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Número regular (Diciembre 2021) en atención al 75 Aniversario de la Pontificia Universidad Católica del Ecuador.

Regular issue (December 2021) in attention to the 75th anniversary of the Pontificia Universidad Catolica del Ecuador.

En honor de
Alejandro Ángel Guzmán Brito †

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.

“ 196. «La auténtica vida política, fundada en el derecho y en un diálogo leal entre los protagonistas, se renueva con la convicción de que cada mujer, cada hombre y cada generación encierran en sí mismos una promesa que puede liberar nuevas energías relacionales, intelectuales, culturales y espirituales».”

“196. «Authentic political life, founded on the Law and on a loyal dialogue between the protagonists, is renewed with the conviction that each woman, each man and each generation holds within themselves a promise that can release new relational energies , intellectual, cultural and spiritual ».”

Fratelli Tutti

“ 122. «El desarrollo no debe orientarse a la acumulación creciente de unos pocos, sino que tiene que asegurar «los derechos humanos, personales y sociales, económicos y políticos, incluidos los derechos de las Naciones y de los pueblos». El derecho de algunos a la libertad de empresa o de mercado no puede estar por encima de los derechos de los pueblos, ni de la dignidad de los pobres, ni tampoco del respeto al medio ambiente, puesto que «quien se apropia algo es sólo para administrarlo en bien de todos»”

“122. «Development must not be oriented towards the increasing accumulation of a few, but must ensure “human, personal and social, economic and political rights, including the rights of Nations and peoples”. The right of some to freedom of business or market cannot be above the rights of the peoples, nor the dignity of the poor, nor respect for the environment, since “whoever appropriates something is only for administer it for the good of all»”

Fratelli Tutti

"En el Ecuador de hoy, estamos llamados a lograr acuerdos mínimos de convivencia, de cuidar las relaciones, de conocer las urgencias de los que menos tienen, de luchar contra la corrupción, de la manera de hacer política. Resulta crucial dar una alta cuota a la escucha, a la situación del otro. En el Ecuador de hoy, estamos llamados a lograr acuerdos mínimos de convivencia, de cuidar las relaciones, de conocer las urgencias de los que menos tienen, de luchar contra la corrupción, de la manera de hacer política. Resulta crucial dar una alta cuota a la escucha, a la situación del otro.

"In Ecuador today, we are called to reach minimum agreements of coexistence, to take care of relationships, to know the urgencies of those who have the least, to fight against corruption, in the way of doing politics. It is crucial to give a high quota to listening, to the situation of the other."

Gustavo Calderón Schmidt, S.J
Provincial

"Somos un proyecto de transformación social"
"We are a project of social transformation"

Padre Dr. Fernando Ponce León, S.J
Rector de la Pontificia Universidad Católica del Ecuador, Ecuador

In Memoriam: Alejandro Guzmán Brito

El 13 de agosto recién pasado la academia latinoamericana sufrió la sensible pérdida de uno de sus miembros más ilustres, el profesor Alejandro Guzmán Brito.

La trayectoria del profesor Guzmán no puede resumirse en unas pocas líneas, como lo demuestra el sentido homenaje que pocas semanas antes de su partida se le realizara en la Pontificia Universidad Católica de Chile, con lo cual sólo es posible destacar algunos de sus aspectos más sobresalientes, como son su prolífica producción bibliográfica, que alcanzó más de 30 libros, 221 artículos de revistas y numerosos prólogos y discursos, así como sus numerosos cargos en el ámbito de la gestión universitaria, entre los que destacan el hecho de que fe decano de la Facultad de Derecho de la Pontificia Universidad Católica de Valparaíso, donde ejerció también el cargo de director del programa de doctorado en Derecho y fue fundador y director de sus dos revistas jurídicas. La convicción del profesor Guzmán de que la profesionalización de la academia era una necesidad para el desarrollo del país le cambió el rostro a esta casa de estudios y, al mismo tiempo, influenció a muchas otras.

Sus investigaciones y producción bibliográfica pueden enmarcarse en el Derecho romano, el Derecho civil y la historia del Derecho, en todas estas disciplinas realizó contribuciones importantes, que serán sin duda un legado invaluable para las generaciones futuras. No cabe duda de que seguirá vivo en sus obras, en las que continuará ilustrándonos y enseñándonos con su pluma elegante y erudita, que le mereció el reconocimiento no sólo en Chile, sino también en América Latina y Europa.

De todas las virtudes que se podrían destacar de un académico de su talante, que son muchas, en estas breves palabras creo muy importante destacar su generosidad académica. Esa fue la palabra que más se repitió en los grupos de what's up de los que formo parte y donde circuló la triste noticia de su fallecimiento. En efecto, me consta su disposición para responder las inquietudes de quienes le solicitaran su colaboración en las investigaciones que llevaban a cabo. Así como también me consta su disposición para apoyar en la formación académica de nuevos doctores y académicos, entre los que me cuento personalmente y por esto le estaré siempre profundamente agradecida.

Por último, permítanme expresar en nombre del Comité Editorial de esta revista, y en el mío propio, el sentimiento de pesar que nos embarga ante esta irreparable pérdida.

Lilian San Martín Neira
Universidad Alberto Hurtado

In Memoriam: Alejandro Guzmán Brito

On 13 August last year, the Latin American academy suffered the sad loss of one of its most illustrious members, Professor Alejandro Guzmán Brito.

Professor Guzmán's career cannot be summarised in just a few lines, as demonstrated by the heartfelt tribute paid to him a few weeks before his departure at the Pontificia Universidad Católica de Chile, so it is only possible to highlight some of its most outstanding aspects, such as his prolific bibliographic production, which reached more than 30 books, 221 journal articles and numerous prologues and speeches, as well as his numerous positions in the field of university management, including the fact that he was Dean of the Faculty of Law of the Pontificia Universidad Católica de Valparaíso, where he also held the position of Director of the PhD programme in Law and was founder and director of its two legal journals. Professor Guzmán's conviction that the professionalisation of academia was a necessity for the country's development changed the face of this university and, at the same time, influenced many others.

His research and bibliographic production can be framed in Roman Law, Civil Law and History of Law, in all these disciplines he made important contributions, which will undoubtedly be an invaluable legacy for future generations. There is no doubt that he will live on in his works, in which he will continue to enlighten and teach us with his elegant and erudite pen, which earned him recognition not only in Chile, but also in Latin America and Europe.

Of all the virtues that could be highlighted in an academic of his character, of which there are many, in these brief words I think it is very important to highlight his academic generosity.

This was the word that was most often repeated in the what's up groups of which I am a member and where the sad news of his death was circulated. Indeed, I am aware of his willingness to answer the questions of those who asked him to collaborate in the research they were carrying out. I am also aware of his willingness to support the academic training of new doctors and academics, including myself personally, and for this I will always be deeply grateful to him.

Finally, allow me to express on behalf of the Editorial Board of this journal, and on my own behalf, our sorrow at this irreparable loss.

Lilian San Martin Neira
Universidad Alberto Hurtado

EN MEMORIA DE ALEJANDRO GUZMÁN BRITO

Ha fallecido uno de los más grandes juristas contemporáneos. Ampliamente conocido y reconocido por sus obras; estudioso del Derecho, no solo desde la perspectiva histórica romana, sino también abarcando importantes áreas de investigación como la interpretación de la ley, la codificación y otros varios aspectos interesantes del Derecho Civil actual. Indiscutible maestro, de impecable elegante presencia, dedicó su vida a la formación de futuros juristas, investigadores y académicos.

Estas todas son cuestiones irrebatibles, conocidas ampliamente, y cuyo desarrollo posterior –en esta invitación a dar cuenta de su vida académica y personal- solo vendrían a constituir una redundancia. Por ello, prefiero dedicar los siguientes párrafos a algunos aspectos subjetivos, -personales suyos- de quien fuera mi tutor en mi investigación doctoral.

