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acuarela de Oswaldo Muñoz Mariño.
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RFJ

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Número extraordinario en atención al
75 Aniversario de la
Pontificia Universidad Católica del
Ecuador.

Extraordinary number in attention to the 75th anniversary of the Pontificia Universidad Catolica del Ecuador.

Declaración de Igualdad de Género

La RFJ tiene como objetivo promover una cultura de igualdad de género en la educación superior y la investigación del Ecuador, así como la difusión de esta cultura en la academia nacional, regional e internacional.Por lo tanto, este número también esta dedicado a celebrar y revalorar el rol fundamental de la mujer investigadora y académica de la Pontificia Universidad Católica de
Ecuador en sus setenta y cinco años de vida institucional.

Gender equality declaration

The RFJ aims to promote a culture of gender equality in Ecuador's higher education and research, as well as the dissemination of this culture in the national, regional and international academy. Therefore, this issue is also dedicated to celebrating and revaluing the fundamental role of the female researcher and academic at the Pontificia Universidad Catolica de
Ecuador in its 75th anniversary of institutional life.

“No podemos formar personas exitosas en sociedades fracasadas”.

“We cannot train successful people in failed societies”

Padre Luis María Ugalde Olalde, S.J.

Ex Rector de la Universidad Católica Andrés Bello, Venezuela

“En una sociedad pluralista, el diálogo es el camino más adecuado para llegar a reconocer aquello que debe ser siempre afirmado y respetado.”

“In a pluralistic society, dialogue is the most appropriate way to come to recognize what must always be affirmed and respected.”

Fratelli Tutti

“Luchamos por la fe y por la justicia”

“We fight for faith and for justice”

Padre Dr. Fernando Ponce León, S.J.

Rector de la Pontificia Universidad Católica del Ecuador, Ecuador

Anniversary

“The Revista Facultad de Jurisprudencia (RFJ) is to be congratulated for its commemoration of the 75th anniversary of the Pontificia Universidad Católica del Ecuador. In its much shorter existence, the RFJ has evolved into an important interdisciplinary publication from in the Spanish-speaking world. It has built bridges with other social sciences, particularly economics, and played an major part in the development of ideas and policies in this area. It has set an example as an innovative, pluralist, interdisciplinary journal that can weave together insights from diverse schools of thought and make a substantial contribution to the understanding of modern legal and economic institutions. It has added enormously to the profile and prestige of the Pontificia Universidad Catolica del Ecuador.”

Geoffrey M Hodgson
Loughborough University London

Acerca del Volumen Especial

Este es un volumen muy especial en la vida de la RFJ. Resultado de un sentido esfuerzo colectivo, en estos tiempos tan difíciles y convulsionados, está destinado a honrar la noble misión de la Pontificia Universidad Católica del Ecuador - PUCE y su Facultad de Derecho con ocasión de su septuagésimo quinto aniversario ¡Que vengan muchos más!

El público lector tiene el gusto de encontrar nutridas contribuciones de notables juristas en sus respectivas áreas de conocimiento, quienes, en buena parte de ellas, y no por casualidad, han querido reflexionar sobre temas medulares del derecho, siempre en evolución, y siempre llamados a ser releídos: la obligación, la tutela de la autonomía privada, los principios generales del derecho, dentro de los que destaca la buena fe y los deberes que de ella derivan; tradicionales dicotomías, como la representada por el iusnaturalismo y el iuspositivismo, o algunos duelos más recientes, como aquél entre constitucionalismo y 'anticonstitucionalismo'. Pero adicionalmente, este número permite al público notar el rol que han jugado los juristas en la construcción del derecho en sus respectivos ordenamientos, como es el caso de E. Betti, a cuyas ideas e influencia decisiva se hace referencia en más de una contribución.

No hay palabras para agradecer la generosidad de quienes han escrito para este número conmemorativo, cuya calidad enaltece a la Pontificia Universidad Católica del Ecuador. A las y los autoras/es todo nuestro reconocimiento y gratitud.

Catalina Salgado Ramírez
Departamento de Derecho Civil
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Pontificia Universidad Católica del Ecuador
www.puce.edu.ec

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Toda persona natural que se encarga de revisar de manera anónima, voluntaria, solidaria y profesional, según arreglo de las formas utilizadas en la academia, acepta valorar manuscritos con temas en los cuales tiene capacidad y competencia para emitir criterio experto. En todo momento, esta revisión y el dictamen seguirán las pautas establecidas por la revista RFJ, ajustándose a sus normas editoriales:

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Antecedentes / estructura

El Código de Conducta COPE para Editores de Revistas está diseñado para proveer de un conjunto de estándares mínimos al que se espera que todos los miembros de COPE se adhieran. Las Directrices sobre las *Mejores Prácticas* son más ambiciosas y se desarrollaron en respuesta a las peticiones de orientación por parte de los editores sobre una amplia gama de cuestiones éticas cada vez más complejas. Aunque cope espera que todos los miembros se adhieran al Código de Conducta para los Editores de Revistas (y considerará la presentación de reclamaciones contra los miembros que no lo hayan seguido), somos conscientes de que los editores pueden no ser capaces de implementar todas las recomendaciones de *Mejores Prácticas* (que son voluntarias), pero esperamos que nuestras sugerencias identifiquen aspectos en relación con la política y las prácticas de la revista que puedan ser revisados y discutidos.

En esta versión combinada de los documentos, las normas obligatorias que integran el Código de Conducta para los Editores de Revistas se muestran en letra redonda y con cláusulas numeradas; por otra parte, las recomendaciones en relación con las *Mejores Prácticas* aparecen en cursiva.

Deberes y responsabilidades generales de los editores

Los editores deben ser responsables de todo lo publicado en sus revistas. Esto significa que los editores deben:

1. Tratar de satisfacer las necesidades de los lectores y autores;

2. Esforzarse para mejorar constantemente su revista;

3. Establecer procesos para asegurar la calidad del material que publican;

4. Abogar por la libertad de expresión;

5. Mantener la integridad del historial académico de la publicación;

6. Impedir que las necesidades empresariales comprometan las normas intelectuales y éticas; y,

7. Estar siempre dispuesto a publicar correcciones, aclaraciones, retracciones y disculpas cuando sea necesario.

Las Mejores Prácticas para los editores incluirían las siguientes acciones:

- *Buscar activamente las opiniones de los autores, lectores, revisores y miembros del Consejo Editorial sobre cómo mejorar los procesos de la revista;*
- *Fomentar y conocer las investigaciones sobre la revisión por pares y publicar y reevaluar los procesos seguidos por la revista a la luz de estos nuevos hallazgos;*
- *Trabajar para persuadir al editor de la publicación para que proporcione los recursos apropiados, así como la orientación de expertos (por ejemplo, diseñadores, abogados);*
- *Apoyar iniciativas diseñadas para reducir las malas conductas en relación con la investigación y la publicación;*
- *Apoyar iniciativas para educar a los investigadores sobre la ética de las publicaciones;*
- *Evaluar los efectos de la política de la revista sobre el comportamiento del autor y del revisor y revisar las políticas, en caso necesario, para fomentar un comportamiento responsable y desalentar la puesta en práctica de malas conductas;*
- *Asegurar que los comunicados de prensa emitidos por la revista reflejan fielmente el mensaje del artículo sobre el que versan y ponerlos en contexto.*

Relaciones con los lectores

1. Se debe informar a los lectores sobre quién ha financiado la investigación u otro trabajo académico, así como sobre el papel desempeñado por el financiador, si este fuera el caso, en la investigación y en la publicación.

Las Mejores Prácticas para los editores incluirían las siguientes acciones:

- *Velar por que todos los informes y las revisiones de la investigación publicados hayan sido revisados por personal cualificado (incluyendo revisiones estadísticas cuando sean necesarias);*

- *Garantizar que las secciones no revisadas por pares de la revista están claramente identificadas;*

- *Adoptar procesos que fomenten la exactitud, integridad y claridad de los informes de investigación, incluida la edición técnica y el uso de directrices y listas de verificación apropiadas (por ejemplo,* miame, *consort);*

- *Considerar el desarrollo de una política de transparencia para fomentar la divulgación máxima de los artículos que no son de investigación;*

- *Adoptar sistemas de autoría o contribución que promuevan buenas prácticas, es decir, que reflejen quién realizó el trabajo y desmotiven la puesta en práctica de malas conductas (por ejemplo, autores fantasmas y autores invitados); y,*

- *Informar a los lectores sobre las medidas adoptadas para garantizar que las propuestas presentadas por los miembros del personal de la revista o del Consejo Editorial reciben una evaluación objetiva e imparcial.*

Relaciones con los autores

1. Las decisiones de los editores de aceptar o rechazar un documento para su publicación deben basarse en la importancia, originalidad y claridad del artículo, en la validez del estudio, así como en su pertinencia en relación con las directrices de la revista;

2. Los editores no revocarán las decisiones de aceptar trabajos a menos que se identifiquen problemas graves en relación con los mismos;

3. Los nuevos editores no deben anular las decisiones tomadas por el editor anterior de publicar los artículos presentados, a menos que se identifiquen problemas graves en relación con los mismos;

4. Debe publicarse una descripción detallada de los procesos de revisión por pares y los editores deben estar en disposición de justificar cualquier desviación importante en relación con los procesos descritos;

5. Las revistas deben tener un mecanismo explícito para que los autores puedan apelar contra las decisiones editoriales;

6. Los editores deben publicar orientaciones para los autores sobre todos aquellos aspectos que se esperan de ellos. Esta orientación debe actualizarse periódicamente y debe hacer referencia o estar vinculada al presente código;

7. Los editores deben proporcionar orientación sobre los criterios de autoría y / o quién debe incluirse como colaborador siguiendo las normas dentro del campo pertinente.

Las Mejores Prácticas para los editores incluirían las siguientes acciones:

- *Revisar las instrucciones de los autores regularmente y proporcionar enlaces a las directrices pertinentes (por ejemplo, icmje: Publicación de investigación responsable: Normas internacionales para los autores);*

- *Publicar intereses contrapuestos relevantes en relación con todos los colaboradores y publicar correcciones si dichos intereses se revelan tras la publicación ;*

- *Asegurar que se seleccionan revisores apropiados para los artículos presentados (es decir, individuos que pueden valorar el trabajo y no son capaces de rechazarlo por intereses contrapuestos);*

- *Respetar las peticiones de los autores de que un evaluador no revise su trabajo, siempre que estas estén bien razonadas y sean posibles;*

- *Guiarse por los diagramas de flujo de COPE (http:// publicationethics.org/ flowcharts) en casos de sospecha de mala conducta o de controversia en la autoría;*

- *Publicar información detallada sobre cómo se gestionan los casos de sospecha de mala conducta (por ejemplo, con vínculos al diagrama de flujo de COPE);*

- *Publicar las fechas de entrega y aceptación de los artículos.*

Relaciones con los revisores

1. Los editores deben proporcionar orientación a los revisores sobre todo lo que se espera de ellos, incluyendo la necesidad de manejar el material enviado en confianza con confidencialidad; esta orientación debe actualizarse periódicamente y debe hacer referencia o estar vinculada al presente código;

2. Los editores deben exigir a los revisores que revelen cualquier posible interés contrapuesto antes de revisar un trabajo;

3. Los editores deben contar con sistemas que garanticen la protección de las identidades de los revisores, a menos que utilicen un sistema abierto de revisión, del que han sido informados tanto los autores como los revisores.

Las Mejores Prácticas para los editores incluirían las siguientes acciones:

- *Alentar a los revisores a realizar comentarios sobre cuestiones éticas y posibles acciones de mala conducta en relación con la investigación y la publicación identificadas en los trabajos presentados (por ejemplo, diseño de investigación poco ético, detalles insuficientes sobre el consentimiento de los pacientes del estudio o sobre la protección de los sujetos de la investigación incluidos los animales-, manipulación y presentación inadecuada de los datos, etc.);*

- *Animar a los revisores a realizar comentarios sobre la originalidad de los trabajos presentados y a estar alerta de las posibles publicaciones repetidas y del plagio;*

- *Considerar la posibilidad de proporcionar a los revisores herramientas para detectar publicaciones relacionadas (por ejemplo, vínculos a referencias citadas y búsquedas bibliográficas);*

- *Enviar los comentarios de los revisores a los autores en su totalidad a menos que sean ofensivos o difamatorios;*

- *Favorecer el reconocimiento de la contribución de los revisores a la revista ;*

- *Alentar a las instituciones académicas a reconocer las actividades de revisión por pares como parte del proceso académico;*

- *Realizar un seguimiento de la labor desempeñada por los evaluadores y tomar medidas que aseguren un proceso de alta calidad;*

- *Desarrollar y mantener una base de datos de revisores adecuados y actualizarla en función del rendimiento de los mismos;*

- *Dejar de enviar trabajos a revisores que emiten, de forma constante, críticas carentes de educación, de mala calidad o fuera de plazo;*

- *Asegurar que la base de datos de revisores es un reflejo de la comunidad académica para la revista y añadir nuevos revisores si resulta necesario;*

- *Utilizar una amplia gama de fuentes (no solo contactos personales) para identificar nuevos posibles revisores (por ejemplo, sugerencias de los autores, bases de datos bibliográficas);*

- *Seguir el diagrama de flujo de COPE en casos de sospecha de mala conducta por parte del revisor.*

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a) The director/editor

b) The editorial coordinators

The editorial/technical management team is in charge of the management and administrative coordination of the editorial processes of the RFJ Magazine. It does not participate as evaluators and/or reviewers, that is, in the blind peer-review process (double-blind peer system). This process is carried out exclusively by the members of the Editorial Board and the Editorial Committee and External Evaluators (who are in all cases academic and/or professional researchers with external affiliation to Pontificia Universidad Católica del Ecuador). Her responsibility is to organize the administrative management process of the texts sent to the magazine. Therefore, none of its members is responsible for determining the publishable nature of articles from a scientific perspective. However, they may submit to the Editorial Board cases of infringement of the rules of the game that guide the RFJ processes.

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The Editorial Board is in charge of supervising the editorial process and the scientific quality of the RFJ Magazine. In this sense, it can issue recommendations aimed at profiling the RFJ as a product of international excellence. Exceptionally, its members can participate as evaluators and/or reviewers, that is, in the blind peer-review process ("double-blind" peer system). However, its allocation (organized through the editorial management team) is carried out within guidelines that aim at full transparency and impartiality. In the event that evaluators and/or reviewers participate, they are inhibited from making opinions or functions that may imply affectation of the journal's code of ethics and/or criteria established by Pontificia Universidad Católica del Ecuador, CACES, or other competent entities. They are in all cases (100%), academic/professionals with external affiliation to Pontificia Universidad Católica del Ecuador.

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RESPONSIBILITIES OF THE EDITORIAL COMMITTEE AND THE EVALUATORS AND/OR EXTERNAL REVIEWERS:

The Editorial Committee and the evaluators and/or external reviewers; As external peers-reviewers perform the role of ensuring quality criteria in content and objectivity in selection and publication, within the editorial process. For this purpose, the following responsibilities are attributed to them:

1. Role of reviewers or arbitration

Any natural person who is in charge of reviewing anonymously, voluntarily, in solidarity and professionally, according to the forms used in the academy, agrees to assess manuscripts with topics in which they have the capacity and competence to issue an expert judgment. At all times, this review and the opinion will follow the guidelines established by the RFJ magazine, adjusting to its editorial standards:

http://www.revistarfjpuce.edu.ec/index.php/rfj/about/submissions

2. Conflict of interest

In the event of a conflict of interest of any kind, natural persons with review responsibilities undertake to inform RFJ magazine immediately, at any point in the process, and to reject their participation as a reviewer.

3. Confidentiality

Natural persons with review responsibilities must respect the content of each text in the process of arbitration and will keep it confidential throughout the editorial process. In this sense, the RFJ will issue acknowledgments once the editorial process has been completed and the respective number has been published.

4. Feedback

Any criticism of the article will be made anonymously, objectively, honestly, and respectfully towards the author, who will be able to make the corresponding corrections or adjustments, as requested by the RFJ magazine. In case of not accepting the arbitration, the article will be rejected.

5. Arbitration modality

The articles issued by the authors are sent to the external peer reviewers, under the blind peer review system ("double blind peer system"). This system for evaluating research papers consists of at least two experts (the text evaluation process may be more than two if required) in the subject on which they are evaluated and they issue an opinion on the viability of the publication. .

6. Responsibilities of the Editorial Committee and the External Evaluators

Together with the Editorial Board, the Editorial Committee and the External Evaluators ensure the academic profile of the journal in its field of reflection, in the object of study to which it responds and in relation to the audience to which is directed.

7. Competition

Together with the Editorial Board, the members of the Editorial Committee and the External Evaluators are solely responsible for determining the publishable nature of the articles from a scientific perspective.

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COPE CODE OF CONDUCT AND BEST PRACTICES GUIDELINES FOR JOURNAL EDITORS

Background / structure

The COPE Code of Conduct for Journal Editors is designed to provide a set of minimum standards to which all COPE members are expected to adhere. The Best Practice Guidelines are more ambitious and were developed in response to editors' requests for guidance on a wide range of increasingly complex ethical issues. Although cope expects all members to adhere to the Code of Conduct for Journal Editors (and will consider filing complaints against members who have not followed it), we are aware that publishers may not be able to implement all recommendations. Best Practices (which are voluntary), but we hope that our suggestions identify aspects of the journal's policy and practices that can be reviewed and discussed.

In this combined version of the documents, the mandatory standards that make up the Code of Conduct for Journal Editors are shown in round type and with numbered clauses; on the other hand, recommendations regarding Best Practices appear in italics.

General duties and responsibilities of publishers

Editors must be responsible for everything published in their Journals. It means that publishers must:

1. Try to meet the needs of readers and authors;

2. Strive to improve the journal continually;

3. Establish processes to ensure the quality of the material they publish;

4. Advocate for freedom of expression;

5. Maintain the integrity of the publication's academic record;

6. Prevent business needs from compromising intellectual and ethical standards; and,

7. Always be willing to publish corrections, clarifications, retractions, and apologies when necessary.

Best Practices for publishers would include the following actions:

- Actively seek the opinions of the authors, readers, reviewers and members of the Editorial Board on how to improve the journal processes;
- Promote and learn about research on peer review and publish and re-evaluate the processes followed by the journal in light of these new findings;
- Work to persuade the publisher of the publication to provide appropriate resources as well as expert guidance (e.g., designers, lawyers);
- Support initiatives designed to reduce misconduct in relation to research and publication;
- Support initiatives to educate researchers about the ethics of publications;
- Evaluate the effects of the journal's policy on the behavior of the author and the reviewer and review the policies, if necessary, to encourage responsible behavior and discourage the implementation of misconduct;
- Ensure that the press releases issued by the Journal faithfully reflect the message of the article they are about and put them in context.

Relations with readers

1. Readers should be informed of who has funded the research or other academic work, as well as the role, if any, of the funder in research and publication.

Best Practices for publishers would include the following actions:

- Ensure that all published research reports and reviews have been reviewed by qualified personnel (including statistical reviews when necessary);
- Ensure that the non-peer-reviewed sections of the journal are clearly identified;
- Adopt processes that promote the accuracy, completeness, and clarity of research reports, including technical editing and the use of appropriate guidelines and checklists (e.g., miame, consort);
- Consider developing a transparency policy to encourage maximum disclosure of non-research articles;
- Adopt authorship or contribution systems that promote good practices, that is, that reflect who did the work and discourage the implementation of misconduct (for example, ghostwriters and guest authors); and,
- Inform readers of the measures taken to ensure that proposals submitted by staff members of the Journal or Editorial Board receive an objective and impartial evaluation.

Relations with authors

1. Editors' decisions to accept or reject a document for publication must be based on the importance, originality, and clarity of the article, on the validity of the study, as well as on its relevance in relation to the journal's guidelines;

2. Editors will not reverse decisions to accept papers unless serious problems are identified in connection therewith;

3. New editors should not override decisions made by the previous editor to publish submitted articles unless serious issues are identified in relation to them;

4. A detailed description of the peer review processes should be published and the editors should be able to justify any significant deviations from the described processes;

5. Journals must have an explicit mechanism for authors to appeal against editorial decisions;

6. Editors should publish guidelines for authors on all aspects that are expected of them. This guidance must be regularly updated and must refer to or be linked to this code;

7. Editors should provide guidance on authorship criteria and/or who should be included as a contributor following standards within the relevant field.

Best Practices for publishers would include the following actions:

- Review authors' instructions regularly and provide links to relevant guidelines (eg icmje5, Responsible Research Publication: International Standards for Authors);
- Post relevant conflicting interests in relation to all contributors and post corrections if those interests are revealed after posting;
- Ensuring that appropriate reviewers are selected for the articles submitted (ie, individuals who can value the work and are unable to reject it for competing interests);
- Respect the authors' requests that an evaluator does not review their work, provided they are well reasoned and possible;
- Be guided by COPE flow charts (Http: // publicationethics.org/flowcharts) in cases of suspected misconduct or controversy in authorship;

- Publish detailed information on how suspected misconduct cases are handled (for example, with links to the COPE flow diagram);
- Publish the delivery and acceptance dates of the articles.

Relations with reviewers

- Editors should provide guidance to reviewers on what is expected of them, including the need to handle confidentially submitted material with confidence; this guidance should be regularly updated and should refer to or be linked to this code;
- Editors should require reviewers to disclose any potential conflicting interests before reviewing a paper;
- Editors should have systems in place to ensure the protection of reviewers' identities unless they use an open review system, which both authors and reviewers have been informed of.

Best Practices for publishers would include the following actions:

- Encourage reviewers to comment on ethical issues and possible misconduct actions in relation to the research and publication identified in the papers presented (eg unethical research design, insufficient details on the consent of study patients, or on the protection of research subjects, including animals, inappropriate handling and presentation of data, etc.);
- Encourage reviewers to comment on the originality of papers submitted and to be alert to possible repeat posts and plagiarism;
- Consider providing reviewers with tools to detect related publications (for example, links to cited references and bibliographic searches);
- Send the reviewers' comments to the authors in their entirety unless they are offensive or defamatory;
- Promote recognition of the contribution of the reviewers to the journal;
- Encourage academic institutions to recognize peer review activities as part of the academic process;
- Monitor the work of the evaluators and take measures that ensure a high-quality process;
- Develop and maintain a database of appropriate reviewers and update it based on their performance;
- Stop submitting papers to reviewers who consistently issue uneducated, poor-quality, or late reviews;

- Ensure that the reviewer database is a reflection of the academic community for the journal and add new reviewers if necessary;

- Use a wide range of sources (not just personal contacts) to identify new potential reviewers (eg, authors' suggestions, bibliographic databases);

- Follow the COPE flow chart in cases of suspected misconduct by the reviewer

AVISO LEGAL

En atención del amparo legal que brinda el Art. 118 del Código Orgánico de la Economía Social de los Conocimientos, Creatividad e Innovación (Código Ingenios) del número 1 al número 6 de la revista se ha respetado el formato original de los documentos/artículos remitidos.

Esta revista se adscribe dentro de las actividades jurídico-investigativas realizadas por la Facultad de Jurisprudencia de la Pontificia Universidad Católica del Ecuador (PUCE).

CUOTA DE GÉNERO

De manera transversal para todos sus órganos, procesos y productos/ secciones, la RFJ intenta que esta no se sitúe por debajo del 25%.

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EDITORIAL

La Revista Facultad de Jurisprudencia de la Pontificia Universidad Católica del Ecuador (RFJ), que este año celebra su 75 Aniversario, es una publicación científica continua y semestral (Enero-Junio) (Julio-Diciembre) publicada por el Centro de Publicaciones y bajo el auspicio de la Dirección de Investigación de la Universidad. La modalidad de publicación continua cierra el 30 de junio y el 31 de diciembre de cada año. Sin embargo, la RFJ se encuentra abierta a recibir artículos a lo largo de todo el año. Su énfasis es el ámbito de lo jurídico y (entendido prima facie en un sentido teórico) su relación con otras disciplinas, saberes y ciencias. Puede utilizar el sistema de "especiales temáticos" en cualquiera de sus convocatorias.

La revista se encuentra dirigida a docentes e investigadores nacionales e internacionales interesados y comprometidos con generar y compartir abierta y eticamente conocimiento científico de calidad e impacto global. La RFJ se edita en castellano, inglés, francés, italiano y portugués. Aborda temas desde una perspectiva exegética, multi y transdisciplinar. Por lo tanto, está dedicada al análisis crítico de la problemática nacional e internacional del Derecho en todas sus áreas. Incluye artículos de científico-jurídicos, revisiones, análisis de actualidad, investigaciones, recensiones de libros, notas de investigación, notas de revisión, informes, miscelánea y traducciones originales.

La propuesta editorial de la RFJ se encuentra en el marco de la misión de la Pontificia Universidad Católica del Ecuador - PUCE, y busca contribuir de un modo riguroso y crítico, a la tutela y desarrollo del Estado de Derecho, la dignidad humana y de la herencia cultural, mediante la investigación, la docencia y los diversos servicios ofrecidos a las comunidades locales, nacionales e internacionales.

El Consejo Editorial y de evaluadores externos está integrado por destacados académicos de las ciencias sociales de diferentes Universidades de Latinoamérica, Europa, Estados Unidos y Oceanía. Estos de forma conjunta al Equipo de Gestión Editorial conforman el Comité Editorial de la RFJ.

La Revista está abierta a la recepción de artículos durante todo el año, dentro de las fechas límites de cada uno de los números. Los documentos recibidos y seleccionados para publicación cumplirán con el sistema de revisión anónima por el sistema de «doble ciego» y las pautas reglamentarias establecidas.

Finalmente, se invita a todos los docentes e investigadores a que participen y compartan con nosotros futuras contribuciones.

