the National Constitution, as amended by Legislative Act 01 of 1993, read as follows: “ARTICLE 356. Except as provided by the Constitution, the law, at the initiative of the Government, shall establish the services to be provided by the Nation and the territorial entities. It shall also determine the “situado fiscal”, that is, the percentage of the current income of the Nation that shall be assigned to the departments, the Capital District and the Special Districts of Cartagena, Santa Marta and Barranquilla, for the direct attention, or through the municipalities, of the services assigned to them.. The resources of the “situado fiscal” will be used to finance preschool, primary, secondary and middle school education, and health, at the levels established by law, with special attention to children. The “situado fiscal” shall increase annually until it reaches a percentage of the current income of the Nation that allows to adequately cover the services for which it is destined. To this end, the withholding of the sales tax and all other resources that the Nation transfers directly to cover expenses in the aforementioned levels of education will be incorporated to it. The law shall establish the terms for the assignment of these revenues and the transfer of the corresponding obligations, shall establish the conditions under which each department shall assume the attention of the aforementioned services and may authorize the municipalities to provide them directly on an individual or associated basis. Responsibilities may not be decentralized without the prior allocation of sufficient fiscal resources to attend to them. Fifteen percent of the situado fiscal will be distributed equally among the departments, the Capital District and the Districts of Cartagena, Santa Marta and Barranquilla.

8 The modification introduced in the Colombian constitutional framework by Legislative Act 01 of 1995, was the modification of Article 357 of the Constitution, which had the following wording: “ARTICLE 357. The law, at the initiative of the Government, shall determine the minimum percentage of such participation and shall define the priority areas of social investment to be financed with such resources. For the purposes of such participation, the law shall determine the indigenous reserves that shall be considered as municipalities. The resources from this participation will be distributed by law in accordance with the following criteria: sixty percent (60%) in direct proportion to the number of inhabitants with unsatisfied basic needs and the relative level of poverty of the population of the respective municipality; the remainder based on the total population, fiscal and administrative efficiency and demonstrated progress in quality of life, assigning exclusively a percentage of this portion to municipalities with less than 50,000 inhabitants. The law shall specify the scope, the distribution criteria provided herein, and shall provide that a percentage of these revenues shall be invested in rural areas. Every five (5) years, the law, at the initiative of Congress, may revise these distribution percentages. PARAGRAPH. The participation of the municipalities in the current income of the Nation shall be increased, year by year, from fourteen percent (14%) in 1993 to at least twenty-two percent (22%) in 2001. The law will establish the gradual increase of these transfers and will define the new social investment responsibilities to be assumed by the municipalities and the conditions for their fulfillment. Their authorities will have to demonstrate to the evaluation and results control agencies the efficient and correct application of these resources and, in case of mismanagement, they will be subject to the sanctions established by law.

transfers were created began to become blurred, as they were allowed to be used for The law authorized that these resources could be used for purposes other than education and health, since the territorial entities could allocate between 30% and 55% of the total of such resources to operating expenses or free investment, depending on the final category of the entity. This situation opened the door for these monies to be diverted to other matters, such as: unjustified and disproportionate increases in the staffing levels of the territorial entities and administrative corruption.

Circumstances that occurred and continue to occur, due to the fact that no special criteria

New taxes will be excluded from the above participation when the Congress so determines and, for the first year of effectiveness, adjustments to existing taxes and those that are arbitrated by economic emergency measures..

As from the year 2000, municipalities classified in the fourth, fifth and sixth categories, in accordance with current regulations, may freely allocate, for investment or other expenses, up to fifteen percent (15%) of the resources received from the participation.

FIRST TRANSITORY PARAGRAPH. For the years 1995 to 1999, inclusive, a transition period is hereby established during which the municipalities, in accordance with the categorization established in the regulations in force, will freely allocate for investment or other expenses a maximum percentage of the participation resources, as follows:

Categories 2 and 3: Up to 25% in 1995; up to 20% in 1996; up to 15% in 1997; up to 10% in 1998; and up to 5% in 1999.

Categories 4, 5 and 6: Up to 30% in 1995; up to 27% in 1996; up to 24% in 1997; up to 21% in 1998; and up to 18% in 1999.