La primera vez que tuve la oportunidad de interactuar con don Alejandro ocurrió en la entrevista de mi postulación al programa de Doctorado que dirigía en la Pontificia Universidad Católica de Valparaíso. Por supuesto ya había tenido la ocasión de escucharlo exponer y opinar agudamente en las Jornadas Nacionales de Derecho Civil, pero esta constituía la primera vez que tendría un contacto directo con él. Y dos cosas me sorprendieron de esa contingencia: la primera, es que efectivamente hubiera leído con detalle mi postulación, las cartas de recomendación y mi currículum, el que no dudó poner a prueba cuando comenzó a entrevistarme en un perfecto manejo del idioma alemán; y la segunda, fue la constatación desde la propia experiencia de la situación a que alude el inciso 2° del artículo 1456 del Código Civil chileno.

Durante mis estudios de doctorado, fui su estuduante en el curso Fenomenología de la normatividad jurídica, oportunidad en la que pudimos revisar una de sus áreas de investigación –la codificación y descodificación del Derecho-, pudiendo constatar de primera mano la exhaustividad del tratamiento de las materias objeto de sus estudios, ya no sólo a través de la lectura de sus escritos como ya daban cuenta sus diversas obras, sino que directamente en la cátedra, corroborando la merecida fama en la formación de juristas, académicos e investigadores que le precedería al profesor Guzmán Brito.

Con posterioridad, tuve el privilegio de que don Alejandro aceptara guiar mi investigación doctoral, sobre pactos en previsión de una crisis matrimonial contenidos en capitulaciones matrimoniales prenupciales -tema que probablemente no formaba una parte especial en sus intereses-, pero que sin embargo aceptó, y siempre orientó muy especialmente en lo relativo a la metodología de la investigación, observando y guiando los cursos a seguir.

Imperdonable sería en este punto, no hacer mención a la generosidad y disposición que siempre tuvo para recibirme y revisar los contenidos de mi tesis: en un comienzo, mientras dábamos unas largas caminatas en el segundo piso de la Universidad, discutiendo contenidos, oportunidad, importancia del tema que estaba proponiendo; luego con la recepción en su oficina, haciéndome entrega de mis manuscritos cargados de sendas observaciones de forma y fondo; más adelante, brindándome la posibilidad y apoyo para realizar una pasantía de investigación bajo el patrocinio de otro gran maestro del Derecho y amigo suyo, don Antonio Manuel Morales Moreno, en la Universidad Autónoma de Madrid, cuestión fundamental para el desarrollo de mi investigación; y ya más avanzado mi trabajo, recibiéndome con café en la oficina de reuniones de la Facultad, para contarme acerca de sus vacaciones, darme algunos consejos sobre el transcurso del tiempo y por supuesto, recomendaciones finales para el depósito de mi tesis.

Es corolario de esta buena disposición, no sólo la concesión de su tiempo y erudición en la guía de mi trabajo, sino también su apoyo constante, el que incluso se materializó en recomendaciones para el acceso de becas internas de la Universidad y nacionales, las que, sin duda o muy probablemente, no habría obtenido sin su detallada y estudiada recomendación. Todo esto gestos dan cuenta de una innegable humanidad, calidez y afabilidad con que el profesor Guzmán guio mis pasos en mis estudios y mi investigación doctoral.

Ha partido uno de los más grandes juristas contemporáneos. Pero también, sin duda, ha fallecido un maestro dedicado, generoso e irrepetible.

Veronika Wegner Astudillo
Universidad Adolfo Ibáñez

ALEJANDRO GUZMÁN BRITO: IN MEMORIAM

One of the greatest contemporary jurists has passed away. Widely known and recognised for his works; a scholar of law, not only from the Roman historical perspective, but also covering important areas of research such as the interpretation of the law, codification and various other interesting aspects of current civil law. An undisputed teacher, of impeccable elegant presence, he dedicated his life to the training of future jurists, researchers and academics.

These are all irrefutable questions, widely known, and whose further development - in this invitation to give an account of his academic and personal life - would only constitute a redundancy. For this reason, I prefer to devote the following paragraphs to some subjective aspects - his personal aspects - of the man who was my tutor in my doctoral research.

The first time I had the opportunity to interact with Don Alejandro was during my interview for my application to the PhD programme he was directing at the Pontificia Universidad Católica de Valparaíso. Of course, I had already had the opportunity to listen to him speak and give his sharp opinions at the Jornadas Nacionales de Derecho Civil, but this was the first time that I would have direct contact with him. And two things surprised me about this contingency: the first was that he had indeed read in detail my application, the letters of recommendation and my CV, which he did not hesitate to put to the test when he began to interview me in a perfect command of the German language; and the second was the confirmation from his own experience of the situation referred to in paragraph 2 of article 1456 of the Chilean Civil Code.

During my doctoral studies, I was his student in the course Phenomenology of Legal Normativity, an opportunity in which we were able to review one of his areas of re-

search -the codification and decoding of Law-, being able to see at first hand the exhaustive treatment of the subjects of his studies, not only through the reading of his writings as his various works already showed, but also directly in the professorship, corroborating the deserved fame in the training of jurists, academics and researchers that would precede Professor Guzmán Brito.

Subsequently, I had the privilege that Don Alejandro accepted to guide my doctoral research, on covenants in anticipation of a marital crisis contained in prenuptial marriage contracts - a subject that probably did not form a special part of his interests - but which he nevertheless accepted, and he always gave very special guidance regarding the methodology of the research, observing and guiding the courses to be followed.

It would be unforgivable at this point not to mention the generosity and willingness he always had to receive me and review the contents of my thesis: at the beginning, while we took long walks on the first floor of the University, discussing content, opportunity, importance of the topic I was proposing; then with the reception in his office, handing me my manuscripts loaded with observations of form and substance; Later, he offered me the possibility and support to do a research internship under the sponsorship of another great master of Law and friend of his, Mr. Antonio Manuel Morales Moreno, at the Universidad Autónoma de Madrid, a fundamental question for the development of my research; and later on, he received me with coffee in the meeting office of the Faculty, to tell me about his holidays, to give me some advice on the course of time and, of course, final recommendations for the deposit of my thesis.

A corollary of this good disposition is not only the concession of his time and erudition in guiding my work, but also his constant support, which even materialised in recommendations for access to internal university and

national scholarships, which, no doubt or very probably, I would not have obtained without his detailed and studied recommendation. All these gestures show the undeniable humanity, warmth and affability with which Professor Guzmán guided me in my studies and doctoral research.

One of the greatest contemporary jurists has passed away. But also, without a doubt, a dedicated, generous and unrepeatable master has passed away.

Veronika Wegner Astudillo
Universidad Adolfo Ibáñez

Acerca del Número Regular

Aniversario de la Pontificia Universidad Católica del Ecuador
Aniversario de la Facultad de Jurisprudencia.

Este es un décimo número 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 Jurisprudencia 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 y a su equipo del área de estudios jurídicos. A las y los autoras/es todo nuestro reconocimiento y gratitud.

Catalina Salgado Ramírez
Departamento de Derecho Civil
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RESPONSABILIDADES DEL COMITÉ EDITORIAL Y DE LAS/LOS EVALUADORAS/ES Y/O EVALUADORAS/ES Y/O REVISORES/AS EXTERNAS/OS:

El Comité Editorial y de evaluadoras/es y/o c externas/os; en su condición de pares externos, cumplen con el rol de asegurar criterios de calidad en los contenidos y de objetividad en la selección y publicación, dentro del proceso editorial. Con este objeto se les atribuyen las siguientes responsabilidades:

1. Rol de revisores/as o arbitraje

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:

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

2. Conflicto de intereses

En caso de existir un conflicto de intereses, de cualquier índole, las personas naturales con responsabilidades de revisión se comprometen a informar a la revista RFJ de inmediato, en cualquier momento del proceso y a rechazar su participación como revisor.