Rubén Carlos Braulio Méndez Reátegui
Docente Titular Principal de la Pontificia
Universidad Católica del Ecuador

Director

A la Pontificia Universidad Católica del Ecuador

AGRADECIMIENTO Y PRESENTACIÓN

La Pontificia Universidad Católica del Ecuador, en su 75 aniversario, como alma mater del conocimiento de las diversas disciplinas del saber, consciente que el núcleo fundamental de nuestra vivencia académica es la investigación y, por lo tanto, la promoción de espacios de participación para la producción científica, agradece:

Al equipo de asistencia editorial conformado por Lissangee Stefanía Mendoza García, Rachel Carolina Romero Medina, Darly Muñoz Moina, Mariana Lozada Mondragón y Amparo Álvarez Meythaler.

A las revisoras y los revisores que actuaron como pares ciegos verificando el contenido y los lineamientos generales investigativos de la revista y la formulación y acoplamiento técnico de su estructura. A las autoras y los autores que con su activa colaboración permiten el desarrollo de una investigación integral en el ámbito de la ciencia jurídica.

A la Dirección de Investigación y al Centro de Publicaciones por su invalorable apoyo durante el proceso de establecimiento y consolidación de la RFJ.

La RFJ representa un aporte original, fruto del trabajo coordinado de la Pontificia Universidad Católica del Ecuador y prestigiosos académicos internacionales.

El proyecto editorial que aquí se presenta generó el espacio propicio de interacción y colaboración científica, que facilitó el arduo proceso de elaboración documental que esta publicación conllevará. Asimismo, la exhaustiva revisión y aprobación por parte de pares externos no se puede dejar sin mención.

Por lo tanto, se puede concluir que la RFJ introduce un elevado grado de originalidad y trascendencia para la literatura jurídica nacional e internacional y favorece a la sociedad ecuatoriana en su conjunto.

Revista Facultad de Jurisprudencia

ARTÍCULOS

SUMARIO DE LA REVISTA

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Conflicts among Rights: An Economic Approach

Conflictos entre Derechos: Un Enfoque Económico

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Original article (research)
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ABSTRACT: Sometimes rights conflict, as when the right to religion interferes with the right to equality. Often law does not prioritize rights, leaving judges to resolve conflicts among them based on their own intuitions and beliefs. This paper explores a new principle for resolving such cases: rule against the party that could have avoided the rights conflict more easily. This principle builds on "least cost avoidance," a theory of liability developed by scholars in law and economics. The main objective of this paper is to adapt least cost avoidance to questions of rights. The secondary objective is to demonstrate the potential of economics in constitutional law. Economics has illuminated and influenced many legal fields. To influence constitutional law, economists must address the questions of lawyers and judges, meaning questions about constitutional doctrine. This paper presents a modest step in that direction.

KEYWORDS: justice, legal reform, legal norm, constitution, political system.

RESUMEN: A veces los derechos entran en conflicto, como cuando el derecho a la religión interfiere con el derecho a la igualdad. A menudo, la ley no prioriza los derechos, dejando que los jueces resuelvan los conflictos entre ellos basándose en sus propias intuiciones y creencias. Este artículo explora un nuevo principio para resolver estos casos: gobernar contra la parte que podría haber evitado el conflicto de derechos más fácilmente. Este principio se basa en “evitar el menor costo”, una teoría de la responsabilidad desarrollada por académicos en derecho y economía. El principal objetivo de este documento es adaptar la evasión de menores costos a las cuestiones de derechos. El objetivo secundario es demostrar el potencial de la economía en el derecho constitucional. La economía ha iluminado e influido en muchos campos legales. Para influir en el derecho constitucional, los economistas deben abordar las cuestiones de abogados y jueces, es decir, cuestiones sobre la doctrina constitucional. Este artículo presenta un modesto paso en esa dirección.

PALABRAS CLAVE: justicia, reforma legal, norma legal, constitución, sistema político.

JEL CODE: F51, H11

INTRODUCTION

The City of Philadelphia sent children in need to Catholic Social Services (CSS), a religious non-profit organization. CSS identified suitable foster parents for the children. CSS accepted married and single adults as foster parents. However, it refused to accept unmarried, co-habitating adults as foster parents. This presented a problem for gay couples. CSS rejects same-sex marriage on religious grounds. Consequently, it classifies gay couples—including legally married couples—as unmarried, co-habitating adults. Philadelphia claimed that CSS discriminates unlawfully on the basis of sexual orientation. CSS argued that the U.S. Constitution protects its religious beliefs. In this dispute, the rights to equality and religion collide. Which right should prevail?

This case, Fulton v. City of Philadelphia (2021), presents a new instance of an old problem: conflicts among rights. For judges, such conflicts create many difficulties. Often the same legal source, typically the constitution, recognizes both rights without prioritizing them. Consequently, judges must decide for themselves which right should prevail, a perilous task. Rights implicate justice, freedom, fairness, and morality.

Since Plato (and probably before) people have disagreed about these values. Without clear guidance from law or philosophy, judges must invent answers themselves. Many of their answers are or appear to be political.

This article explores[1] a principle, first introduced in Barzun and Gilbert (2021), for resolving conflicts between rights. The principle can be summarized in one sentence: rule against the party that could have avoided the conflict more easily. In the following pages I will explain and defend this principle.

The principle draws inspiration from economics, which might seem like a surprising source. Economists usually address topics like monopoly, trade, employment, and inflation. Efficiency supplies their guiding value. Critics call economics the "dismal science." In fact, the dismal science can illuminate burning questions of rights, as I will try to show.

1. ON CONSTITUTIONAL LAW AND ECONOMICS

To situate my argument, I will begin with a little intellectual history. Prior to the 1960s, law limited the use of economics to tax, antitrust, regulated industries, and topics like monetary damages. This changed dramatically in the 1960s following the publication of two germinal works, The Problem of Social Cost by Coase (1960), and Some Thoughts on Risk Distributions and the Law of Torts by Calabresi (1961). With these papers, economics began to expand into more traditional areas of law.

1 This original article is an extended version of remarks delivered to the Be Latin International Seminars 2021-1. For helpful comments I thank seminar participants and Charles Barzun.

Sixty years later, law and economics has become an intellectual force. The field received the highest recognition when Nobel Prizes in Economics were awarded to Ronald Coase and Gary Becker, two scholars who helped found it.

Much law and economics scholarship focuses on “private law,” including property, contracts, corporations, and torts (the law of accidents). In addition, scholars in this tradition have studied regulations, administrative law, family law, criminal law, bankruptcy, and the list goes on. Economics supplies an influential perspective across legal fields. However, in one important corner of law economic analysis has had relatively little impact. I am referring to constitutional law.

Why has constitutional law resisted economics? The problem is not a shortage of scholarship. Many scholars have applied economics to constitutional issues, and much of this scholarship (in this author’s opinion) is excellent. However, much of the scholarship is irrelevant to the work of lawyers. Consider The Calculus of Consent by Buchanan and Tullock (1962). Among other topics, this famous book addresses voting rules. For the legislature to enact a law, should the constitution require majority rule, unanimity rule, or some other voting threshold? This question is profoundly important for governance, but not for the practice of law. In court, lawyers are not asked, “What voting rule is best?” They are asked questions like, “Does the constitution authorize this statute?”, and “Did the executive violate citizens’ rights?”

For economics to matter more in constitutional law, it must address the questions of lawyers. Instead of constitutional design, it must address constitutional doctrine.[2]

2 Robert Cooter and I are writing a book that applies economics to public law, including constitutional doctrine. For a preview of the book, see Cooter and Gilbert (forthcoming).

2. ON LEAST COST AVOIDANCE

In private law, economics has long addressed the questions of lawyers. Consider the following example from tort law. A train crashes into a truck at a crossing, destroying the truck and damaging the train. Who is liable for the loss, the train company or the truck's owner? This kind of question gets resolved in court. Lawyers make arguments—about fault, negligence, and so on—and judges make decisions.

Here is one way to think about liability in this case. How could the parties have avoided the accident? The train could have stopped to let the truck pass, or the truck could have stopped to let the train pass. Either solution would have worked. However, stopping the train would have been very difficult—or "costly" in the language of economics. Trains take much time and track to stop, and many passengers and cargo get delayed. In contrast, trucks stop quickly, and relatively few people and products get interrupted. Similarly, restarting a train is difficult, whereas restarting a truck is not. All things considered, stopping the truck would have been "cheaper" than stopping the train. So, make the truck's owner liable for the accident. This prevents future accidents by encouraging truck drivers to stop at train crossings (they do not want to pay for accidents). And it prevents those accidents at relatively low cost.

This is the theory of "least cost avoidance" (Calabresi 1970). This theory energized the economic analysis of accidents, and it relates directly to legal doctrine. A judge puzzling over the crash between the train and the truck could use least cost avoidance to resolve the case.

Economics can help resolve cases in at least three ways. First, it can supplant legal doctrine, as when a court ignores law and lets economics guide her decisions. Economists who think law should maximize efficiency might like to supplant legal doctrine. Second, economics can inform law, as when it helps clarify or illuminate doctrine. Third, economics can supplement legal doctrine. To illustrate, suppose the law did not answer the question about liability among the train company and truck owner, or the judge could not find the answer. The judge could use least cost avoidance to break the impasse.

The remainder of this paper fits into the third category above. It shows how economics can be relevant to legal doctrine by applying least cost avoidance to a hard problem in constitutional law. When the law does not provide an answer to a conflict among rights, economics can break the impasse.

3. CONFLICT AVOIDANCE IN FULTON

Earlier I stated a principle for resolving cases in which rights collide: rule against the party that could have avoided the conflict more easily. This is the conflict avoidance principle (Barzun and Gilbert, 2021). This principle translates least cost avoidance from tort law to constitutional law. Making the translation requires several steps, which I will demonstrate by analyzing Fulton.

First, I will assume for the sake of argument that Fulton is a hard case. By "hard case" I mean a case in which reasonable, conscientious judges are deeply uncertain about its proper resolution. Judges might feel uncertain because different legal sources—text, precedent, original understandings—support different conclusions. They might feel uncertain because the demands of justice are unclear. Or they might feel uncertain because they lack essential information. Scholars disagree on when (if ever) cases are "hard" and why (Hart 2012; Dworkin 1986).

I take no position on that issue. Instead, I simply assume the existence of some cases that the judges deciding them consider "hard." In such cases, judges would benefit from a default rule or "tiebreaker" to resolve the dispute. The conflict avoidance principle is a tiebreaker for hard cases involving aconflict among rights.[3]

3 In fact, the conflict avoidance principle might apply in a wider set of circumstances, but here I concentrate on rights conflicts.

Assuming Fulton is a hard case, we can proceed with the analysis. In the tort context, least cost avoidance assigns liability to prevent accidents. But cases like Fulton do not involve accidents. They involve conflicts among rights. Such conflicts create many problems. The parties are aggrieved, time and money go towards litigation, and judges decide cases (and make new precedents) with little to guide them. Some rights conflicts divide society. If the parties to the case could have avoided the conflict in the first place, they would have saved themselves and many others a lot of time and trouble. In the language of economics, the "social costs" of rights conflicts seem high, whereas the social costs of avoiding rights conflicts seem relatively low. The conflict avoidance principle aims to reduce social costs by reducing rights conflicts. Instead of preventing collisions among vehicles, the principle prevents collisions among rights.

Some readers might object to this reasoning. They might argue that rights conflicts generate benefits, not costs, because they promote justice. In general, this might be true. But in hard cases I am not convinced. According to the definition above, a hard case is one in which the judge is uncertain what law and justice require. When judges face such uncertainty, their decisions might undermine justice rather than promote it. Given the uncertainty, judges will struggle to write convincing opinions, and their legitimacy may suffer. Meanwhile, the costs mentioned above will mount. In sum, rights conflict in general might be beneficial. However, I assume that rights conflict in hard cases are harmful.[4]

In the example involving the train and truck, we asked how the parties could have avoided the accident. We considered the possibilities (the train stops or the truck stops) and chose the cheaper option. In cases like Fulton, we must ask how the

4 This assumption might be too broad. Perhaps rights conflicts are harmful in only a subset of hard cases. If we could identify that subset, then we could apply conflict avoidance there but not elsewhere. This paper concentrates on developing the conflict avoidance principle rather than identifying its precise domain.

parties could have avoided the conflict. CSS could have avoided the conflict by referring children to gay couples. Alternatively, the side representing equality could have refrained from complaining about CSS's discrimination. Either approach would have prevented a conflict that generated a hard case. Which approach is cheaper? To answer we would have to assess the "cost" to CSS of sacrificing its religious beliefs and the "cost" to equality from tolerating discrimination. Of course, we cannot assess and quantify those "costs." If we could, the case would probably seem easy instead of hard, and judges would not need conflict avoidance to break a tie.

The interests in religion and equality are important and admirable but too general. These interests existed before this case, and they will persist afterwards. To make conflict avoidance work, we must lower the level of abstraction. We must move away from amorphous, value-laden interests and towards more concrete matters that make the case manageable. To do this, focus on the particular interests of the parties that brought them into conflict. The particular interests are narrow: gay couples want children referred to them, and CSS does not want to refer children to gay couples.[5]

Again, some readers might object to this reasoning. They might argue that ignoring the general interests in religion and equality cuts the heart from the case. Here are two responses. First, if the general interests were manageable, then of course they should dominate the case. But we assume the case is hard, meaning the conflict between the interests is unmanageable. Second, courts often concentrate on particular instead of general interests in the way we describe. To illustrate, consider our accident. The train company might have a general

5 Many rights conflicts involve the government as a party, as in Fulton v. City of Philadelphia. The conflict avoidance principle instructs courts to look beyond the government to the real parties in interest, meaning the people whose rights and interests the government is defending (see Barzun and Gilbert, 2021 pp. 32–34). In Fulton, the government is defending gay couples and children who seek foster care. For simplicity, I concentrate on the interest of gay couples only. Including the interests of the children would complicate the discussion without affecting the conclusion.

interest in property rights (especially if it owns the tracks) and economic development. The truck owner might have a general interest in property rights (if, for example, he must cross the tracks to go home) and the right to travel. Both sides have interests in freedom and in living in a society safe from unnecessary risk. These interests are important and admirable. But courts usually ignore them. Judges set aside the broad issues and concentrate on specific, concrete questions, like "How hard would it have been to stop the truck?" Emphasizing particular instead of general interests is common in law—so common that we sometimes fail to perceive it.

Once we have identified the particular interests that prompted the conflict, we can ask this question: "How could a reasonable person in each party's position have secured its particular interest without making its demand on the other side?" To begin, focus on CSS. Its particular interest is in not referring children to gay couples. How could it have secured that interest without making its demand of the other side—in other words, without insisting that the City permit it to discriminate? The answer is not clear. If CSS were a for-profit company, and if one employee had a religious objection to same-sex marriage, then we might ask whether another, non-objecting employee could cover referrals involving gay parents. That would be a natural way to avoid the conflict. But CSS is not a for-profit company. It is a religious organization committed to a set of religious beliefs. It probably does not employ people who reject those beliefs, and even if it does, permitting such employees to handle referrals involving gay couples would frustrate CSS's interest, not secure it. In sum, CSS does not seem capable of securing its particular interest without making its demand on the City.

Now consider gay couples. Their interest is in having children referred to them. Can they secure that interest without making their demand on the other side—in other words, without insisting that CSS not discriminate? The answer depends on whether they have other ways to connect with and foster children. The City had contracts with 30 organizations, of which CSS was one. Twenty-eight of those organizations did not discriminate against gay parents. So, gay parents had many options for getting referrals and fostering children. They could secure their interest relatively easily, without demanding that CSS stop discriminating.

Loosely speaking, CSS resembles the train and gay couples resemble the truck. The latter could avoid the conflict at relatively low cost. According to the conflict avoidance principle, CSS should win the case.

Suppose the facts were different. Suppose that just one organization referred children, and it was a for-profit company with many employees, one of whom objected to same-sex marriage on religious grounds. In that case, the company could avoid the conflict easily by having a non-objecting employee handle cases with gay couples. With no other organizations to choose from, gay parents could not avoid the conflict easily. They could not secure their interest in fostering children without demanding that the company stop discriminating. In this scenario, the couples would resemble the train and the company would resemble the truck. The gay couples should win the case.

As this example shows, the conflict avoidance principle depends heavily on facts, and it does not favor one value or another. Equality trumps religion under some facts, and religion trumps equality under others. The principle generates case-by-case decisions based on relatively concrete considerations. Of course, the principle is not value neutral. It is committed to avoiding difficult conflicts among rights.

CONCLUSIONS

Economics could enrich constitutional law as it has enriched many other legal fields. To do so, economics must address the questions of lawyers, meaning questions about doctrine. This paper applies economics to one important issue in constitutional doctrine, the adjudication of rights. In some hard cases, judges cannot determine which of two competing rights should prevail. The conflict avoidance principle offers a method rooted in economics for breaking the impasse.

I have presented the conflict avoidance principle only briefly. The principle raises many questions that I have not addressed. One important question involves objectivity and discretion.[6] To apply the principle, judges must identify "particular" interests and compare the parties' costs of avoiding them. This is not necessarily easy, and judges must exercise discretion. They might exploit that discretion and decide cases the way they prefer, not the way the principle demands. This concern is real but not fatal. A hallmark of economic analysis is its comparative character. When assessing something, scholars of law and economics ask, "Compared to what?" The conflict avoidance principle will not always be objective and determinate, but the question is, "Compared to what?" Often the alternative is for judges to engage in free-form reasoning about abstract values over which they have no special expertise. Compared to that alternative, conflict avoidance seems more objective and determinate.

In 2021, the Supreme Court decided Fulton v. City of Philadelphia, 593 U.S. The majority ruled in favor of Catholic Social Services on surprising grounds. In brief, the Court concluded that the City's anti-discrimination policy was not "generally applicable," triggering a careful review that the City could not overcome. In reaching this decision, the Court rejected the analysis of both the appellate and district courts

6 Barzun and Gilbert (2021) address this question and other challenges to conflict avoidance.

below, and it relied on contestable interpretations of state and local law. Justice Gorsuch wrote, “From start to finish, [the opinion] is a dizzying series of maneuvers.” Justice Alito argued that the decision “might as well be written on the dissolving paper sold in magic shops.”

Perhaps this is simply rhetoric, or perhaps the criticism is accurate. Perhaps Fulton is a hard case as I assumed above. And perhaps economics offers a better approach to resolving hard cases.

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The Italian Law of Obligations from the Civil Code of 1942 to today profiles of an evolution

La Ley de Obligaciones Italiana desde el Código Civil de 1942 hasta la actualidad perfiles de una evolución

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ABSTRACT: This article examines the category of obligations and its evolution from the Italian civil code of 1942 to the present day. It mainly focuses on the figure of the non-performance obligation due to its theoretical and practical relevance. He then tackles the currently debated topic of recoding.

KEYWORDS: Law, legal system, civil law, legislation.

RESUMEN: Este artículo examina la categoría de obligación y su evolución desde el Código Civil italiano de 1942 hasta la actualidad. Se centra principalmente en la figura de la obligación sin desempeño debido a su relevancia teórica y práctica. Posteriormente aborda el tema actualmente debatido de la recodificación.

PALABRAS CLAVES: Ley, sistema legal, derecho civil, legislación.

JEL CODE: K, K0

INTRODUCTION

The Italian law of obligations has its systematic root in Book IV of the Civil Code of 1942, which is entitled Delle obbligazioni. The structure of the entire system consists of the three initial articles, 1173, 1174 and 1175, which are placed in chapter one as Preliminary Provisions of title one. They are devoted respectively to the Sources of obligations, the pecuniary nature of performance and conduct by fairness. Two other provisions join the preceding ones as cardinal rules of the discipline, art. 1176, which in chapter two opens the discipline of performance, imposing on the obligor the duty of care of the good family man, and art. 1218 which begins chapter three, Non-performance of obligations, regulating the obligor's liability. A further rule governs the obligation and is that of Art. 2740(1): "The debtor is liable for the performance of obligations with all his present and future assets". This so-called property liability should not be confused with the liability into which the obligation is converted as a consequence of non-performance. While the latter is coessential to the obligation, of which it can be said to be the other side once the non-performance has occurred (Mengoni, 2011), the so-called patrimonial liability, as a guarantee provided by the obligor, can be considered to be the other side. Asset liability, as a guarantee provided by the debtor's assets, i.e. as a bond other than obligatio, is outside the obligation (Di Majo, 2013), concerning which it is, therefore, accessory, just as the process is more generally accessory, even if it is functional, but only in a possible way (i.e. after deducting fulfilment and enforcement in specific form, which does not concern the assets as a whole, but only the goods due with the obligation), to the achievement of the economic result intended by the creditor. In the absence of specific guarantees, the lien on the debtor's assets will become active only later, it can be said to act as a background to the obligation; and the means of preserving the asset guarantee, subrogation and revocation actions, and attachment, serve to maintain the so-called general asset guarantee, not to enforce it.

To orient the discourse on the obligation from the idea of patrimonial liability, with an extemporaneous revival of the old syntagma Schuld und Haftung, means reversing the direction of the system (Larenz, 1987).

As regards the language used by the legislature to express the very idea of obligation, it should be noted that the latter is declined both in the singular and in the plural, depending on the content it is intended to signify (Zurita and Benatti, 2020). Thus, as we have already seen, the book of the Civil Code containing the discipline is entitled of obligations and Art. 1173 refers to the sources of obligations, while immediately after Art. 1174 speaks of the object of the obligation, and so on. The model is the Roman obligatio, as a genus capable of summing up and encompassing all species of obligation, the characterisation of which concerning the genus takes place in chapter 7, devoted to certain species of obligation. We have said that articles 1173, 1174 and 1175 contain the framework of the system. This is not only because they are the rules which, each from a different point of view, express the essence of the obligation, but also because, as we shall see at once, they constitute the heads of the chapter, the starting point of the lines of development along which, by way of a radial pattern, the law of obligations has developed in the Italian legal system, from its foundation in 1942 with the new civil code to the present day.

1. ARTICLE 1175 AND THE OBLIGATIONS OF FAIRNESS AND PRE-CONTRACTUAL LIABILITY

The chronological order according to which these rules proved to be seminal for the evolution of the living law is inverse to the numerical order. Thus in the first years immediately after the code came into force, it is article 1175 which becomes the normative place of the new structure which the doctrine intends to give to the obligation. Significantly, it is Emilio Betti (1953), a Romanist who is accustomed to the idea of obligation as a vinculum iuris which abstracts the debtor from the creditor as a unilaterally binding duty for the debtor, who ritualizes the obligation as a bond of solidarity, “concerning the principles of corporate solidarity” (Mengoni, 2011, p. 262), in which the credit is a bond of solidarity, “concerning the principles of corporate solidarity” (Mengoni, 2011, p. 262). in which credit is not opposed to debt in terms of a mere claim, and the creditor is not a mere spectator of the debtor’s effort aimed at a mere result to be achieved by the former. Credit and debt are situated in an interactive framework, in which both parties, debtor and creditor, are bound to respect the legal sphere of the other party, according to a model of reciprocity in which the idea of cooperation is realised (Mengoni, 2011). And concerning this cooperation, the obligation acquires a new functional dimension.

This idea of reciprocity in which cooperation is realised is expressed in Art. 1175 as an ideal rule when, in advance of the discipline of performance as conduct typically expressive of the debtor’s obligation, it draws the framework constituted by the obligations of correctness that are imposed on the aggrieved party to the same extent as on the debtor. In this respect, Art. 1175 can ideally be said to make use of the theory of accessory obligations and especially of obligations of protection as characterised by reciprocity, in a much more appropriate way than § 242 BGB which imposes on the obligor alone the obligation to perform the obligation in good faith. Shortly after Betti, it will be Mengoni (2011) who will identify the obligations of protection as ‘obligations of fairness, “according to the terminology of our art. 1175” (p. 229). And Betti (1953) clarifies that it is these same obligations that must be observed “already before a relationship of obligation comes into being, that is to say, from the stage of negotiations” (p. 68).

The implicit reference is to Article 1337, which is another of the novelties of the Italian Civil Code of 1942 because it regulates for the first time in general pre-contractual liability, requiring the parties who enter into negotiations to enter into a contract to behave in good faith. This rule should also be compared, as Betti says, to Article 1175, in that it anticipates the obligations of fairness at the beginning of negotiations, that is, at the prodromal stage of the contract, before it is concluded. On this point, Betti (1953), reasoning about the obligatory relationship in the traditional manner, which identified it according to the Romanist tradition with the obligation to perform, fails to notice the contradiction when he states that the obligations of fairness arise before an obligatory relationship is created. What Art. 1337 requires to be said is that the obligations of fairness precede the conclusion of the contract, but precisely, for this reason, it means that the obligatory relationship, through the arising of the obligations of fairness, begins to exist with them, pending integration with the obligation to perform if and when the latter, with the conclusion of the contract, also comes into existence. If it is true that with the assertion of obligations of protection or of fairness, the obligation has become a complex relationship, in which the obligations of protection stand alongside the obligation to perform, albeit in an ancillary function, the implication that follows is that the obligatory relationship begins to exist when any of its constituent elements, thus also the obligations of fairness alone, come into existence, whether the obligation to perform comes into existence subsequently or not.

This observation is important for the further development of the theory of obligation, as we shall see below. What can already be seen is that obligations of correctness, as is positively clear from articles 1175 and 1337, are obligations ex lege, capable of integrating with the obligation to perform, even when the source of the latter is the contract and private autonomy (Castronovo, 1990). From this, it follows that the obligations of protection, while integrating with the obligation of performance in the unity of the obligatory relationship, insofar as they are founded on a different source have an autonomous destiny: that is, as we have seen, they pre-exist the obligation of performance, and survive it (Mengoni, 2011); they are not therefore bound to its fate. The ultimate implication that can be drawn from this, and that Italian doctrine has drawn from it, is therefore that they can come into existence even when an obligation to perform is not in view but a social contact must be said to have been established capable of generating that mutual trust from which good faith gives rise to them.

