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Bureaucratic activism and Colombian community mothers: The daily construction of the rule of law

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ABSTRACT

Whereas mainstream literature affirms that the rule of law is an abstract concept that comes from democracy and liberal institutional systems, people in the local Global South do not experience this certainty. In some ways, the rule of law is a product of the daily life transactions and bargains of social actors. This article analyzes the case of community mothers as street-level bureaucrats who produce the rule of law in their local spaces, within an institutional or democratic mechanism. This case study of community mothers, developed between June 2012 and February 2013, shows how street-level bureaucrats use the rule of law as a tool of empowerment. Community mothers display an undocumented agency that develops a feminist agenda of helping fellow women, contrary to the government agenda that promotes childcare and the early childhood program policies. In this sense, the fieldwork undertaken portrays mothers and children as conflicting actors. Despite this, the social policy hides this conflict reproducing the normative image that ideologically links mothers with their children. The results of this research project reveal, therefore, that the local agents as the street level bureaucrats play an unexpected role in the power dynamics inherent to the rule of law.

KEYWORDS: *community mothers, feminism, Latin America, street level bureaucracy, rule of law*

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The central focus of this document is to build a theoretical map for what I call bureaucratic activism. This will lead us on a path through debates constructed around legal theory and the theory of administrative law and public administration. The study also seeks to explain why it is necessary to build and use this category to analyse administrative bureaucracies. The above allows us to shed light on the critical role of this type of bureaucracy in the implementation phase of public policies and how a critical approximation to law—like that which is represented by distributive analysis—generates a fertile analytical map to analyse the undetermined decisions of agents involved in public administration, as the effects of what law builds in everyday life.

Community mothers are women who take care of other families' children. They work in Community Welfare Homes (CWH), which are a social programme developed from the states agencies in order to help the first childhood. Despite being a public social policy, the CWH programme has an outsourcing operation and the government gives almost no funds to the operation. In order to fulfil this aim, we undertook a case study of a number of Community Welfare Homes (CWH) in four Bogotá localities (San Cristóbal sur, Suba, Simón Bolívar y San Cristóbal norte) and in El Espinal (Tolima) over a period of four months, from August to November 2012, analysing the role of community mothers as street-level bureaucrats. The study combined five different data gathering mechanisms: documenting experiences in field diaries as an ethnographic technique; semi-structured interviews with employees and expert administrative staff at the Colombian Family Welfare Institute (ICBF); observation of the workings of the Community Welfare Homes; focus groups with community mothers and beneficiaries; and a documented analysis of the different types of tasks undertaken by community mothers in their daily work and focus groups. Annexe 1 presents a detailed log of the activities undertaken. In sum, the research allowed us to gather information from 19 semi-structured interviews, 90 hours and 35 minutes of observation, 3 focus groups, the documentation of informal experiences with the CWH actors in a field diary and a documentary analysis of 8 official formats generated by community mothers and reviewed by the ICBF.

The text is structured as follows: In the first section, we compare liberal legalism and distributive analysis as two different ways of looking at law in the broad sense of the word. The second section presents the theoretical debate surrounding the definition of law, realised in the previous section, using two approximations to the definition of the law, one founded on classical administrative law and the other on bureaucratic activism. The third section presents an analysis of how the CWH case study questions the traditional discretionality model.

Subsequently, in the fourth section, we analyse the phenomenon of the bureaucratic decision using findings from the case study. In this section, the reader may find an approximation to the phenomenon of bureaucratic activism through the analysis of four characteristics of street-level bureaucracy with the case of the CWH community mothers. Finally, the fifth section organises the results of the field observations into a typology of community mothers to understand the different manifestations of bureaucratic activism as a daily construction of the rule of law.

1. What is law like? Liberal legalism and distributive analysis

Liberal legalism and distributive analysis constitute two trends in the conceptualization of what and how law is. The former groups together a series of theoretical and dogmatic approximations that place the rule of law and the activism of a legal operator in opposition, which, in turn, sanitizes the argument of discretionality. The latter groups a number of critical theories that document the indetermination of the law and destabilise the trust placed in normative bodies with predictable mechanisms, by maintaining the thesis of subjectivity in the scenarios of adjudication or normative application.

Liberal legalism is an expression first used by David Trubek and Marc Galanter in their popular article: “Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States,” published in 1974. According to their approximation, law has three fundamental characteristics: it is separate from society, it answers to social needs, and its answer to the problems and changes that it generates in society have a direct causal relationship (Trubek & Galanter, 1974). This implies that the law is a system that is separate from society, one that regulates its problems self-referentially by applying norms that have precise effects within social scenarios that are recognised as being malleable.¹

Distributive analysis offers an alternative understanding of law, according to which: (i) there is no opposition between law and society or between law and economy. Law creates a reality that regulates the subjects that intervene in it, and the material positions in which they interact. Thus, all legal regulations have concrete distributive effects, including those which we perceive as deregulated or oriented by the “free market” (Hale, 1923; Llewellyn, 2009; Rittich, 2002).² (ii) The relationship between norms and reality, or between law and society, is not measured by causal logic. The effects of law, in reality, are not linear; on the contrary, they are indeterminate and contingent (Frank, 2009; Duncan Kennedy, 1998). (iii) Indetermination and contingency lead the distributive results of law to be unpredictable. This means that law intervenes by constructing reality, generating unexpected combinations between rigidity—it reproduces the state of existing things—and fugacity—it can generate social changes, emancipations, and occasional resistance—that vary in concrete cases and particularisms (Alviar & Jaramillo, 2012).³ This trend has been developed only recently in local legal academia in three fundamental books: *Feminism and Legal Criticism – Distributive Analysis as a Critical*

¹ The characteristics of liberal legalism have been described as “legal functionalism” in another famous article among critical legal literature: “Critical Legal Histories.” For an in-depth analysis of Colombian-style liberal legalism, see Helena Alviar and Isabel Cristina Jaramillo (2012). *Crítica Jurídica. El análisis distributivo como alternativa al legalismo liberal*. Bogotá: Siglo del Hombre Editores, Chapter 1.

² An important theoretical premise of distributive law is the deconstruction of the State/market, public/private binominals. Following what has been set out by Robert Hale, some realist authors and some representatives of critical legal studies such as Duncan Kennedy, distributive analysis insists that the “market” or the “private” are a result of the legal regulations that decide between privileges in terms of a particular group of people with particular forms of operation (such as property and contract rights). Thus, there is nothing essentially “free” within these spaces and, therefore, precisely as maintained by Robert Hale, the private market spaces are saturated with rules regarding coercion and constriction of the subjects that intervene in it (Hale, 1923).

³ For Alviar and Jaramillo, there are nine questions that guide a distributive analysis: What is at stake? Who are the actors involved? What are the resources or abilities that allow some to impose themselves on others? What are the manifestations/forms of the conflict? What are the legal rules that are directly related to the situation in question? What other rules influence even if they are not directly related? In what way can the resources or abilities of the parts in conflict be the result of legal privileges or rights? What are the elements of the theoretical framework with which a situation is usually interpreted; what are the obstacles and what is useful for new interpretations? What changes in the rules would lead to increasingly distinct equilibriums? (Alviar & Jaramillo, 2012).

Alternative to Liberal Legalism (Alviar & Jaramillo, 2012), *Women, Courts and the Media: the Legal Reform of Abortion* (Jaramillo & Alonso, 2008) and *The Law and Family in Colombia. Stories of Race, Gender and Property* (Jaramillo, 2007b).⁴

The rule of law presents different manifestations in different schemes of the understanding of law. In general, for traditional legal academia, this principle represents an effect of liberal legalism. This brings together the idea of the existence of pre-existing laws related to human actions as universal and abstract principles to which both associates and governors are subject. This has two applications in terms of legal analysis: (i) the state of law—which is used in the same sense as the rule of law in local academia⁵—is a way to control power abuses; (ii) power is regulated through the strict monitoring of norms; and (iii) acting outside of those norms implies arbitrariness in the case of public legal operators or illegality in the case of citizens⁶ (Tamanaha, 2004). For distributive analysis, the rule of law does not determine the results of the questions about norms because (i) law is indeterminate and does not have a fixed meaning; (ii) the stabilization of determinate interpretations of the law depend on power scenarios that are contingent for the law; (iii) the results of legal investigations depend more on factors that are external to the law than that what liberal legalism is prepared to accept (Alviar & Jaramillo, 2012; Duncan Kennedy, 1998).

Within this framework, the debates surrounding contemporary legal theory dealing with the rule of law have been inscribed above all in the line of liberal legalism, or the exaggerated faith in the legal previsibility (Tamanaha, 2004). Thus, fulfilling this principle has inspired debates on self-referential law, legal activism, discretionality in adjudication, the separation of powers, and the correlative dispute surrounding the sources of law. Legal philosophers have been obsessed by the thirst for the control of legal activism and maintaining the legislation/adjudication dichotomy (Dworkin, 1988; Duncan Kennedy, 1997). In the same vein as liberal legalism, are the debates surrounding the degree of systematicity with which the law solves social problems and its corresponding effect on legal behaviour (Kelsen, 1994). On that side we have also the discussions of the creation of law by judges (Dworkin, 1988; Hart, 1990) and the distinction between easy and difficult cases, as a methodology for the contention of the judicial creation of the law (Hart, 1990).