3. Confidencialidad

Las personas naturales con responsabilidades de revisión deben respetar el contenido de cada texto en proceso de arbitraje y lo mantendrán en condición confidencial durante todo el proceso editorial. En ese sentido, la RFJ emitirá reconocimientos/certificados una vez concluido el proceso editorial y publicado el número respectivo.

4. Retroalimentación

Toda crítica al artículo se realizará en forma anónima, objetiva, honesta y respetuosa para con el autor, quién podrá realizar las correcciones o ajustes correspondientes, según lo solicitado por la revista RFJ. En caso de no aceptar el arbitraje, el artículo será rechazado.

5. Modalidad de arbitraje

Los artículos emitidos por los autores son enviados a los pares revisores externos, bajo el sistema de *blind peer review* (sistema de pares a <<doble ciego>>). Este sistema de evaluación de los trabajos de investigación consiste en que al menos dos expertos (pudiendo ser más de dos de requerirlo el proceso de evaluación del texto) en la materia sobre la que tratan los evalúan y emiten un dictamen sobre la vialidad de la publicación.

6. Responsabilidades del Comité Editorial y de las/los Evaluadoras/es Externas/os

Junto con el Consejo Editorial, el Comité Editorial y de las/los Evaluadoras/es Externas/os vela por mantener el perfil académico de la revista en su ámbito de reflexión, en el objeto de estudio al cual responde y en relación con la audiencia a la cual se dirige.

7. Competencia

Junto con el Consejo Editorial, los miembros del Comité Editorial y de las/los Evaluadoras/es Externas/os, son los únicos responsables para determinar el carácter de publicable de los artículos desde una perspectiva científica.

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COPE - CÓDIGO DE CONDUCTA Y MEJORES PRÁCTICAS DIRECTRICES PARA EDITORES DE REVISTAS

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, i*cmj*e: 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.

3) Editorial and External Evaluators Commitee:

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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. Furthermore, 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

*El Equipo Editorial de la RFJ se encuentra integrado por los miembros del Equipo de Gestión Editorial, el Consejo Editorial y el Comité Editorial y de Revisoras/es Externas/os. El Consejo Editorial y el Comité Editorial y de Revisoras/es Externas/os asume la responsabilidad académica de la revista y se encuentra conformado exclusivamente por docentes e investigadores externos a la Pontificia Universidad Católica del Ecuador (PUCE).

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

JOURNAL SUMMARY

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Global Law formation: Evolution of National Law towards an Universal Law

Formación del Derecho Global: Evolución del Derecho Nacional a un Derecho Universal

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ABSTRACT: The phenomenon of globalization has unprecedented characteristics in the political, economic and social history of humanity. It does not start from a previous acceptance of the states to get involved in it, but it advances nevertheless an eventual opposition resistance of the new subjects of International Law who want to impose a different direction for globalization. The fundamental objective of this article of analysis is to propose a specific formation of Global Law from three probable sources, according to the projections of contemporary international relations and the political balances that can be foreseen, either by the greater influence of powers and its allies, due to the pressure of successful integration processes, or the presentation of new legal universal systems. The fundamental point is in the need for all political actors to find an adequate response in the formation of Global Law that suits their political interests or that offers the best possible scenario for asserting them. This, because it is evident that some political entities could contribute more to determine a "common direction" while others would be forced to seek a better possible position.

KEYWORDS: legal developments, globalisation, international economic relations, legal systems, social integration..

RESUMEN: El fenómeno de la globalización tiene características inéditas en la historia política, económica y social de la humanidad. No parte de una previa aceptación de los Estados para involucrase en ella sino que avanza no obstante una eventual resistencia opositora de los nuevos sujetos del Derecho Internacional que buscan imponer una dirección de avance distinta para la globalización. El objetivo fundamental de este artículo de análisis es plantear una formación específica del Derecho Global a partir de tres fuentes probables, de acuerdo a las proyecciones de las relaciones internacionales contemporáneas y a los equilibrios políticos que pueden preverse, ya sea por la influencia mayor de potencias y sus aliados, por la presión de procesos de integración exitosos o por la presentación de nuevos ordenamientos jurídicos de alcance universal. El punto fundamental está en la necesidad que todos los actores políticos encuentren en la formación de este Derecho una respuesta adecuada, que convenga a sus intereses políticos o que les ofrezca el mejor panorama posible para hacerlos valer. Esto, porque es evidente que algunos actores podrían aportar más para la determinación de una "dirección común", mientras que otros se verían abocados a buscar una mejor posición posible.

PALABRAS CLAVE: Evolución jurídica, globalización, relaciones económicas internacionales, sistemas jurídicos, integración social.

JEL CODE: F02, F59.

INTRODUCTION

The phenomenon of globalization has characteristics previously unknown in the political, economic and social history of humanity. It does not require the prior acceptance of the States to get involved in it, but it does advance despite opposition resistance, particularly represented by political movements of the new left that, in developed countries and in Latin America, see in globalization a new form of colonialism.

In processes to regulate national conduct, the States accept the parameters of the Vienna Convention on the Law of Treaties (Fisher, 1994) since, based on an initiative to establish an international commitment, of any kind, a correct negotiation of its terms by expert delegates from States interested in the matter.

The process of adopting certain rules of conduct rests, consequently, on the express political will of the States that make them their own, as if they were their own. However, in the globalization process the opinion of the States is not heard. Globalization progresses even when certain political actors oppose it.

In addition to accepting the existence of this global phenomenon, it must be recognized that the process gives rise to a set of influences in which the political entities that contribute the most in determining a "common direction" of globalization are more relevant. Consequently, the search for a better position for each of these entities may respond, in many cases, to various factors of competitive state interrelation. In others, to complementary interrelation factors, such as those that respond to integration processes (Santos, 2004).

In accordance with the above, the contributions to globalization will be decisive when the direction of the process obeys the real influence of powers and their allies, or successful integration processes, which in practice come to constitute a

universal political power. Failed integration processes, as well as the influence that comes from smaller states, can be, according to this approach, insignificant.

It is evident then, that due to the full appreciation of their internal realities, some States choose competence and others complementarity. The latter understood as the union of resources and efforts to jointly face the challenges of globalization, thanks to a process that complements the potential of a State with the contributions of the partners in the integration process.

In this panorama, it is foreseeable to find, through complementarity, a better position for the political entities involved in the development of this globalizing phenomenon. Integration, therefore, is the instrument that makes possible the improvement of the potentialities of each of the states committed to joining together to create a new reality, which is by no means the mere sum of national realities immersed in the process. Finally, the result of the joint and shared effort consolidates an orbit of influence of the entity built. In this way, it is possible that the capacities of each one of the States individually considered are magnified.

1. SYSTEMATIC FORMATION OF GLOBAL LAW

The concept of the first analysis, the formation of Global Law, goes back to the beginning of the creation of a new international community.

After the Second World War was over, without affirming the aspiration of reaching a Universal Law, the conception of a community greater than the usual one was proposed, depending on the will of the governments of the member states. Thus, a United Nations community (Charter of the United Nations Organization) began to be created, which would later bring the possibility of a world-scale right closer (Jiménez De Arechaga, 1958).

Only the idea of a relevant role for nations, of course represented by governments, opens up new alternatives, in theory, to conceive a universal sovereignty. Within this theoretical scenario, in the first years of deliberations of the Sixth Committee of the General Assembly of the United Nations, it is proposed in speculative terms that one might even think of a "universal sovereignty", so that the national states administer their delegated sovereign portions. , while the International Community kept for itself, exclusively, sovereign powers to deploy actions in very specific matters such as those related to the preservation of world peace and security, state cooperation and the dissemination and respect of human rights (Heller & Heller, 1995).