2. THE OBLIGATION BETWEEN THE PATRIMONIAL NATURE OF THE PERFORMANCE AND THE NON-PATRIMONIAL NATURE OF THE CREDITOR'S INTEREST (ART. 1174)

Turning to the second of the three articles of the Civil Code that constitute the positive foundation of the law of obligations, Article 1174, it can be said that initially with it we return to obligatio in the traditional Romanesque sense: the vinculum iuris that consists of and is exhausted by the obligation to perform. The rule tells us that it is characterised by patrimonially: what the debtor owes to the creditor or, as art. 1174 puts it, "the performance that is the object of the obligation must be susceptible of economic evaluation; adding, however, that "it must correspond to an interest, even a non-pecuniary one, of the creditor". It is a question, as has been pointed out (Giorgianni, 1945), of two provisions, the first of which, it may be added, looks back to the Romanesque tradition of obligatio, the second looking forward, in the direction in which we have seen art. 1175 turn before. However, while the prediction of fairness as a source of accessory obligations enriches the obligation from a structural point of view, the prediction of interest remains outside the structure of the obligation but connotes it in essence at the functional level. The creditor's interest is the lever of the obligation since it constitutes both the efficient cause and the final cause (Mengoni, 2011); the obligation departs from the creditor's interest and reaches perfection with the realisation of the interest because of which the vinculum iuris between the debtor and the creditor is triggered. Furthermore, the result as the object of the obligation cannot be understood as an element of the content of the obligation but as télos, objectum as that which is placed before it, to which the debtor's conduct tends to achieve fulfilment (Mengoni, 1952).

Read in this light, the prediction of the necessity of the interest, even when not patrimonial, takes on a double significance of novelty. On the one hand, it overcomes the negative attitude regarding its relevance to the establishment and continuation of the obligatory relationship, and on the other, it definitively opens up the boundaries of nonpatrimonially to the obligation in the sense that, if the structure remains firmly anchored to the idea “ea enim in obligatione consistere, quae pecunia lui praestarique possunt” (D. 40, 7,9, Ulpianus libro vicensimo octavo ad Sabinum), the function highlights the subjection of what is traditionally characterised by patrimoniality to the personal dimension in which the variety of interests that characterise human affairs unfolds, subordinating having to being.

Moreover, art. 1174, by specifying that the creditor’s interest can also be non-pecuniary, on the one hand, specifies the provision of art. 1322, para. 2 of the Civil Code in the sense that “interests worthy of protection according to the legal system”, to which the latter rule generally refers, can be <also non-pecuniary>: the social appreciability of the interest as a limit of the obligation no longer coincides with patrimoniality; on the other hand, it no longer allows art. 1174 to be read as a rule placed for the exclusive protection of the debtor, who in the face of the creditor’s claim can object to the lack, original or subsequent, of the interest to exonerate himself from the obligation that he is bound by. The social appreciability of the interest as a limit of the obligation no longer coincides with patrimoniality; on the other hand, it no longer allows art. 1174 to be read as a rule placed for the exclusive protection of the debtor, who, in the face of the creditor’s claim, may object to the lack, original or supervening, of the interest to exonerate himself from the obligation that abstains from it, but colours the obligation in the sign of reciprocity - anticipating the unfolding of it that we have seen confirmed in art. 1175 - in favour, therefore, of the aggrieved party, who precisely by ‘forcing’ the interest can demand performance from the debtor and, in the event of non-performance, that the compensation be commensurate not so much with the value of the performance, which may then no longer have any value for it, but with the extent of the interest violated.

3. NON-ASSET DAMAGE IN CONTRACTUAL LIABILITY

We thus proceed along the new path opened up by Art. 1174, which has emerged in the last decade on the front of the damage deriving from the injury of the non-material interest which, having given rise to the obligation and being unsatisfied, legitimises the aggrieved party to compensation. This recent development can be said to be alien to the idea that the legislature of 1942 may have had when it made the non-material interest of the aggrieved party a relevant premise of the obligation, in the presence of which the latter conforms with the legal system.

The legislator's view did not go beyond the accreditation of the obligation and the meaning of Art. 1174, in this respect, was limited to expressing the idea that the non-pecuniary nature of the interest was not in contrast with the essentially patrimonial nature of the obligation: the latter, despite the non-pecuniary nature of the interest from which it took its cue, could count on the approval of the legal system, which did not consider it necessary to make distinctions at the level of the quality of the interest once the economic appreciability of the performance was certain. The view was that expressed by the doctrine in the sense that the satisfaction of the creditor's interest tended to coincide with the attainment of the performance (Mengoni, n.d.a.). In short, the interest is a precondition of the result.

But if the result is the attainment of the good owed by the performance, it is evident that the interest, before "objectifying itself as the legally essential function of the conduct owed, so that the realisation of the interest becomes the object (or content) of the corresponding right", is the "aim in a subjective sense" (Mengoni, 1952, p. 82) to which the creditor is directed and because of which it establishes the obligation with the debtor. It is this subjective aspect of the interest that has recently emerged as a function of the qualification of the relationship, expressing the value for the creditor of achieving the result due: how much this result counts for the creditor and, conversely, the failure to achieve it.Furthermore, the highlighting of the interest as a separate element concerning the performance and its patrimoniality brings to fruition the idea of Emilio Betti (1953) that the question of the obligation should not be exhausted in the purely structural perspective but should also take into account the "teleological consideration (no longer) rejected as a 'contamination". (p.6).

It can be said that the overcoming of the vision which identifies the obligation as a debit-credit relationship (apart from the integration which in the modern key is made by accessory obligations, transforming it into a complex relationship, according to what we have seen accepted by art. 1175 of the Civil Code) with the performance lies in the passage from the affirmation that "the notion of aim in the subjective sense is irrelevant for the construction of the obligation" (Mengoni, 1952, p. 63) to that according to which "the protected interest does not represent the content of the credit right, but rather an element of the obligatory case", ascertained by the consideration that "the interest in itself can also be an element of the obligation". (Mengoni, 1952, p. 63) to that according to which "the protected interest does not represent the content of the credit right, but rather an element of the obligatory case", ascertained by the consideration that "the interest in itself can also be of a non-pecuniary nature, while the obligation is a typically patrimonial relationship" (Mengoni, 1952, p. 82). The apparent contradiction, between the coessentiality of the interest to the idea of obligation and its possible non-pecuniary nature when the latter is essentially patrimonial, is resolved in the terms precisely suggested by art. 1174: it is the performance that is marked by patrimoniality and which alone "must be susceptible of economic evaluation".

There is therefore an 'interest in performance', which translates into a claim for performance, and an 'interest in the obligation', without which the obligation does not arise. When the creditor's interest is patrimonial, the interest in performance coincides with the interest in the obligation, and the result of the performance is no more than the attainment of the latter, which then "is entirely absorbed in what we may call the entelechy or end in itself of the obligation to perform" (Castronovo, 2018, p. 208); hence in the case of non-performance, the damage to be compensated has as its reference parameter the value of the performance. Not so in the case where the interest is nonpecuniary. Here the legalisation of the 'interest in the obligation' means that the failure to achieve the result makes this interest active, placing it as a reference term for the compensation for the service not performed or badly performed in violation of the interest for which it is intended (Zecchin, 2020). In this hypothesis, for the unsatisfied creditor, the value not achieved, what intervenes between the occurrence of the obligation and its (non-)performance, is not measured by the economic value of the non-performed service, which ends up losing its meaning, but by the original need translated into an interest in the obligation, which was finally disappointed. If, as Giorgianni (1968) states since "the interest of the aggrieved party may be non-pecuniary… it cannot be considered inherent to the function of the obligation that the interest of the aggrieved party has as its objective the economic result of the performance of the debtor" (p. 63), it is on this non-economic result that the damages are to be measured.

In these terms, if, in the negative, it is finally stated that for the non-enforcement of the non-pecuniary interest, "in the obligation, on the one hand, become complex in structure, on the other hand, characterised by the highlighting of the creditor's interest…the compensation…can no longer be a pure conversion of the value of the original object of the obligation" (Castronovo, 2018, p. 330), in the positive, it must be concluded that the compensation must be commensurate tout court with the value of the unsatisfied interest. With this, one runs into the aporia of translating into the patrimoniality of the compensation what is born as not susceptible to economic valuation. But this is the unquenchable contradiction that characterises non-asset damage.

4. THE OPENING UP OF THE SOURCES OF THE OBLIGATION (ART. 1173) AND THE OBLIGATION WITHOUT PERFORMANCE

We come to the last of the rules constituting the fundamental discipline of the general part of obligations, the first in the logical order followed by the legislature of 1942: Art. 1173, devoted to the sources of obligations. This may appear to be a purely classificatory rule, not capable of adding anything to our knowledge of the law of obligations. In reality, as has been well pointed out in doctrine, compared to the corresponding article (1097) of the 1865 code, art. 1173 of the Civil Code, through the formula "any other act or fact capable of producing them in conformity with the legal system", "clearly intended not to recall the other sources other than contracts and torts, but to reserve to the 'legal system'... the judgement of the suitability of each act or fact for the production of obligations... Hence the entirely elastic character of the list in article 1173" (Giorgianni, 1988, p. 590). From this elastic character an important implication has been drawn: that "it belongs to the general theory... the problem of establishing which acts or facts... in addition to those indicated in Art. 1173 or expressly regulated... are capable of generating obligations" (Giorgianni, 1988, p. 593).

Positive law has therefore opened a window of the method, authorising interpreters to identify the normative coordinates from which to derive the morphological elements of material facts to be considered suitable as sources of obligation. The rule contained in Art. 1337 of the Civil Code, which governs pre-contractual liability, has proved particularly fruitful in this respect. By stating that "the parties, in the course of negotiations and the formation of the contract, must behave in good faith" (Marsden and Siedel, 2017), this rule has positively established that obligations of conduct are imposed on the parties before an "obligation arises as an elementary relationship, limited to the performance due by the debtor and to which the creditor is entitled" (Mengoni, n.d.b., p. 284). In the beginning of the negotiation, Art. 1337 of the Civil Code positively entrenches that figure which in German doctrine has been called Schuldverhältnis ohne primäre Leistungspflicht (Larenz, 1987) in which the absence by definition of the obligation to perform, which does not yet exist nor is it possible to say whether it will come into existence, does not prevent good faith from giving rise to an obligatory relationship, which is such although lacking the obligation to perform.

Analysing this obligatory relationship without performance, what is highlighted on the factual level is that the law has established the obligation to behave in good faith, which is articulated in the obligations to protect the legal sphere of the other party, based on the reliance of each party on the other, considered plausible as an attitude at the negotiation stage. The question, which space opened up by Art. 1173 on any other act or fact capable of producing an obligation following the legal system, induces the doctrine to ask itself is whether other situations arise, characterised by similar reliance between the parties, and whether, in the presence of the latter, they should not be considered to be governed by rules similar to those of the pre-contractual negotiations, thus giving rise to another kind of 'obligation without performance'. In this case, this category, envisaged as a dogmatic qualification of the case 'pre-contractual negotiations', becomes a genus to which they belong, constituting not so much the original, but no longer the exclusive, model. On closer inspection, pre-contractual negotiations are qualified not so much by being oriented towards the conclusion of a contract, but rather by the establishment of a social contact-oriented towards that end, from which arises an expectation on the part of each party, i.e. mutual trust that in the first place that contact will not be exploited to the detriment of the other. Social life presents us with a possible series of hypotheses in which, as in negotiations, subjects meet with a view to a goal to be pursued even though such a result does not involve the establishment of a relationship with an obligation to perform and a corresponding right to claim. A contractual agreement is a contractual agreement between a party and a third party that is not a contractual agreement and that is not a contractual agreement. It is precisely this that has been theorised in Italian doctrine since the 1990s, hypothesising an arc between other figures of social contact that have come to the fore in the meantime and the formal model of the obligatory relationship without primary obligation to perform developed in German doctrine as the legal form of the so-called culpa in contrahendo.

The original case of the latter, as Jhering discovered it, is governed by Art. 1338 of the Civil Code, and contemplates the liability of the contracting party “who, knowing or having to know...a cause of invalidity of the contract, has not given notice thereof to the other party”. Pre-contractual liability thus arises as a consequence of the violation of an obligation to inform (Castronovo, 2010). The doctrinal elaboration following Jhering highlighted those negotiations giving rise to the obligatory relationship before the obligation to perform arises, under good faith which, based on the trust placed between the parties at the start of negotiations, is articulated in a series of obligations, aimed at mutually protecting the legal sphere of the parties, of which that of information is only one type. The intuition of this pre-contractual obligatory relationship gave reason to Jhering’s idea of attributing a contractual nature to pre-contractual liability, overcoming the apparent contradiction precisely by recognising that an obligatory relationship can exist without the obligation to perform is a constituent element.

From this starting point, a plausible line of evolution was oriented by the question of whether, even outside a precontractual negotiation, erroneous information that is a source of damage for the person who has requested and obtained it, can be a source of analogous liability, i.e. of a liability ex contractu such as that arising from the violation of good faith during negotiations. The request for information is an attempt to establish social contact with someone who is not obliged to provide it, a contact that is made when the request is satisfied.

This seemed to the writer to be the case in which to recognise at the same time that purpose-oriented social contact highlighted in German doctrine as the source of an obligatory relationship even though without an obligation to perform (Dölle, 1943) and the assimilation of it to pre-contractual negotiations, already considered the source of a Schuldverhältnis ohne primäre Leistungspflicht. In this context, the asymmetry of information between the party requesting the information and the party receiving it also highlights the suitability of the professional status of the party providing the information as a specific source of reliance. This aspect comes to the fore in cases where the information is provided in fulfilment of a professional assignment but is then used by third parties who, precisely based on the professional status of its author, have reason to rely on it. This is why professional status as a source of reliance is no longer relevant only within the limits of untruthful information, but more generally concerning conduct that proves harmful, as a result of the breach of a duty of protection, for a person who is not a creditor of a service.

The most eminent concrete case in which in Italy first the doctrine (Castronovo, 1995) and then jurisprudence (Court of Cassation, 22 January 1999, no. 589) have applied the model of the obligation without performance to liability based on a social contact qualified by the professional status of the liable party is that of the health care professional within a structure to which the patient has asked to be treated. In this case, the professional subject is not a debtor vis-à-vis the patient but treats the patient, with whom the undeniable social contact is characterised by the trust engendered by the professional status of the practitioner. This is reflected like liability in the event of an eventus adversus that is attributable to the practitioner: the trust founded on the status that qualifies the social contact has given rise to obligations of good faith oriented towards protecting the person who submits to the intrusion of his legal sphere with a view to treatment; and liability, being qualified by the violation of these obligations, acquires a contractual nature.

Although it is a coherent development of the idea that an obligatory relationship may also exist without an obligation to perform, as is undoubtedly the case in pre-contractual negotiations, and that such an eventuality arises when, as a result of an expectation generated between the parties, good faith gives rise to obligations of protection whose breach, precisely because it relates to an obligatory relationship, gives rise to contractual liability, the idea that a purpose-oriented social contact may give rise to an obligatory relationship without an obligation to perform even if the purpose is not the conclusion of a contract is hostile to the German doctrine, which considers that it must be circumscribed to the conclusion of a contract, the idea that a purpose-oriented social contact can give rise to an obligatory relationship without an obligation to perform, even if the purpose is not the conclusion of a contract, is hostile to German doctrine, which considers that Schuldverhältnis ohne primäre Leistungspflicht must be confined to the original form of pre-contractual negotiations. The consequence of this, however, is hypertrophy of culpa in contrahendo, to which hypotheses of liability are attributed that are extraneous to the c.i.c. since they cannot be described in terms of a precontractual negotiation. To avoid such straining, the author theorised the obligation without a performance as a genus that does not end with pre-contractual negotiations and of which the latter is to be considered the first species. Secondly, following the reform of the German law of obligations, § 311 BGB, after having in Absch. 2, after having provided in various ways that an obligatory relationship may be created by having as its content only obligations of protection in pre-contractual negotiations and situations similarly oriented towards negotiation, in Absch. 3, it admits that such obligations may also arise concerning persons "die nicht selbst Vertragspartei werden sollen", i.e. between persons who in a proper and textual sense cannot be considered parties to a pre-contractual negotiation.

In the case of an obligation without performance, it is necessary to take into account the fact that the obligation is not governed by art. 1337 of the Civil Code, but rather by its own reference rule. The first thought runs precisely to Art. 1337, since it is undeniable that pre-contractual negotiations have constituted the model on which the obligation without performance has been modelled. The idea is theoretically plausible but historically inappropriate. We have seen how the German experience, insisting on the precedent of precontractual negotiations, has come to hypothesize, within § 311 BGB, similar contractual and finally similar negotiation figures, thus remaining a prisoner of the original model. For this reason, the solution we hypothesized runs directly to art. 1173 of the Civil Code. (Albanese, 2014), whose calibration we tested at the outset in the light of the doctrine which has concluded that the sources of the obligation are now atypical. Moreover, in particular, it is appropriate to recall what we referred to earlier: that it belongs to the general theory... the problem of establishing which acts or facts... in addition to those indicated in article 1173 or expressly regulated... are capable of generating obligations. The arguments put forward in favour of the development of the obligation without performance may be considered to asseverate the latter as a new figure of obligation. The arguments put forward in favour of the development of the non-performing obligation can be considered to asseverate the latter as a new form of obligation. If the obligation comes into existence even without the obligation to perform, and, as art. 1337 clearly shows, it is already as such in conformity with the legal system, the non-performing obligation, which generalises the features of the c.i.c., reveals itself to be the adequate result of a fact capable of generating obligation. In these terms, moreover, although it has met with criticism and misunderstanding, it is accredited in doctrine and jurisprudence.

But it is a positive law itself that points in this direction, and it is a series of rules on mandates, contained in Art. 1718 of the Civil Code, relating to the duty of safekeeping of the agent concerning the things sent to him on behalf of the principal, other instrumental duties and a duty to notify the principal. (1) of the Civil Code, relating to the agent's obligation of safekeeping concerning things sent to it on behalf of the principal, other instrumental obligations and an obligation to give notice to the principal. In our view, the last paragraph is of relevance, which provides that "the provisions of this article apply even if the agent does not accept the assignment given to it by the principal, provided that the assignment is part of the agent's professional activity". The case in point is certainly extraneous to pre-contractual negotiations since the principal can unilaterally decide on the assignment to the agent; secondly, the so-called accessory obligations are incumbent on the agent who does not intend to accept the assignment, when the latter falls "within the professional activity of the agent". Thus, the purpose-driven social contact and the professional status of the person whom the law burdens with the obligations in question are intertwined. And it is confirmation in positive law that even outside pre-contractual negotiations an obligatory relationship may arise in the absence of an obligation to perform

5. OVERCOMING THE DISTINCTION BETWEEN OBLIGATIONS OF 'RESULT' AND OBLIGATIONS OF 'MEANS

After the preliminary provisions contained in Arts. 1173, 1174 and 1175, the more general rules on obligations, as mentioned at the outset, are contained in Art. 1176(1) and Art. 1218, which open Chapters II and III of Tit. I of the Code of Obligations devoted respectively to performance and non-performance. They are to be read in the functional sense resulting from the systematic placement assigned to them by the legislature. The first constitutes the general directive given to the obligor for performance, while the second, and it alone, is the rule about non-performance from the point of view of the liability arising therefrom. This means that diligence contributes to the accuracy of performance but does not exhaust it, so that proof of diligence is not sufficient to exonerate the obligor from non-performance and consequent liability, the criteria for which are contained exclusively in Art. 1218. Furthermore, it has been stated in legal literature that "not so much the performance of the service as the preservation of the possibility of performance is the main function of diligence, from a technical legal point of view" (Mengoni, 2011, p. 164), i.e. according to Art. 1218, which states that the debtor is exonerated from liability only if he proves "the impossibility of performance resulting from causes not attributable to him".

This unitary reading of the rules on liability for nonperformance, which is confirmed by the heading of Art. 1218, which proclaims this rule as exclusive of the debtor's liability, excludes that in turn the rule of Art. 1176(1) can be invoked as a criterion of liability. Just as the diligence imposed on the debtor is not decisive in establishing performance, fault as lack of diligence is not decisive in establishing non-performance and the related liability. The uniqueness of the rule governing nonperformance means that the distinction between obligations of result and obligations of means is unacceptable if, as is normally the case, it is intended to be linked to a different liability regime (Mazzamuto, 2014). If the limit of the obligation is an impossibility, liability is also limited by impossibility, so that only when this occurs will the debtor be released, provided that he proves that the impossibility is due to a cause not attributable to him, (Bashkatov and Nadmitov, 2018) i.e., first and foremost, not due to fault. Thus diligence comes into play not as a criterion for attributing liability but as a criterion for excluding liability mediated by impossibility. In the middle of the last century, Luigi Mengoni (2011) spoke out against the idea of a different liability regime for the debtor depending on whether the obligation is one of result or means. In the middle of the last century, Luigi Mengoni (2011) stated that every obligation is an obligation to achieve a result and that in obligations of diligence or of means, negligence does not amount to fault as a criterion for attributing liability, but constitutes in itself that non-performance to which Art. 1218 reconciles liability, subject to proof of impossibility due to causes not attributable to the debtor.

Jurisprudence has also come to this conclusion fifty years later (Cass, sez. un. 28 July 2005, no. 15781, 2006; Cass, sez. un. 11 January 2008, no. 577, 2008). On the one hand recomposing the unity of the obligatory relationship, of which the unity of the discipline of liability is a corollary, and on the other avoiding the undue assimilation of liability in so-called obligations of means to non-contractual liability. Believing that the debtor's liability is based on fault and placing the burden of proof of the latter on the creditor means reproducing the model of liability in tort, neutralising the vinculum iuris under which the debtor is not merely required, as in tort, to avoid damaging the legal sphere of others, but is obliged to conduct himself to achieve a result in the creditor's interest (Mazzamuto, 2014).

This unbridgeable gap between the wrongful act and non-fulfilment, between aquiline liability and contractual liability, has been blurred by several recent decisions by the Supreme Court (Court of Cassation, 26 July 2017, no. 18392; Court of Cassation, 11 November 2019, no. 28991).), which in the field of medical liability has re-established, in terms of evidence, partial assimilation of the latter to aquilian liability, requiring the patient to prove the causal link between the professional's conduct and the damage suffered, rather than guilt in terms of inexperience. Although it cannot be concluded that in these terms the Supreme Court has resurrected the outdated distinction between obligations of means and obligations of result, by imposing the burden of proof on the plaintiff regarding the causal link it ends up projecting the model of aquilian liability onto contractual liability, whereas the single discipline of liability contained in article 1218 of the Civil Code does not assign to certain types of obligations a rule different from the latter and comparable to that of noncontractual liability.

It is possible that the Court of Cassation's unintended contamination of contractual liability with liability for tortious acts was prompted by the recent regulations contained in law no. 189 of 8 November 2012, and subsequently in law no. 24 of 8 March 2017, which, in article 7, paragraph 3, states that "the healthcare professional ...is liable for his actions according to article 2043 ...unless he acted in the performance of a contractual obligation undertaken with the patient". However, the above-mentioned decisions concerned allegedly contractual ground, where, as we have just said, the different structure of the obligatio and consequent liability on the one hand, and of the illicit act on the other, does not allow contractual liability to be assimilated to aquilan liability.

6. LEGISLATIVE INNOVATIONS AND RELATIVISATION OF THE SO-CALLED PATRIMONIAL LIABILITY

A fundamental principle of the law of obligations in the Roman tradition is the invalidity, for the debtor in pecuniary obligations, of the limit of supervening impossibility as a cause of exclusion of liability, in deference to the principle genus numquam perit (Petoft, 2020). Indeed, the liberating impossibility does not coincide with the extinction of the genus to which the object of the obligation belongs (Mengoni, n.d.c.), but concerning monetary obligations the aphorism has always meant that the debtor cannot rely on his financial impotence as a ground for inexcusability of performance. This rule for pecuniary obligations, implicit in the requirement of unattributable impossibility as the sole cause of exclusion of liability (except for contractual clauses admissible under Article 1229 of the Civil Code), appeared to have been superseded following Law no. 3 of 27 January 2012, the contents of which in this respect were subsequently absorbed within Legislative Decree no. 14 of 12 January 2019, the so-called Code of Corporate Crisis and Insolvency. These rules provide that an 'over-indebted debtor, i.e. in a state of definitive inability to meet its obligations, may, according to various procedures, offer its assets, which are in theory insufficient to fully satisfy creditors, in exchange for its 'exdebitation'. This is achieved through a declaration by the court, which, at the same time as pronouncing the decree closing the proceedings, "declares unsatisfied bankruptcy debts unenforceable against the debtor" (art. 281 l. no. 14/2019, and already art. 14- terdecies l. no. 3/2012), without prejudice to the obligation to pay the debt within four years of the judge's decree where significant benefits arise that allow the satisfaction of creditors to an extent of not less than ten per cent" (art. 283, para. 1). The terminology adopted by the legislator and in particular the qualification of 'uncollectible' referred to the pecuniary obligations that remain unsatisfied after the exdebitration procedure may have led to the belief that through the latter an extraordinary hypothesis of uncollectibility of the performance occurs, an uncollectibility equivalent quoad effectum to the impossibility provided for by article 1218 of the Civil Code in the light of the directive of correctness under article 1175 of the Civil Code. (Mengoni, 2011). In these terms, precisely concerning those pecuniary obligations of which we have just seen that the bromcardo genus numquam perire censetur excludes even the prospect of the extinction impossibility of the obligation, there would have been a systematic crack in the design of contractual liability contained in the civil code, and consequently in that of the obligation itself. In reality, as the very 'insolvency' logic adopted by the law seems to suggest, we find ourselves here beyond the obligation as a right of the creditor and obligation of the debtor referring to conduct called performance as well as to the relative liability resulting from the attributable non-performance. The discipline in question does not deter non-performance from its imputability, but goes directly to the asset guarantee, adapting it to the concrete reality of the debtor's assets, concerning his incapacity or overindebtedness (Di Majo, 2013): the latter is, in fact, "the situation of persistent imbalance between the obligations assumed and the assets that can be readily liquidated" (art. 6 l. no. 3/2012), and it is concerning this imbalance - not to a conflict of the creditor's interest "with an interest of the debtor to which...a judgement of pre-eminent value is inherent" (Mengoni, n.d.d., p. 333) - that the law reconfigures the credit according to the debtor's actual assets. It is the other logic, that of the patrimonial guarantee, which, as we said at the beginning, takes over from that of the obligation when the latter has not been able to make the creditor achieve the result due.