The rule of law inspires other discussions within the field of the distributive analysis of the law. First, it emphasises that discretionality is not the exception, but the rule among the scenarios of the operation of the law (Frank, 2009; Holmes, 1987; Llewellyn, 2009). Second, the rule of law discussions offer evidence that there is no separation of powers or functions that guarantee the control of power (Duncan Kennedy, 1997). Third, the rule of law analysis shows that the debate surrounding the systematicity of the law hides another debate on the indetermination of normative texts, and the certainty that no text could ever be clear or sufficient (Frank, 2009; Duncan Kennedy, 1997). Fourth, it analyses how all legal manifestations may be interpreted as economic privileges of certain groups (Hale, 1923). Fifth, it documents how the indetermination of legal texts implies that the results generated by the norms are produced within concrete games of interests among particular actors (Alviar & Jaramillo, 2012).

⁴ For the theoretical antecedents of distributive analysis see, among others, Hale (1923); Duncan Kennedy (1993, 1998); Mnookin & Kornhauser (1979).

⁵ The correlation between the rule of law and the state of law may be analysed in a number of articles in local literature (López Medina, 2007; López Sterup, 2009).

⁶ “Private individuals are only responsible insofar as the authorities when they infringe the Constitution and the law. Public servants are accountable for the cause and omission or extralimitation in the exercise of their functions” (Political constitution. Article 6).

These debates are directly connected with the way in which legal theorists have discussed the topic of discretionality (Dworkin, 1988; Kennedy, 1997). According to liberal legalism, the discretionality exercised by legal operators is minimal given that there are correct legal responses that can be drawn from the integration of the different tools that the law provides. For distributive analysis, discretionality is the way in which the rule of law is constructed. That is, while for the former discretion has no place when law is taken as a kind of pre-existing and complete material, for the latter, the reach of what legality actually means depends on the discretionality of the operators (Kennedy, 1997). This implies that the debates on activism are stigmatized, from the perspective of liberal legalism; and documented as a phenomenology, from the perspective of distributive analysis (Alviar y Jaramillo, 2012).

Despite these differences, in Colombia, these two ways of conceiving the law have a sort of fixation with the scenario of the judge. Authors such as Abdón Rojas point out the anxiety with which local academia approaches legal activism. Also, this author emphasizes that the role of judges as a paradigmatic space has developed significantly over the past twenty years, but primarily within US borders. In contrast, the emphasis on the figure of the judge is particular to the application of these debates to Colombia, where the opening of the constitutional tribunal in the 1991 Constitution needed to legitimise the constitutional judge as creator of the law (Rojas, 2012). Despite this, the observation of the “activism” of the discretionality of legal operators in other areas of public power, where the legal is also at stake, remains practically unexplored.

Thus, while legal activism is excessively documented within the body of legal theory literature, the opposite is the case with administrative bureaucracies, or the operators who, based on the executive power of the liberal state, apply the norms. This means that the debate on bureaucratic activism is under-theorised within the discussions on public law. To ask ourselves how administrative bureaucrats apply the norms in Colombia is important for several reasons. One of these reasons is that bureaucrats are a representative example of how the implementation stage differs from the legal scenario. To use the legal adjudication scenario as a paradigmatic model of the application of the law is problematic in our context because, as we can see in the *pirámide de la litigiosidad* (litigiousness pyramid) (Santos & García Villegas, 2001),⁷ the judges are not residual agents that apply the law. Despite this, that the judges “solve enough cases” does not imply that the answers are outside of the law or that the breach between law and society is so broad as to imply a kind of sublegal culture to be discovered (Alviar & Jaramillo, 2012). It is the law itself that has distributed the faculties of adjudication and normative operation beyond legal power.

The law has unexpectedly empowered actors who not only challenge the instrumental management of the language of the State but also show the contingent operation of the law. The police force, guards, activists, school-teachers, doctors and community mothers, among others, are the new legal operators that employ normative operation schemes that are very different from that which is stipulated in the adjudication debate. In this scenario, the decision of the law to not regulate intermediate spaces between that which is legal and that which is not legal is part of the daily battle. It is where the competencies of the application of the law are not clear, that street-level bureaucracies emerge as new models for the use of legal norms.

Although this empowerment can be related to the outsourcing of social policies—within the framework of the implementation of the Washington Consensus—a direct causal link between the two phenomena cannot be established despite the fact that the context of the

⁷ The “*pirámide de la litigiosidad*” is a sociological model that shows that only 23% of the social conflicts are attended by official justice (Santos & García Villegas, 2001).

Consensus was important in the design of social policies in the 90s. For example, the Community Welfare Homes as a social childcare policy were inaugurated a decade earlier in schemes that were also outsourced. This implies that bureaucratic activism, as a way to capture the discretionality of administrative bureaucracies, could be regarded an independent phenomenon of the outsourcing of social policies.

For these reasons, the topic of legal interpretation and activism must be laid to rest in light of the new readings of bureaucratic activism, understanding this category in its broadest sense and as applicable to both the low-level implementation of street-level bureaucracies and the high-level bureaucracy of executive power or of the civil servants who are close to the power centres (Alviar, 2011). This implies the defence of the thesis on the total indetermination of norms: discretionality is not given depending on the closeness or not of the legal operators to the power centres; in fact, it is constant because all existing legal material is indeterminate, which makes it possible for discretionality to be the actual way in which legality is constructed. Consequently, the treatment of discretionality and its opposition to the rule of law has a different trajectory with regard to topics related to public administration, that vary basically within the three models of administration to analyse bureaucratic behaviour: the Weberian scheme, the public management model and the governance alternative (Pollitt & Bouckaert, 2011; Prats Catalá, 2005).

2. The debate of discretionality within liberal legalism: the theories of public administration from Weber to the governance scheme

Public administration models are not exempt from the debate surrounding discretionality. The Weberian scheme represents the antidiscretionary model par excellence, where the civil servant is limited to—mechanically and directly—applying norms (Weber, 1963). In contrast, the neoliberal seclusion of the State, that supposes the application of the public management model and its results-centred focus, implies that the margins of possible discretionality increase for the behaviour standard of civil servants (Evans, 2010; Lipsky, 1984-2010; Maynard-Moody & Musheno, 2003). The scheme of governance also plays down the strict fulfilment of the rule of law. Horizontal and decentralised administration of civil servants pertaining to the global governance models supposes that citizens, as new agents of administration, make decisions that are constantly outside of the boundaries of that which is foreseen in the management plans (Gupta & Sharma, 2006; Mitchell, 1999).

Despite the variety of theoretical models used to analyse discretionality in public administration, in Colombia, the Weberian model prevails among legal academics who analyse public administration (López Medina, 2007; López Sterup, 2009; Moreno, 2012a). Administrative law is, thus, a local space of the reception of global readings of administration schemes (Malagón Pinzón, 2003). In Colombia, the literature continues to deal with the discretionality debate from a Weberian perspective of the rule of law and the state of law. In this sense, although modern administrative agents are very tolerant in terms of this category and affirm that administrative law is discretionary, the characteristic is more strongly related to the technical features or expertise of executive power, than to the subjectivity expressed by legal theory. In fact, in structure, the Weberian model of formal rationality, that considers public power as being hierarchical, specialised and ritualised (López Medina, 2007; SÁCHICA, 2005; Vidal Perdomo, 2004), is the implicit theory of the controls foreseen by the administration, the approximation to norms, and the structure through which administration works. Thus, the

discretionality model continues to be much more similar to the Weberian scheme than the results focus of the new public management or the horizontal government of governance.

At this point, it is important to mention that the liberal institutional design conceives executives as a technical part of the State and, with this speciality, provides a special judge for their acts. This is the role of the administrative law judge who holds special respect for the “technical” acts of the executive, that escape legal logic as they tend to be extrajudicial (Vidal, 2004). The idea of the judge’s limited special control insofar as the “expertise” of the administration is concerned, assumes that if the application of extrajudicial criteria is allowed as part of the operator’s decision, the inclusion of subjective, emotional and contingent elements in this decision is completely prohibited (Cassagne, 1986; Santamaría-Pastor, 2010).

Despite the above, the dichotomy between politics and administration has meant that the debates surrounding discretionality within administrative dogmatism have a different meaning than those pertaining to legal theory. Thus, whereas the former discusses discretionality as the presence of administrative decisions in unregulated acts, the latter focuses on the inclusion of elements that are extrajudicial or subjective in legal decisions (López-Streup, 2009; Santamaría-Pastor, 2010; Vargas, 2005; Vega, 2005). The above implies that for administrative dogmatism, discretionary (or unregulated) acts are not those that are outside of the rule of law, but those: (i) of free appointment and removal, undertaken by the civil servants who do not make use of the Contentious Administrative Procedure Code, (CAPC) and, thus, must not apply the administrative procedure in their decision-making; (ii) executed by an administration with a deference of the judicial control, which grants it the technical characteristic of its functioning. Also, regulated administrative acts cannot be discretionary. If they are, they activate the respective penalisation for abuse of power foreseen for the perversion of justice, understood as the issuing of an unjust or arbitrary administrative decision (Sáchica, 2005). This implies that—in contrast to general legal theory—the dogmatic view of administrative discretionality penalises subjectivity in decisions, rather than the application of extrajudicial criteria pertaining to the “technical” character behind the acts of executives (Malagón Pinzón, 2003).

The above discussion is at the centre of the distinction between politics and administration. The split between the “technical” and the “political” with regard to government and public administration shows the way in which the essential dichotomy of public law works: to prohibit the arbitrary, and favour the technical (López Medina, 2007). Within this dichotomy, administrativists experience the debates on discretionality of the administrative bureaucracies as a problem of submission or not to the procedures of regulated acts (Moreno, 2013). Thus, whether or not they are permeated by the technical character of public administration, discretionary acts by the administrativists are never outside of the rule of law. In contrast, any act executed by the administration is presumed to be legal and, as such, aimed at generating a principle of certainty at the heart of the liberal institutional design (Trubek & Galanter, 1974).