Along the same lines, in the theoretical proposal of universal sovereignty, which of course was not accepted by the major political powers in the world, the international community maintained the probable reserve of holding national states to account for administrators of portions of sovereignty.

Consequently, it would be the organized community of nations itself that would request accountability, so it would not depend on preponderant States, even when it is accepted that these have implicit powers, not described in the United Nations Charter, that they give them greater responsibilities.

This theoretical conception announces the possibility of creating a globalized universal administration, which would guarantee the rights and interests of medium and small States, but which in a certain way would limit the powers of the major Powers, which are reluctant to accept that the national States had entered deteriorating, as regards the application of its sovereignty.

In later years, when the concept of the phenomenon of globalization is accepted, the creation of blocks and mega-blocks returns the prominence to the regional Powers, which

demonstrate in practice that their particular national states, namely the world powers, have not declined. in their powers to exercise sovereign actions, with repercussions in their respective regions and even in the entire planet.

The so-called implicit powers include, for example, the right to veto granted to the permanent member states of the United Nations Security Council, under the notion of preserving a world equilibrium born precisely in the postwar period, a balance that grants sufficient power to stop changes or to avoid the approval of some resolutions that may violate that power reserved for the states that won the war.

Consequently, with the exercise of these special powers, not shared with medium and small States of the International Community, a new world equilibrium is sustained, which is later drawn as bipolar, which aims to safeguard world peace and security and is nourished by "Values" defended by states that won the war and that were imposed on the "anti values", proposed and that tried to be equally imposed on the world, by the fascist powers.

This confrontation between values and anti-values, because in the formation of Global Law I also propose that national legal systems will gradually adopt globalized rights standards, which are based precisely on the values, described in the principles included in the Charter of the United Nations and in the Constitutions of its member states.

However, to return to the world balance that was intended to be established, a practical rupture of it was born at the same time as the proposal to create a new international community, due to the presence of two of the emerging powers, also triumphant, who support a balance bipolar political powers, supported by the threat of the use of devastating military force. Bipolarity is alien to the original conception of a new international community of peoples, equal in rights and backed by a universal political power.

As an aggravating factor for the medium and small states, which could have benefited from a globalized community, there was and remains an imbalance in the representation of the international community by the members of the Security Council, which affirms the United States (USA) and the then Union of Soviet Socialist Republics (USSR) as consolidated emerging powers and retains for the victorious allies, powers similar to those of the two powers, for maintaining that they have greater responsibilities for the preservation of world peace and security, only the two powers emerging countries and their war-victorious allies, not the other member states of the United Nations.

Despite the imbalance in world representation, the demand for accounts works through the commitment expressly made by the member states to accept the resolutions and mandates of the international community. In reality, the new International Law of mandatory compliance, the so-called "jus cogens", may resemble an incipient Global Law, even when the latter, the Global Law, does not respond to an express commitment of the States to put it into effect (Monroy Cabra, 1998).

It is convenient to establish as a premise that in those first decades of the new political, economic and social orders, there is no clear conception of what Global Law could be, which is only taking force in the face of the globalization process, in which the community current international, is immersed.

As already mentioned, the postwar period is a crucial event in the formation of a Universal Law. The characteristics of the contemporary globalization process may be a collateral result of the objectives set by the allies who won the Second World War. Indeed, immediately after peace was reached, the winning allies made public their desire to establish a "new world order" (Huntington, 2015), capable of ensuring a lasting peace by avoiding a third world conflagration.

Furthermore, globalization as such is not made explicit as one of the objectives of the winning alliance. Alliance that proposed new interstate relations orders sufficiently cohesive to prevent a third world war, but not to close all the escape valves of human violence that could be unleashed from the magnifications of the political positions of the victors or the losers.

The new interstate relations orders were designed as mechanisms to avoid a world catastrophe. In addition, they maintained sufficient flexibility so as not to restrict the development of the victorious powers, guided by their particular ideological channels and their own economic recipes. This means that, in the two decades after its establishment, there still does not exist in the new organization of the international community, some sign of deterioration of the national state of the powers, particularly with regard to the political elements that are very clear in globalization. current (Ripol, 1994).

On the contrary, if the deterioration of the new States is evident, of those that emerged in the second postwar period due to the so-called decolonization process, because there is no doubt about the scant development of integration processes in Africa, Latin America and elsewhere. the South Pacific. Without too much contrast, the integrationist processes in Asia have fared better (Mayntz, 2002).

In the first decades that follow what I have indicated as the probable dawn of Global Law, contrary to the determination of the present globalization process, it was observed that the consolidation of a single world power was impossible to propose even among the victorious powers. It is so much so that, after the Second War, the Cold War began practically without rest. The evident approaches of the two emerging powers: the former Soviet Union that claimed its place of preponderance for having sacrificed thousands of its soldiers, and the United States that was called to act as saviors and as the surest sources

for the reconstruction of the world ravaged by war (Gardner, 1994); they were the ideal terrain for a new fight, without an official declaration of hostilities.

The differences that gave rise to the Cold War were so profound that political universalization had to wait until an unquestioned winner emerged from this unarmed conflict. Meanwhile, the consolidation of balanced powers in political bipolarity should leave the valves open for détente. The Korean War was the first valve that was put into operation to "measure" the potential of each of the axes and to see if a third world confrontation could be avoided, with sector wars.

With the powers occupied in promoting one or another pole of the balance, there were very few coincidences in the world to build the orders that the new world organization proposes in consideration of the principles contained in the Charter of the United Nations. Probably it was not taken into account that its development shows a deterioration of the allied and associated nation states, with each of the two axes, and furthermore, it configures an unprecedented mechanism of political, economic and social universalization: this is the process of globalization, understood as an unplanned by-product of the new orders.

For this reason, it is admissible to suppose that globalization is an unforeseen phenomenon, derived from the construction of previously unknown orders. Since the beginning of the new world organization, the efforts made in paradigmatic matters such as Human Rights, the advancement of international trade and the validity of legal systems with universal scope - Maritime Law, Air Law, Space Law - have contributed greatly to the promotion of the globalization. Phenomenon that, from this perspective, created the possibility of the existence of a Global Law.

At some point in the search for the few common points to the two poles of political equilibrium, the strengthening of the

concept of international community had to be accepted, with the tacit reservations of aspiring to lead it, at the end of the already manifest ideological confrontation (the Cold War), by one or the other of the two poles of the political balance of that time (Díez de Velasco-Vallejo, 1994).

Either way, the dominant powers agreed that greater firmness was needed to strengthen the international community. The two powers and their respective allies knew that it was necessary to avoid a fiasco similar to the one that occurred after the First World War. To this end, with all the implicit reservations and outlined ambitions, it was taken for granted, by all the protagonists, that the new international community should be united thanks to "principles" included in a solemn pact: the Charter of the United Nations, which recognizes them worldwide validity. Initially, a little more than 50 States were the ones who recognized these principles that, gradually, have been laying the foundations for the construction of a new world organization. Currently, 190 States apply these guidelines (Herdegen, 2005).

It could be discussed, at present, whether the intervention of the organized international community, determined in Chapter VII of the United Nations Charter for the use of force against States that affect or violate international peace and security, is a dead letter.

Apart from the fact that, currently, contemporary globalization poses at least three rivalries and, the new globalized order is not within the powers of the international community, even when they are placed on a higher plane than the sovereign powers that remain for each national state (Wahl, 1997).