CONCLUSIONS

What has just been said shows, by way of example, that Italian law of obligations can no longer be reduced within the confines of the civil code as conceived by the legislator of 1942. It is, in particular, the normative solicitations coming from Europe, especially those concerned with consumer protection, that has both enriched its contents and undermined its design. This has affected all the European Union legal systems, which are linked by a common destiny to the regulatory framework that the latter has established with a view to a uniform law that now overcomes national barriers. Along this line of tendency, also the European codification projects, although so far unrealised, have in turn exerted a drive to reshape the positive law of obligations, as happened first in Germany in 2002 and then in France in 2016. This is also the reason for the most recent initiative of the Italian government, which is rather general in content, to undertake a reform of the civil code, also concerning the matter at hand. It is not without significance, however, that the Italian civil code, being more modern than both the Code civil and the BGB, is more adequate than the former from a systematic point of view and than the latter also in terms of content. As regards the first aspect, it is sufficient to think that the obligation has a discipline separate from each of its sources, avoiding, in particular, the drowning in the modes of acquisition of property which characterised the Code civil; and as regards the second, the discipline of non-performance, which is much more linear, in particular concerning the basis of liability, and complete to avoid the lacuna of the positiven Vertragsverletzungen which doctrine and jurisprudence had to remedy.

This greater modernity of the Italian code has provided a more favourable basis for the developments of jurisprudential law (doctrine and iurisdictio) that we have referred to in the preceding pages. Thus, the clarification of the non-pecuniary nature of the interest in the case of the obligation has allowed the evolution of contractual non-pecuniary damage, in more advanced terms than those reached by the German reform of the law of obligations with the new section 253, still restricted by the limitation to cases determined by law, which in Italy remains circumscribed to the liability of third parties (art. 2059 Civil Code) but exclusively concerning moral damage. And the discipline of pre-contractual liability contained in art. 1337, with the obligation of good faith placed to preside over the negotiation phase, has finally revealed the positive foundation of the contractual nature of pre-contractual liability, as well as having made the latter more certain as a positive figure of liability straddling the law of obligations and that of contracts. At the same time, the opening of the sources of obligations has made it possible to derive, from the very discipline of pre-contractual liability, the idea of a purpose-oriented social contact as a general figure capable of reshaping the boundary line between contractual liability and civil liability.

The point of intersection between written law and the law of jurisprudence and doctrine, the point beyond which the former, through interpretation and application, flows back into the latter, has thus moved forward for the discipline laid down by the civil code. At this point, the question arises whether the time has not come for a new positive model to be recast in the Civil Code to take up the threads of the interpretative work carried out in the meantime. It is not easy to establish whether the time for a recodification of the Italian Law of Obligations is now: reworking a code requires a magical time in which a series of a priori imponderable factors must converge. The very idea of codification is the fruit of 'myths and destinies' born of time. Today, to some it seems necessary to recode, while not more than a few decades ago others claimed that the time for codification was over, and even today others still consider the codes an error of history from which we contemporaries should miraculously free ourselves

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Reflections on principlism and Neoconstitutionalism. The so-called constitutionalisation of rights

Reflexiones sobre el principalísimo y el Neoconstitucionalismo La llamada constitucionalizacion de los derechos

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ABSTRACT: This analysis article describes the process of constitutionalization of law and argues around how neoconstitutionalism ends up appropriating the technique of general principles (sometimes deforming its meaning), whatever the philosophical sign of its cultivators (inclusive or exclusive positivists). The article states that it has occurred and continues to occur within inclusive positivism and analytical jurisprudence.

KEYWORDS: jurisprudence, legal system, general principles, public law.

RESUMEN: Este artículo describe el proceso de constitucionalización del derecho y argumenta en torno a cómo el neoconstitucionalismo termina apropiándose de la técnica de los principios generales (deformando en ocasiones su sentido), cualquiera sea el signo filosófico de sus cultores (positivistas incluyentes o excluyentes). Se asevera que a grandes rasgos esto ha ocurrido y continúa ocurriendo en el seno del positivismo incluyente y en el de la jurisprudencia analítica.

PALABRAS CLAVE: filosofía jurídica, sistema jurídico, principios generales, derecho público.

JEL CODE: K, K0

INTRODUCTION

The history of law does not only fulfil the function of explaining and unravelling the past of institutions. Its functions are multiple and almost all of them have the effect of raising the culture of jurists and professionals who practise law or cultivate the law, giving greater rigour to the legal language they use in their respective professions.

If we consider that law, conceived as the set of prescriptions that govern a given system, is a social product and, therefore, dynamic and adaptable to a given reality, its epistemology needs to accommodate its philosophical dimension, since, to grasp and understand the essence and meaning of the present, it is always necessary to know the past.

The Enlightenment and the methods imposed by the encyclopaedic movement overlooked, for some time, the knowledge of the origins or sources of law and the history of the philosophy that nourishes it, pretending to enclose it, once and for all, in Codes that were supposed to represent the triumph of rationalism based on an immanent philosophy that closed access to the principles of natural law, even though it must be recognised that the positive consecration of many of those principles contributed to the realisation of justice in human relations.

In turn, German romanticism, which emerged as a reaction to enlightenment rationalism, generated an authoritarian political ideology based on the exacerbation of national sentiments, sowing the seed that germinated with the unleashing of barbarism and generalised violence, through Nazism and fascism, whose actions were based on Carl Schmitt's decisionist doctrine, which can be summarised as the rule of force and the will of the ruler (the leader) over reason and contempt for the enemy. In parallel, and with a common philosophical kinship (Hegel and Nietzsche), this totalitarianism ended up confronting another international and more complex sign such as communism, whose modern construction is a mixture of the ideas inherited from Marx, Engels, Lenin and Gramsci (Camus, 1953). Then, Camus makes a profound critique of the philosophical roots of communism (state terrorism and rational terror), although without analysing the thought of Gramsci who, at that time, had not acquired the influence he had on the development of post-Marxism and the theories of so-called 21st-century socialism. Curiously, the philosophers and philosophical thinkers of the left have not taken much trouble to refute Camus who (arguing that authentic rebellion is not immanent but in line with human transcendence) makes a profound critique of Hegel's idealist philosophy and nihilist conception, showing his adversity to violence and adherence to man's freedom insofar as it favours human dignity.

This historical-philosophical context WAS followed by the development of the conception of legal positivism, whose continental European and Anglo-Saxon strands recognise different philosophical doctrines which, nevertheless, do not become opposites (mainly Kant for the former and Hobbes, Bentham and Austin for the latter) (Vega, 2018). The loss of validity of Kelsenian positivism (to which our compatriot Mario Bunge, a notable philosopher, attributed a severe responsibility in the theoretical foundation of the Hitlerist regime) has contributed to the fact that a good part of modern positivism's followers has reconverted, taking refuge in the Hartian conception of analytical jurisprudence, a kind of inclusive positivism, which, although differing from iusnaturalism, exhibits common aspects, in that it does not disdain the practical aim that should guide the science of law, recognising that, in short, "it is practical in the fullest sense if it is about and directed towards what is good to do, to have, to obtain and to be..." , (Finnis, 1993).

The basic thesis of positivism considers the positive norm as the centre of law and the legal system, considering that any norm emanating from the predetermined state procedure is valid regardless of whether it is just or unjust, moral or immoral. Such a conception holds that the values of justice are subjective and irrational and even metaphysical, that a theory of law must be pure and limited to positivised material and, consequently, that morality must be separated from law. As Bobbio (1958) has put it very well, legal positivism is a doctrine "which reduces justice to validity" (p. 30), to which should be added a strict separation between morality and law.

In contrast, the conceptions of iusnaturalism revolve around what is just and morally good for individuals and the common good, conceiving law (by which we mean just) as the object of justice. Strictly speaking, pure legal positivism (much later than the iusnaturalist thought of Aristotle and St Thomas) held exactly the opposite: that justice consists in the formal validity of a law or, in other words, that the object of justice is not real law (what is just) but its formal validity, accusing classical iusnaturalism of introducing metaphysical or religious elements into the theory of law, whose purity it claimed to be an irrefutable dogma. Moreover, based on Hume's naturalistic fallacy, positivists went so far as to say that, if nature was the order of being, it was false to argue that normative prescriptions (the moral order or ought to be) could be derived from human nature.

What is certain is that, as has been demonstrated in recent years, the naturalistic fallacy did not exist in iusnaturalist thought as argued by Finnis, quoted by Massini Correas (2018), who, on this point, agrees with his critics since he never came to hold that normative prescriptions derive directly from being (human nature) but that normative knowledge of natural law, far from deriving from prior knowledge of human nature, "starts from first principles known by evidence and which are rationally developed - with practical reason - either through conclusive inferences or through the circumstantial determination of what in the principles is indeterminate".

In this scenario, in which the most varied currents of positivism (both inclusive and exclusive) and classical iusnaturalism compete, without analysing other conceptions that are inapplicable in continental European or Latin American systems, such as North American realism or some that have lost doctrinal relevance such as structuralism (Suñé Linas, 2006), a trend has developed which, without actually configuring a conception of legal philosophy, assigns prevalence to the general principles of law over norms.

This trend has had a great reception in modern constitutional law, given that a good portion of these principles was incorporated in the positive constitutional texts sanctioned from the 19th century onwards and the fact that, subsequently, they were regulated in the Constitutional Charters in the Second World War together with a plethora of international treaties.

However, although this fact is not recognised by other disciplines, the fact remains that administrative law was built based on the prevalence of the general principles of law over the rules from its very origins (Laferriére) until, finally, the French Council of State recognised their primacy (Coviello, 2020), giving rise to one of the greatest changes in the understanding and operability of the general principles of public law, This was initially highlighted in France by Jean Rivero (1951) and Jeanneau Benoit (1954), in one of the pioneering works on the subject, by describing and founding a jurisprudence that was later projected to European administrative law and, finally, although without recognising this origin, to constitutional law, whose doctrine fell into the error of considering that the birth certificate of the constitutionalisation process was to be found in the positive texts of the European Constitutions sanctioned at the end of the last global conflagration. In this way, the fundamental theories formulated in French law (Hauriou, 1927) and the jurisprudence of its Council of State were ignored, which, implicitly or expressly, ended up enrolling in iusnaturalism, as did many of the German authors of the previous century (Otto Mayer), in which adherence to the truths of natural law can be seen (García de Enterría, 1984).

A clear and resolute position on the transcendence of the general principles of law in the configuration of modern administrative law can be seen throughout the work of García de Enterría (1984), who, at the end of his first research on the subject, could not suppress his astonishment that in France, the homeland of legalism, an administrative law had been built in which principles prevail over written laws, in a system where "the idea of general principles has only gained ground" (p.44-45).

However, contrary to what positivists maintain, principlism has not come to supplant positive legality but to reinforce its validity in a rational-moral dimension of justice that coexists with the factual or formal dimension coming from the authority of the social sources of law (Massini Correas, 2018).

It is precisely in this dimension of rational-normative validity that the general principles of law "discovered and functionalised by jurists" and "collected and developed by jurisprudence or in legislation" (García de Enterría, 1948, p. 43) are housed.

In this scenario, before describing the process of constitutionalisation of law and seeing how neo-constitutionalism ends up appropriating the technique of general principles (sometimes deforming its meaning), regardless of the philosophical sign of its proponents (inclusive or exclusive positivists), let us see, broadly speaking, what has happened and continues to happen in the heart of inclusive positivism and analytical jurisprudence (Acosta, 2016).

While the number of philosophical conceptions increased exponentially, making it difficult to understand legal science and the methods that guide the interpretation and application of the law, there was an abandonment of the premises of legalistic positivism by prominent legal philosophers who have been described as inclusive positivists or iusmoralists (Dworkin, Alexy and Nino).

The fact of being blessed with the qualification of iusnaturalists (brilliant paradoxical rhetoric), developed by no less brilliant philosophical pen than García Amado (2015), implies that all those who illuminate the moral dimension of law and do not admit a sharp conceptual separation between morality and law are iusnaturalists. Moreover, to the disgrace of pure positivists (a strange purity that leads them to be blind to avoid seeing what is happening in reality), a professor from Oxford University (John Finnis), trained in Hart's analytical school, has burst onto the philosophical scene, of Protestant origin, after converting to Catholicism, he adhered to Aristotelian-Thomistic iusnaturalism, within the analytical model, making this conception more comprehensible to Anglo-Saxon thinkers (Massini Correas, 2018).

Finnis' iusnaturalist approach breaks the conceptual separation between morality and law but does not fail to attribute to positive law, emanating from factual and social sources, a weighty hierarchy insofar as there are no situations likely to seriously and extremely affect justice as shaped by the general principles of law, conceived according to an Aristotelian Thomistic vision that attributes a central role to the law produced by the authority of formal sources. These are not limited to the law, where judges play a creative role in the case of legal gaps or having to interpret ambiguous concepts that characterise natural language (which lacks the precision possessed by the exact sciences).

Other significant points that exhibit dissent with certain sectors of legal positivism and even iusnaturalism lie in 1) the dogma of the plenitude of the positive legal order and that positive law regulates its creation; 2) the conceptual meaning of the law, justice and the function of analogy; 3) the distinction between norms and principles and their status in both cases as binding rules; 4) whether the source of a principle can be extra-legal or constitutional and the principle is therefore not positivised; 5) the question of ought-to-be in the legal system; 6) the binding or merely optimal character of a principle; and, the methods of interpretation and,7) the theory of argumentation and rational justification of judicial and administrative decisions (Vigo, 2015).

We have dealt with some of them in our previous works, but their analysis would require a more extensive work that we are unable to address in this article, in which, nevertheless, it seemed important to us to set out the general lines of the speculative scenario.

1.PRINCIPLISM, THE CONSTITUTIONAL RULE OF LAW AND THE VARIOUS NEO-CONSTITUTIONALISM

Principlism can be understood as the speculative tendency that assigns predominance to principles over norms, considering that both categories constitute binding legal rules and sources of law. It is debated whether the authoritative character constitutes, in principle, one of the characteristic features of the Constitutional Rule of Law, as Ferreyra (2019) points out insofar as "in the Constitutional State every right of the State must be genuinely authorised by the fundamental positive norm of its coercive order" (p.344); but, in any case, it must always be a State of limited and limited powers, in which its organs (also called powers) act with reciprocal independence and harmony, subject to the principle of legality (whose maximum expression is the block of constitutionality), to the principles of justice (that is, to the law and the law) and to the jurisdictional control of constitutionality. The State's way of being is best combined with the rational, evaluative and critical element (Massini Correas, 2014), without relegating the role of positive law as long as it does not degenerate into injustice or immorality.

In trying to unravel the phenomenon of neo-constitutionalism, things get complicated for several reasons. We will now explain the fundamental ones:

Firstly, there is the inertia involved in admitting changes, especially when these changes are being developed after the extraordinary dogmatic development carried out by the great constitutionalists who built the edifice of the Rule of Law, especially when the changes are in the process of being implemented (Muñoz Machado, 2006). A second reason concerns the different sources of knowledge on which the doctrinal positions are based, the focal criteria of which vary according to the orientation of the philosophy of law, on the one hand, and constitutional dogmatics, on the other. In turn, within each position, different conceptions and classificatory criteria are developed.

On the other hand, the transition from the historical conception of the Rule of Law to the Constitutional Rule of Law has been an evolutionary process in which, as German doctrine has warned, a series of geological layers have been superimposed, which do not supplant the original principles of the classical Rule of Law. They give them content adapted to the new political, economic and social realities, always maintaining the objectives of protecting individual and collective freedoms (Aragón Reyes, 2013) and security (Isensee, 2020) as the fundamental aims of the state legal framework.

In this scenario, two kinds of neo-constitutionalism have emerged, among others, both considered as trends or movements, characterised by the diversity of the points of view they postulate (Cardenas, 2019). However, it is also true that only one of them represents the true constitutional rule of law. In turn, other criteria have also been put forward to classify neo-constitutionalism, depending on whether the central criterion used is formulated based on whether or not it is ascribed to legalistic positivism (Vigo, 2015) or whether the classification is made from the perspective of constitutional dogmatics.

In our opinion, and opting for the path opened up by constitutional dogmatics, it is possible to recognise a systematisation that exhibits two main types of neo-constitutionalism, although only one is compatible with constitutional law rooted in democracy.

The first is what is known as the Constitutional Rule of Law and is nothing other than the regulation of democracy by the Constitution, the main lines of which remain unchanged: the Constitution as a way of limiting power for the benefit of the freedom of citizens, of the equality of all in that freedom (Sumar and Zúñiga, 2021). Even when this new constitutionalism strengthens and increases the power of the judges in the control of constitutionality, this circumstance does not authorise them to go beyond the Constitution or to become legislators or administrators of public affairs, since the principle of separation of powers, correctly interpreted, does not admit such excesses or deviations of power. The empowerment of the judicial function is a product of the principalist conception of law, since, as the principles are binding mandates lacking in factual assumptions and the precision that characterises the rules, judges acquire a greater interpretative role, provided that they do not exceed the constitutional limits represented by the principle of separation of powers.

The second of this neo-constitutionalism necessarily leads to a deformation of the Constitution, in both a formal and a material sense, in that it

> (...) makes power prevail over control, the unity of state action over the division of powers, the "political" understanding of democracy over its "legal" understanding, direct "plebiscitary" democracy over indirect representative democracy, political will over laws, and, in short, the decisional state over the rule of law (Aragón Reyes, 2013, p.6).

It is, therefore, false constitutionalism or "anti-constitutionalism", which has little to do with authentic constitutionalism, the risks of which have been highlighted by authoritative doctrine (Vigo, 2015).

Certainly, regardless of European or American origin, in the field of constitutionalists and legal philosophers in favour of the distinction, who adhere to the true conception of the constitutional rule of law, there are both the so-called inclusive positivists (who admit morality as an ingredient of law) and the iusnaturalists (whether classical or the modern ones of the New School of Natural Law)[1].

The relevant aspect that should be emphasised, as a central condition of the constitutional rule of law, is the principle of supremacy stemming from the model of the rule of law adopted by the Constitution of the United States of America. This principle, adopted in the constitutions of the entire American continent, was later transferred to continental European law, making a decisive contribution to the abandonment of legiscentrism, i.e. the historical conception of law based, among other things, on the omnipotence of the legislator. For this reason, when we speak of the transition from the rule of legal law to the rule of constitutional law, we must bear in mind that, at the beginning of comparative constitutional law, two different conceptions coexisted and that, in America, constitutional supremacy never ceased to rule, despite the tendency to consider that certain constitutional precepts and the principles set out in the constitutional preambles were of a programmatic and non-operational nature (Robalinho, 2019).

However, since the end of the Second World War, the Constitutions sanctioned in Europe, as well as doctrine and jurisprudence, expressly or implicitly recognised the supreme nature of the Constitution and, consequently, the operative nature (sometimes with derived operability and limited to

1 The name was given to the legal-philosophical movement of modern legal-naturalism, led by John Finnis.

the financial possibilities of the States) of its principles and rights, which ended up unifying the comparative systems of the countries of America and the European continent, with the Constitution becoming the “supreme rule” (Ferreyra, 2019).

2. THE CONSTITUTIONALISATION OF THE LEGAL SYSTEM

The expression “constitutionalisation of the legal system” does not seem to allude to anything new. Furthermore, the supremacy of the Constitution over the rest of the public or private legal system has always been upheld in the field of constitutional dogmatics. However, there is nothing to oppose its modern use either. At least in classical Argentine administrative law (Marienhoff, 1990), the majority of the doctrine always taught that the heading of the chapters of administrative law was to be found in the Constitution, following the thinking put forward by Alberdi, when he spread Pellegrino Rossi’s well-known phrase.

In this way, the enshrinement of the constitutional rule of law has generated a series of effects that are projected onto the judicial control of constitutionality, among which the following stand out:

1. The effectiveness assumed by the supremacy of the Constitution, whose norms, principles and rights are no longer considered programmatic but operational, or at least with derived operativity;

2. The emergence of general principles which, according to much of the doctrine, take precedence over laws, informing, at the very least, the legal system;

3. The strengthening of the role of the judge in the application of these general principles, as a result of the fact that they must apply binding mandates lacking in factual assumptions and legal consequences, given that, although judges are not empowered to replace the law nor must they become legislators, they are

obliged to rule in cases of normative deficiencies or gaps, using the technique of analogy and not subsumption (in the absence of a specific rule to resolve the issue).

This does not imply an objection to the civil legislator when, for example, it increases the insertion in the CCCN of the general principle of good faith, to the extent that the interpretative task of the judges is carried out following the constitutional principle of reasonableness which, as a matter of principle, excludes all arbitrariness or interpretative abuse.

Then, in some cases, judges need to apply general principles to resolve normative shortcomings, through the technique of weighting, replacing the subsumption to which the positivist technique forced them to resort, a sort of dead end.

CONCLUSIONS

The law is not a static reality but a dynamic reality that can be adapted to historical, social and economic circumstances, but this does not justify altering the essence of the aims, rules and principles of the Constitution. In this scenario, the Constitutional Rule of Law constitutes a legitimate and positive brake on the so-called false neo-constitutionalism, which replaces the will of the constituent and the legislator with the ideological convictions of the judges.

The legal phenomenon is not as we would like to see it, but as it is, and it cannot be ignored that evolution has ended up imposing the constitutionalisation of public and private legal systems (Dalla Via, 2015).

Constitutional supremacy (belatedly recognised in European law due to the doctrinal influence of Lasalle), the separation and independence of powers and the principles that make up the block of the legitimacy of the constitutional rule of law, constitute the central pieces of the edifice of representative democracy, which it is essential to preserve to maintain the dignity of all members of the community, regardless of their political colour.

The purpose of this constitutional rule of law is to pursue the common good, through the allocation of constitutional powers, and it must be oriented towards achieving the aims, principles, rights and duties prescribed by the Constitution, while preserving the freedom and equality of individuals, the true central objective of public law and, by extension, of private law. This is essentially what the constitutionalisation of the legal system and the work of the judiciary are all about.

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Human Rights and Gender Perspective

Derechos Humanos y Perspectiva de Género

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ABSTRACT: Talking about the idea of gender equity throughout history is very complex because this concept only began to emerge in the mid-1970s as a response to the asymmetry and inequality existing between men and women according to their sex. However, to investigate the origin of this idea, we can note the predominance of the male gaze, since, until very recent times, women were never the object of study in history as such.

KEYWORDS: Human rights, gender perspective, equality between men and women.

RESUMEN: Hablar de la idea de equidad de género a lo largo de la historia es muy complejo debido a que dicho concepto recién comenzó a surgir a mediados de los años setenta como respuesta a la asimetría y desigualdad existentes entre hombres y mujeres en función de su sexo. Sin embargo, en un intento por indagar el origen de tal idea, podemos advertir el predominio de la mirada masculina, pues, hasta épocas muy recientes, las mujeres no fueron nunca objeto de estudio de la historia en tanto tales.

PALABRAS CLAVES: justicia, reforma legal, norma legal, constitución, sistema político.

JEL CODE: J16, J7

INTRODUCTION

The conception of human rights in the course of history has undergone constant changes, reconfiguring itself according to social, cultural, and political circumstances and, in general, according to the time and space in which a community is located. This, in addition to demonstrating the possibility of their transformation, indicates that we cannot consider them as finished processes, fixed once and for all; on the contrary, they are in constant evolution, which is why it is necessary to adapt them to the moment that the family, communities and the State are going through almost as daily challenges. In this context, since 2011, Mexico has included in its Magna Carta a fundamental modification to move from individual guarantees to human rights. Likewise, each of the fundamental human rights has had its dynamics, has been perfected and, of course, has generated a great change in the social and family base and even in the State's vision of citizenship (Urgilés, 2019).

This transformation has made problems visible both for the state and for individuals, among them gender equity as a process to achieve equality between women and men. All of this is the result of arduous struggles for the emancipation of women, their recognition, their autonomy, their access to popularly elected positions and decision-making positions in various fields of community development. This of course means a great opportunity for women, but at the same time, it represents an enormous challenge, which women face with capacity, preparation, and full conviction about the objectives to be achieved.

As an institution, human rights and the constitutional rule of law have been the fundamental basis for supporting women's struggles in our country (Song and Soliman, 2019). However, it should not be forgotten that through these elements it has been possible to adopt and understand as correct and institutional, the relations of domination and patriarchy within society, whatever its geographical location, since this lacerating and discriminatory attitude continues today, in the 21st century, to generate violence and sexist and derogatory language against the so-called "weaker sex".