From the perspective of distributive analysis, this emphasis on procedures implies the concealing of the malleability of procedural norms and the naturalisation of the forms or the procedures as a neutral exercise of the law (Jaramillo & Alfonso, 2008; Duncan Kennedy, 1976). The procedural norms are, like all norms, indeterminate and contingent, so there is nothing “antidiscretionary” in a model of regulated bureaucratic behaviour; that is, one that is subjected to a procedure. Similarly, the presumption of legality that covers public actions is nothing more than an institutional arrangement that operates so that a select few benefit more than others by involving the symbolic load of State actions.

Based on the premises proposed by distributive analysis, the case study is focused on deconstructing the ideas related to the inevitability and certainty of the rule of law. Thus, the analysis of the Community Welfare Homes (CWH) and community mothers will shed light on how legality is constructed contingently in spaces not considered by the liberal scenarios of the exercise of public power. It will also explain how certain legal arrangements unexpectedly produce a reality in which children do not benefit as much as expected, but their mothers do, within a *range* of resources that is more complex than a literal reading of public policy and of the actions of the State and the law could ever anticipate. Similarly, the case study will *show* how street-level bureaucracies build legality through their discretionality, understood as subjective and extrajudicial actions, as opposed to mere technical actions as understood in classic administrative law.

3. How does the case study question the traditional administrative discretionality model?

The case study of the Community Welfare Homes (CWH) as social policy based on observations undertaken in Bogotá and El Espinal allows us to analyse how this policy is established in specific contexts and the consequent implications for the theoretical construction of categories such as discretionality and legality.⁸ Here, we present the context in which the research was undertaken and describe the use that community mothers make of their ambiguous relationship with the State, as well as their behaviour in terms of the norms that regulate their labour. This discussion allows us to analyse how this affects the social policy foreseen by the Colombian Institute of Family Well Being (ICBF).

3.1. Context of the research

The research on Community Welfare Homes (CWH) was developed within an intense social context of political confrontation between community mothers and the Director General of the Colombian Institute of Family Well Being (ICBF). The social policy known as *De cero a siempre* (From Zero to Always), whose aim is to specialize childcare through the implementation of Childhood Development Centres (CDC) to replace the old CWHs, raised the organised voices of the more than 77 thousand community mothers in the country, who asked for—within association schemes pertaining to the work regime such as trade unions—the regulation of their situation as real civil servants of the State. Through stopping their activities and through public demonstrations, their petitions included the elaboration of work contracts directly through the ICBF that would make their subordination visible in terms of the entity they worked for.⁹ In contrast to these postures, the narratives of the ICBF employees from different levels—both in the management arena and the central level employees who implement early-childhood programmes in the different regions—insisted on referring to community mothers as “mere volunteers,” “free workers” and “philanthropists who need society in order to live” (Camacho, personal communication, August 2012; Navarro, personal communication, November 2012).

Within this context, the Constitutional Court, in sentence T-628 of August 2012, written by magistrate Humberto Sierra Porto, decided to order the ICBF to regulate—within no more than six months—the situation of each one of community mothers in the country. According to the sentence, the ICBF had to coordinate institutional work to guarantee that the women who

⁹ See “1’100.000 de niños, sin clases por paro de madres comunitarias” (1,100,000 children can't go to class because of community mothers' strike) (2012).

undertake this work earn at least a minimum salary as compensation for their work for the community and for the State (Ardila Trujillo, personal communication, January 2013; Sentence T-628 of August 2012, MP Humberto Sierra Porto).

In October 2012, the ICBF began to socialise the implementation strategy of the sentence. According to the opinion of a number of civil servants (Camacho, personal communication, August de 2012; García, personal communication, August de 2012) and the interventions of director Diego Molano in the Senate of the Republic on the 4th of November 2012, community mothers lose out with this new scheme, given that it implies that they are contracted as public service providers with no access to the current prerogatives (i.e. bonuses and pension payments made by the ICBF). In the words of Molano, each mother will receive less than they do now because they will have to make their own parafiscal payments.¹⁰

In November 2012, in one of the last field visits, one of community mothers whom we observed still answered to her neighbour's greetings with informal updates regarding the news of her presumed hiring. While the debate goes on, the CWH continues to be one of the most popular programmes in the country. The figure of community mother seems to work as a centre of power in many social scenarios where even priests manifest that the "State does not reach them" (Focus group, El Espinal, Tolima, 2012). Such statements are significant given that Colombia is a very Catholic country where religious leaders are frequently respected as protagonists and advocates. The case study shows that community mothers are perceived as one of the few State agents that are visible in peripheral sectors of the national territory, such as San Cristóbal sur, Suba, Simón Bolívar and San Cristóbal norte in Bogotá and El Espinal (Tolima). In a number of the informal conversations with people who benefit from the programme, the ICBF—known only through the logo on the mothers' t-shirts—is the only public manifestation of the State that many people have in their daily context. We present this and other findings of the research in the following sections.

3.2. Community mothers: between the public and the private

Despite the fact that the legal regime of community mothers has been a legal battlefield, the restrictive interpretation of the Constitutional Court in terms of their condition as autonomous State workers does not necessarily represent a "loss." This section will show how 17 community mothers studied strategically and instrumentally use to their advantage the ambiguity of their link to the ICBF and the decision of the Constitutional Court. They are part of the State when they benefit from identifying themselves as public civil servants, but they assume critical positions with regard to the State or present themselves as abandoned or victims of the State when it is convenient to do so in order to gain symbolic, political or economic capital. In addition, this section explains that community mothers are part of a floating bureaucracy that profits from both the symbolic position of closeness to the State as from the discourses regarding its precariousness. This has to do with the characterization of the CWH as a space of intersection between the State and the market and with the legal arrangements that have been developed precisely to create ambiguity in terms of the obligation of the State insofar as childcare.

Community mothers benefit both from belonging and not belonging to the State. The instrumental use of the frontier between the public and the private can be seen in their own words: "sometimes, it is good to be in the limbo we are in" because "you attack when you have to attack, you are the victim when it suits, or let people congratulate you when there are good things to be said" (Focus group El Espinal, Tolima, 2012). Despite the ambiguity of the

¹⁰ Intervention by Diego Molano in the Senate of the Republic, Sunday 4th of November 2012.

condition, community mothers studied know very well the defects of the regime that regulates them:

The characteristic of the programme is born as a voluntary social service, therefore, given that we are solidary volunteers, as we are very motherly mothers, we have no employment links with the Institution or with the Association or with the contracting entity, there are no employment links (...). It is a contribution agreement between the Institute and the contracting entity. Who are the contracting entities? [...] Either the parents' associations of the children who are in the homes or Family Welfare Funds or NGOs or a cooperative. Our argument is that the Homes must continue to be managed by the community in order not to lose their community work (Arango & Molinier, 2011).

The feature of floating or street-level civil servants is taken advantage of in many ways by community mothers who participated in the case study. They all recognise that they wear ICBF t-shirts in their work as the logo of the governmental agency grants them a symbolic authority that they need in order to undertake their work: "It is like being a policeman, people see your t-shirt and respect you for it" (Arango & Molinier, 2011). The State symbol dissuades even muggers and criminals, as one of the FAMI (Family, Women and Children Programme) community mother told us: "they have tried to rob me a few times, but when they see the ICBF t-shirt, they say: she is from welfare, let's leave her alone" (Focus group El Espinal, Tolima, 2012).

They also use their link to the CWH as a mechanism of empowerment. Being a community mother highlights and strengthens their perception as collective leaders and intermediary agents for social problems. They are the direct representatives of public organisms, they appear as the centre of the childhood policies in the ICBF and are included, in different ways, in the planning of ICBF's public policy and, thus, in the techniques and programmes that the entity has established to help generate a sense of identity. In this respect, the researcher from the Centre for Economic Development Studies at *Universidad de los Andes* (CEDE), Raquel Bernal, mentions:

What is interesting about the CWH programme is that the mothers are at the centre of it all. If you go to a meeting at the ICBF, everything pivots around the mother (...) how to keep mother happy, mother is complaining, mother wants (...) in many ways, the children fall to a second level and the role of the mother is oversignified in public policy (Bernal, personal communication, January 2013).

Community mothers we interviewed also position themselves as agents who deal with social problems. In one of the visits that a FAMI community mother paid to a low income family that lives on the banks of the Magdalena River, we were surprised to see that one of the walls in Angela's house—a fourteen-year old girl who looks after 4 younger brothers and her own two-month old daughter—was full of notes from community mother. The notes included the requirements for registering the newborn, the dates of the medical appointments and the date when Angela had to present herself in order to have access to the *More Families in Action* programme. There was also a piece of propaganda warning of the use of Fireworks at Christmas in order not to violate children's rights, among many other papers stuck there by community mother (Field diary, December de 2012).