It is for all this explanation that the globalization that I propose, grants a different control to that of the administration of the portions of sovereignty of the international community,

supposedly given under reserve to each one of the national states. For this reason, the single direction of the globalization process would not correspond to the current international community, but it does not prevent a particular power and its allies or a multipolar world from determining that direction or its redirection, within a new balance between powers and allies. and successful integration processes (Huntington, 1999).

The theoretical concept, not universally recognized, of universal sovereignty divided into portions, is alien to globalization that rests on two fundamental pillars. The first, the definitive end of the national State, as a political conception and, the second, the appearance of a new concept that regulates the conduct of States immersed in blocks and mega blocks of dissimilar origins, but all created and maintained as adequate responses to the process. of globalization.

In this scenario that I envision, national identities are lost. Some would be diffuse in the blocks and mega blocks. Others, in the best of cases, would be recognizable by the contributions of each power and its allies or of each successful integration process, in the elements of globalized institutions, in direct relation to the value of their contributions to configure an adequate response to the phenomenon of globalization.

If a reservation can be made in the panorama described, it is because the idea of the support of contemporary Global Law is not linked to the concept of international community. However, both this Law and community strengthening, under the parameters that are still present, have a direct relationship with the decline of nation states.

Likewise, in the political balances that the world has experienced since the end of the Second War, it is possible to conclude that not all nation states have seen their sovereignty deteriorate. In these first years of the 21st century, it can be

seen that the alliances of powerful states, which combine their particular sovereignties by using their implicit powers, acquire greater power than the organized international community (Posso Serrano, 2015).

It is possible to insist on the formation of contemporary Global Law, fundamentally because the purpose of unifying the application of a single legal system is not foreign to humanity. In effect, in the worlds that were known to imperialist powers, an attempt was made to impose a single Law, that of the region's hegemonic power (Mascareño, 2007).

In Asia, for example, China by extending its empire took its Law as a basis for coexistence of the subject peoples. Of course, the imposition of an imperialist state against smaller states could not be considered, because the current conception of the state does not coincide with the imperial deployment of antiquity. Even so, it is evident that there was the purpose of having the same Law for the entire empire, which from the point of view of the Chinese, was the world known to them and above all, the world that China imported.

Also, in his time, the Greeks tried to impose with Alexander the Great, their Law in the entire sphere of the created empire. The same conception of China can be seen in Greece: the law had to reach the whole world that for Alexander mattered.

On the other hand, the Roman Empire further elaborated this sense of universalization of Law. He even came to accept the possibility of applying a particular Roman Law to non-subject peoples, whose individuals associated with Rome in one way or another. Hence, a law of nations (ius gentium) was created, specifically for non-Romans; A fact that can be considered precisely as the origin of International Law (Rawls, 1993).

In times of modern history, the purpose of imposing a single legal order remains quite similar to that of ancient times. The

coinciding element, in these ancient and modern endeavors, is in the "imposition." It is about asserting a Right that comes from a superior political will and that aims to reach the entire territory of the empire. In the ancient conception, the empire reached the known world that was for the dominant political will, the one that mattered. In modernity, empires coexist and reach the areas that power gives them. Consequently, the importance for each empire of the world, in each of its domains, is determined by reason of power.

The so-called Cold War was a clear example of the reach of empire on the basis of royal power. Power that was confronted in an essentially bipolar world, in which alliances reached their maximum historical dimension. While the West, for reasons of power, accepted "sharing"; The East had a power that rests on the greater force of a dominant political will. The end of the Cold War allowed conclusions to be drawn about the stability of an empire and its rival. The conclusions allow us to appreciate the strategies of the game in the reached equilibrium and, perhaps with a small margin of error, it can be said that sharing power offers better stability results.

In the contemporary world, we start from a basic principle of legal equality of all States (Borowski, 2003). In addition, it is proposed that in this theoretical sovereign equality, there are state contributions for the creation, maintenance and strengthening of the organized international community. Of course, the exercise of the so-called implicit powers, already mentioned, means that certain Member States come to have greater responsibilities than others, in this supposed equal contribution. Furthermore, the vindication of their particular national sovereignties leads to the real presence of greater political wills, which could also, eventually, impose their own rights.

The importance of the contribution is still currently rooted in power, but it is even more relative to the possibilities that

each alliance distributes to the allies. In such a way, the greater contribution appreciated by the alliance's core power could lead to greater possibilities of sharing the benefits of its intervention.

In confirmation of the previous assertion, it should be noted that the current data and statistics explain that the reconstruction of a State intervened by force, in charge of an alliance, usually costs three times more than what is used for the submission of the State intervened. Consequently, the greater contribution of a determined ally in the subjugation operations should lead to a greater participation of that State in the reconstruction tasks of the one that has been intervened (Merino, 2006).

In any case, leaving aside a possible cynical interested participation, it is evident that the way of exercising the implicit powers is very close to the greater political will, in antiquity and in modern times, to impose a Law. The germ of Global Law of the ancient empires and of the modern era, differs from the hegemony projected in contemporary times because there is currently a new fundamental element, which did not appear in ancient times but which had an important support in the modern era: power shared in alliances. Power that could not be drawn in the empire of Alexander or the later Roman.

In virtue of this, it may be correct to affirm that in our days, the consolidation of a world hegemony like that of the United States presupposes the idea of sharing power. Washington's allies are essential to carry out any manifestation of dominance. Above all, in use of the implicit powers of the United States, under the conception of the greater responsibility of the power in the tasks of preservation of peace and international security (Keohane, 1993).

Regarding the formation of Global Law, despite the alliance with all the indications of sharing political power, the United States apparently is inclined to impose its Law rather than join

a universal one of community origin. The preference for its own legal order was evident when it was tried to counteract the harmful effects of climate change; with the validity of the Rome Statute of the International Criminal Court; and even with the position of Washington in the Rounds of Negotiation of the WTO (World Trade Organization) (Silva, 2001).

Continuing with the United States, its main allies are not very willing to accept the imposition of their legal order. They intend to create an order that has greater support in their community and, therefore, that can be better projected in a world in the process of globalization. Hence, European Community Law could be that supported by political wills that share the benefit of power (which comes mainly from Washington) but that do not fully embrace the possibility of adopting US Law as the basis for projection of Contemporary Global Law. It is clear that the European Union (EU) would lean because Global Law, which arises from the West, has an important content of its common law, that created by the successful efforts of community integration.

Moreover, the rest of the Western world can turn to integration, perhaps not to access the possibility of sharing the political power currently consolidated by the United States, but to claim responsibilities defined in the formation of Global Law, the sustained " adequate response "to globalization. The contribution that the integration of these countries can offer constitutes a mechanism to safeguard, as far as it may fit, the legal personality and the particular principles of the integrated States.

In the same way, emerging powers in Asia could attract new allies around them. The other States are already trying to strengthen their own integration processes and those minor ones, who were not taken into account or who do not carry out serious integration processes, run the risk of being absorbed without benefit of inventory.

On the other hand, Africa shows a pessimistic scenario in this concept. The integration processes are still scattered on the continent, south of the Sahara. While, to the north, the Maghreb continues to struggle between modernity with western features and the orthodoxy of fundamentalist Islamism (Midón, 1998).

The fundamental problem of the Maghreb and other predominantly Muslim States is that in the formation of Global Law an important contribution of Islamic Law cannot be drawn. This does not deny the growth of political influence in the Muslim world, which can become a source of alliances currently unthinkable. However, the principled characteristics that contemporary Global Law must have are those that hinder the legal contribution of Islamic Law (Riosalido, 1993).

It is important to consider that the surprising alliances, due to the political influence of the Muslim States, could give rise to conceptions of successive goals, which would be achieved with the application of coinciding principles in the field of the new Global Law. The goals achieved could be thought of as processes, in which some States would not be complicated to participate and achieve the proposed objectives, while for others institutional adjustments would be required first. The same ones that, in turn, can be more difficult to carry out in certain States than in others. The principled transformation of Islamic Law therefore implies a task with very complicated contours.