Faced with this problem, this paper presents the need to include a gender perspective in the context of human rights. With this perspective, some paradigm changes are brought about, and equitable culture, in the understanding that the public policies that the States implement for this purpose must include the education of men and women so that from the home and even in the womb, future citizens are forged who live together without violence or discrimination based on gender. In the family, social, school, political, democratic and community spheres, since, in my opinion, both sexes, inequality and harmony, must contribute to the good life.

1. HUMAN RIGHTS VS. RIGHTS OF MANKIND

Reflecting on the historical development of human rights, it is easy to realise that they are not the rights of mankind but solely and exclusively the rights of man (Michell, 1986). Sometimes, and this is probably the most grammatically correct way of expressing it, the term man refers to the whole of humanity, although of course this way of using language is reduced to a statement related to the androcentric principle, which places the male at the centre of all issues arising in the family, in communities or in the state itself. Traditionally, only men have been considered capable of accessing public or private positions; or leading the institutions where a country, a state, a municipality, or any other community is run. This places the male sex as the paradigm of humanity by considering its characteristics as the essence of what is human and thus giving it a higher value than the rest of the citizens.

If the declaration of human rights implies the human, it is important to remember that this term derives from the Latin "humanus", formed by "humus" which means earth and the suffix "anos" which indicates the origin of something.

This expression alludes to the animal species belonging to the "homo sapiens", characterized by its capacity for reasoning, ability to develop at different levels of intellect, which allows it to acquire knowledge. Throughout history, humans have developed, sustained, and trained those who make up their community (Ramos Escandón, 2008).

When we analyse this concept, we realise that women were not considered in the declaration of human rights, since the female, reduced to the level of a thing by our ancestors, was not included because she lacked the aptitudes and abilities to develop levels of intellect and create knowledge. These activities, faculties, aptitudes, could not be developed by women, because they were impeded, not because of their sex, but because of social conditioning; thus, the concepts in their etymological or grammatical meaning give us the guideline on what has been the role of each one in the community.

It can be affirmed that man, considered the prototype and paradigm of humanity, belongs to a later, fictitious category, even if he has a biological basis:

> Taking a relatively short chronology and a restricted geographical cut-off - European culture from the 16th century onwards - it can be said that Man is a recent invention. Knowledge has not hovered long and obscurely around him and his secrets. (Foucoult, 1968, n. p.)

While the French thinker, Foucault, refers to the category of man, as an individual and it is easily followed also in terms of a man belonging to the male sex (Bernal, Orozco and Molinares, 2016). There are social factors in this construction since not all men enjoyed equality; suffice it to visualise slavery in the great Germanic Roman Empire, where there were subjects whose qualities and rights were diminished, those who were called incapable or unfit, to reach the extreme point of being able to be traded. We could say the same about women, who throughout history have had limited access to universities, to knowledge, to public activities, because they have been practically reduced to the domestic sphere, to organising the house, training children and "administering" the home.

During the time of the struggle for the soul of the Indians of America, certain characteristics emerge that must be fulfilled to be considered a man, as understood in the Declaration of Human Rights. Race, ethnicity, class, caste is considered. These issues intersect the category of man, and the one that has the preponderant differentiation is sex, which is biologically given; masculine or feminine gender is a cultural apprehension.

In 1791, Olympe de Gouges, in the epilogue to her famous "Declaration of the Rights of Women and Citizens", emphasised the following:

> The male slave has redoubled his strength, and has needed to appeal to yours, to break his chains, but once at liberty he has been unjust to his companion. O women! women! When will you cease to be blind? What disadvantages have you gained from the revolution? A more marked contempt, a more visible disdain. (De Gouges, 2009, n. p.)

The concepts of Olympe De Gouges, which awakens the female sex, are very interesting, as women are not included in the Declaration of the Rights of Man and the Citizen, as they were not within the parameters of the French Revolution, which advocates ideals such as liberty, equality, and fraternity. These aspirations apply to those who fall within the assumptions of the declaration, not to humans in general, with biological differences, e.g., the case of women. To be a woman in this context was considered a condemnation, leaving her out of the field of action, since she is after all not a man.

It could be thought that the Declaration of the Rights of Man is universal, in that it covers the whole universe, considered within relevant contexts; this as an ideal, but reality and social conditioning and stereotypes lead us to the conviction that even when it seems a grammatical error, it is prudent to use inclusive language. Our civilisation has reached this condition or circumstance through painful, strong movements, such as the struggles of the suffragettes, among other groups of women warriors, who have been opening the way for women belonging to other generations, closer to the 21st century.

2. WOMEN'S EQUALITY

As in the case of the category of man, referring to equality forces us to situate ourselves in the current discursive horizon, starting from the modern era. Equality is a recent topic (Sartori, 2005), among other things:

> Because to make sense, it needs a society divided into individuals. The estates could be considered homogeneous, but to speak of equality it is necessary to appreciate the possibility of differentiation, and this is only possible through individualisation, within the estate. (Bobbio, 1993, p. 43)

To understand inequality, it is valuable to first determine what equality is. It derives from the Latin aequalitas, a locution that is formed from the adjective aequus (equal, justly balanced) and the suffix alis meaning (relating to). The term equality brings us twinned with the meaning of equity. (Diccionario Etimológico Castellano, 2021).

Grammatically, it is conceived as the condition or circumstance of having the same nature, quantity, quality, value, or form, or of sharing some quality or characteristic; in another of its grammatical meanings, it is said to be a proportion or correspondence between the parts that uniformly make up a whole (Diccionario de la Real Academia Española, 2014).

The concept of the term equality invites us to understand what is equitable in its full dimension. In my concept, equity is a process, the goal of which lies inequality.

If we apply these concepts to the ancestral treatment of women within the primary family community, social communities, as well as the state itself, we inevitably fall into the categorical statement that there is no true equality between women and men in any country in the world; despite the great struggles of women, to have equal treatment, opportunities like those enjoyed by men, the situation of one and the other are unequal. Women have ancestrally lacked opportunities; suffice it to recall that in the course of history, many women have had to pretend to be men to gain access to university education, to have the possibility of holding elected posts or positions, to be at the head of universities and centres of higher, secondary, and basic education; in a word, they have been denied the opportunity, the option of being at the right time, in decision-making. Men have monopolised the political, administrative, labour, and professional education arenas, even within the home. Men everywhere in the world need to feel that they are the head of that group, of that fundamental organisation of the State, which is the family.

The aspiration is to enjoy equality, because of travelling the path of equity in opportunities.

For its part, inequality can occur within homogeneous groups, this kind of division, the situation, the status since antiquity, has been reflected in stereotypes, disqualification, violence, lack of opportunities for a large population, which is normally the majority and is relegated almost to the extreme of a being without capacity, in a decline in the interests of society, in some countries sexist or misogynist.

In the dialogue entitled Republic, Plato (1996) differentiates human groups, which through their different essences, have been presented as unequal. Something similar can be seen in the thought of Aristotle (2012), whose positions are perhaps the most widespread on the subject, he assumes:

> An unbridgeable difference between different human groups, according to their nature. Not all are born to work in the fields, and not all have what it takes to devote themselves to philosophy. Some beings, from the moment they are born, are destined, some to obey, others to command, even if to very different degrees in both cases. (n. p.)

Aristotle (2012) goes on to say, this is also the general law, which must necessarily govern among men. When one is inferior to his fellows, as much as the body is inferior to the soul, and the brute is inferior to man, and such is the condition of all those in whom the use of bodily powers is the best and only advantage that can be derived from their being, one is by nature a slave.

Of course, the naturalisation of cultural differences intersects the relationship between men and women. According to the philosopher of Stagira, a woman is "not man", an incomplete being (Aristotle, 2012). In the words of Simone de Beauvoir (2012), a woman is a woman under a certain lack of qualities, according to Aristotle, and we must consider the character of women as an adolescent (SIC) of natural imperfection.

For Thomas Aquinas (n. d.), it does him good, the woman is a failed man, an occasional being (quoted by Pérez Estévez, 2008).

In this context, the way of understanding the female nature In this context, the way of understanding the female nature was not exclusive to Greco-Latin antiquity, but with the emergence of Christian ideology, which is presented in modernity as a precursor of human rights, Simone de Beauvoir did not escape in any way from this hierarchical and differentiated vision of women. In the face of this phantom, women had to face many struggles to gain access to vindication; however, the wheel has been "set in motion" and of course the groups that work tirelessly in the struggle for women's equality continue their march. The gender gap could be closed in 50 or 60 years, but the struggle must continue. Furthermore, the declaration of women's and citizens' rights, written in 1791 by Olympe de Gauges, is a very valuable document in the history of women's demands for equal rights, legal and legal equality concerning men, issues that have been achieved in the last century, until the twentieth century, in the passage of those fateful years, women have been recovering spaces that were previously denied to them. According to the OECD report, the fight for gender equality, according to reports from 2017, gender inequalities in social and economic life persist in the world. Young women in OECD countries have higher levels of education than young men, on average, yet they are less likely to be in paid work, and gender gaps widen with age, as childbearing often hurts women's pay and career advancement. They have fewer opportunities to be entrepreneurs and are over-represented in private and public leadership positions. In the face of these challenges, the OECD report assesses whether countries are closing gender gaps in education, employment, entrepreneurship, and public life, which calls for a review of public policies to address gender inequality and policy recommendations to reduce these inequalities. This is worldwide, but Mexico, like all Latin American countries, is not exempt from this type of discrimination (OECD, 2017).

3. RATIONALITY OF DIFFERENTIATION

When speaking of differentiation between human beings, the case of women becomes a significant issue; the old naturalising prejudices of cultural issues have gradually taken on a rationalist tinge. Indeed, there is an essential, substantial difference between men and women, from an eminently biological point of view; due to cultural circumstances, this issue translates into a difference between the scope and characteristics of their reasons, which prevent them from living in harmony, with abysmal differences that are difficult for members of each gender to assimilate. This ideology, converted and recognised by the human beings of modernity, in a logical leap, was based and sustained by the difference between the achievements obtained by men and women in the field of science, especially in mathematics. Based on this logic, if women and men were not rationally equal, they could not be considered and treated as equals. The difference is in the set of abilities, which are assumed to be natural, because if they exist, they are so, based on social motives. It is here that discriminatory and differentiating contexts between men and women become natural and every day.

Moreover, Adeline Virginia Stephen, better known as Virginia Woolf (2006), British writer, considered one of the most outstanding figures of Anglo-Saxon modernism and international feminism, in one of her best-known speeches modernism and international feminism, in one of her best-known speeches, examines the supposed naturalness of men's greater academic performance, showing how school conditions that privilege men and systematically exclude women are an important part of this presumed superiority.

In this order of things, if equality, in this approach, is conceived as the need for individuals, regardless of their sex, to be treated in the same way, this is not the only possible or the most desirable way of understanding. This is clear if we realise that on one level, what Virginia Woolf (2004) states could be translated into a critique against the fundamental idea of classical liberalism, which puts freedom and equality understood as anything other than a straightforward "equalisation".

To develop properly, equality requires that those who are placed in its sphere enjoy freedom, but at the same time, it implies an individualised differentiation that makes possible an egalitarian exercise. Moreover, Simon de Beauvoir (2012) indicates the following:

> And indeed, it is enough to walk around with open eyes to see that humanity is divided into two categories of individuals, whose faces, clothes, bodies, smiles, interests, and occupations are manifestly different, perhaps superficially, perhaps destined to disappear, but what is certain is that, for the moment, they exist with dazzling evidence. (n. p.)

On the contrary, in the context of human rights, the gender gap must be closed, women and men, equal before the law, must be reflected in fact in the community, in the family, in society, in the state and in the institutions, positions and positions where decisions are made. Both men and women have the same capacity and are prone to professional training and to develop within society, to benefit the family as the basic and central group of the State, which will be strengthened to the extent that the integration of women in all spheres and levels of decision-making is encouraged (Newman et al., 2017). Public policies must be conducted for the best results by human beings, regardless of the sex attributed to them by birth. Equality, therefore, is based on human rights and is the product of a process of equity.

CONCLUSIONS

Humanity is faced with a dilemma, posed at various levels and various moments of women's struggles; if on the one hand, it is vitally important to achieving equality as equalisation, the latter is not enough to achieve true equality, the substantive one, the one that allows men and women to evolve equally.

This is valuable when introduced in the context of law:

> Beyond covering and clothing, the bodily characteristics of individuals have a powerful impact on the way they construct identities, conceive of their rights, regulate their conduct and, above all, regulate their relationships as individuals. Of all the discourses that regulate corporeality, there is a powerful one: the legal discourse. (Ramos Escandón, 2008, n. p.)

It is the legal discourse, the essential support of the law, which has been used in women's struggles in the search for greater equality within society; an example of this is the suffragette movement, the attempts at personal autonomy from a paterfamilias, work opportunities, access to popularly elected positions and the possibility of developing in the community, to gain space in the social, business, and governmental fabric, have been based on law.

Indeed, there is a substantial problem that constantly arises in the struggle for equality. One of the characteristics of the rational discourse embodied in modern law implies a total equalisation of individuals before the law (Alexy, 1998).

Equality is not appreciated, the gender gap has not been overcome; much remains to be done, it is a problem of education.

A brief review of domestic and international legislation, translated into conventions, treaties and agreements signed by Mexico and ratified by the Senate, shows that the differentiation between men and women continues, with sexist language, discrimination and in some cases sexual harassment, extreme violence and even feminicide, the effects of which are tragic in the family and social sphere when we realise that a man leaves a woman dead simply because she is a woman. Attempts at public policies to end inequality and affirmative action in various parts of the world, discrimination continues to be present, machismo and misogyny are culturally present in our midst (Prendes et al., 2020). The answer, in our opinion, lies in respect for human rights and a broader vision with a gender perspective.

In Mexico, the efforts made during the last epoch in law have been significant, a foundation for equality, by recognising the differences that exist in society.

Ten years after Mexico's constitutional reform on human rights, we can categorically state that there is still work to be done, in the first case, to increase women's access to education and professional training; gender quotas and total parity in political matters have been a great step forward, but greater respect for human rights is required.

Amendments to laws, the context of human rights, among other beneficial circumstances to project equality, must be complemented with public policies, to re-educate and a social and political deconstruction, where the gender perspective is made substantive. Education, I reiterate, and suitable training, tending to eliminate the hierarchies that permeate the community; to avoid issues that violate even subliminally, the status quo of society, banishing the idea that "they are women's things" and therefore are inferior to others, traditionally considered superior, such as those that are "men's things".

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Pre-contractual objective Good Faith and information. Duties of information

Buena Fe e información objetiva precontractual. Deberes de información

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ABSTRACT: In the preliminary phase of contracting, the fundamental importance of information, and the information exchanged by the pre-contractual parties, is undoubted. Parties, by entering a contract, seek to pursue their interest, to maximise their welfare. Based on the information it possesses, a party decides to conclude or not to conclude the contract; if the party concludes the contract, the pre-contractual information spills over into the content of the contract, influencing the contractual agreements, the reciprocal performances established, the conditions under which the contract is concluded. This is not a work of economic analysis, but rather a legal work; economic analysis is used exclusively to highlight problems, to which the rules of the Civil Code provide a solution. The pre-contractual problems in the light of economic analysis, arising from the asymmetries of information between the parties at the time of the conclusion of the contract, and the solutions to them provided by the rules of the civil code, have already been examined by the writer in a fragmentary way during studies concerning representation and the insurance contract. The survey will briefly examine information, and especially pre-contractual information, and the problems connected with it, in the light of economic analysis; it will then focus on the rules of the Civil Code that deal with pre-contractual information and the problems connected with it and will try to find solutions to them.

KEYWORDS: contracts, information, legal systems, civil law, civil liability.

RESUMEN: En la fase previa a la contratación, no cabe duda de la importancia fundamental de la información, y de la información que intercambian las partes precontratantes. Las partes, al celebrar un contrato, buscan su propio interés, maximizar su propio bienestar. Sobre la base de la información que posee, una parte decide celebrar o no el contrato; si la parte celebra el contrato, la información precontractual se traslada al contenido del contrato, influyendo en los acuerdos contractuales, en las prestaciones recíprocas establecidas, en las condiciones en que se celebra el contrato. No se trata de una obra de análisis económico, sino de una obra jurídica; el análisis económico se utiliza exclusivamente para poner de manifiesto los problemas, a los que las normas del Código Civil dan solución. Los problemas precontractuales a la luz del análisis económico, derivados de las asimetrías de información entre las partes en el momento de la celebración del contrato, y las soluciones a los mismos que aportan las normas del código civil, ya han sido examinados por el autor de forma fragmentaria en el curso de los estudios relativos a la representación y al contrato de seguro. El estudio examinará brevemente la información, y especialmente la información precontractual, y los problemas relacionados con ella, a la luz del análisis económico; a continuación, se centrará en las normas del código civil que tratan de la información precontractual y los problemas relacionados con ella, intentando aportar soluciones a los mismos.

PALABRAS CLAVE: justicia, reforma legal, norma legal, constitución, sistema político.

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INTRODUCTION

There are various types of information[1], including technological information, information on production resources and opportunities, and market information.

In connection with the negotiation, market information on circumstances, characteristics, elements, terms, assumptions concerning the contract to be concluded (e.g., on market circumstances, on the expediency of the deal, on contractual terms, on the characteristics or quality of the goods, products, services, features or qualities of the persons of the contracting parties) becomes relevant.

In the preliminary phase of the negotiation, there are normally asymmetries of information between the parties, which are, moreover, reciprocal, on circumstances inherent to the negotiation; they may concern the characteristics of the parties *(of their goods, their services: hidden information),* or the conduct of the parties themselves *(hidden action).*

A party may have more information[2] than the other party on circumstances concerning the contract; and a party is presumed to have more information than the other party on circumstances relating to relevant assumptions, elements and essential features of the contract, which are within its sphere of influence or under its control, in particular relating to their characteristics (on its characteristics, its capacity, its qualities, its ability to perform; the characteristics, qualities of its performance, its goods, its property; the terms of the contract

1 Various distinctions are made concerning information; in particular, it is distinguished into technological information, about productive resources or opportunities, information about personal data, and market information, about market parameters (price, quality or other attributes of the goods or parties, of the terms on which potential contractors intend to conclude contracts) (Hirshleifer, 1973; Beales, Craswell and Salop, 1981; Mackaay, 1982).

2 There is asymmetry when one party has more information than the other, and when it is easier to get information at a lower cost than the other.

prepared, etc.). This information is likely to influence the other party's decision to conclude, or not to conclude, the contract and the conditions under which it will be concluded.

In a situation of uncertainty as to the circumstances of the contract, in the presence of less information on essential features or elements of the contract, especially relating to the sphere of others, a party may fall into error and make a choice (to conclude the contract, not to conclude it, or of the terms on which to conclude it), which might later, with more information, prove to be wrong.

Information is expensive, to produce, give, buy, obtain, evaluate, verify, use (Stigler, 1961; Cooter and Ulen, 2016; Beales, Craswell and Salop, 1981; Chan and Leland, 1982; Darby and Karni, 1973; Mackaay, 1982; Cooter et al., 2006).

A party may decide to obtain information to improve its contractual choice; if it decides to obtain information, the party will assess the costs and benefits of the information and will, in principle, obtain information up to the point where the costs are, at the margin, equal to the related benefits.

The party with less information may ask the other party for information, on characteristics concerning its sphere; the other party may agree to give it (Jacobson et al., 2021).

A particular requirement for information is reliability, trustworthiness, truthfulness. The information obtained may be true or false (Nelson, 1973; Hirshleifer, 1973; Darby and Karni, 1973). The issue of false information is related to the circulation of information and is especially serious for quality information, which can be very expensive for the counterparty to obtain.

Information asymmetries between pre-contractual parties on each other's behaviour create favourable conditions for the party with an information advantage to engage in covert actions (moral hazard), which may take the form of negligent or dishonest behaviour of various kinds, including the giving of false information in the broad sense.

Moral hazard is the behaviour of a person who, being unobservable, engages in hidden action, which may consist of various forms of misconduct, whether negligent or malicious, carelessness, or dishonestly, to his advantage and the detriment of the other party; subspecies of moral hazard are deception, fraud, false information. Moral hazard is a phenomenon due to the presence of information asymmetries (hidden action), which was first found in the insurance market, and then extended to other markets, in which the quality of the goods and services that are exchanged can be influenced by the behaviour of the party, which cannot be observed by the counterparty (Saltari, 1990; Kotowitz, 1987; Rea jr., 1998). A moral hazard is a negative externality that causes other negative externalities, which must be corrected (Akerlof, 1970).

False information may consist in positive conduct, whether intentional or negligent, in a false statement in the strict sense, or a false statement in the broader sense, in a statement that is partially true but incomplete, thus equivocal, inaccurate, misleading, deceptive, or even in omissive conduct, whether intentional or negligent, in the failure to correct a previously given true statement, and sometimes also in the failure to disclose[3] information that one has. False information as to the quality of terms, elements or assumptions of the bargaining process results in bad characteristics of the terms, elements, or assumptions themselves (of the person, the goods, the performance, etc.). False information of the party with an informational advantage, if not discovered, may result in a mistake and a consequent wrong choice[4] by the other party.

3 In the presence of asymmetries, it is difficult to make a strict borderline distinction between false information and inadequate information, between false information and reticence (Beales, Craswell and Salop, 1981).

4 It is assumed that the other party wants to make the right choice. The wrong choice could also be autonomous; in the presence of asymmetries, however, it is difficult to distinguish the wrong choice caused by the bad behaviour, the false information of others, from the autonomous wrong choice (Beales, Craswell and Salop, 1981). Bad choice caused by the bad behaviour of others is a negative externality.

If the information costs (costs of procuring, of assessing) of the party with less information are high, it is difficult for the party with an information disadvantage to discover the hidden actions of others, to ascertain whether the information received is true or false, and thus the characteristics, the qualities of relevant essential elements and features of the bargain, relating to the sphere of others.

More precisely, the conduct undertaken by a party may be good or bad, the information given may be true or false, the quality (of the good, the performance, the party, etc.) may be good or bad, and it may be very costly for the other party at the time of the conclusion of the contract to find out whether such conduct is good or bad, whether such information is true or false, whether the quality (of the good, the performance, the other party, etc.) is good or bad (Emons, 1988; Leland, 1979; Magat, 1998).

The issue known as the Lemons problem, described by Akerlof (1970), could occur in a general way when information is very costly for the counterparty to obtain (which may be the case especially for quality information), in the absence of market correctives (conventional guarantee and reputation, see below in the text), or legal correctives (legal guarantee, fairness, see below in the text).

The party with less information may not be able to identify the type of party with whom it contracts, the characteristics (Akerlof, 1970; Wilson, 1987; Varian 1993) of the party (of the person, the goods, the performance, etc.); it may not be able to distinguish parties with bad characteristics from those with good characteristics.

It might, therefore, act based on a statistical average, or its assessment (Akerlof, 1970; Leland 1979; Postlewaite, 1989) of the probability that the behaviour of the other party is good or bad, that the information received is true or false, that the characteristics relating to the other party's sphere are good or bad, and thus of the probability that its choice of contract and contractual conditions are right or wrong.

The party with an informational disadvantage (Akerlof, 1970) may therefore want to pay an average consideration, an average price; thus, contractors with bad characteristics would receive a price, a higher consideration than they should get, while contractors with good characteristics, on the other hand, would receive a price, a lower consideration.

Contractors with good characteristics might not conclude the contract (Akerlof, 1970), because the price is not convenient, and leave the market. The average price would fall further, and so on; in the end, only contractors with bad characteristics would remain in the market, with whom no one would be interested in negotiating.

An issue of adverse selection could arise. Adverse selection is a phenomenon due to the presence of hidden information asymmetries, which was first found in the insurance market, and later also in other markets, in which the goods and services traded are not homogeneous, and the quality of them is known only to one side of the bargaining (Saltari, 1990; Cooter et al., 2006; Akerlof, 1970). Adverse selection is a negative externality, which must be corrected.

Parties with better information, giving true information, may fail to enter contracts due to the presence in the market of parties with bad characteristics, giving false information; at the limit, the market may cease to exist.

For the solution of the general pre-contractual problems described above, due to information asymmetries between the parties at the time of the conclusion of the contract, there are market and legal remedies.

Market remedies consist primarily of the conventional guarantee, or similar instruments (signalling, licensing, certification, authentication in various forms), and repeated dealings in reputation. The legal correctives consist primarily of the legal guarantee, or equivalent (e.g., certification, written form); and above all, in the current code, of objective good faith or pre-contractual fairness, with the limit of the ordinary diligence of the counterparty (Articles 1337, 1338 of the Civil Code).

1. SOLUTIONS TO THE PROBLEMS OF THE PRE-CONTRACTUAL PHASE IN THE CIVIL CODE. THE LEGAL RULES OF CONDUCT AND LIABILITY OF OBJECTIVE GOOD FAITH AND ORDINARY PRE-CONTRACTUAL DILIGENCE.

The Civil Code of 1942 recognises the private contractual autonomy of individuals (Art. 1322 of the Civil Code), i.e., the freedom of individuals to pursue their interests, to increase their well-being, by entering contracts (Art. 1321 of the Civil Code) with other individuals.

The current Civil Code thus addresses and resolves the general problems examined[5] at the stage of concluding a contract, occasioned by the presence of information asymmetries between the parties (moral hazard, adverse selection on the side of the party with more information, error, and wrong choice on the side of the party with less information).

The Civil Code intervenes to reduce transaction costs, to reduce information asymmetries between the parties in the pre-contractual phase, the information costs of the party with an informational disadvantage, and in general to prevent or correct bad behaviour (moral hazard), false information of the party with an informational advantage, error and wrong choice of the party with an informational disadvantage (to conclude the contract that would not have been concluded, to conclude it under conditions other than those under which it would have been concluded, or not to conclude the contract that would have been concluded), to prevent or correct adverse selection. The goal (Posner, 1992, p. 89) is to encourage the conclusion of socially advantageous contracts, the proper functioning of the market.