Community mother had a "legalised" discourse. She carefully explained to Angela that she had to present herself promptly at the registry office, taking with her the documents she had been given in the hospital. She told her that she had to answer the questions they asked her, and told her how to present the newborn. Angela listened carefully and respectfully. When we asked

Angela what she thought of community mother, she told us that she was sure that Ligia (community mother) had to be very important because she asked her questions that no one else asked, she made essential recommendations and she always knew how to get the things she needed: “For example, she tells me what I have to do with my baby in the town, how I can improve my life, how I can look after my brothers and sisters respecting their rights, this sort of stuff” (interview in El Espinal, 2012). This same dynamic was replicated in a number of localities in Bogotá, where the users of the community homes always referred to community mothers as “real community leaders, hard-working mothers that help us look after our children and they guide us not only in terms of education, but also as far as the mechanisms that can save us having to go through so many formal procedures to get the things that we need, and how to take advantage of benefits that we may not know about” (interview with a user in San Cristóbal sur, 2012).

In the neighbourhoods and the homes of the beneficiaries, to be able to rely on the knowledge of community mothers on matters like where to go with a certain document or what to do in a particular situation is the users’ only contact with distant and confusing bureaucratic proceedings (Focus group in El Espinal, Tolima, 2012). This role of community mother as an “expert in legal proceedings” was something we began to understand when one of the ICBF employees who was processing our access to the CWH in Suba, Bogotá asked me to train the mothers in the right of petition and the new changes in Law 1437 of 2011: “they are always interested in this, this exchange is the only way to make them speak about what is happening to them” (Camacho, personal communication, November 2012).

For community mothers we interviewed, to belong to the CWH also raises their self-esteem, broadens their support network and clarifies their life project. In the conversations, they frequently recognised that this role had helped them to improve their self-perception. Many of them said that they had overcome domestic violence or being abandoned by their partners thanks to their link with the programme. This indicates that community mothers also benefit from elements that are not visible when the social areas are analysed. The affection of the children, the support of the network of other community mothers, the construction of self-worth based on their usefulness as community mothers, and to feel needed and loved are also important in the CWHs.

It is possible to conclude that community mothers move closer or further from the State, to legitimise their position and earn different types of capital: economic, social, symbolic. For example, they are part of the public sphere when they give reasons to legitimise their work contracts; in this case showing their subordination and the control that the ICBF exercises over them is convenient and they know it. But they distance themselves when they need to legitimise positions in terms of their own complaints or citizen complaints (field diary, October 2012). This section, therefore, shows how the site of the CWH contains not only spaces of oppression for the women, but also spaces of opportunity in which they can display their agenda, and where they receive affection and benefit from elements invisible in the analyses that only highlight their losses within schemes of oppression.

But this is not the only level at which community mothers exercise agency with respect to their role. Paradoxically, the ICBF has accompanied its discourse of “community mothers are solidary actors” by that of “the actions of community mothers are regulated.” The contradiction in the situation allows community mothers to frequently move between narratives that account for the regulations in terms of making her decisions insofar as the programme and the discretionality to do their work.

3.3. The behaviour of community mothers with regard to norms

The existence of expressed rules that regulate the acts of community mothers is a paradox if we consider the ambiguity of their links to the State. Despite this, the ICBF has designed a legal document that serves as a regulatory framework of the actions of community mothers, known as the “technical-administrative guidelines, Community Welfare Homes modality in all its forms for attention to children under five (5) years.” This document, aimed at community mothers and the civil servants connected to this public policy, enumerates the profile of a mother, the nutritional guidelines she must follow in the home, how she should set out the space, how she should register the children, which pedagogic activities and assistance protocols she should implement, her obligations, who can supervise her work, etc. The technical guideline is a 452-page document, updated with some degree of regularity by the ICBF. The most recent version available is the March 2011 issue (ICBF, 2011).

However, the results of the case study suggest that daily life in the CWH is not mediated by this technical guideline as would be expected. The observations undertaken in Bogotá and El Espinal indicate the existence of scenarios that constitute the exception to these norms. For example, there are cases of asymmetric treatment of the children depending on the family ties or emotional closeness of community mother with the family of the child registered in the CWH. In some cases, the requisites for a child’s access are not those one would expect.¹¹ Something similar happens with the opening hours: some children arrive before and leave after the established opening hours thanks to informal transactions between the programme beneficiaries and community mothers. When this topic is approached in the dialogues, they answer:

[...] Of course, I try and help them out. How am I going to not look after my sister’s child till the evening, if she has to work? Anyway (...) this is apart from my work and to me it is just a family favour, but it has nothing to do with the children that arrive in the morning as programme beneficiaries (Focus group in San Cristóbal sur, 2012).

Other situations confirm that daily life in the CWH does not develop as indicated in the technical guideline. The number of children received does not necessarily coincide with the numbers indicated; there may well be five or more children in each Home. The assistance protocols are not applied precisely, given that the mother can’t always rely on a support assistant or the funds necessary to follow the instructions exactly (Field diary, October 2012). In addition, many of community mothers that participated in the case study admit that they have not read the technical guideline, even if they always say that they have studied the whole document through the training courses given by the centres in the different zonal centres: “Are you going to tell me that you know the guideline by heart? Have you read the whole thing Dr.? Not even the ICBF knows the guideline”; “The guideline is very long and not even the supervisors have read the whole thing”; “When am I going to have time to read the document if I work till 5 and then I have to look after my husband?”; “Honestly, I have never even opened the guideline, I don’t even have it, I only have a few photocopied pages that they gave us in the training session.”¹²

The perceived distance between the norms and daily life in the CWH reveals the discretionary and contingent character of the decisions made by community mothers. Given that

¹¹ Section 6.2. analyses the decisions of community mothers observed with regard to the acceptance of the beneficiary children and the distribution of benefits.

¹² Fragments from interviews and focus groups.

they see their role as something inherent or natural to their identity as mothers, the management of daily decisions cannot be anticipated in any way:

What do you mean, what decisions do I make as a community mother? (...) Well, I decide what I cook, what I do with the kids, what games we play, what I tell the assistant to do (...) Yes, I also decide which child to take in and which not to take in, because you can make trouble for yourself taking in a child from a problematic family (...) yes, taking in the children of sex workers, for example, is a problem, I have done, but I didn't realise it till afterwards, and in the beginning I pretended not to know, but later on little by little I managed to get him out (Focus group in San Cristóbal sur, 2012).

Paradoxically, for some of community mothers that participated in the case study, discretionality coexists with the perception that there is an excess of vigilance and control imposed by the different State entities:

[...] We are governed by many laws and agreements that the Institution has imposed, we are governed by the institution, by the Attorney General's Office, the Public Prosecutor's Office, the Office of the Ombudsman, the SENA (the National Learning Service) the Health Authorities, anyone who wants to come here between 8:00 and 4:00 can do, to ask us to account for things, I am a volunteer but there are rules I have to follow [...]. Everything you see in a community home is imposed by the Institute, everything, the minute, all the documents: the register, the height and weight record, everything (...)." (Arango & Molinier, 2011, p. 299).

However, the relationship with this supervision is also ambiguous. Most of the mothers affirm that they "feel" the control of the State, at the same time as they talk about the ICBF visits being exceptional or unusual interruptions of their work: "yes, for example, I know about a colleague who they visited because of a complaint from one of the parents in the zonal centre (...) it was terrible because ICBF agents visited several days a week and they checked everything" (Focus group in San Cristóbal sur, 2012). This quote illustrates that ICBF visits are not frequent because the referral of a community mother is indirect (this happened to a colleague of hers and not to her). From the tone of surprise in the above comment, we may well think that the visits are very few and far between.

The high degree of discretionality reported by community mothers indicates that the way in which they relate to the technical guideline is not within the statute-monitoring scheme foreseen by Weberian public administration theory. The assistance protocols designed by the ICBF have parallel socialisation mechanisms that do not coincide with the direct relationship between bureaucrat and statute as foreseen by Weber. The mothers constantly refer to the training sessions, workshops in the zonal centre and meeting with the associations—among other scenarios—as a means to socialise the "content" of the norm: "You don't need to read the guideline just because ICBF gives you a few hours of compulsory training where they tell us what we have to do"; "maybe we don't know the norm inside out, but the director of the association does, so, for example, if I don't know something I will go and ask Angelita, who supports us" (Focus group in El Espinal, Tolima, 2012).

The majority of community mothers in the case study recognise that they do not know how to fill in the forms and they write things that do not make sense only so as to comply with the requisites of sporadic controls, even though they know that the ICBF social workers never actually read the documents. As one community mother said: "These papers serve to justify their

work and the money they receive, but no one reads them and no one even understands them” (Focus group in San Cristóbal sur, 2012). To this, we can add the difficulty to control a universe so vast and heterogeneous: there is no one to supervise the totality of the CWHs because their mere extension is too much for the bureaucratic structure of the ICBF.

The case study, thus, reveals that community mothers present a very particular behaviour with regard to the technical guidelines and the other normative bodies that guide their actions: they either do not know them or they experience them as mere monitoring of the rules of the procedures established by the ICBF (nutritional guideline and activity planner). This leads us to think that the scenarios of high discretionality such as the CWH can be shrouded by a fake legality that reduces them to procedures, without implying a constraint in terms of the decisions. Legality, thus, is a process, a ritual, a form derived from discretionary decisions.

All manifestations have at least two connections with the broad notion of discretionality that we discussed in the previous section. First, community mothers are not discretionary in the sense that legal theory uses to approximate the notion, situating the discretionary decision outside of legality. They construct the rule of law in their daily dealings and, thus, analysis of their decisions goes further than the reaches of the discretion/legality dichotomy. Second, community mothers are not discretionary in the sense that classic administrative law understands discretionality, as a technique. They make decisions as individual subjects in particular contexts and not as childcare experts. As street-level bureaucrats, their decisions are not covered by some kind of expert or specialised knowledge. Their decisions are a product of the concrete interactions that they have in particular situations with the programme users.