Due to the above, contemporary Global Law is still in the process of formation and therefore cannot be noted immovable characteristics, since the unquestionable link of this Law with international politics allows to foresee incalculable developments.

"Furthermore, it is possible to refer to an application in Law of the usual mechanisms of political analysis. This implies building scenarios based on situations that the world currently contemplates and the reactions that could, with fundamentals, occur in the near future (Mereminskaya and Mascareño, 2005).

Along these lines, a fantasy scenario has no value whatsoever to envision the formation of contemporary Global Law. A decade ago, presuming that the world would be legally "multipolar", for example, was based on the conviction that the then emerging powers were going to continue along the path of political consolidation that they demonstrated in their origins. However, unforeseen circumstances may occur, such as the strengthening of the Islamic State, which among its objectives also has globalization, under the aegis of Muslim fundamentalist principles that presuppose an imposition (Ferrero, 2015).

It should be borne in mind that the response to Islamic globalization is not comparable to that proposed in Latin American integration processes, such as ALBA (Bolivarian Alliance for the Peoples of our America) and UNASUR (Union of South American Nations) itself. Above all, because the latter were focused on a response to globalization that, they take for granted, has been orchestrated by the United States (Rosenthal, 1991).

The confrontation of "adequate answers" could currently be examined with certain political foundations that would allow to arrive at a reply that could be described as "western" (for explanatory purposes) and that would open the way to seek alliances with States, including Muslims, that are seen affected by Islamic globalization.

In that order, a legal conditioning of the non-fundamentalist Muslim state systems is foreseeable, the same that could be confused with a "westernization" of its own law. It is unreasonable to believe that Islamic fundamentalism will warm up to move closer to Western globalization, since the strength of the Islamic State is precisely in the purity of its principles and in the political radicalization of its legal institutions.

Along these lines, it could be assumed that at the same time that the Western response to globalization benefits from the

legal contribution of non-fundamentalist Muslim states, the Western response itself becomes more tolerant in determining the sources of the principles that shape it. Global Law. Likewise, in the admission of successive objectives of the legal-political institutions, in such a way that the new States that would join the "response" have more time and use other considerations, to make the necessary adjustments in their legal systems, in concordance with Global Law.

Although the proposed extreme is obvious, it is probably more difficult to draw scenarios in which the responses and positions would be similar. Thus, the globalizing proposal of the United States cannot be conceived as essentially different from the one that may come from the EU (Barbé, 2005).

Then, for the construction of scenarios, it will be necessary to appreciate the virtualities of the major political influences for the formation of Global Law. On the one hand, the potentialities of the United States to impose its system have certain limits in the very conformation of the hegemonic power that is projected in the current world. On the other hand, the achievement of the political goals of the European Union is supposed to affect Washington's position to "give in" on matters, especially those in which the legal approach is shared.

The modified political position of the US has to affect the proposed goals, not achieved, in the integration processes of Latin America. In particular, ALBA and UNASUR, in order not to collapse, could have "discovered" political positions similar to those of Europe, already accepted within the eventual US proposal, examined here as another possible scenario (Serbin, 2007).

If so, the rapprochement of Latin America cannot be ruled out, even if one examines the history of the integration of the subcontinent and the systematic defaults. The pre-existence of shared "goals", in the scenario under analysis, thanks to the

European contribution, would soften the demand for a greater effort from the region, so that its legal personality and interests are respected by globalization.

In another derivation of the previous scenario, it would be naive to aspire for the EU to be the one to join the United States' globalization proposal, eventually modified by pressure from Latin America. Until now, European integration, despite the crisis in the euro zone and the exit of the United Kingdom (Young, 2016) known as "Brexit", looks much more concrete than the pale results of the multiple integration processes of the Latin American subcontinent, who repeat their objectives and propose higher goals, before having achieved the lower ones.

Consequently, it is not practical to presume that Latin America would be able to promote its "adequate response" to globalization, in such a way that it would force the United States to modify its response. The same one that, once altered, will encourage Europeans to join it.

Due to this, the construction of scenarios could be infinite. Even each scenario itself could give rise to many considerations. It is possible, perhaps, to propose three basic lines of analysis in order to glimpse a Global Law, currently in formation, faithful to the globalization process: scope of the imposition of a greater political will; contributions of national states to the process of formation of world law; and multiplication of national potentialities by virtue of successful integration processes.

In the first line of analysis, the application of international conventions of a universal nature takes great relevance, which have uniformly and substantially modified domestic norms of the member states regarding Human Rights. Rights that are included as paradigms in the Constitutions and state application norms, whose breach or violation leads to censorship and rejection of international public opinion and, in some cases, even the intervention of international jurisdictional bodies.

On the other hand, the second point of consideration gives an important role to the models of legislation proposed, for example in labor matters by the International Labor Organization (ILO), in industrial matters by the United Nations Organization for Industrial Development (UNIDO), on Private International Law by the United Nations Commission for the Development of Private International Law (UNCITRAL / UNCITRAL). All these models have managed to unify the respective national laws, which adopted them to create laws according to their own legislative procedures. Likewise, the application of international standards on Intellectual Property and Copyright is another important example of the true influence of international models in domestic legislation.

In the line of recognition of these contributions, within the third area of analysis, it is necessary to point out all the achievements in trade matters of the old GATT (General Agreement on Customs Tariffs and Trade) and the current WTO (World Trade Organization). Perhaps it is even correct to say that the new international economic order gave rise to globalization: that from the economic, from trade, to the cultural and, later, to the political.

In short, the list could be enriched with International Criminal Law, Maritime Law, Treaty Law, Air and Space Law, and many other manifestations that started from a principled proposal, which after having been analyzed by experts, became politically evaluated. . Finally, the governments pledged their political will to make their own, with greater value than that which they give to their national laws, to these ordinances that, put into effect and applied in accordance with the different legal traditions, have proven not impossible to get along in the practice.

In the same sense, comparative legislation, which has grown very significantly in recent years, shows that there are many common elements between national legal systems around the world and that it is not difficult to assimilate a rule of foreign

legislation, which for sharing realities, it may be convenient for another internal legal system.

In conclusion, it would be necessary to foresee at least these three pillars of analysis enunciated to be able to glimpse the characteristics of the formation of a Law that is called global, only by deducing that an unstoppable process of globalization must seek its own legal order, which from the political point of view, it would be essential.

2. ESSENTIAL CONCEPTION OF GLOBAL LAW

Regarding the practical application of Global Law, it is necessary to consider the common guiding principles, but not necessarily shared, under the influence of hegemonic alliances. This, despite the fact that Community Law is based on the purpose of "sharing", without this meaning eliminating the possibility of imposing a successful integration process on another or others that had made little progress or simply failed (Alexy, 2003).

Therefore, it is necessary to find the reasons to sustain that the Global Law institutions that are being formed must respond to concepts, taken as ideals in some cases, or as inevitable in others, because of the imposition.

The practical application of these institutions entails an empirical basis, which is not reflected in codes, which cannot be expected within the scope of Global Law, but rather in the sets of norms of the different community and national legal systems.

Consequently, in order to highlight the essential conception of Global Law, it is necessary to resort again to the guiding principles of Alexy (2003), which are not inappropriate in a contemporary interrelated world where the member states of the international community repeat them in their own Constitutions. The norms of Community Rights, for example, are based on those principles that are the same that serve the

hegemonic powers and their allies to draw their supposed "implicit powers". Currently, they are also useful for managing the supreme benefit of the preservation of international peace and security, which undoubtedly allow to exert a greater influence on the unstoppable march of globalization.