To achieve these aims, the Civil Code imposes on the pre-contractual parties reciprocal duties (obligations, burdens) of objective good faith[6] or correctness, and of diligence (arts.

5 We only deal with the Civil Code contract.

6 Pre-contractual objective good faith and fairness are considered synonymous (Benatti, 2012; Bianca, 1990).

1337, 1338 Civil Code). (The rules of objective good faith or correctness and diligence are reciprocal, since the asymmetries of information may be mutual).

Objective good faith, an ethical rule of social behaviour that has become a legal rule, prescribes to subjects during the formation of a contract the duty to behave honestly, loyally, sincerely, to protect the contractual freedom (Bianca, 1990, p. 140) of others (the freedom to conclude a contract, not to conclude it, and the conditions under which to conclude it).

Objective good faith, a rule of liability, represses conduct that differs from that prescribed (dishonest, unfair, deceptive), which damages the negotiating freedom of others by causing damage, provoking a wrong choice (to conclude the contract that would not have been concluded, to conclude it under conditions other than those under which it would have been concluded, or not to conclude the contract that would have been concluded), establishing the liability of the party that behaves incorrectly for the damage caused, i.e. for the wrong choice of the other party (arts. 1338, 1431, 1439, 1440, 1478, 1479, 1490, 1491, 1492, 1494, 1497 Civil Code; through the wrong choice, moral hazard and adverse selection are also corrected).

Pre-contractual objective good faith is limited by the duty of ordinary pre-contractual diligence, imposed on the counterparty. Ordinary diligence, a rule of conduct, prescribes to subjects, during negotiations, the duty to behave with normal care, caution, attention, and prudence; a rule of liability, calls negligent subjects to account for the damage resulting from their behaviour, i.e., from their own wrong choice (arts. 1338, 1398, 1491 Civil Code).

The pre-contractual rules of objective good faith or fairness and ordinary diligence together place on the pre-contractual parties the costs of information = precaution, or place on them the cost of the damage that may occur (wrong choice) with liability; they thus induce the pre-contractual parties to take precautions to prevent the expected damage, which they would otherwise bear.

2. THE RULE OF CONDUCT OF PRE-CONTRACTUAL OBJECTIVE GOOD FAITH, WITH THE LIMIT OF THE COUNTERPARTY'S ORDINARY DILIGENCE, CONCERNING INFORMATION. DUTIES OF INFORMATION

Objective good faith or pre-contractual fairness, as is unanimously recognised, is of particular importance concerning information (Betti, 1953; Benatti, 2012).

In the presence of information asymmetries between the parties at the contracting stage, objective good faith (art. 1337 Civil Code) controls the circulation of information; it aims at the truth of the information, prescribes the truth, prohibits falsehood, or otherwise corrects the consequences (the error and wrong choice of the party with an information disadvantage, and at the same time the moral hazard and adverse selection), through the liability that follows the falsehood of the information. Imposed liability is a deterrent against falsehood, and pushes pre-contractual parties, to tell the truth.

Pre-contractual objective good faith is a general clause; it is an elastic prescriptive rule of conduct, establishing only in principle what information must be given or not given, and does not establish how much information must be given.

In the presence of asymmetries of information between the parties on essential or non-essential circumstances of the contract, on circumstances relating to internal or external elements or characteristics of the contract to be concluded, concerning one's own or others' sphere, relevant to the choice of the other party, not easily observable, pre-contractual objective good faith in all contracts and relationships poses, for the party with an information advantage, the general prohibition of giving false information (arts. 1337, 1439, 1440 Civil Code) in the strict sense (Betti, 1953) (malicious deception) and in the broad sense (Visintini, 1972, p. 121), that is, equivocal, deceptive, obscure, inexact, with the limit of ordinary diligence[7] on the part of the other party and places a duty on the party to give true information, when given, in the strict sense and the broad sense (exact, clear, comprehensible).

In the presence of asymmetries of institutional information between the parties on essential circumstances of the contract, relating to internal elements or prerequisites of the contract to be concluded, concerning important characteristics, qualities, attributes, which fall within their sphere or in the sphere under their control (of the person, the goods, the performance, the terms or elements of the contract, etc.), relevant to the choice of the counterparty, not easily observable by the same with ordinary diligence, pre-contractual objective good faith imposes, then, on the contracting party with an institutional information advantage, the duty to give the other party (true) information on the precise points themselves.

More precisely, objective good faith imposes on the party with an institutional information advantage the duty to inform the other party truthfully about important essential characteristics, not easily observable, of his person (identity, personal qualities, capacity, legitimation, ability to perform, etc.: arts. 1337, 1338, 1429, n. 3, Civil Code). The duty to inform the other party truthfully of important and not easily observable features of the elements of the contract (the party's intentions: Arts. 1337, 1338 Civil Code; the subject matter of the contract, identity, qualities, characteristics, attributes, possibilities, etc., of its goods, of its performance: Arts. 1337, 1338, 1429, n. 1, n. 2, Civil Code); imposes a duty to provide truthful information on characters and other relevant essential attributes, not easily observable, which relate to aspects of the contract to be concluded (nature or terms of the contract, or other elements or assumptions: Arts. 1337, 1338, 1429, n. 1, n. 4, Civil Code).

7 If the circumstances are readily observable using ordinary diligence, asymmetry, deception, false information, and consequences are overcome.

Furthermore, in some typical contracts or relationships, in which there are peculiar information asymmetries on essential circumstances, relating to important features of the contract (content or assumptions), relevant to the choice of the counterparty, which is not easily observable, objective good faith imposes on the contracting party with an informational (institutional) advantage the duty to give the counterparty (true) information on the essential, specific points, which are the object of the asymmetry (e.g., for the seller in the sale (Betti, 1972, p. 86), arts. 1478, 1489, 1490, 1497 Civil Code; for the insured in the insurance (Betti, 1972, p. 86), arts. 1892, 1893 Civil Code; for the representative and the represented in representation, arts. 1392, 1393, 1396, paragraph 1, 1398 Civil Code).

Again, when during the negotiation an information asymmetry develops between the contracting parties, when, using the ordinary diligence prescribed (Art. 1431 Civil Code), one party discovers or may discover an error (Kronman, 1978; Bishop, 1983) on the part of the other party as to the essential circumstances of the contract to be entered, which are not easily observable, about its sphere or to the sphere under its control, on which it has an institutional information advantage (concerning characteristics or qualities of its person, its goods, its performance, etc.), objective good faith imposes an obligation on the party to inform the other party of the existence of such an error (arts. 1337, 1338, 1429 Civil Code and the other articles cited). Symmetrically, the pre-contractual rule of conduct of ordinary diligence, also a general clause, which is incumbent on the other party, concerning information requires it to procure, to ascertain, to evaluate the information received (truth or falsity) with ordinary care, caution, attention, prudence (arts. 1338, 1398, 1491 Civil Code).

3. FUNCTION AND LIMITS OF THE DUTY OF INFORMATION IMPOSED BY PRE-CONTRACTUAL OBJECTIVE GOOD FAITH.THE RETICENCE

The duty of information imposed by pre-contractual objective good faith operates in the presence of (institutional) information asymmetries between the parties. It is instrumental to the truthfulness of the information circulating between the pre-contractual parties themselves on the characteristics, elements, essential, relevant attributes of the contract.

The duty to inform implies information asymmetries, i.e., it implies that one party knows or can know more easily, at less cost than the other, essential relevant circumstances of the contract relating to its sphere; without asymmetries, i.e., with symmetrical information, there is no duty to inform, there is no false information, there is no induced error of the other party, there is no induced or incorrect choice of the other party, there is no adverse selection. Objective good faith or fairness is instrumental in correcting information asymmetries and the resulting problems.

The duty of information imposed on the party with an institutional information advantage is not so much a duty to give the other party (true) information about essential, relevant, positive features, requirements and attributes of its sphere (of its person, its goods, its performance, terms or elements of the contract, etc.), which are object of asymmetry, that the contracting party with an information advantage has an interest in giving, and would give, true because such information is favourable to its bargaining position (thus, it obtains a consideration corresponding to its good features).

The duty of information imposed on the party with an institutional information advantage translates, rather, into the duty to give the other party true information on essential, relevant, negative characters, requirements and attributes (Arrow, 1996) of its sphere (of its person, its goods, its performance, the terms or elements of the contract, etc.), which are object of asymmetry, and which the contracting party with an information advantage would not be interested in giving, or would be interested in giving false, because unfavorable to its contractual position (since it would obtain a lower consideration or might not succeed in concluding the contract).

The misinformation of the party with an institutional information advantage may consist in positive, intentional, or negligent conduct, in a false, misleading, obscure, inexact, incomprehensible statement, or even in omissive, intentional or negligent conduct, in a reticence. In the presence of asymmetries of information between the pre-contractual parties on essential relevant features of the contract, the reticence of the party with an institutional information advantage on these essential, specific, negative points, relating to its sphere, which is the object of the asymmetry, amounts to false information. (And intentional reticence by the party with an institutional information advantage is willful misinformation).

Pre-contractual objective good faith does not impose on the party with an informational advantage a general duty to inform. It does not require the party to inform the other party of essential circumstances relating to its sphere, which the party neither knows nor can easily know since there is no information asymmetry. It does not require the party to inform the other party of essential circumstances relating to its sphere, which the other party can easily observe with ordinary care since there is no asymmetry of information. It does not require the party to inform of positive essential circumstances in the other party's sphere which are favourable to the other party's bargaining position.

Objective good faith does not require disclosure of non-essential circumstances of the negotiation. Objective good faith does not require disclosure of circumstances, even if essential, relating to elements or purposes external to the bargaining (i.e., market trends, the convenience of the deal, one's speculative purposes); it does not require disclosure of information of a technological or productive nature.

Not everything has to be told to the other party, nor would that be desirable. Pre-contractual objective good faith means fairness: it does not impose altruism, it does not aim at redistribution of income, at solidarity between the parties, at social solidarity; the contracting parties are opposing parties, each pursuing its interest, and each is free to procure information, facing the costs and keeping the relative benefits.

Information is, in fact, expensive (to produce, acquire, obtain, evaluate, etc.); moreover, information as an economic good has characteristics that make it like public goods. The imposition of an unlimited duty to provide information would, on the one hand, deprive those (Posner, 2011, p. 109) who have obtained information and paid for it of the associated benefits and, on the other, could also lead to serious inefficiencies[8].

Objective good faith prescribes to the party with an institutional information advantage only a circumscribed duty of information, instrumental to the truth of the information circulating between the parties. True information, which must be given by the party with an institutional information advantage to the other party, is only some information on market parameters, on characteristics, qualities, requirements, important essential attributes of internal elements or prerequisites of the contract to be concluded, which concern its sphere or the sphere under its control (the person, the goods, the performance, terms or elements of the contract, etc.), not easily observable, relevant to the contractual choice of the other party.

8 They point out that placing a general duty of information could lead to serious inefficiencies (Bishop, 1981, p. 167).

The corrective action of objective good faith on information asymmetries is limited to information concerning important characteristics, qualities, essential attributes relating to the sphere of the contracting parties, which are the object of the asymmetry, inherent in the contract to be concluded, and relevant to the conclusion of the contract; objective good faith seeks to correct false information circulating between the pre-contracting parties.

Pre-contractual objective good faith increases the reliability, the truthfulness of the information exchanged by the parties in the pre-contractual phase on circumstances, elements, or characteristics inherent in the contract. It facilitates the identification of the characteristics of subjects, goods, and services; it makes it easier to distinguish individuals with good characteristics from those with bad characteristics. Objective good faith improves the decision-making process of the pre-contractual parties (not to conclude, to conclude the contract and the conditions under which to conclude it); it facilitates the correct attribution of the consideration, the price, the correct correspondence of the services. It is in favour of the party with an informational disadvantage and is also in favour of the party with an informational advantage, which has good characteristics. Objective good faith favours the conclusion of socially advantageous contracts, the proper functioning of the market.

The information costs imposed by objective good faith on the burdened party do not seem high. The information costs imposed by ordinary diligence[9] on the other party do not seem high either.

9 Due diligence is also imposed on both parties to the contract. The costs imposed by ordinary diligence on the party with less information do not appear to be high (it must procure, evaluate the information received with ordinary care, attention, prudence).

Objective good faith or pre-contractual fairness, however, rests on both pre-contractual parties. The information that objective good faith or correctness requires one party to give to the other is market information, on the characteristics and essential elements of the contract, relating to its sphere or the sphere under its control, the object of asymmetry; it is information that a contracting party has, or can obtain at a low cost, less than that of the other party; it is information that is not so expensive for the party to provide (Kronman, 1978).

4. THE LIABILITY RULE OF PRE-CONTRACTUAL OBJECTIVE GOOD FAITH, WITH THE LIMITATION OF THE COUNTERPARTY'S ORDINARY DILIGENCE, CONCERNING INFORMATION. VARIETY OF REMEDIES.

The violation of the pre-contractual rule of objective good faith or information correctness, the most relevant hypothesis of incorrectness, is followed by the liability of the author of the incorrectness, of the false information, for the damage caused to the other party (the wrong choice to conclude the contract that otherwise would not have been concluded, of not concluding it when it would have been concluded, of concluding it on terms other than those on which it would have been concluded), liability through which the harmful consequences of the misinformation are corrected (the mistake and wrong choice of the party itself, the moral hazard of the party with more information, and adverse selection).

The remedies that follow a violation of objective good faith are varied and articulated and consider the damage caused (wrong choice), the interest of the damaged party, and the general interest. The parties' conduct is considered as a whole, in the light of the rules of objective good faith and diligence.

When the false information, whether intentional or negligent, originates from the other party to the contract and has determined the choice of the other party to conclude a contract which it would not otherwise have concluded, where possible, provided that the interest of that party so requires, the remedy may consist in the validity and effectiveness of the contract concluded, as a means of removing the harm suffered by the victim and founding the right to the expected performance, or its equivalent, the positive contractual interest (a kind of specific performance, and application of the prohibition of venire contra factum proprium). Thus, for example, the civil code provides for the validity and effectiveness in all cases of the contract on the seller in the discipline of the sale of things belonging to another person (Art. 1478 Civil Code); on the minor who has concealed by deception his minor age (Art. 1426 Civil Code); for example, case law establishes the validity and effectiveness of the contract in the event of the original impossibility of performance, of which the contracting party is aware.

Sometimes the remedy may give rise to the effectiveness of the contract concluded; for example, in the Civil Code the effectiveness of the contract on the principal is established in the event of false information coming from the principal (De Lorenzi, 2002, p. 359) concerning the representative's powers (Arts. 1392, 1396(1) Civil Code); then in case law, the effectiveness of the contract on the principal is established in the event of negligent creation by the principal of a false appearance of representation.

At other times, the remedy may involve the inclusion of the false information given in the contractual promise (e.g., in cases of fraud, or of recognizable mistake, where the other contracting party chooses performance; in defects of the sale, where the other party requests performance or asserts liability for non-performance; or, again, the cases reported (Graziadei, 1994, p. 587) in the case-law of absorption of false information into the contractual promise).

The victim is thus placed in the same position as he or she would be in if the information based on which he or she concluded the contract had been true if the contract concluded was valid, effective, and performed.

In the event of false information coming from the other party, the remedy may also consist in the invalidity and ineffectiveness of the contract: for example, annulment for fraudulent intent (Art. 1439 Civil Code), for a recognisable essential mistake (Art. 1428 Civil Code); in insurance, annulment at the request of the insurer, in the event of fraudulent or grossly negligent false information on the part of the insured (Art. 1892 Civil Code); in case law, annulment for fraudulent reticence. (Compensation for damages, negative interest, is always allowed if damage remains). The victim is placed in the same position as if the contract had not been concluded if he had not relied on the validity of the contract.

The interference between rules of conduct and rules of liability, on the one hand, and rules of validity and invalidity, effectiveness, and ineffectiveness, on the other, is present in some rules, is present in case law (original impossibility, negligent appearance of representation, fraudulent reticence), and is recognised by much of the doctrine. The rule of validity penalizes misconduct, makes the act effective and protects the victim. The rule of invalidity penalizes misconduct, removes the act, protects the victim.

Many authors and judges, on the other hand, support the clear distinction between rules of conduct and liability, on the one hand, and rules of validity and invalidity, on the other, i.e. they consider that the violation of the rule of conduct of objective good faith or pre-contractual correctness (art. 1337 Civil Code) cannot lead to the validity or invalidity of the contract, but only to compensation for damages; the interference between the rules themselves, sometimes recognised upstream in the ratio of the rules, is denied that it can exist subsequently, in the force of the rules themselves. (The rules of conduct concern the morality of business, the rules of validity concern the structure of the act, the binding nature of agreements, the certainty of legal relations) (Benatti, 2002).

The validity or invalidity of the contract (effectiveness or ineffectiveness) is not the only remedy that follows from a breach of objective pre-contractual good faith. Sometimes, where there is decisive false information conveyed by the other party, there is provision for the removal of the transaction at the request of the aggrieved party, with withdrawal-resolution; e.g, in the sale of property belonging to another person, for the purchaser who is unaware that the seller is not the owner (Art. 1479 Civil Code); in the guarantee for defects in the sale, for the purchaser (Art. 1492, para. 1 Civil Code); in insurance, for the insurer in the event of false information by the insured without willful misconduct or gross negligence (Art. 1893, para. 1 Civil Code). (Compensation for residual damage, negative contractual interest, must be added if the damage is still present). The victim is thus placed in the same position as he would be in if he had not entered the contract.

If the false information received from the other party is only incidental, i.e. if it has affected only the conditions under which the contract was concluded (e.g. incidental fraud, incidental "essential" mistake recognisable, false information incidental to the insured, defect in the thing incidental, etc.), the remedy may consist (in addition to avoidance of the contract, Art. 1892 cc) in withdrawal-resolution, as a means of renegotiating the contract and the correct balance[10] between the performances (e.g. in the case of false incidental information of the seller in the warranty for defects in the sale, Art. 1492(1) cc; or in the case of false incidental information of the insured without fraud or gross negligence in insurance, Art. 1893(1) cc). Alternatively, remedies may take the form of a reduction of the counter-performance (e.g., reduction of the price, in the warranty for defects in the sale, Art. 1492(1); reduction of

10 Our civil code does not deal with the relationship between performance and counter-performance: the relationship is freely established by the parties; the code deals with it only if it is altered by unfairness. The incorrect relationship between performance and counter-performance harms the counterparties, and harms all contractors with good characteristics (performance, quality, goods, etc.), distorts the functioning of the market.

the indemnity due by the insurer, Art. 1893(2)); or they may consist in compensation for damages (variously, of the negative interest, or of the damage assessed according to the rules on non-contractual liability, or of the partial positive interest).

One author has argued that, in the event of an "incomplete defect" in the contract, the violation of the rule of conduct of objective good faith or pre-contractual correctness, while leaving the contract valid, in the autonomy of the rules of liability and validity, may give rise to subsequent pre-contractual liability (Mantovani, 1995).

Jurisprudence, accepting the thesis of incomplete defects, has transformed it in the maxims into "pre-contractual liability for the conclusion of a valid but unsuitable contract". The expression is equivocal because it seems to evoke a duty to inform the party with more information on the convenience of the bargain, which is normally not the case (except in the case of contracts concluded by financial intermediaries, and more generally of contracts and relationships of trust, where the duty to inform is more intense).

The thesis of so-called incomplete defects is to be accepted. In the writer's opinion, it may cover an area of negligent misconduct arising from the violation of objective pre-contractual information good faith, which causes damage that must be compensated, but for which no specific remedies are provided for in the code, or no other remedies are granted by established case law; more precisely, it may cover the area of culpable false information, determining or incidental, which has affected the conclusion or the content of the contract, for example, the area of culpable deceit, determining or incidental; of culpable reticence, determining or incidental, as in the case of an incidental "essential" error which is recognisable.

The thesis of incomplete defects, however, although it has arisen (Mantovani, 1995), in the acceptance of the postulate of non-interference between rules of conduct and liability, and validity-invalidity, does not appear to be in contradiction with the acceptance of the possible interference between rules of conduct and liability, on the one hand, and rules of validity-invalidity on the other. The violation of objective pre-contractual good faith does not always entail the invalidity-validity, the effectiveness-ineffectiveness of the contract, but may entail it in certain cases. “Incomplete defects” cover a different area.

If then, the false information comes from a person who is not a party to the contract and a contract has been concluded, the remedy is always damages. (Compensation concerns the negative contractual interest if the contract concluded is ineffective or is removed, e.g., Arts. 1398, 1439(2); otherwise, it concerns the harm suffered, assessed according to the rules of non-contractual liability).

Finally, if the false information (whether coming from the other party or a third party) has caused the party with an informational disadvantage not to conclude a contract, which would otherwise have been concluded, the remedy is damages (negative interest, if negotiation costs have been incurred, or damages are calculated according to the rules of non-contractual liability). The victim is placed in the same position as he would be if the tort, the false information, had not occurred.

An articulate and varied range of remedies follows, therefore, from the violation of the rule of objective pre-contractual good faith, including, in addition to damages (the positive or negative contractual interest, or the damage assessed under non-contractual liability), reduction of the counter-performance, withdrawal-resolution, validity or invalidity, effectiveness or ineffectiveness of the contract.

Liability for breach of good faith information meets the limit of the ordinary diligence of the party with less information; the latter, if it does not use ordinary diligence concerning the information, suffers the costs of its own wrong choice (Arts. 1338, 1398, 1491, etc., Civil Code).

5. THE DUTY TO PROVIDE PRE-CONTRACTUAL INFORMATION IN THE SENATE BILL FOR THE REVISION OF THE CIVIL CODE, NO. 1151/2019. CRITICS

A recent draft law delegated by the Senate to the Government for the revision of the Civil Code (No. 1151/2019) sets out principles and guidelines on pre-contractual liability and states in Art. 1(1)(f) that the new legislation shall "provide that, during the negotiations for the conclusion of the contract, the party who is aware of information of decisive importance for the consent shall be under a mandatory obligation to communicate it to the other party when the latter is unaware of such information and has placed necessary reliance on the loyalty of the other party; information concerning the value of the subject matter of the contract shall be excluded". The draft enabling act follows in the footsteps of the reform of the French Civil Code, which contains a similar provision (Article 1112-1 Code Civil).

The Report traces the duty to inform to objective good faith (Art. 1337 of the Civil Code) and explains the inclusion of a pre-contractual duty to inform on the party with an information advantage by the fact that it would not be present in the Civil Code, outside Art. 1338 of the Civil Code.

The objectives of the suggested revision of the Civil Code in this field, as expressed in the accompanying Report, seem limited (modernizing the Civil Code with the fixed points reached by the prevailing case law, concerning the accepted theory of "incomplete defects", translated by the courts into pre-contractual liability following the conclusion of a valid but unsuitable contract).

The postulates indicated in the Report, which lead to the formulation of the considered provision, are derived from several case laws, about the conclusion of a valid but inconvenient contract. Let us follow what is stated in the Report.

The most recent case law (in addition to cases of breach of negotiations and the conclusion of an invalid or ineffective contract) has come to include in pre-contractual liability also the conclusion of a valid contract when, because of the failure of the party with an informational advantage to disclose relevant information, the contract has been concluded by the other party on terms different from those on which it would have been concluded. Withholding is the failure by the party with an informational advantage to disclose material information possessed to the other party, leading the other party to the conclusion of a valid contract, but on terms different from those on which it would have been concluded. Failure to disclose relevant pre-contractual information, while leaving the contract valid, gives rise to pre-contractual liability, with compensation for damages, of the positive contractual interest, for difference (so-called "pre-contractual liability for a valid but unfavorable contract").

The "necessary reliance on the loyalty of the other party", required for the party with less information, is justified by the need to avoid protecting negligent or unwarranted reliance.

The reticence is not fraud, since fraud requires, according to the prevailing jurisprudence, commissioned behaviour, accompanied by cunning or malice; the omitted information, the reticence does therefore never entail the annulment of the contract, but only the compensation of damages. The provisions of the Civil Code on determining fraud (Art. 1439 of the Civil Code) and incidental fraud (Art. 1440 of the Civil Code) are therefore not affected, but only supplemented.

The relevance of reticence, derived from case law on pre-contractual liability for the conclusion of a valid but inconvenient contract, leads to the formulation of the proposed provision, and leads to the mandatory duty of the pre-contracting party with more information to disclose, during the formation of the contract, to the other party who is unaware of it the known relevant information determining consent, whatever it may be (except information on the value of the subject matter of the contract). Breach of this duty is reticence and gives rise to damages.

By speaking generically of “material” determinative information, the provision places a general duty of information on the party with an informational advantage in favour of the other party. Any information possessed by a party may be of decisive importance for the other party for the conclusion of the contract (e.g., information on the convenience of the deal, market trends, etc.), and the exclusion of information relating to the value of the subject matter of the contract is of little significance since important information usually influences the value of the subject matter of the contract.

Thus, the party’s with more information duty to inform is disproportionately broadened, and at the same time the relevance of reticence is broadened (contrary to the intentions expressed in the Report). Any failure of the party with more information to provide information on known circumstances “of importance” to the other party may constitute non-disclosure and give rise to damages.

It may be observed that the proposed provision, and the accompanying report, do not take account of the literature on information; the distinctions that are made concerning the information. No distinction is made between the asymmetries of information in general that may exist between the pre-contractual parties, which may concern any information, and the asymmetries of institutional information between the parties themselves, which concern characters, attributes, important essential elements relating to their sphere, inherent in the contract to be concluded, and relevant to the contractual choice of the counterparty. The costs of information, the special characteristics of the information good are not considered.