SECOND TRANSITORY PARAGRAPH. From 1996 to 1999, inclusive, an increasing percentage of the participation will be distributed among the municipalities in accordance with the criteria established in this article, as follows: 50% in 1996; 60% in 1997; 70% in 1998 and 85% in 1999. The remaining percentage of the participation in each of the years of the transition period will be distributed in direct proportion to the value received by the municipalities and districts for the transfer of VAT in 1992. As from the year 2000, the criteria established in this article for distributing the participation will be in full force and effect".

were indicated, from the architecture of the same constitutional norm, that would not allow the use of these monies in sectors other than those initially contemplated for the use of these resources, such as the coverage and expansion of health and education. Likewise, it is also a cause of these realities that it was not determined that the use of these funds be reserved for the satisfaction of unsatisfied basic needs or basic sanitation.

The occurrence of an increase in cases of corruption and diversion of money to the detriment of the public patrimony, had a prompt response from the national government, who after warning of the diversion of transfer resources, promoted a new reform, this time through Legislative Act 01 of 2001. This reform did not respond to an economic evaluation of the impact of the transfers on the decrease in the poverty levels of the region and its growth, but was caused by the fiscal deficit that the nation had at that time, which would be counteracted if the resources that the nation transferred to the territorial entities were reduced. Forgetting that the cause of the deficit was the strong growth of central public spending. This led to the modification of the formula for calculating the distribution of transfers, with the harmful effect this has had on the country's economic growth, since it has reduced coverage on the social spending fronts.

In relation to the modifications established by Legislative Act 01 of 2001, we have that, in the first place, it authorized the poorest

municipalities (level 4, 5 and 6) to spend up to 28% of the transferred resources in operating expenses or free investment, that is, instead of forcing them to invest the lower value of the resources that would now be transferred to them in health and education in their entirety, they were allowed to fatten their payrolls and make expenses that in most cases did not generate growth. Increasing the gap of imbalance in regional growth and the growth of the poverty margin, since time has shown that the lack of adequate management of these resources by the territorial entities in a significant number of cases reflects the backwardness and imbalance of some Departments compared to others, as is the case of the Departments of Chocó or Sucre, for example.

Notwithstanding this, Law 617 of 2000 was enacted.⁹ The fiscal adjustment plan, which caused the territorial entities to reduce their administrative payrolls and operating expenses, seems to be a palliative to avoid the fiscal situation of the territorial entities in Colombia. So far, these measures seem to be a palliative to avoid the fiscal situation of the territorial entities in Colombia, since with this type of measures the national government has generated that these entities do not worry about increasing the resources they receive due to the implementation of public policies

that generate a significant growth of their own resources income, but from the reduction of public spending to comply with the spending limits imposed by this regulation and thus receive a greater number of resources to execute their budgets. As a result, transfers have not solved the problem of economic growth in some regions of the country.

This last modification brought a significant change in the way of calculating the money transferred, going from an increasing increase according to the increases in the nation's current income, to "temporarily" between 2002 and 2008, increasing the transfers according to the inflation rate caused plus 2% or 2.5% of such income. This implied a substantial reduction in the amounts transferred and a decrease in health and education coverage.

Now, in view of the fact that the previous measure was transitory, the government imposed and achieved the approval of Legislative Act 04 of 2007, which introduced as a positive aspect, having indicated that the money received from transfers would be destined to the domiciliary public service of drinking water and basic sanitation. However, it reversed in a negative way the way in which these resources would be allocated, stating that they would no longer be allocated according to the number of inhabitants in need of drinking water and basic sanitation services. This is inequitable if we take into account that the territorial entities with the greatest backwardness are the ones that make the worst use of these funds. This generates

⁹ *By which Law 136 of 1994, Extraordinary Decree 1222 of 1986, the Organic Budget Law, Decree 1421 of 1993, and other norms tending to strengthen decentralization are partially amended, and norms for the rationalization of national public expenditure are enacted".*

greater resources for areas such as Antioquia, but at the same time, brings greater social inequalities to areas such as Choco and Sucre.

On the other hand, Legislative Act 04 of 2007, although it allows the use of transfer funds in matters other than health and education, brought about other consequences, since it authorized that these resources could be invested in operating expenses and destined to free investment in a higher percentage than the one allowed up to that moment, going from 27% to 42%. For this reason, it can be affirmed that administrative corruption is not the cause for reducing the transfers, since if this were the case, then the following question must be asked: why is the amount of resources transferred by territorial transfers increased by almost half, not to invest them in the true purposes of these revenues (health, education, basic sanitation and drinking water), but in matters that do not generate growth? It is worth stopping to review the uncalculated amounts of the labor liabilities left by the enlargement of the staff of the territorial entities, after the application of the administrative restructuring, because the use of these resources for purposes such as this, do not contribute to a responsible management of the territorial finances, promoting administrative corruption, unequal growth, without solving the problem of inequitable growth of the regions in our country.