3.4. Public policy and its beneficiaries (implicit)

The days we spent in the CWH taught us very clearly that the “strategic action for early childhood” does not revolve around early childhood only, as mentioned by a number of the interviewed ICBF employees and is documented in the 400 pages or more of the technical guideline of the programme. The CWH have an additional, but invisible, beneficiary: women. That includes the friends, relatives and neighbours of community mother, and even community mother herself, who do not have anyone to leave their children with while they go out to work (see section 4.3.2).

For these reasons, when answering questions about the public role of community mothers and the potential effects of terminating the programme, focus groups members tended to express similar opinions. As one member stated, “It is clear that community mothers help other women and it is also clear that if they didn’t exist, women would have more worries in terms of being able to work and earn a living” (Focus group in El Espinal, Tolima, 2012). In this sense, the CWH allows the mothers of the beneficiary children to be more competitive in the labour market. Despite the fact that ICBF regulations sometimes stipulate opening hours that do not suit the working day, community mothers make use of their discretionality to extend the day, informally in some cases, and allow the mothers of the children to overcome the disadvantages derived from care-work. This implies that community mothers represent a non-documented role within the analysis of the implementation of the programme, which positions them as real creators of street-level public policies. In this sense, they do not exclusively apply a social policy for childhood, as suggested in the *top-down* analysis of the public policy, but also a gender policy focused on the conciliation of the productive and reproductive work of their support networks.

Regarding the above, community mothers tell us:

[The ICBF doesn’t recognise it, but] [t]he programme was created due to the fact that, in the

communities, mothers had to go out to work and they didn't have anyone to leave their children with. So all of us women got organised and helped each other to look after the children; and that is how the community homes programme was born (Focus group in El Espinal-Tolima, November 2012).

In the same way that community mothers help other women, it is also clear how their work can also be detrimental to them. Their space and that of their families is reduced and invaded by at least 14 children on a daily basis, all their material possessions are damaged or deteriorate more quickly; frequently, they have to use their own resources to help the children or mothers that may need it and, often, spend hours waiting for a parent that is late picking up their child. Despite all this, as expressed by Ligia Espinoza, a community mother "in the end, we win because we are at home, with their children, seeing our husbands and surrounded by the affection of our children" (Espinoza, personal communication, November 2012). In particular, the affection they get from the children and neighbours is something that community mothers tend to report as a "benefit." In this sense, the work with the children presents this paradox: it constantly generates "extra" cost, but, at the same time, it brings unexpected and satisfactory benefits.

The case study shows evidence that community mothers have created an organic public policy that is different from the one foreseen by the ICBF. In general, the results of the early childhood public policy are different from those that are foreseeable in terms of causal logic, but they are not less important. In this new *bottom-up* public policy, the CWH programme is not aimed exclusively at childhood, but also at working women from lower social classes. The CWH are a public policy of conciliation between productive and reproductive work that allows low-income mothers to enter the labour market, while community mothers earn social and symbolic capital from the collective exercise of care-work. That is, the adequate nutrition and education of children is not at stake in the real scenario of negotiation, despite its being the focus of the design of the public policy at central level.

Thus, the rule of law in the CWH behaves in two ways. It works as expected in liberal legalism, covering the behaviour of community mothers with processes, rituals, and documents issued by a public authority. Despite this, the rule of law also operates as documented in the distributive analysis, where it is evident that these forms conceal the discretionality of the mothers who make their own decisions and the result of the social policy, as unpredictable and contingent and non-controllable by the "law," understood as a system.

In this sense, the "my work is to be a mother" script express the tension between care-work as unregulated work and the regulation that the ICBF wants to impose. In fact, these two versions of the rule of law compete within the roles of community mothers, who are bartering the legitimacy that constant legality can offer to reach advantageous positions. It is precisely this contingent character of the rule of law that allows the early childhood public policy to have more than one beneficiary.

Within this framework, the rule of law is not, therefore, perceived as a mechanism of control in terms of the arbitrary actions of concentrated power, nor as a mechanism of normative certainty, given that, while power is dispersed and exercised in a decentralised manner, the normative bodies are indeterminate. The case study of the CWH shows us how the new realities of public administration and administrative law have to account for the gaseous structures where legality is in constant negotiation in scenarios that move in an unstable manner between the public and private spheres.

4. Phenomenology of bureaucratic activism

Community mothers of the Community Welfare Homes (CWH) that participated in the case study tell us about a social reality that questions, in many ways, the way we think about the law. As explained in the above sections, the “public” or “State” are far from being static entities. On the contrary, the use of these categories—as privileged roles—are in constant negotiation within the law, understood as an incoherent and indeterminate body. The norms give us contradictory and exclusive answers, and these alternatives benefit or affect the social actors in question in different ways. The mothers also take us to a different social scenario. Their community work, their connection with their neighbourhoods, their familiarity with legal language, the understanding of their role in collective terms and the way in which they relate with State organisms that invigilate them cannot be easily interpreted using the theories that split social reality between the public and the private or between the State and civil society. In contrast, community mothers belong to a political society and as such—as part of a precarious citizenship—try, through legal complaints, to improve their political position (Charterjee, 2004).

Community mothers cannot place themselves fully in the public sphere or the private sphere. They are in the middle and doing their work as part of the State or as part of the market, they are part of a reality that is inexplicable for the law: they particularize conflicts, make subjective decisions, have no behaviour patterns, and use their role to develop their own agendas. This pattern that is inexplicable in the classic theories on bureaucratic behaviour and classic administrative law (CAL) is what we seek to explain with this proposal of *bureaucratic activism*. As a legal phenomenon, this denotes the behaviour of the street-level bureaucracies, such as community mothers, in the frontier between the public and the private, discretionally applying the law and building the rule of law day by day.

Bureaucratic activism refers precisely to the daily life of public administration in contexts pertaining to a political society (Epp, 2010). In fact, even though legal debates in general and rights in particular have been studied in terms of litigation and the mobilization strategies of social movements (Commaille & Kaluszinsky, 2007; Israël, 2009), they acquire a more mundane reality in public administration mechanisms that serves as a base for its application: administrative offices, committees in charge of the assignation of rights, public offices that distribute benefits or decide about sanctions and the people that make such decisions (D’Halluin, 2010; Dubois, 2009; Fischer, 2009; Lejeune, 2011; Siblot, 2006; Warin, 2006; Weller, 1999). This “turnaround of the roots of administration” brings into view actors that were previously invisible to us.¹³ Thus, analysing how street-level bureaucracies behave is a key piece of the puzzle in determining how social benefits are given within a broader framework of the social reality, that goes further than the work we do in courts according to the application model of the law, centred on the classic exercise of adjudication (judge-court). What is particular about this

¹³ Academia’s interest to “come out” of constitutional law and the debate surrounding legal activism as the engines of academic production is rather recent (Alviar & Jaramillo, 2012). Thus, this research makes an effort to decentralise the constitutional discussions and develop reflections in terms of the public in a different sense. The exacerbation of the constitutionalist and theoretical analyses surrounding activism brings with it two main manifestations: (i) the phenomenon of the “constitutionalisation” of the law in its entirety, which refers to the expansion of the logic behind constitutional law to the furthest reaches of penal, civil and commercial law, among others; and (ii) the obsession with the debate on the judicial decision. One of the manifestations of this phenomenon is the reading of reflections in the philosophy of law as exclusively dedicated to the topic of judicial discretionality. For authors such as Rojas, the visibility of the reflection around the judicial decision is just one aspect of how some of the contemporary legal theories have positioned themselves in Colombia. For this author, neither Kelsen, nor Hart, nor Dworkin were obsessed with the topic of discretionality, but their Colombian readers are (Rojas, 2012).

picture, which community mothers help us put together, is that the law does not limit the behaviour of the actors immersed in particular conflicts in specific places. They teach us that the street-level bureaucrats have much more power than what the law says they have, and they themselves, are aware of holding it. This plus point in terms of their ability to act and go further than the law, is what we call *bureaucratic activism*.

The analysis of community mothers as street-level bureaucrats also breaks away from the legal/discretionary distinctions, in the sense of setting out a constant between that which is implied by discretionality and what is meant by legality. What street-level bureaucracies do through bureaucratic activism is legal. In this respect, we wish to reiterate that this research does not analyse the discretionality of the mothers as an act of disobedience to the norms or imply that they go further than the norm, as if the norms had precise meanings (Duncan Kennedy, 1997). On the contrary, it assumes that the text of the norms is indeterminate and represents one of the many factors that are at stake when street-level bureaucracies act (*see section 4.1*).

4.1. The decisions made by the street-level bureaucracies in the everyday life of the CWH programme

The literature on street-level bureaucracies alerts us in many ways to the importance of the particular context in which interactions between bureaucrats and citizens develops (Sommer & Ostergard, 2013; Watkins-Hayes, 2009). Thus, a phenomenology of the bureaucratic decision should be sensitive at least to the following question: who is the bureaucrat, that is, what are the essential characteristics of his or her social identity? What type of education does he or she have? How aware is he or she of discretionality and the power of change of its agency within the everyday lives of the citizens that she attends to?