Again, it may be observed that the provision speaks only of "material" information determining the other party's consent, leaving out information affecting the content of the contract (whereas the example given in the Report is of incidental information). Moreover, it does not point out a duty of ordinary diligence[11] of the other party in obtaining and checking the information.

The Explanatory Memorandum accompanying the provision also shows little or no knowledge of the complex subject of pre-contractual liability in doctrine and case law. (This is evidenced by the exclusive reference to several case law maxims, relating to pre-contractual liability for a valid but unsuitable contract).

Above all, the report shows a lack of knowledge of the rules contained in the Civil Code, Article 1337 of the Civil Code and the other rules linked to it.

The duty to inform is already present in the code, imposed by pre-contractual objective good faith, in Art. 1337 of the Civil Code. In the civil code, pre-contractual objective good faith does not impose a general duty of information on the party with an information advantage.

This should be repeated briefly.

Objective good faith (Art. 1337 of the Civil Code), with the limit of ordinary diligence, operates in the presence of asymmetries of (reciprocal) information between the pre-contractual parties and controls the circulation of information (all information) between those parties. Objective good faith imposes on the party with more information the duty not to give false information and the duty to give true information

11 Although the counterparty's duty of care seems to be expressed in the Report concerning the explanations given on the "necessary reliance on the loyalty of the counterparty", and on the balance between the duty to inform the other party and the duty to inform oneself, to which reference is made.

when given (Williamson, 2018). It imposes on the party who institutionally has more information the duty to give some true information to the other party on certain precise points which are the subject of asymmetry.

Not everything has to be said, nor is it desirable that it be said. Information is indeed expensive and has characteristics that bring it closer to public goods.

The duty of information imposed on the party with an informational advantage established by pre-contractual objective good faith (Art. 1337 of the Civil Code) is limited, instrumental to the truth of the information circulating between the pre-contractual parties.

The true information which the party with an institutional information advantage must give to the other party is information on market parameters, on important characteristics, qualities, essential attributes, relating to its own sphere or to the sphere under its control, inherent in internal elements or presuppositions of the contract to be concluded (the characteristics or qualities of its person, its goods, its performance, the terms of the contract prepared, etc.), object of asymmetry, not easily observable by the other party with ordinary diligence, relevant to the choice of the counterparty; it is information which the party has, or may have, at a low cost, less than the cost of the counterparty; it is information which is not so expensive for the party to obtain.

And more precisely, the duty to give true information imposed on the party with an institutional information advantage translates into the duty to give the other party true information on the characteristics, qualities, essential important negative attributes of its sphere, object of asymmetry, inherent in the contract to be concluded, relevant to the choice of the other party, which the party has no interest in giving, or has an interest in giving false, because unfavorable to its contractual position. (It should be noted, however, that some information on characteristics, qualities, important negative attributes of one's sphere, inherent in the contract, which the party who institutionally has the most information must give - about one's goods, one's own thing, one's performance, etc. - is information on value, which the provision in question seeks to exclude from the duty to inform).

In the presence of a duty to inform on the part of the party that institutionally has more information, the omission of information, the reticence of that party on the precise negative points, which are the object of asymmetry, amounts to false information. Moreover, reticence may be culpable or intentional, and intentional reticence is fraudulent (contrary to what is stated in the Accompanying Report, following some case law).

It may be observed that the Civil Code's discipline of error induced by fraudulent intent on the part of the other party, whether decisive or incidental, includes intentional reticence, whether decisive or incidental, on the part of the party with an institutional information advantage on essential relevant elements of its sphere, inherent in the contract to be concluded, for which a duty of information is prescribed; with the consequence respectively of the annulment of the contract, under Art. 1439 Civil Code, plus compensation for damages, under Art. 1338 Civil Code, or compensation for damages, under Art. 1440 Civil Code.

It may also be observed that in the Civil Code's regulation of a party's spontaneous essential determinant error on important elements of the contract to be concluded falling within the sphere of the other party (for which there is a duty of information on the part of that party with an institutional information advantage), if the error is recognisable with ordinary diligence, the omitted information, negligent or willful reticence is followed by the annulment of the contract, under Arts. 1428, 1429, 1431 Civil Code, and damages, under Art. 1338 Civil Code.

The duty to provide pre-contractual information, which is linked to pre-contractual objective good faith (Art.

1337 of the Civil Code), and omitted information as a breach of the duty to provide information imposed, is already present in the rules of the Civil Code. In the civil code, the duty to inform, and reticence as failure to provide information due, have a more restricted content than that proposed in the provision under consideration. The discipline of non-disclosure is already present in the civil code and does not provide therefore only compensation for damages.

The so-called theory of incomplete defects may be accepted. It emphasises in the first place the configurability of pre-contractual liability after the conclusion of a valid contract. It can then serve to illuminate and partly cover, in the writer's opinion, the area of negligent false pre-contractual information, determining or incidental, which does not affect the validity or effectiveness of the contract, where concluded, and for which no specific remedies are provided for by the Civil Code, nor are special remedies granted by established case law.

Culpable misrepresentation consisting of culpably false statements, determinative or incidental, by the party with an informational advantage about relevant circumstances relating to the contract; or consisting of culpable reticence, determinative or incidental, by the party with an institutional informational advantage about relevant essential elements of the contract relating to its sphere, for which a duty of information is imposed. Culpable false pre-contractual information constituting pre-contractual unfairnesses, pre-contractual torts causing damage, which must be compensated.

The acceptance of the so-called theory of incomplete defects does not, however, lead to a general duty [12]information, linked to good faith, for the party with an information advantage.

12 Contrary to what might be suggested by the case law maxim, which speaks of "pre-contractual liability for the conclusion of a valid but unseemly contract", there is no duty to inform about the convenience of the bargain, except in contracts and relationships of trust.

Irrespective of the objectives and postulates in the Report, which underlie the considered provision, a rule inserted in the Code that follows the principles and guiding criteria indicated by the proposed revision of the Civil Code on pre-contractual liability not only does not solve any problem, but risks having disruptive effects, unhinging the Civil Code system.

Imposing on the party with an information advantage a general duty of information related to objective good faith about circumstances “relevant” to the other party deprives the party who has incurred information costs of the benefits thereof and may cause serious inefficiencies.

Again, in the writer’s opinion, the (superficially) proposed rule, if accepted in positive law, could be interpreted by linking objective (pre-contractual) good faith to solidarity, to constitutional social solidarity (Art. 2 of the Constitution), as is done by a part of the doctrine and in recent times by case law.

But this would completely subvert contract law: the contracting parties are opposing parties; each party legitimately pursues its interest by concluding a contract; contract law responds to market logic.

Objective good faith is different from solidarity between the parties, and constitutional social solidarity; pre-contractual objective good faith, as regards information, and information duties, is different from solidarity, it has no redistributive purpose (Rizky et al., 2018).

Objective good faith does not require the party with an informational advantage to share all relevant information possessed by the other party.

Also, Bianca (1990), who links objective good faith to constitutional social solidarity, recognises that a duty to inform about the convenience of the bargain (which seems to emerge from the Supreme Court pronouncements cited about incomplete defects of the contract, some of which speak of failure to communicate relevant information on the convenience of the bargain) "distorts the sense of the precept of good faith". "This precept cannot require the party to act against its interest...". (p. 143)

The area of information, and pre-contractual information, is a sensitive one. Unthoughtful intervention by the legislator in this field can have serious negative economic and social consequences.

In the Civil Code, pre-contractual information is governed by pre-contractual objective good faith, with the limitation of the ordinary diligence of the counterparty.

Pre-contractual objective good faith is pervasive in the Civil Code. There is a thin thread linking objective pre-contractual informative good faith, of articles 1337 and 1338 of the Civil Code, and the related duties of information, to many rules of the code of the general part and the special part of contracts, as has been pointed out. There is a thin thread linking the violation of the objective good faith pre-contractual information to numerous remedies provided for by the rules of the code, or granted by established case law, as has been highlighted.

The discipline of pre-contractual information implemented by the code with objective good faith, as derived from the rules, as interpreted by doctrine, and from consolidated case law (beyond the declamations), appears to be orderly and rational, consistent with the nature of the good information, with the problems highlighted by economic analysis, consistent with the system of private contract law.

It should be noted, however, that the draft revision of the civil code seems to have lost its relevance now (one can say, fortunately, in this field).

CONCLUSIONS

A discipline of pre-contractual information and consequent problems emerges from the rules of the Civil Code. The discipline is based on the duty of objective good faith or pre-contractual correctness and on the duty of ordinary pre-contractual diligence (arts. 1337, 1338 c.c.), which are incumbent on both parties in the preliminary phase of contracting.

In the presence of (reciprocal) information asymmetries between the pre-contractual parties, objective good faith (Art. 1337 of the Civil Code) controls the circulation of information between those parties. It aims at the truth of the information, imposes on the pre-contractual parties the truth of the information when it is given, prohibits falsity or otherwise corrects the consequences.

Objective good faith does not impose a general duty of information on the party with a pre-contractual information advantage. It prescribes to the party who institutionally has more information a limited duty of information, instrumental to the truth of the information.

Objective good faith imposes on the party with an institutional information advantage the duty to give the other party some specific truthful information on characters, qualities, essential important negative attributes of its sphere (person, good, performance, terms, elements, assumptions of the contract), the object of asymmetry, relating to the contract to be concluded, relevant to the choice of the other party (to conclude, not to conclude, of the conditions under which to conclude the contract); information which the party would not have an interest in giving, or would have an interest in giving false, because unfavorable to its contractual position. In the presence of a duty of information on the part of the party with an institutional informational advantage as to the essential relevant negative features relating to its sphere, concerning the contract to be concluded, which is the object of asymmetry, reticence on the part of the party with an institutional informational advantage as to the precise points is equal to false information (and intentional reticence is fraud).

Pre-contractual objective good faith is limited by the duty of ordinary pre-contractual care incumbent on the other party.

The violation of objective pre-contractual good faith results in a variety of remedies, which always operate with the limitation of the ordinary diligence of the counterparty; among them, validity-invalidity, effectiveness-ineffectiveness of the contract, withdrawal-resolution of the contract, compensation of damages (of negative interest, of positive interest, or damages calculated with the rules of extra-contractual liability).

The recent Senate bill delegating authority to the Government for the revision of the Civil Code, No. 1151 of 2019, deals with pre-contractual liability and proposes to include in the Civil Code, at the expense of the pre-contractual party with an informational advantage, the duty related to objective good faith (Article 1337 of the Civil Code) to give the other party "relevant" determinative information.

The proposal gives rise to criticism and misgivings, for the observations already made. It places a general duty to provide information on the pre-contractual party with an information advantage; it does not distinguish between the various types of information, it does not take account of the cost of providing information or the special nature of the information; it does not establish the limit of the counterparty's ordinary diligence. It points to damages as the only consequence of reticence (which is, moreover, widely understood).

It needs to be repeated, the discipline of pre-contractual information and duties of information, linked to objective good faith, already emerges from the rules of the Civil Code, as interpreted by scholars and established case law. Legislative intervention in such a sensitive area as pre-contractual information and pre-contractual liability seems inappropriate without it being preceded by careful consideration by a study commission composed of expert civil lawyers. Extemporaneous interventions in this field may disrupt the consolidated system of the Civil Code and lead to serious inefficiencies.

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Reflections on ethnic inequality, recognition , distributive justice and participation in Latin America

Reflexiones sobre desigualdad étnica, reconocimiento, justicia distributiva y participación en América Latina

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ABSTRACT: The normative framework proposed by Nancy Fraser integrates the politics of redistribution and the recognition of difference. This framework of social justice allows us to analyse social agreements and their institutions to determine to what extent they can guarantee parity in participation, given that the social injustices we suffer are a mixture of economic injustices and their distribution. Based on this theoretical proposal, this article sets out to outline lines of analysis of the extent to which ethnic inequality in Latin America responds to the exclusionary nature of distribution and recognition, and therefore of parity in participation, inherited from the colonial era.

KEYWORDS: : social justice, social participation, inequality, ethnic groups.

RESUMEN: El marco normativo que propone Nancy Fraser integra las políticas de redistribución y de reconocimiento de la diferencia. Este marco de justicia social permite analizar los acuerdos sociales y sus instituciones para determinar hasta qué punto pueden estos garantizar la paridad en la participación dado que las injusticias sociales que padecemos son una mezcla entre injusticias económicas y su distribución. Con base en esta propuesta teórica, el presente artículo se plantea esbozar líneas de análisis sobre la medida en que la desigualdad étnica en América Latina respondería al carácter excluyente de la distribución y el reconocimiento, y, por tanto, de la paridad en la participación, heredado desde la época colonial.

PALABRAS CLAVE: justicia social, desigualdad, participación social, grupos étnicos.

JEL CODE: D63, J15

INTRODUCTION

In response to distributive theoretical approaches, which according to Nancy Fraser (2008) fail to be fully inclusive and considering that the social injustices we suffer from are a mixture of economic injustices and their distribution, Fraser (2008) proposes a normative framework thsat integrates both aspects, namely policies of redistribution and recognition of difference (cited by Rivera, 2020). This social justice framework allows us to analyse social arrangements and their institutions to determine to what extent they can guarantee parity in participation.

Moreover, and with this theoretical basis, some lines of reflection will be outlined concerning the case of ethnic inequality in Latin America, where both distribution and recognition, and therefore parity in participation, have inherited from colonial times the influence of hierarchies, exclusion and privileges based on ethnic differences. Thus, the political and economic structures derived from the colonial period have been built around an exclusionary view of groups that do not conform to the values of “modernity”, marginalizing their rights. As Lagos and Callas (2007) point out, the formation of the modern state does not fulfil an objective role or constitute a monolithic entity but rather represents a message of domination.

1. BIVALENT COLLECTIVITY

Fraser works on the areas of recognition of minorities, i.e., differences based on nationality, ethnicity, race, gender, sexual orientation and how these have been equally affected by economic redistribution. His thesis is because justice requires both redistribution and recognition, as neither of these aspects individually is sufficient. Furthermore, Fraser introduces the concept of bivalent collectivity (Fraser, 1996) which makes it possible to demonstrate how social justice has two dimensions: the socio-economic and the cultural, which cannot be separated.

Bivalent collectivity is groups of people who suffer from socio-economic maldistribution and lack of recognition due to cultural discrimination, where neither can be reduced at the expense of the other. The injustice that a collectivity face arises in both spheres simultaneously. Therefore, gender allows us to exemplify this concept, as the causes of inequity are partly rooted in economic arrangements and partly in cultural arrangements. Similarly, the social construction and validation of the notion of race exemplify this bivalence (Fiske, 2018). In the rest of the groups that are widely discriminated against, this characteristic is present. For example, in the case of sexual orientation, cultural reasons for injustices may outweigh economic reasons, yet the two always coexist to a greater or lesser degree (Fraser, 1996).

Accordingly, if the economic and cultural spheres are seen to play a role in social justice and this has political implications, it means that an approach to social justice must be in dialogue with theories of distributive justice (Hickey and Robeyns, 2020). However, according to Fraser, the opposite is evident in the political realm, where redistribution and recognition are treated as mutually exclusive.

This is how Fraser proposes a critical theory of society that involves the construction of a conceptual approach based on the observation of the purposes of the activities of progressive social movements. The author develops a dual conception of justice by inserting the objective dimension: referring to the criterion of redistribution and an intersubjective dimension: referring to the concept of recognition. The author proposes an approach to the Westphalian state and conceptualizes the territorial state as the appropriate entity to develop the concepts of justice and even talks about the possibility of going beyond the territorial borders to consider what she calls "meta-struggles". His model of recognition is based on the quality of political arrangements that would prevent members of the community from participating on an equal footing with others.

However, what gives Fraser's approach a political dimension is the notion of participation. How it can be determined whether a society is just the extent to which it accommodates the participation of all its members, in such a way that it can ensure participation in the construction of shared values, in processes of deliberation about redistribution policies and all forms of social interaction. Her theory of justice can be differentiated from those centred on notions of capabilities since, for Fraser (2012), her focus is on how humans relate to each other.

To understand the relationship between redistribution and recognition, their proposal must be seen as including these two elements: struggles for distribution and struggles for recognition (Huanca et al., 2020).

Claims in the redistributive sphere are for resources and wealth, and in the recognition sphere, they are for a world that accepts difference. This calls for a new concept of social justice that establishes the need to propose a two-dimensional conception of justice, which Fraser (2006) calls "integrating the emancipatory aspects of the two issues into a single global framework" (n. p.).

Fraser (2006) makes an express reference to Rawls by highlighting his contribution from the models of distributive justice "in trying to synthesize the traditional liberal insistence on individual freedom with the egalitarianism of social democracy, they proposed new conceptions of justice that could justify socio-economic redistribution" (n. p.).

Fraser's (2006) two-dimensionality is understood as those groups that suffer from both maldistribution and recognition in "ways in which neither of these injustices is an indirect effect of the other, but both are primary and co-original" (n. p.).

Thus, injustices can be attributed to both realities: groups suffering from maldistribution as well as misrecognition; thus, as explained above, gender is a two-dimensional social differentiation. Fraser refers to gender as a phenomenon that exemplifies two-dimensional social differentiation, a "hybrid category rooted" (Fraser, 2006, n. p.), in two areas of society: both in the economic structure and in social status, which is why overcoming gender injustices requires the revision of redistribution and recognition. There is a preconceived idea that those who suffer injustice can only be framed within one type of conflict, either redistribution or recognition, but these two phenomena are never seen as coexisting and originating. Gender thus leaves the thesis that these factors are mutually exclusive unsupported.

Fraser's concept of participatory parity includes the notion of equality, which not only denotes her interest in the social character of societal life but focuses on political demands in decision-making processes (Navalpotro, 2018). Thus, justice includes parity in participation and applies to all spheres of social interaction from the family to civil associations. Accordingly, justice cannot be reduced to the implementation of certain conceptions of representation because the political dimension is one of the facets of justice. The notion of participation in his theory endows politics with a normative dimension that influences his social theory and moral philosophy. The value of participation is what gives the subject the possibility to construct cultural values, norms, and relations in general within the community.

This implies that solutions to problems of social injustice must meet both conditions. This is because solutions that are only oriented to the economic field - that is, that solves the economic condition of participatory parity - will not be useful because such injustice is directly related to the intersubjective condition.

Fraser identifies the following types of solutions as alternatives for the resolution of the problems: affirmative solutions, which are those aimed at correcting inequitable outcomes of social arrangements, and transformative solutions, which are those aimed at correcting inequitable outcomes by restructuring the overall framework that generates them.

2. ETHNIC INEQUALITY IN LATIN AMERICA

As mentioned above, since independence and the formation of Latin American states in the 19th century, power has reflected not only economic inequality but also the ethnic-racist divide derived from colonialism. Since the birth of Latin American republics, governments have been formed by Creoles or mestizos (Herrera, 2007). This explains the fragility of the idea of nations, even in the political and economic sense, as they were built on a series of contradictions and the impossibility of responding to the needs and interests of the groups that made them up (Zacharie, 2013). The indigenous population in the region is close to 50 million people, or 10 per cent of the total population of the subcontinent (Cabrero, 2013).

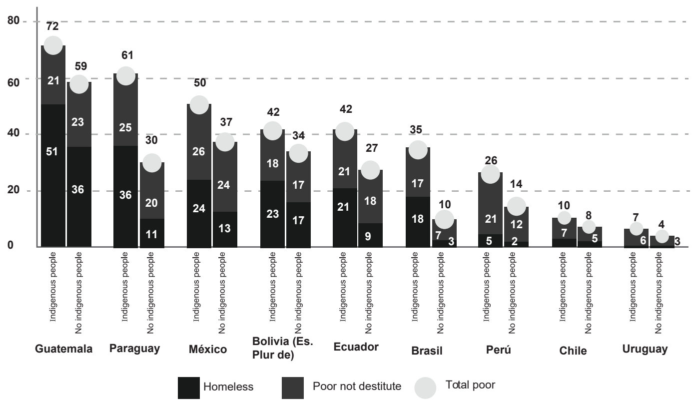
Although currently, in many countries in the region, public policy has progressively recognised so-called ethnic minorities and their rights, this has occurred more from a multicultural vision, manifested in the neoliberal policy of inclusion of minorities that do not seek to affect the system that reproduces inequalities (Cabrero, 2013).

In other words, they have sought to integrate them into the dominant society and the neoliberal economic order, instead of addressing the historical and structural causes of their exclusion from an intercultural perspective (Cabrero, 2013).

Therefore, as they are presented as marginalized groups, the responses to their problems have been insufficient, increasing their vulnerability to exclusion, their stigmatization due to poverty and discrimination based on ethnic prejudice, and maintaining inequalities. Thus, ethnic, religious, or other conditions condemn many communities to live on the margins of society and the economy (ILO 2004).

According to statistical information, it is clear how poverty and inequality affect vulnerable groups, particularly the indigenous population in Latin America. Levels of indigence and poverty are higher for this population:

Figure 1. Poverty rates (percentages) for indigenous and non-indigenous populations in 9 Latin American countries (2014)

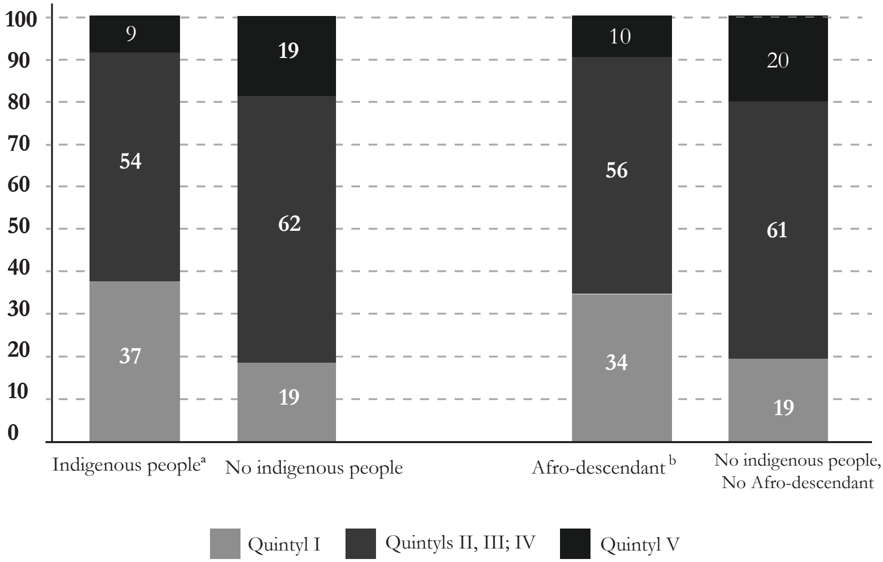


Source: ECLAC (2016, n. p.).

According to ILO (2004), in the region, ethnic characteristics shape the division of labour, creating a gap between low-skilled jobs -manual labour and jobs of low social value- that bring together mainly indigenous populations and high-profile, high-wage jobs that bring together mainly white-mestizo populations.

In this case, the gap represents the colonial legacy, which based exploitation on racial and ethnic categorization, through a series of mechanisms and institutionalized discrimination by society. Indigenous peoples are marginalized and excluded, resulting in higher rates of poverty, less autonomy, and less exercise of citizenship rights (ILO, 2004).

Figure 2. Latin America, population distribution by household per capita income quintiles and ethnicity (2014)



Source: ECLAC (2016, n. p.).

There is a strong link between the social and cultural characteristics that influence the labour market and inequality, but the level of awareness of this type of domination and the need for mobilization is still low (ILO, 2004). For Cabrero (2013), "the class variable especially affects indigenous peoples (little or unproductive land, poverty and destitution lines) and is in the facilitating conditions of conflict with the state" (p. 72).

This is even though, over the last two decades, a positive change has taken place in Latin America's legal and political frameworks about indigenous peoples' rights. Thus, there has been a shift from assimilationism to an agenda "aimed at preserving cultural differences and protecting the rights of indigenous peoples to reproduce their cultures and languages, manage their lands and natural resources, and govern themselves according to their political systems and traditional laws" (World Bank 2015), as part of a global trend of legal realignments following the adoption of ILO Convention No. 169 on Indigenous and Tribal Peoples (ILO Convention No. 169). 169 on Indigenous and Tribal Peoples (1989), signed by more than 15 countries in the region, and the UN Declaration on the Rights of Indigenous Peoples (2007). The existence of these, among which Convention No. 169 and its provisions are binding so that states must immediately fulfil their duty to respect, implement and protect the rights of indigenous peoples established therein, is evidence of the extent to which indigenous social movements have succeeded in raising their demands. However, one can speak of an "implementation gap", existing between the formal recognition of the international legal framework of rights and the absence of administrative and political practices by Latin American states (Martínez 2015). In fact, the recognition of the rights of indigenous peoples does not imply their easy implementation, especially in terms of participation, consent and prior consultation (World Bank 2015).

This is key, given that other manifestations of poverty, such as dependency, discrimination, territorial dispossession, and political exclusion, contribute to perpetuating or increasing the vulnerabilities of indigenous groups, making participation in decision-making crucial for them (World Bank, 2015).

Figure 3. International treaties and covenants on indigenous rights.