Regarding the real projection of Global Law, it can be taken into account that even when there are guiding principles, the execution and guarantee of the norms are different according to the particular conditions of each State involved in the globalization process. For this reason, a single formal conviction remains, that the results of the norms are shared, even when the advantages of their application are greater for some and less for others.

States that resign themselves to being merely beneficiaries of the process can claim to benefit from globalization without having contributed to its cohesion. However, the dependence coupled with the situation of pure beneficiary, does not allow that State to access all possible benefits, but only those that the influential States and those that managed to insert themselves, with the recognition of the parties, allow it to access (Lins Ribeiro, 2005).

There is evidence that the globalization process also gives rise to a set of influences, when some political entities intend to contribute more to the determination of a "common direction". Consequently, the search for a better position for each of these entities may respond to various factors of competitive interrelation in many cases, or complementary in others.

An alternative path that can be theoretically developed refers to an integration process sufficiently consolidated to avoid the situation of the dependent State or simple beneficiary of some other successful process. National realities, for this second option, must also be weighed in such a way that they open the way to the exercise of an authentic and sustained convergent political will of the States.

At this point, it is essential to analyze the potential to form an integral, but important, part of an existing integration process, with greater convening power and with consolidated bases. This, before promoting a new process, which would aspire to overcome, without good probabilities, the previous one, and which could eventually serve as a bulwark to achieve a better location in the globalized world.

Indeed, if it is about the imposition of a strategic alliance, the inherent potentialities of the alliance do not make it possible for the lagging State to be considered strategic for its global projection. The same happens within the globalization process, in which it cannot be assumed that it stops due to lack of will or inability to contribute, by any State, with dependency profiles.

2.1. Common elements of national rights

Original Global Law conceived in the manner described, since there is no room to propose a global legislative body, the coincidence in the appreciation of the common elements, based on the principles of validity recognized by the Constitutions of the States of the international community and collected in the Community Organization Charter, under the motto "we the peoples of the United Nations", allow to have a stable base for the development of Global Law.

The General Principles of Law, consequently, are the common elements of the political concept of "National States", that is, the States individually considered, when they voluntarily form part of an integration process, which creates a Community Law also guided by these principles.

The agreement of the States and the communities around the acceptance of the validity and validity of the General Principles of Law is not due to chance, since it is probably an inexcusable requirement, proposed by the States for the construction of the new global community.

The original subscribing States to the Charter of the United Nations endorsed those general principles contained in the document and not invented by the jurists of that time. The notion of collecting the principles is based on the certain assumption that they already existed and that they were in force and valid for States that are committed to developing a new form of interstate treatment.

The new interrelation between States establishes specific purposes, precisely based on the principles included in the Charter of the organization, and they take for granted the undertaking in the common task of creating or establishing new orders, to strengthen the harmony that should prevail in the state relations and to give rise to a greater defense and protection of international peace and security.

Globalization is precisely inserted in the creation of the new orders, not as a result sought by the new international community, but as an effect directly related to the new economic and political order, with the consolidation of Human Rights as a universal practice, with international cooperation and solidarity, among other premises that led to the approach to globalization.

3. COMPETENCES OF GLOBAL LAW WITHIN AN INFORMAL PROCESS

In its common sense, competences are the powers of the States, of the International Organizations and of the bodies resulting from an integration process, to know and decide actions and positions on certain matters.

In its origins, the competencies of the nation states were unquestioned and excluded.usivas and their imposition could have even given rise to confrontations between States that did not accept the competences of others.

Then when creating the International Organizations, the States grant competence to them, to deal with issues of common interest, such as the preservation of international peace and security, granted the competence to the United Nations Security Council, or the competence granted to regulate the foreign trade of the European Union, valid for the entire community.

But this classic concept of competences, when it comes to Global Law in training, presents numerous complexities, especially due to the lack of formality of the globalization process. Except for state commitments to undertake an integration process or alliances made by the powers, there is no legal baggage that can serve as the heritage of globalization in terms of competencies.

Although the General Principles of Law are adopted as bases for Original Global Law and are solemnly embodied in international agreements and in the Constitutions of the member states of the international community; There is not really a legal instrument that supports globalization, nor Conventions or Constitutions, which can be considered as proper documents of the legal support of this world phenomenon, or of the establishment of an exclusive global competence, supported by national competences.

It is probably more logical to conceive certain shared competencies between globalization and the States of the international community, even though the latter, to a greater or lesser degree, could have been imposed a global competition, which, in order not to be so drastic, would imply an earlier one. acceptance that states and communities of nations have shared responsibilities in a given matter.

The degree of responsibility of the States will be determined by the convenience or, to avoid the repercussions of the omission and rejection, on the part of civil societies and international public opinion, which will play a very important role.

In some cases, civil societies can push for a certain initially reluctant state to accept global competition. In other cases, they can pressure the state, inclined to give in to pressure from a power or a successful integration process, not to do so.

If all these factors are considered, it is obvious to deduce that the issue of competences comes from the practical application of Global Law. In some matters, those that have a strategic value, global competition appears clearly, without accepting exaggerated lucubrations like those of some years ago, when from Washington he raised a star wars (Bardaji, 1986) that could not hide an arms desire until the extreme of preparing to face eventual extraterrestrial enemies

For this reason, it would be necessary to consider the matters that are convenient for all the States of the international community, for example, security or globalized foreign trade, until the starting point of the competences is directly related to the practice of Global Law.

In the current development of competencies, to better explain the proposal, the competencies that States grant to international organizations or bodies of integrated schemes are exclusive, shared and supportive. When they are exclusive to the organization or community body, the States are obliged to support them; When exclusivity belongs to the States, international organizations or community bodies must support them. When they are shared, organizations, bodies or States share responsibilities regarding the treatment of specific matters.

Then, an eventual global competition would correspond to the powers and their allies or to the integrated community that has carried out a successful globalization process and that demands the necessary support from the States involved. Their contributions constitute non-concerted support powers, but imposed or accepted for convenience. Without this exempting, in

any way, the responsibility of each State, which precisely allows its support powers to also be understood as mandatory.

From the point of view of the States, their exclusive competences continue to apply to all matters not included in the globalization process. The harmonization caused by this phenomenon, in the projection and development of each State, gives rise to the exclusive powers of the States progressively diminishing as the integration process advances.

It should be taken into account that, notwithstanding the foregoing, the incidence of the exclusive powers of the States could eventually increase in their own derived global law, which would be the right that each State would apply in its sovereign sphere, as its potential to influence in the globalizing process.

Within the competencies that can be shared during the globalization process, by conviction or convenience, the involvement of the nation states is increasing. Consequently, their contributions increase and it is necessary a gradual conditioning of the legal-political institutions and the norms of national law, towards globalization.

Along the same lines, it is also possible to glimpse that the exclusive powers and support of the globalization process, on the part of national States, go through an evolutionary process that in its early stages depends on the real degree of influence of the powers and their allies or of the States that exhibit a successful integration process. Thus, it is possible to occupy a place of subsidiarity in relation to the domestic application of norms that the national order could not foresee. Thus, the rules of Global Law, in practice, would end up being the only ones applicable.

Shared competencies, in the manner described, and the subsidiary nature of global norms in situations of domestic legal loopholes, support the extension of the scope of practical

application of Global Law. The reactions to this extension are located in schemes similar to the integral process of globalization itself.

In other words, for some States it is convenient to extend the scope of domestic powers, while for others it is part of the strategy to gain influence, and finally for some States it will only represent the result of having been forced, by their own circumstances, to adopt global standards.

In terms of competences, it cannot be said that global norms always imply greater rights and powers for the States of the international community or for individuals. However, it can be argued that they function as mechanisms to evaluate the progress of the process and, therefore, the growth or decrease of the obligatory community or national contributions to globalization.