The question about the social identity of the street-level bureaucrat looks into, in general, the characteristics of class, race and sex of each subject (Watkins-Hayes, 2009). If there is something that is particular in the adjudication of rights realised by the street-level bureaucrats, it is that they answer to distinct identity markers. While the judges belong to the educated middle classes with professional training, the street-level bureaucrats tend to be in the same social class as the users, normally low-income classes (Maynard-Moody & Musheno, 2003).¹⁴ To describe the way in which they make their decisions about the benefits that they distribute, it is important to bear in mind that they live in the same neighbourhoods as the users, they have the same dress codes and behaviour codes and they recognise themselves as belonging to similar racial groups.

As well as identity, the literature on street-level bureaucracies has also marked the importance of previous education or training to allow them to undertake their work. This refers to some type of specific education in the work they do (i.e. social work, safety, school level education). The topic of the “discipline” has been broadly debated in the United States with respect to social workers, given that there is empirical evidence that shows how the existence of previous training or education that familiarizes the bureaucrat with the duties pertaining to their roles constrain or limit the discretionality of their decisions (Evans, 2010; Hollis & Howe, 1987). Despite this, some actors insist on high discretionality and high level of agency on the part of the street-level bureaucrats (Maynard-Moody & Musheno, 2003).

The new debates on the topic of the behaviour of the street-level bureaucracies also deal with the bureaucrats’ degree of awareness of their discretionality and its connection to positive

¹⁴ These references use the North American context. Their affirmations in relation to the socio-economic composition of legal administration constitute the analysis that remains to be completed in Colombia (García Villegas, 2011).

social change (Maynard-Moody & Musheno, 2003). The street-level bureaucrats have a distinctive feature: they are aware of the room for manoeuvre they have when it comes to executing public policies to which they are connected. They know that they can change the way things are, that they can give more or less depending on how much they want to give, but they experience feelings of freedom and restriction in terms of such possibilities. They are aware that they can change the content of the policies but, at the same time, they are afraid of displaying their agency openly and frequently. This happens sometimes for fear of supervision, and other times, it is simply due to self-sabotage that comes from a self-image of incompetency and ineptitude. Neoliberal public administration is responsible for creating this image of the bureaucrats as “pusillanimous” as it serves to avoid mass access to the administration (Maynard-Moody & Musheno, 2003).

Research studies on the topic developed with social workers and the police in the US shed light on the clarity in the degree of awareness that the street bureaucrat obtains on his or her role. In some cases, this awareness goes beyond the power of affectation of the people with whom he or she interacts as part of the service he or she provides. Despite this, another feature is the constant feeling of frustration with respect to his or her ability to help. This has at least two explanations: on the one hand, the State plans and policies are so broad that they generate frustration toward budgetary restrictions that the people who execute the Budget know about; on the other hand, the State itself makes sure to incorporate this feeling in the street-level bureaucracies, as part of the training for their roles (Lipsky, 1984, Maynard-Moody & Musheno, 2003).

In this vein, the recognition of the level of discretionality is analysed based on the different types of relationships that the street-level bureaucrats develop with the actors in their context: the community in general, the organisation or control organism and the beneficiaries of the service (Portillo, Rudes, Viglione & Nelson, 2013). Thus, while they freely admit to their level of discretionality to individuals, they do so less freely to the community or the organisms that control them.

Within the framework of the above theoretical clues, we can affirm that community mothers who participated in the case study are a good example of class symmetry between bureaucrats and citizens, proposed in the literature. Given that the mothers' homes are the spaces in their neighbourhoods where they can attend to the children, their beneficiaries are naturally their neighbours. This implies a similarity of their basic social characteristics, at least in terms of socioeconomic stratification and social codes. Community mothers generally belong to social strata 1 and 2, like their users, with secondary education and permanent access to a property, either a property belonging to a relative (husbands, wives or parents generally) or one based on a rent contract they have had for a long time (Herreño, 1999).¹⁵

Insofar as education and training in what they do for a living, the ICBF technical guideline requires a minimum of having completed elementary school, despite the fact that many of them have technical diplomas in education and childcare from SENA (National Education Service). The ICBF provides at least one workshop a month for civil servants or contractors, and has designated specific dates for zonal meetings with community mothers (Camacho, personal communication, August 2012). In this respect, the mothers report, in their interviews, that they attend “many training sessions” (Focus group in El Espinal, Tolima, 2012). Despite this, and in contrast to what is pointed out in the literature, they don't see the training sessions as restrictions

¹⁵ The present analysis does not consider the characteristics of race or ethnic identity of community mothers who participated in the case study.

to their level of discretionality. The following section presents the analysis of two areas where community mothers who participated in the study can make decisions and the degree of awareness that they have both of their discretionality, and their ability to positively affect the situation of the beneficiary mothers.

4.2. The decisions made by the mothers: discretionality and agency

The Community Homes observed in Bogotá and El Espinal provide evidence of the existence of political societies or politicised spaces insofar as they generate scenarios that are propitious for the construction of close social interactions. Community mothers who belong to a locality promote events around the children, which in turn generate social spaces that can be used by community leaders to impart a different type of information: bureaucratic procedures to access subsidies, political options, new social programmes, etc. (Focus group in San Cristóbal sur, 2012). These periodical meetings, organised around the Community Welfare Homes and the ICBF, provide a space for parents to get to know each other, to talk, to become friends and to agree on reasons why they should oppose the official institutions, or to form collaboration groups for meetings and become a community (Focus group in San Cristóbal sur, 2012). In these types of politicised scenarios (*see* the context of the investigation in section 3.1), community mothers report a high degree of discretionality in their decision-making.

Among the observations undertaken, two concrete fields of decision were analysed: the selection of minors to be admitted to the CWH and the delivery of benefits. Both operations are regulated by the “Administrative Technical Guideline, Community Welfare Homes modality in all its different bodies for the attention to children under the age of 5.”

4.2.1 Selection criteria for the admission of minors to the CWH

With respect to the first decision scenario, the technical guideline provides the following information on page 11:

4.2 THE SERVICE IS AIMED AT:

Children between the ages of 0 to 5 years, belonging to families classified according to the criteria defined by the ICBF.

Children of displaced families.¹⁶

Children referred by the UNIDOS Network (National Agency for Overcoming Extreme Poverty)

Children belonging to SISBEN levels 1 and 2 (System for the Identification of Potential Beneficiaries of Social Programs).

Children who because of their parents’ or carers’ employment have to stay on their own during a certain period of time every day.

Children under 5 with mild disabilities.

Exceptionally, care will be provided in the CWH to children over 5 years of age in the situations contemplated in articles 3, 4 and 6 of Resolution 1064 of the 24th of May 2007, emitted from the ICBF Director General.

In the case of company homes, priority will be given to the children of workers with lower incomes.

Pregnant women and mothers who are breast-feeding

Children belonging to ethnic groups (Indigenous, Afro-Colombian, *Raizales* (literally, roots

¹⁶ The term “displaced population” in Colombia is used to refer to the internal migration problem caused by the armed conflict.

people, from the three islands of San Andres, Providencia and Santa Catalina) and the ROM) bearing in mind the free-choice of the community—represented by its authorities and organizations—regarding the implementation of the programme (ICBF, 2011).

The decision of the community mother regarding the reception of children in her CWH cannot be easily predicted through number 4.2 in the technical guideline. Despite the fact that a number of community mothers complain about the deficiencies of the territorial agencies in updating the SISBEN (Focus group in El Espinal, Tolima, 2012), they use the group of parallel criteria for the selection of their beneficiaries. The way in which they operate the criteria, the power dynamics that they imply, the instability of the results and the contingency in the application of the norms is what we call *bureaucratic activism*. That is, it is a manifestation of the discretionality of the decisions made by the administrative bureaucracies.

There is an evident bias with respect to the origins of the children taken in. Most of them are “referred”¹⁷ by a relative or a friend. That is, community mothers prefer to look after the children of their relatives (the children of their sisters, sisters-in-law or aunts) or friends (neighbours, family-friends or school-friends) (Field diary, September-December 2012). For example, in three of the CWH visited, 100% of the children had a previous link with community mother, but they were not formally registered in the programme (Field diary, September-December 2012).

Similarly, there are a number of concealed “veto” criteria insofar as some of the applicants. Having argued with community mother in different scenarios in the neighbourhood (hairdressers’ or town squares, were the examples found), being the child of someone involved in infidelity or being involved in suspicious activities (robbery, prostitution, or organised delinquency) may lead to children being vetoed from some of the CWH we visited. As mentioned by one community mother “if these people insist in the zonal centre we have to take them in, later on we work out how we can get rid of them. It is better not to have anything to do with bad people.” (Focus group in San Cristóbal sur, 2012).¹⁸

4.2.2 Distribution of benefits

One of the main findings of the CWH impact evaluations has been the heterogeneity of the results obtained in different units of analysis, correlated to the discretionality with which community mothers make decisions (Bernal et ál., 2009; Hoyos, 2002; ICBF, 1997). This implies that, despite there not being a causal link that implies that discretionality leads to heterogeneity, discretionality and heterogeneity are two parallel characteristics of the programme. A community home in San Cristóbal may be under the supervision of a woman who strictly complies with the opening hours, applies the nutritional guidelines and fills the planner with activities 30 days a month. But a kilometre further, in the same locality, controlled by the same association, there may be another community mother who doesn’t have a timetable, cooks whatever she has at home if no one from the ICBF or an NGO is coming, completes the planners mechanically, or writes the same things in a different order the day before the documents are checked; she is clear on the fact that the documents mean nothing and doesn’t want to waste any time on them (Field diary, November 2012).

¹⁷ This word was used constantly by community mothers interviewed.