The unequal growth of the regions was contrasted to a greater extent when it was observed that the national government,

through Legislative Act 02 of 2007, intended to include cities such as Buenaventura, Tumaco, Popayán, Tunja, Turbo, and Cúcuta as Special Districts, which implied for them a greater participation in these revenues, and in turn, the possibility of becoming development poles in their respective regions, This implied for them a greater participation in these revenues, and in turn, the possibility of becoming poles of development in their respective regions, promoting the emergence of clusters, which would trigger development in these areas of the country. This is worrisome for other areas, such as the Atlantic Coast, which has comparative advantages over other areas of the country due to its proximity to the sea, but does not grow in the same way and has a depressed regional growth that is not in accordance with its natural advantages.

However, in spite of this, these modifications disappeared from the constitutional order when the sections of this legislative act that included cities other than Buenaventura as Special Districts were declared unconstitutional¹⁰.

10 As central arguments for the declaration of unenforceability of the provision in question, the Constitutional Court in Ruling C-033 of 2009, with Magistrate Manuel José Cepeda Espinosa presiding, stated the following: *"The Congress of the Republic violates the principle of consecutivity in the processing of a constitutional reform, when a Legislative Act includes normative proposals with no thematic relation that were never discussed or voted, neither in the first nor in the second round by any of its Chambers, within the corresponding debates constitutionally required to reform the Political Constitution. The committees in charge of reconciling the texts of a Legislative Act violate the Constitution when they introduce new topics and issues, with no thematic relation, under the pretext of reconciling the differences between the texts. Therefore, the Constitutional Court will*

due to formal flaws and errors of legislative technique. Despite this fact, it is evident that through public policies and the allocation of transfer resources, development is generated in the respective regions.

4. CONCLUSIONS

All of the above statements show us that the arguments put forward to reform the 1991 constitution do not respond to the poor state of the nation's finances, but rather to the realization of the regional project outlined in the 1991 constitution. Other options could have been taken to overcome the deficit and not to make permanent, measures that in principle were transitory. For the fact that it is the nation who distributes the resources according to the factors subjective factors does not benefit Colombia's most needy population, much less help to reduce the existing social inequity, since this situation seems to have its origin in allowing the center to have economic power over the rest of the territory and to be the one who, according to its criteria, drives the development of the

regions, and not as initially contemplated in the 1991 constitution.

Now, in order to improve the management of royalties, it must be ensured that the same territorial entities make good use of the resources transferred, and even when they are allowed to be used in other sectors, these resources should only be used for health, education, basic sanitation and drinking water. In which the execution of these resources is monitored by the State control agencies, in a more preventive than corrective work.

Likewise, in order to promote regional growth with the appropriate use of the transfers, a modification should be introduced to the text of the constitution whereby the original scheme of the transfer of resources by the nation is returned to, in which these revenues are calculated and increased year by year according to their variation and that the criterion for their use is that of efficiency in the management of the resources but accompanied by the criterion that imposes the allocation of these resources according to the number of people with unsatisfied basic needs made by the respective territorial entity.

declare the challenged paragraphs of Article 1 and the paragraph of Article 2 of Legislative Act 2 of 2007 to be unenforceable. After these unenforceability, the Court clarifies that Article 1 remains as follows, without the challenged plurals and the challenged paragraphs:

Article 1. Add the following paragraph to Article 356 of the Constitution: The city of Buenaventura is organized as a Special, Industrial, Port, Biodiverse and Ecotourism District. Its political, fiscal and administrative regime will be determined by the Constitution and the special laws, which for this purpose are dictated...

REFERENCES

Political Constitution of Colombia.

Colombia, Legislative Act 01 of 1993, whereby the city of Barranquilla, Capital of the Department of Atlántico, is established as a Special, Industrial and Port District.

Colombia, Legislative Act 01 of 1995, which adds Article 357 of the Political Constitution.

Colombia, Legislative Act 01 of 2001, which amends some articles of the Political Constitution.

Colombia, Legislative Act 04 of 2007, which amends Articles 356 and 357 of the Political Constitution.

Colombia, Law 617 of 2000, which partially amends Law 136 of 1994, Extraordinary Decree 1222 of 1986, adds to the Organic Budget Law, Decree 1421 of 1993, establishes other norms to strengthen decentralization, and establishes norms for the rationalization of national public spending.

Constitutional Court. Decision C-033 of 2009. Presiding Judge: Manuel José Cepeda.