Country	Convention No.169 [1] (ratified)	DNUDPI [2]	PIDCP [3]	PIDESC [4]	CIETFDR [5]	CDN [6]	CETF-DCM [7]	Río 1992 [8]	CCIEA-FFS [9]
Argentina	✓	✓	✓	✓	✓	✓	✓	✓	✓
Belice	X	✓	✓	✓	✓	✓	✓	✓	✓
Bolivia	✓	✓	✓	✓	✓	✓	✓	✓	✓
Brasil	✓	✓	✓	✓	✓	✓	✓	✓	✓
Chile	✓	✓	✓	✓	✓	✓	✓	✓	✓
Colombia	✓	✓	✓	✓	✓	✓	✓	✓	✓
Costa Rica	✓	✓	✓	✓	✓	✓	✓	✓	✓
Dominica	✓	✓	✓	✓	X	✓	✓	✓	✓
Ecuador	✓	✓	✓	✓	✓	✓	✓	✓	✓
El Salvador	X	✓	✓	✓	✓	✓	✓	✓	✓
Guatemala	✓	✓	✓	✓	✓	✓	✓	✓	✓
Guayana	X	✓	✓	✓	✓	✓	✓	✓	✓
Honduras	✓	✓	✓	✓	✓	✓	X	✓	✓
México	✓	✓	✓	✓	✓	✓	✓	✓	✓
Nicaragua	✓	✓	✓	✓	✓	✓	X	✓	✓
Panamá	X	✓	✓	✓	✓	✓	✓	✓	✓
Paraguay	✓	✓	✓	✓	✓	✓	✓	✓	✓
Perú	✓	✓	✓	✓	✓	✓	X	✓	✓
Surinam	X	✓	✓	✓	✓	✓	✓	✓	✓
Uruguay	X	✓	✓	✓	✓	✓	✓	✓	✓
Venezuela	✓	✓	✓	✓	✓	✓	✓	✓	✓

Source: International Work Group for Indigenous Affairs.

[1] ILO Indigenous and Tribal Peoples Convention, 1989.
[2] United Nations Declaration on the Rights of Indigenous Peoples.
[3] International Covenant on Civil and Political Rights
[4] International Covenant on Economic, Social and Cultural Rights
[5] International Convention on the Elimination of All Forms of Racial Discrimination [5] International Convention on the Elimination of All Forms of Racial Discrimination
[6] Convention on the Rights of the Child
[7] Convention on the Elimination of All Forms of Discrimination against Women [8] Convention on the Diversity of Cultural Expressions [9] Convention on the Rights of the Child
[8] Convention on Biological Diversity
[9] Convention on International Trade in Endangered Species of Wild Fauna and Flora [10] Convention on International Trade in Endangered Species of Wild Fauna and Flora

Source: World Bank (2015, p. 4)

Furthermore, it is worth mentioning that the political participation of indigenous peoples in the region has undergone an important evolution (obviously differentiated for each case), allowing them to position themselves as differentiated actors of their own culture before state society, starting with the struggles for autonomy, civil, political, economic, social and cultural rights of these peoples, which crystallized in a series of mobilizations in the face of neoliberalism in the 1990s (Cabrero, 2013).

Among the causes behind the emergence of indigenous social movements since the 1970s and 1980s are the failures of the development policies of previous decades and the impact of the global economy on rural areas. These movements can be classified into self-defence or tribal movements, which have been more successful in territorial delimitation and the recognition of their forms of government and justice, and peasant-based movements, whose demands are based on identity and autonomy issues, and which have managed to influence multicultural constitutional and legislative changes (multicultural constitutionalism), but with little impact on structural socio-economic aspects (such as genuine agrarian reform), i.e. a better quality of life (Cabrero, 2013).

The indigenous political parties that have had the greatest impact in the region are to be found above all in Bolivia, Ecuador, and Nicaragua. With their differences and to varying degrees, they have managed to position themselves in the symbolic dimension, as well as in the substantive and operational, i.e., policy formulation and implementation, respectively. However, they have also been worn down in electoral contests, although their constant capacity for reorganization and the broadening of the debate to which they contribute with issues such as racism, discrimination, recognition of difference, the rights of nature, etc., stand out. Unfortunately, on many occasions, participation has been limited to offering government positions to indigenous leaders, without necessarily resolving aspects of inequality and class, and then, influencing redistributive public policies that reduce poverty and contribute to the ongoing construction of intercultural states continues to be "the great unresolved issue of indigenous peoples' electoral political participation" (Cabrero, 2013).

Building on Fraser's earlier analysis, we can see that, indeed, in the case of ethnic inequality in the region, recognition has not led to redistribution. Although, to a certain extent, one can speak of an "acceptance of difference", claims to resources and wealth are still valid, even if we consider that it is often not monetary wealth per se that indigenous groups are demanding, but rather greater participation in decision-making that concerns them.

This places us in a context of a bivalent collectivity, whose struggles for distribution and recognition have reached partial milestones, such as achieving recognition and ratification of binding instruments concerning indigenous peoples' rights, but not their strict implementation.

The two-dimensional conception of social justice is still in question, especially if we add to this the historical limitations in terms of parity in participation and decision-making, beyond representation (Puelles, 2020). This problem is very visible, for example, about socio-environmental conflicts around the exploitation of natural resources and the lack of prior and informed consent, or its limitation to the socialization of decisions taken without the participation of the groups involved.

We could say, therefore, that despite the progress made in terms of social justice and, particularly, indigenous peoples' rights, these constitute affirmative solutions that seek to correct the inequitable effects of social agreements, but do not amount to transformative solutions based on a restructuring of the framework that produces these results (Martin et al., 2017).

This is also because the recognition of indigenous groups as subjects of rights corresponds more to a broadening of democracy, but not to a paradigm shift (Cabrero, 2013).

CONCLUSIONS

The central point of Fraser's postulates is the dual conception of justice. She considers that justice cannot be separated from the notions of redistribution and recognition, as other theories of justice have argued because the economic and cultural spheres are mutually dependent. In this way, it can be determined that the rejection generated by the lack of recognition is the fundamental criterion for judging whether a system is just or not.

Her approach groups social injustices as matters of recognition and not only redistribution, but a factor also that distances her from other authors. For her, justice cannot be based solely on the adequate distribution of a pre-established set of rights and goods. Fraser's dual perspective is subject to the concept of participatory parity, which implies the simultaneous consideration of the economic and cultural spheres, making recognition subject to the principle of participation. Fraser, in his dual conception, includes problems that are a real threat in today's societies. In this approach, it is not only sufficient to grant equality to individuals, but it is also necessary to guarantee the representation of disadvantaged groups. For Fraser, these groups must have access to political representation (Rivero, 2017). Fraser proposes extending the scope of his Theory of Justice to the global sphere given that, in his vision, justice must be reconstructed from a global perspective that redefines the Westphalian system according to the phenomenon of globalization.

Also, it is necessary to refer to Fraser in her critique of John Rawls to understand the reasoning that accompanies this cross-border vision of the author. According to her view, Rawls denies that the norms of egalitarian distributive justice apply at the international level and delimits the domestic sphere as the only terrain for distributive justice because he conceives of international justice as a space unsuitable for egalitarian economic claims:

> Rawls excluded social rights from the “urgent” class of human rights that international society would be obliged to protect; thus, he would have been denying impoverished individuals in the Third World the possibility of raising claims of distributive justice beyond state borders; on the other hand, with this Westphalian conception of distributive justice, Rawls would also have limited the economic obligations of prosperous ‘well-ordered’ peoples towards impoverished peoples in ‘less advantaged’ societies to a ‘non-egalitarian duty of care; thus denying the latter societies, as corporatist political communities, any basis for pursuing cross-border egalitarian claims as a matter of justice. (Fraser, 2012, p. 12)

Fraser questions Rawls because his theory ignores the factor “equality between who?”, indeed, he invokes it as a problem of egalitarianism, the uncritical assumption of the who (Lizarraga, 2019). The epistemological problem of what is justice? should also be seen from an ontological point of view that responds to how to define the subject of justice?

Fraser’s Theory of Justice can articulate the different dimensions of social action while including more traditional concepts of social justice theory.

Moreover, the brief reflections presented on ethnic inequality in Latin America underpin the need to redefine social justice, among whom it is or is not applied, and on what basis it can be measured since recognition has not implied redistribution or greater political participation in the structural issues that maintain the condition of the vulnerability of indigenous populations. This historical condition becomes crucial in a context in which national and, today, global policies have not been able to respond to the demands of these populations; on the contrary, under the dominant neoliberal economic model, the latter is increasingly threatened.

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El Caso del Derecho Internacional Comparado

The Case for Comparative International Law

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KEYWORDS: international instrument, international co-operation, bilateral agreement, international law, legal systems

INTRODUCCIÓN[1]

A primera vista, el "derecho internacional comparado" puede parecer un oxímoron. En principio, el derecho internacional -al menos cuando surge de tratados multilaterales o de la costumbre general- se aplica por igual a todas las partes o Estados. En consecuencia, los juristas internacionales suelen resistirse a hacer hincapié en los enfoques locales, nacionales o regionales debido a las aspiraciones de universalidad y uniformidad de este campo. Los comparativistas, por su parte, suelen pasar por alto la posibilidad de aplicar las ideas del derecho comparado al derecho internacional basándose en que "las normas que tienen un carácter declaradamente universal no se prestan a la comparación" (Gutteridge, 1980, p. 13).

Sin embargo, la división tradicional entre el derecho internacional y el derecho comparado está sufriendo cada vez más presión. Algunos estudiosos han cuestionado la pretensión de universalidad de este campo poniendo de relieve su eurocentrismo y destacando la diversidad de las tradiciones nacionales y regionales del derecho internacional. Otros han adoptado un enfoque comparativo para examinar cómo diversos actores estatales, como los tribunales nacionales, y no estatales, como las diferentes academias, se comprometen con el derecho internacional o lo abordan. Otros han explorado el efecto de las culturas, familias y tradiciones jurídicas en los enfoques del derecho internacional.

El uso de enfoques comparativos en el derecho internacional tiene importantes antecedentes en estudios anteriores. Sin embargo, la abundancia de nuevos trabajos y una serie de conferencias recientes ponen de manifiesto un interés renovado en este ámbito, que puede reflejar la creciente globalización de la práctica jurídica, la mayor penetración del

1 Los autores agradecen a los participantes en el Coloquio Sokol de Derecho Internacional Privado de 2014 sus comentarios sobre una versión anterior. El Fondo del Coloquio Sokol de la Facultad de Derecho de la Universidad de Virginia financió el Coloquio y la edición de las ponencias para su publicación.

derecho internacional en el ámbito nacional, el aumento del flujo transnacional de estudiantes de derecho, la mayor accesibilidad a diversas fuentes nacionales a través de bases de datos electrónicas y el movimiento hacia una era de poder multipolar. Algunos estudiosos han propuesto explícitamente la creación o la reactivación de un campo de “derecho internacional comparado”, aunque sus contornos y métodos siguen sin estar definidos.

El objetivo de este artículo es mostrar una serie de contribuciones que reflejan diferentes aspectos del fenómeno del derecho internacional comparado y comenzar a sentar las bases teóricas y metodológicas de este campo. Así, en los siguientes apartados se ofrece una definición provisional del derecho internacional comparado, se examinan algunas de las cuestiones metodológicas que plantean estos estudios comparativos y se exploran algunas de las implicaciones normativas de esta investigación. Con ello, esperamos estimular la investigación y el debate sobre este campo emergente.

1. CONCEPTUALIZACIÓN DEL DERECHO INTERNACIONAL COMPARADO

Como campo en desarrollo, los contornos del derecho internacional comparado son necesariamente fluidos y contingentes. Conscientes de estas dificultades, ofrecemos una definición provisional: el derecho internacional comparado implica la identificación, el análisis y la explicación de las similitudes y diferencias en la forma en que los actores de los distintos sistemas jurídicos entienden, interpretan, aplican y abordan el derecho internacional. Difiere de los debates sobre la fragmentación, que suelen referirse a las diferencias que surgen entre distintos subcampos del derecho internacional, como los derechos humanos y el comercio, o distintas instituciones internacionales, como la Corte Internacional de Justicia y los tribunales penales internacionales. En cambio, se centra en gran medida en las similitudes y diferencias entre los actores nacionales o regionales en su enfoque del derecho internacional[2].

2 Aunque esto constituye el núcleo del derecho internacional comparado, en algunas circunstancias también puede implicar la comparación de cómo los organismos nacionales, regionales e internacionales entienden, inter-

Para proporcionar un marco de análisis, sugerimos que las ideas comparativas pueden utilizarse en el derecho internacional de tres maneras principales: (1) para *identificar* lo que constituye el derecho internacional; (2) para explicar las similitudes y *diferencias* en la *interpretación* y *aplicación* del derecho internacional, y (3) para comparar los enfoques de los actores nacionales o regionales respecto al derecho internacional.

En primer lugar, los métodos de derecho comparado pueden ser relevantes para *identificar* la existencia y el contenido del derecho internacional. Identificar el derecho internacional consuetudinario requiere que los juristas internacionales busquen la práctica estatal general y coherente y la opinio juris. Establecer un principio general del derecho internacional implica a menudo analizar si ciertos principios son comunes a los sistemas jurídicos nacionales, como analiza la contribución de Neha Jain con respecto a los enfoques adoptados por los tribunales penales internacionales. Realizar un análisis comparativo puede ser relevante en los ejercicios de codificación, como describe Mathias Forteau con respecto al trabajo de la Comisión de Derecho Internacional. La comparación de las prácticas nacionales también puede ser pertinente cuando se trata de interpretar los tratados a la luz de la práctica posterior, como se ha hecho o se ha sugerido en ámbitos como el derecho de los derechos humanos y el arbitraje de los tratados de inversión.

En segundo lugar, los estudios comparativos pueden ser útiles para identificar y explicar las similitudes y diferencias en la interpretación y aplicación del derecho internacional. Por ejemplo, ¿ofrecen los ejecutivos diferentes versiones de la misma norma de derecho internacional[3]? ¿Adoptan los poderes legislativos enfoques uniformes a la hora de transformar las

pretan, aplican y enfocan el derecho internacional.

3 Por ejemplo, las ramas ejecutivas de los gobiernos de Estados Unidos y Rusia han elaborado diferentes declaraciones de seguridad nacional que inciden en la interpretación y aplicación del uso de la fuerza.

obligaciones de los tratados en derecho interno o vernacularizan esas obligaciones de forma particular y predecible?[4] ¿Proporcionan los tribunales nacionales interpretaciones similares o diferentes de las obligaciones de los tratados y, al hacerlo, entablan un diálogo transnacional con los tribunales de otros Estados? ¿Qué explica estas similitudes y diferencias y qué significan para nuestra comprensión del derecho internacional? Christopher McCrudden aborda este reto en su análisis de 324 decisiones judiciales nacionales de 55 jurisdicciones que citan la Convención sobre la Eliminación de la Discriminación contra la Mujer (McCrudden, 2016).

En tercer lugar, las ideas del derecho comparado, la política comparada y la sociología pueden ser útiles para explicar los diferentes enfoques nacionales del derecho internacional. Por ejemplo, ¿cómo pueden las diferencias jurídicas, políticas, culturales y económicas transnacionales informar sobre los distintos enfoques del derecho internacional? ¿Vemos similitudes o diferencias basadas en la condición de centro/periferia o en la pertenencia a diferentes familias jurídicas? ¿Cambian los enfoques de los distintos Estados a lo largo del tiempo y, en caso afirmativo, cómo y por qué? Un ejemplo de este trabajo es el estudio de Pierre-Hugues Verdier y Mila Versteeg sobre la relación entre el derecho internacional y el nacional en 101 países desde 1815 hasta 2013 (Roberts, Verdier y Versteeg, 2018). Al estudiar un gran número de países a lo largo del tiempo, son capaces de mostrar varias tendencias, como el aumento de los requisitos de aprobación legislativa de más tratados en más países, la creciente prevalencia de la aplicación directa y la superioridad jerárquica de los tratados, y la subordinación casi universal del derecho internacional consuetudinario a la legislación nacional

4 Por ejemplo, varios Estados han adoptado la prohibición internacional del genocidio en su derecho interno, pero han ampliado o reducido su definición con respecto a la del Estatuto de Roma.

2. LOS MÉTODOS DEL DERECHO INTERNACIONAL COMPARADO

Los estudios de derecho internacional comparado pueden basarse en teorías y metodologías de una amplia gama de campos y disciplinas vecinas, como el derecho comparado, la política comparada, la antropología y la sociología.

Un reto importante a la hora de aplicar el análisis comparativo en el derecho internacional es que el propio derecho comparativo está plagado de debates teóricos y metodológicos. Los estudiosos del derecho comparado se enfrentan a cuestiones como: si centrarse en la equivalencia formal o funcional entre sistemas jurídicos; si comparar los enfoques de los sistemas a un alto nivel de generalidad o centrarse en normas específicas (Reitz, 1998); y si analizar sólo las normas jurídicas formales (comparativismo delgado) o tener en cuenta las prácticas reales (comparativismo grueso) (Reitz, 1998). Al aplicar los enfoques de forma cruzada, los estudiosos también tendrán que examinar críticamente si algunos de los debates habituales del derecho comparado, como la existencia e importancia de las familias jurídicas, son pertinentes cuando se aplican al derecho internacional. La contribución de Jain aborda varias de estas cuestiones en su crítica a los métodos utilizados por los tribunales penales internacionales para encontrar principios generales del derecho (Jain, 2015).

Una cuestión recurrente en el derecho internacional comparado será la tensión entre la amplitud y la profundidad del análisis comparativo. Dado el número de Estados del sistema jurídico internacional y el hecho de que las normas de derecho internacional se basan a menudo en una pretensión de generalidad, la amplitud suele ser importante. Sin embargo, existe una tensión inevitable entre el número de Estados que se pueden estudiar (análisis horizontal) y la profundidad con la que se puede profundizar en los detalles de un Estado concreto (análisis vertical). Las descripciones densas que se centran en las culturas vivas más que en las normas jurídicas formales pueden ofrecer la mejor oportunidad de comprender la función que desempeñan determinados conceptos jurídicos internacionales en sociedades concretas. Pero cuanto más profundo sea el análisis vertical, menos probable será que los juristas internacionales sean capaces de realizar análisis horizontales de gran alcance, y viceversa. Como campo, deberíamos esperar desarrollar una combinación de enfoques.

Como muestra la contribución de Roberts, Verdier y Versteeg (2018), es posible desarrollar grandes bases de datos n y emplear técnicas estadísticas como el análisis de regresión para identificar tendencias y, eventualmente, relaciones causales. Este trabajo horizontal de gran envergadura, que está en consonancia con la reciente ola de estudios empíricos en derecho comparado e internacional, es probable que sea un aspecto importante del futuro trabajo de derecho internacional comparado. Pero también es importante desarrollar estudios de caso que permitan una comprensión más profunda de cómo se enfoca el derecho internacional dentro de determinados Estados, como muestra Congyan Cai (2007) en su análisis de cómo el enfoque judicial de China sobre el derecho internacional está moldeado por su estructura socialista y el ascenso de China. También puede ser útil recurrir a los métodos desarrollados en las ciencias sociales sobre cómo seleccionar estudios de casos para poner a prueba las hipótesis. Por ejemplo, Katerina Linos (2013) advierte contra el “muestreo de conveniencia”, en el que se infiere una norma general a partir de un puñado de ejemplos destacados y fácilmente accesibles de la práctica estatal. En lugar de ello, y extrayendo lecciones metodológicas de la política comparada, sugiere formas de realizar selecciones de casos teóricamente informadas, de modo que se puedan utilizar pequeños estudios para hablar de cuestiones más amplias.

El derecho internacional comparado también puede aprovechar los conocimientos de la antropología y la sociología. La antropología llama la atención sobre el modo en que las normas internacionales pueden ser vernáculas en diferentes sistemas jurídicos (Sally, 2006; Zwingel, 2012). La sociología proporciona herramientas para comprender cómo se desarrollan y transmiten los enfoques del derecho internacional a través de las redes profesionales y educativas. Por ejemplo, la contribución de Roberts parte de la premisa constructivista de que el campo está constituido en parte por procesos sociales, incluida la forma en que se presenta en los materiales de uso común (como los libros de texto y los libros de casos) y cómo se transmite de forma interactiva entre los actores (como los profesores y los estudiantes). Al examinar la difusión de los libros de texto de derecho internacional, destaca uno de los mecanismos a través de los cuales se exportan diferentes visiones del derecho internacional desde los Estados centrales, como el Reino Unido y Francia, y se importan a los Estados periféricos, como India y Senegal.

3. LAS IMPLICACIONES DEL DERECHO INTERNACIONAL COMPARADO

Algunos juristas internacionales consideran que la noción de derecho internacional comparado amenaza los supuestos y objetivos universalistas del campo (Kennedy, 2007). Por ejemplo, Forteau (2015) sugiere que el derecho internacional comparado parece “una trampa: si se admite que hay diferentes enfoques del derecho internacional (es decir, un espacio para un verdadero derecho internacional comparado), ¿sigue habiendo un ‘derecho internacional’?” (p. 34). Muchos de los conceptos que los juristas internacionales celebran, como los derechos humanos, el Estado de Derecho y el libre comercio, se basan en ideales universalistas (Carruthers y Halliday, 2006). La noción de que éstos pueden ser interpretados y aplicados de forma diferente en distintos contextos nacionales podría parecer que socava las aspiraciones del campo.

Sin embargo, creemos que el derecho internacional comparado tiene el potencial de enriquecer nuestra comprensión del funcionamiento actual del derecho internacional y de cómo podría funcionar mejor en el futuro. Al buscar similitudes y diferencias en la forma en que los Estados entienden, interpretan, aplican y abordan el derecho internacional, es posible ver casos en los que el sistema tiene éxito en la difusión de normas generales, así como ejemplos de los casos en los que las normas de derecho internacional dan lugar a la adaptación local o al incumplimiento. De hecho, como muestra el análisis de McCrudden sobre la CEDAW, la adopción de estudios comparativos más sistemáticos puede reducir el riesgo de permitir que un puñado de ejemplos de divergencia de alto perfil eclipse un conjunto mayor de convergencia menos sensacionalista.

Incluso cuando existen divergencias, su estudio no supone una amenaza existencial para el derecho internacional. Mientras que algunos estudiosos celebran las virtudes del pluralismo a la hora de promover la corrección de errores, la articulación de normas y la innovación creativa, otros subrayan que el derecho internacional tiene sus propios mecanismos para resolver las interpretaciones y prácticas divergentes, lo que depende, al menos en parte, de la comprensión compartida de la diferencia entre argumentos plausibles y pretextuales. Se expresaron temores similares sobre la amenaza potencial que supone la fragmentación del derecho internacional, pero el sistema internacional ha aprendido a convivir con cierto grado de divergencia entre los distintos subcampos y las distintas instituciones internacionales sin entrar en crisis (Rep. de la Comisión de Derecho Internacional, 2006).

Identificar y explicar las similitudes y diferencias a nivel descriptivo es también un proyecto distinto del ejercicio normativo de respaldar o intentar contrarrestar esas conclusiones. Por ejemplo, el análisis del derecho internacional comparado tiene el potencial de descubrir dinámicas de poder que privilegian a determinados actores y sus interpretaciones preferidas del derecho internacional. Sin embargo, el análisis no dicta qué hacer con estas revelaciones. Los realistas podrían celebrar el modo en que el derecho internacional se adapta para servir a los intereses de los Estados, mientras que los teóricos críticos del derecho podrían utilizar las mismas conclusiones para defender medidas que contrarresten esas diferencias de poder y persigan un orden mundial más equitativo.

Los conocimientos derivados del análisis comparativo pueden ayudar a diseñar tratados e instituciones internacionales que respondan mejor a la diversidad del sistema jurídico internacional. Por ejemplo, si el análisis comparativo revela que los tribunales nacionales aplican los compromisos de los tratados de forma más coherente que los poderes legislativos, hacer que un tratado sea directamente aplicable puede ser deseable en áreas en las que la aplicación uniforme es importante. Del mismo modo, si el análisis comparativo demuestra que las prácticas de algunos Estados tienen un peso desproporcionado a la hora de evaluar la existencia y el contenido del derecho internacional, esto puede reforzar los llamamientos para crear repositorios de prácticas estatales y traducciones de instrumentos jurídicos clave de una mayor variedad de Estados.

Pensar en el derecho internacional comparado como un campo facilita la identificación de puntos ciegos en el trabajo existente y la sugerencia de direcciones para la investigación futura. Por ejemplo, gran parte de los estudios detallados sobre derecho internacional comparado realizados hasta la fecha examinan cómo los distintos tribunales nacionales interpretan y aplican el derecho internacional. Sin embargo, como muestra la contribución de Roberts, centrarse en las decisiones de los tribunales suele sesgar los estudios comparativos hacia ciertos Estados, en particular los Estados centrales, occidentales, de derecho común y de habla inglesa, y hacia cuestiones que se plantean ante los tribunales, como los derechos humanos y el derecho de los refugiados. Esto pone de manifiesto la importancia de otros proyectos de derecho internacional comparado, como los estudios sobre las legislaturas, los ejecutivos y los órganos administrativos, así como las descripciones de las prácticas de otros Estados, como China.

Por último, conceptualizar el derecho internacional comparado como un campo distinto nos permite relacionar mejor el trabajo de diferentes estudiosos, en diferentes continentes y a través de diferentes generaciones, y centrar la atención en la evolución histórica del campo y su trayectoria futura. En particular, situar el actual auge del trabajo comparativo en el contexto de una larga tradición nos permite considerar cómo puede innovar -y a menudo lo hace-, por ejemplo, considerando una gama más diversa de países y sistemas jurídicos; prestando más atención a las causas y consecuencias de los diferentes enfoques nacionales y regionales; y recurriendo a los métodos de las ciencias sociales. En resumen, alentando a los estudiosos del derecho internacional a llevar a cabo proyectos comparativos y a comprometerse con las cuestiones teóricas y metodológicas fundamentales que plantean, esperamos impulsar el desarrollo del derecho internacional comparado y contribuir así a una mejor comprensión del derecho internacional.

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