¹⁸ The information provided by the mothers in the focus groups was triangulated with the characteristics of the informally admitted children. Only in two of the CWH observed could the triangulation be undertaken with the registration forms of all the children admitted.

The heterogeneity is also evident in the benefits delivered to the children (affection, care, food, etc.) Community mothers make their decisions in this respect, based on criteria that are informal, external to the norm, subjective and an unexpected effect of the norm itself. For example, the children who are related to community mother receive more attention and care than the other children in the home as well as different portions of food (more sweets, different drinks, better utensils, etc.). In contrast, the children of “problematic” mothers or families cannot access the routine benefits so easily (games, colours, books, blankets, etc.). This difference in terms of distribution is visible in the affection and care given. A noteworthy pattern in this sense is the difference in the distribution of affection towards children that belong to community mother’s family (nephews, cousins, children). In general, the distribution of affection is a complex activity because while the children who enjoy being picked up when they hurt themselves have constant attention from the mothers and assistants and are the centre of all the examples and games, other children do not receive such benefits (Field diary, September-December 2012).

The above indicates, once again, that the administrative or bureaucratic scenario of the CWH is highly permeated by informality or by the decisions found in the background of that which is foreseen by the ICBF technical guideline.¹⁹ In everyday life, social policy can be seen in terms of the exceptions made in terms of the times the children arrive at and leave the homes, which frequently run over official opening times. This means that the programmes work as a support network for the neighbours, friends and relatives of community mother, rather than a consolidation policy for attention to early childhood. Consequently, the diversity in the delivery of benefits to the children linked to the homes can be a cause of the heterogeneous results of the policy in terms of childcare.²⁰

4.2.3 Awareness of the discretionality

The analysis of the criteria used by community mothers interviewed in terms of the admittance of the children and the distribution of benefits illustrates the discretionary and contingent character of their decisions and their awareness of it. This characteristic can sometimes be explained by the mothers as being based on the inherent feature of their work: “what do I do? Well, what I know how to do [...] being a mother” (Focus group in San Cristóbal sur, 2012). This feminine nature of the service provided is in constant tension with the presumed ICBF regulation of care-work. In this sense, one of community mothers said:

[...] Well the work is easy [...] you do what your instincts tell you to do with the children, no one can teach you how to do it, not the guidelines, not the ICBF, nor the association [...] you are a mother and that’s it. Or are the guidelines going to teach us how to be mothers? (Focus group in San Cristóbal sur, 2012).

Community mothers react differently when they are questioned about the situations in which they do not strictly follow the indications of the ICBF technical guidelines. Some openly recognise the discretionality in the management of their CWH and link their actions to concrete justifications. For example, the following was the answer of one of the mothers interviewed

¹⁹ Section 4.3.3 offers a more detailed analysis of the behaviour of the participating community mothers with respect to the norms.

²⁰ Despite this, there is empirical evidence that highlights the improved performance of the CWH programme with respect to child development than other public policies with the same objective, such as the *Más Familias en Acción* (More Families in Action) programme (Pineda Duque, personal communication, February 2013).

when she was asked about registering children “referred” by their relatives, friends or acquaintances:

[...] Of course I have more children than the women I know, no one would leave their child to just anyone. [...] You hear so many things that mothers have to be sure that their children will be ok in the homes, that’s why I only look after the children of my friends and neighbours who have known me for a long time and who trust me, who know that I am going to take good care of their children because I know them and they know me (Focus group in El Espinal, Tolima, 2012).

Other community mothers try to hide the personal agency in their decisions and a third group deny it altogether. For still others, the State “owes them” the possibility to have this level of agency: “I am lending out my house, my furniture, my time for which they don’t pay me [...] why shouldn’t I be able to spoil my nephew more” (Focus group in San Cristóbal sur, 2012).

The high degree of discretionality reported by community mothers who participated in the case study is also linked to the degree of awareness that they have developed in terms of their ability to generate foreseen social changes. While in the arena of national debate, CWHs are never perceived as conciliation policies between productive and reproductive work,²¹ some community mothers recognise without reservation that they work for the mothers, not for their children: “the children are not our aim, their mothers are” (Focus group in San Cristóbal sur, 2012). In this sense, they execute a conciliation policy “in action” that is different to the policy that, in theory, favours only the children.²² Some of them have very elaborated opinions with respect to why they should work for the mothers and the meaning of working in favour of the work-family balance:

[...] They beat us less and respect us more if we have money [...] we even like ourselves more if we work, so it is good to help our neighbours be able to go to work; it is good that we look after their children so that they can go to work (Focus group in San Cristóbal sur, 2012).

The above comment is a good explanation of the meaning of bureaucratic activism. In the case of community mothers, this resides in the creation of organic public policies that favour women, developed through their discretionary decisions. In this sense, the discretionality of their decisions constitutes the sense of legality in the neighbourhoods in which the CWH operate. The following section includes more information regarding bureaucratic activism applied to the case of community mothers.

5. Different ways of being a bureaucrat: typology of community mothers

To facilitate the understanding of bureaucratic activism in the case analysed, we identified four types of community mothers based on two internal criteria: their degree of awareness concerning their discretionality and their parallel relationship with the State insofar as the observance to the subversion of the regulations. This means that while discretionality exists

²¹ The opposite happens with the District programmes, which are thought, directly, as conciliation policies.

²² It is important to bear in mind that the fieldwork did not investigate to find the effect that the programme has on the children. Despite the fact that the programme’s result is precarious in terms of early childhood (Bernal et ál., 2009), this is not a conclusion that can be extracted from this research. On the contrary, we would even maintain that community mothers’ interest in helping other women also has to do with their interest in the benefit of the children. This topic is developed in section 5.4.

(all community mothers act with different criteria that are favourable to women users, even if they narrate or report their behaviour as more or less close to technical guideline), their degree of awareness of this discretionality and their degree of exteriorization or recognition of it varies. Thus, this scenario recreates the way in which the behaviour of the mothers mediates between feelings of freedom and restriction.

The typology proposed includes an external criteria: community mothers' closeness to grassroots organisations or the ICBF given that the fieldwork also showed that one of the determining factors in the lives of community mothers is the creation of networks of social capital that represent "new sources of support" in their lives. Thus, for women from strata 1 and 2, becoming a community mother means to belong to a heterogeneous community moved by common interests, to have friends, to share topics of conversation and to be visible in local communities. The heterogeneity of this community is given, within the social spaces observed, by the closeness to different support groups that present opposing discourses around what the CWH programme should do, what is the role of community mothers and whether they should or not have political impact. While some women are closer to grassroots organizations and trade unionists and are very active in protests and social mobilizations against the State to fight for fair wages, other mothers become friends and confidants of the ICBF employees in the ICBF zonal centres. These contingent contacts, which the mothers build up through day to day empathy, also determine the mothers' belonging to one or another type because they affect the social framework through which they build their self-image and the need for their roles within a broader context (Field diary, September-December 2012).

The following table organises the different types of mothers in terms of the variables described²³:

	Relationship with the State		
Awareness of the discretionality of their decisions		Undermines regulations	Complies with regulations
	High	Activist mother	Fearful mother
	Low	Individualist mother	Innocent mother
Networks		Grassroots organizations	ICBF

Table 1. Types of mothers

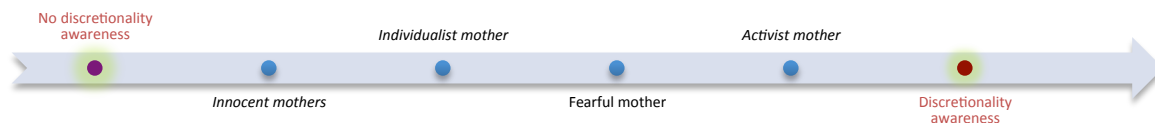
According to the above criteria, the mothers are organised into four groups: *activist*, *individualist*, *fearful* and *innocent*. While *activist* and *fearful* mothers have a high degree of awareness insofar as the discretionality of their decisions, *individualist* and *innocent* mothers report or reveal little awareness of their discretionality. However, *activist* and *individualist* mothers are close to the grassroots organizations, and the *fearful* and the *innocent* ones build their personal support networks around the ICBF employees.

Although the denominations refer to personality features, the adjectives chosen emphasize what these typologies imply in terms of their awareness of the discretionality of their

²³ This exercise is inspired in the classification of judges undertaken by Duncan Kennedy in his book *A Critique of Adjudication*, where describing various types of judge is useful in terms of explaining different approximations to feelings of freedom and restriction in the scenario of adjudication (Duncan Kennedy, 1997). This classification was suggested by sociologist María José Álvarez Rivaduilla, reader of the doctoral thesis, on the 17th of October 2013 in *Universidad de los Andes*. She is a teacher of the Social Sciences Department at *Universidad del Rosario*.

decisions or their detachment from the law. In this sense, the denomination *activist mother* groups together women who know of their agency as street-level bureaucrats and fearlessly expose the degree of the interference of their preferences in the result of the social policy. So, these mothers are those who move the agenda of the “we work for other women and not for their children” script, explained in the above section. In contrast, *innocent mothers* deny that such discretionality exists and narrate their daily labour as being close to the ICBF technical guideline. The intermediate types have different positions: whereas the *individualist mother is aware* of her discretionality, she does not justify it socially. This implies that she does not use it in favour of community ends, but is aware that she could do so and she expresses it. In contrast, the *fearful mother* indirectly recognises her level of discretion, perhaps because of the pressure she feels from her supervisors.

The following Figure explains the situation of the types of community mothers in terms of the degree of discretionality they admit to. While *innocent mothers* represent a minimum degree of recognition (greater experience of restrictions), the *activist mother* personifies the maximum degree of recognition (greater experience of freedom). Of 17 mothers that we met, 8 correspond to what we have called *activist mother*; 2, to the *individualist mother*, 5 mothers were of the *fearful* type, and 2 were *innocent mothers*. Following is an explanation of each type of community mother.



5.1. The *activist mother*

The mothers who have a visible role within the CWH, generally accept the high degree of discretionality of their work and the level of agency that they exercise in terms of public policy in action, that grants greater preference to the mothers than their children. They are aware that the work they do is only profitable socially if they “betray” the State’s script. They know very well that their role needs to be strategic in order to gain better conditions not just for themselves, but also for the other women in their communities. These mothers are community leaders who connect their care-work in the CWH with other visible work within the social arena: they are political leaders, they are the most available link with the representatives of the social programmes in the locality, and they have great knowledge of legal language, among many other things. In the same way, they are exemplary in their work, they organise and guide their colleagues and they usually mobilise the group actions.²⁴ They lead the interlocution with the ICBF in times of conflict and frequently have conflictive personal relations with the supervisors of the zonal centres (Field diary, September-December de 2012).

5.2. The *fearful mother*

The *fearful mother* is generally found in the close circle of the *activist mother*. Together they construct a support network, they lend each other materials, they exchange work, and they

²⁴ Mobilizations of the mothers as a group are frequent. As explained before, despite not having a work status, community mothers are unionised and they are politically active. Not only do they mobilize with particular social and political purposes, but they also turn to national and territorial strikes to draw the attention of the Management of the Colombian Family Welfare Institute (ICBF).

go together to meetings (Field diary, September-December 2012). This type of mother is trained, she always responds when called upon to complete a task, and is always present in group mobilizations. Despite her on-going training and social interaction, she seldom speaks in public and avoids having to manifest her opinions or positions. She does not recognise the discretionary character of her work and always has political answers to questions, which often are the same as what her colleagues may have previously expressed.

5.3. The *individualist mother*

The *individualist mother* is not particularly mobilization-friendly. She does not recognise the discretionality of her work, but she doesn't hide its results either. She does not attend meetings with the other community mothers, she does not open her house for investigation, and she is not interested in being in contact with her community in other spheres. She does her work. She always claims that she chose to be a community mother because this allows her to be close to her family while she works, but she does not recognise her work as "public" or "social." She says that her work is "her way of earning a living" (Focus group in San Cristóbal sur, 2012), so she often finds it funny when her colleagues try to defend the position of community mother as a visible role within community and with some philanthropic effects. Usually, *individualist mothers* have conflictive personal relationships with *activist mothers* and *fearful mothers*.

5.4. The *innocent mothers*

The *innocent mother* is usually close to the *individualist mother*, but with a higher level of participation in collective action scenarios. She attends the meetings organised by her colleagues because "she understands it as part of her duty, not because she wants to go on strike or be problematic" (Focus group in San Cristóbal sur, 2012). She is always very close to the ICBF and the people in the zonal centre; they are part of her support network. She frequently visits the supervisors in the zonal centre and she keeps them up-dated insofar as the daily dealings of the Home, and the mobilizations or parallel meetings to the ICBF promoted by the *activist mothers*.

This type of mother perceives her work as "giving to the children." She tries to always have everything organised for the ICBF visits and describes her activity as being within the same category as the ICBF describes it. Despite the fact that in her everyday life she exercises the same degree of subjectivity in the decisions with respect to accepting children and the distribution of benefits, she seems anxious: "it is very difficult to organise people, here we work really hard and sometimes it is difficult to do everything the ICBF asks us to do" (Focus group in San Cristóbal sur, 2012).

The four types of mother (*activist, individualist, fearful* and *innocent*) come together to form a complete and particular map of bureaucratic activism. It is complete, in the sense that it exhausts the information available on the social space studied. It is particular because it presents the specificity of the law, understood as the decisions of the street-level bureaucracies. This typology is constructed to organise the different variations of bureaucratic behaviour surrounding the awareness of the presence of discretionality in the chosen decisions: acceptance of children and delivery of benefits in the CWH. In this sense, it is a typology that is sensitive to the category of bureaucratic activism understood as the different levels of the combination of feelings of freedom and constriction in terms of the norms of a legal operator at street-level.

Conclusion

In the implementation phase of a public policy, community mothers have created a social policy “in action” that is different from the public policy indicated “in the books” (Field diary, September-December 2012). While the ICBF technical guideline is dedicated to configuring the Community Welfare Homes programme as a policy aimed at the education of young children in low-income sectors, community mothers have created a social policy in action of which the main beneficiaries are the women in their neighbourhoods. This implies having different degrees of awareness in terms of the general aims that are fulfilled through the programme and the degree of malleability that such aims have in the hands of those that carry them out: community mothers. While there are mothers who are completely aware of their level of agency in terms of the results of the programme, and present it as a political achievement to develop their own agendas, other mothers conceal or hide their degree of discretionality (Field diary, September-December 2012). Despite the fact that this degree of awareness varies, the verification of the way in which the decisions are made with respect to the CWH and the distribution of benefits delivered in the CWH, maintain that bureaucratic activism as a phenomenon is composed of the actions of those who execute the public policies. In the scenario of the bureaucratic activism, the rule of law does not exist as a pre-existing reality but, rather, a reality whose capital points are negotiated where the State has direct contact with citizens.

This universe of variations indicates that the content of the legal decisions in micro social spaces and the results of the interactions of the public with the citizens in the last level of the execution of public policies, depend on contingent variables: the mothers’ friend-circles, their alliances, their affections, and their temperament. Thus, the fact that the labels of the type of mothers have this bias, in terms of the personality of the mothers, leads us to think that it is the people and the contexts, and not the norms, that determine the result of the application of the law.

I hope that the findings presented here serve to trace a research agenda on street-level bureaucracies in the global south that overcomes the commonalities in the discussion on the rule of law and its different mechanisms of governance. Classic Weberian theory has a prevalent role in the way in which classic administrative law organises the materiality of the State. As we have already mentioned, this theory affirms that the State as a bureaucratic, rational and unitary entity. Despite this being the thesis that dominates the way in which we think about the State, maintaining it is problematic from a descriptive point of view. This implies that, although the Weberian canon and the bureaucratic organization of the State is a thought habit that transversally crosses Western legal traditions, its description is also limited on various fronts. We dare to say that Weberian public administration is a globalised thought habit and its model of public administration is a transnational reference to develop debates around new ways of narrating the organization of the State (Chevallier, 2011; Gupta & Sharma, 2006; Tamanaha, 2004; Trouillot, 2001). For this reason, criticism of this Weberian scheme becomes pertinent in regional, national and international contexts.

This research advocates for the need to distance ourselves from the Weberian model and, instead, approach the understanding of how public administration operates both in the new management model and in governance. A remaining task for local academia is to pay due attention to the dissolution of the State as a superior, centralised and coherent entity, and to centre its studies and socio-legal investigations on its precarious, dispersed and unconnected character.

This new way of thinking about the State holds two fundamental challenges within Latin American legal academia. The former is related to decentralising the debate of the legal decision

as an articulating axis of contemporary legal thought. This implies the inauguration of the exploration of the Executive and the implementation phases as partially dark spaces within the field of legal research. To take a break from the judicial scenario and discover the administrative bureaucracies as new niches for analysis will allow us to amplify the way in which we understand the behaviour of norms, their uses, and their effects.

The second challenge that accompanies the steering of academic investigation towards administrative bureaucracies is a disciplinary challenge. In 2010, Mauricio García Villegas edited a book which documents the lawyers' exit from the Executive sphere and a cessation of considerable space beyond the economists with more acute knowledge as to how the public is managed in the Colombian context (Sánchez, 2010). This pattern is replicated in the Latin American scenario where lawyers are increasingly losing position and power within the field of public administration. Despite this, if together with the new forms of thinking about the State proposed by this paper, we dedicate ourselves to understanding how the public is managed in daily life, the legal discipline will surely be revitalised to shed light on how the public operates, what happens with the norms in administrative scenarios and the most frequent difficulties of the implementation. To begin by making the administrative bureaucracies visible as legal operators—which are currently almost invisible in terms of the quantity and quality of academic production dedicated to research into how the legal application of the law occurs—is definitely a step in the right direction.

Finally, we hope that this research study is interesting for social feminists who find, in reproductive work, the most powerful cause of women's inequality. The idea of the analysis of the Community Welfare Homes developed is for it to contribute to this debate. Additionally, the deep tensions encountered in this field—such as the mother-child opposition, and the differentiated effects that the policy brings with it in terms of its effect on different groups of women (it helps beneficiary women, while making the community women more vulnerable)—can inaugurate new lines of research in gender studies emphasising the differentiated distributive effects of the public policies.

This research constitutes a first step in this new direction. Within the view that we propose, the street-level bureaucracies are the “new State” and their activism the “new administrative law.” This implies that we must understand that the public is managed in scenarios of high indetermination, where the law constitutes the identities faced in power dimensions, but street-level bureaucracy are also the space where these identities meet. Despite this, it is impossible for the law to predict the result of the bureaucratic interactions. To distance ourselves from the certainty generated by liberal perspectives is risky. However, it may begin to clarify what is at stake when we decide to approach the public or be in contact with the State. This paper gives rise to a line of research to explain, clearly and consistently, how the public is managed in the everyday lives of the citizens.

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