In some specific cases, in matters of trade and global security, it is possible to deduce that the rights and powers of States and individuals have increased. Even so, the balance with the obligations demanded by globalization does not necessarily imply, at a certain stage, a notable decrease in the sovereign powers of the nation states or in the possibilities of influencing the integration processes.

Again, in this matter of competences and areas, mechanisms can be delineated that, in many national sectors, are feared that they are typical of globalization. In other words, mechanisms that open the door to the exercise of new forms of colonization and that offer new instruments to create dependencies. Hence, the efforts of the injured States are also manifested in the defense of their sovereign powers, diminished by the global phenomenon (Coronil, 2004).

Due to the lack of legal formalities and the unconditional nature of globalization, it can be foreseen that from a certain stage of the process it will be much more complicated for medium and

small States, which have not resorted to integration, to return to the real application of your previous powers. In many situations, returning to them would be tantamount to increasing their vulnerability, causing their isolation and making it impossible to distinguish the elements of the state legal institutionality, from the characteristic elements of Global Law.

It is therefore almost impossible not to link the situation described above with the opportunity for States to prepare an adequate response to globalization.

4. POLITICAL CONSIDERATIONS IN THE FORMATION OF GLOBAL LAW

Although globalization is an unprecedented phenomenon in human history, there is a possibility that its remote antecedent is the conception of the universal and the local. Precisely through the predominance of one conception or another, imperial expansions take place, which project both a larger political entity to the world, as well as a multiplicity of local political entities determined to impose their personality and abstract themselves completely imposed by the major power.

The expansion of Rome from the "city to the orb" combines the two aforementioned tensions and manages to universalize a political and legal form created, initially, for a city, an entire empire. Despite the existence of a time when expansion shows that the local political-legal model is not sufficient for larger spaces (Iglesias, 1958).

In the same way, it can be noted throughout history that not only the Roman Empire but all of them progressively adopted institutions and political forms, including subjugated entities, in order to prop up the universal conception, which began to crumble as it continued. the noted constant of the confrontation between the universal and the local.

In times after the fall of the Roman Empire, the universal collided with the local. The conflicts between emperors and kings, between the pope and the bishops, are clear examples of this. The modern concept of sovereignty began to be outlined, then, to enter into a process of evolution of the exclusive sovereign King, to share power with the feudal lords; after the King the aristocracies, to share power with the bourgeoisie and merchants; until reaching the granting of sovereignty to the people.

This historical evolution, with ups and downs, due to the presence of dictators and political parties that seek to replace the people, show, in any case, that humanity tried to channel the conquests of power of the people. In this context, it is possible to propose a further evolution, from the local to the universality.

It can even be affirmed that, at the same time, historically, from the universal, a greater political power could be claimed, which when trying to impose itself on national sovereignties, were those considered "minor" and in practice appreciated as such (Clavero, 1994).

Public International Law emerges as a compromising solution in the Peace of Westphalia, to reconcile the efforts of national sovereignties that try to coexist in a field of apparent universal legal equality, not necessarily political, since major powers are recognized. From there, there is a need to join forces, to unite national sovereignties, to form a greater one, which comes precisely from the alliances in vogue (Elliott, 1999).

As a consequence, the universal order that is achieved is ephemeral and its fragility is demonstrated, once again, by the resistance of the local to the universal. After the First World War there is a clear attempt to build an international community, which is not then conceived as global in a contemporary sense, but which gives rise to the unification, under universal concepts, of the relations between nation states. Unfortunately,

very soon the imposition of the universal was rejected, the League of Nations was broken and a Second World War began (Owens, Baylis, and Smith, 2017).

The peace achieved after the confrontation between the "principles" of the allied nation states that won the Second World War, against the "anti-principles" of the nation states of the so-called Axis, gave rise to a second attempt to create an international community. This time, to allow the nations and not the national states to create the new orders.

The foregoing always, under the conception of a delivery of important portions of national sovereignty to a common, universal entity, which in certain matters, such as those relating to peace and security, may exhibit a greater power than that of the national States.

He already said, in previous paragraphs, that the theoretical and idealistic conception of universal sovereignty, deposited in the United Nations, is not accepted by the larger national states with imperialist vocations, which faced each other, just signed the Charter of Nations. United, in the so-called Cold War, but even those opposing powers, it is evident that they tried to measure their own political forces, achieved with new alliances, in order to aspire to an expansion towards the universal (Morgenfeld, 2010).

CONCLUSION

Without the last universal organization having been shattered, as happened with the League of Nations before World War II, clear signs have been evidenced that the power game did not end with the forced maintenance of the United Nations and that, There are fields to assert the aspirations of the national states: those of the West and the East; those who defend the values of Christian civilization and those who swear not to rest until the law of the Muslim God rules universally (Segura i Mas, 2014).

While the political concerns are manifested, from sectors that were systematically more influential or from perspectives that were believed to be surpassed by contemporary realities, the global village is a reality and globalized paradigms, as they have been treated throughout this analysis, also achieve progressively and systematically greater validity and applicability. Consequently, despite the new clashes of powers to achieve the universal and the resistance of peripheral states, the globalization process advances.

However, due to the essential informality of globalization, it is risky to propose the stages of this process to determine in which of them societies are now. Even if it was for the sole purpose of estimating the time available to small and medium-sized states to seriously construct the appropriate response to globalization, it is unlikely to determine specific stages.

With the desire to find a true starting path for globalization, perhaps it should be argued that from its various stages, basically those that have to do with the imposition of a greater political will or shared political power, the very concept of it came coupled with the concept of international community, because since the first postwar period, in the last century, it was seen as a goal to project coexistence among human beings, beyond national borders.

The international community, thus conceived, has an important load of principles that, it was supposed, should be guiding the relations between States, based on equality and mutual and consensual submission to achieve a harmonious coexistence. However, the absence of mechanisms of political pressure to always enforce these principles, together with the lack of cohesion of the organization achieved through that first contemporary concept of the international community, were the main reasons for its failure.

Subsequently, in the second attempt at international organization, if greater precautions are taken and a better

consolidation of common principles and equally valid for all States is led. Despite this, there have existed and will continue to exist, certain relativisms of compliance that clearly cannot be equated with the total disrespect of the States, which occurred as a result of the formation of the international community that succumbed to the Second World War (Posso Serrano, 2007).

As a result of the second postwar period, the new global society formed changes and encourages, in parallel, the development of a phenomenon that currently has unprecedented contours, since globalization appears with the conceptions of the new orders and feeds on agreements of universal scope.

On the other hand, at the same time that globalization is taking shape, a deterioration of the once unshakable concept of the sovereign powers of the nation states becomes evident. Deterioration that, by the way, affects some States more, since others agree, in principle, with the limitations to their sovereignty although they immediately take safeguards to fully recover it, to the extent that they believe it corresponds to them (Hernández, 2016).

In any case, the principles collected by the international community are appreciated in a more textual way by the new actors in international relations, which are civil societies and international public opinion, which are gradually demanding and obtaining greater participation in this scenario. The new actors rely precisely on globalized paradigms, which reflect the unquestionable validity of the principles and reject the interested interpretations of them, even by their own governments.

With this new perspective, it is not possible to maintain that there is naivety in the new actors in the international community's relations, in contrast to the prudence and political calculation that distinguish governments. The new actors show greater solidarity with the causes, which, due to a series of technological advances, can currently be shared among civil societies and that, spontaneously, provoke endorsements or

censures for developing in accordance or in frank disagreement with the established principles (Orozco, 2005).

In current times it is evident, from complaints and empirical verifications, that humanity faces challenges that, although they cannot be attributed to the disorderly development of societies, are serious never before registered. Consequently, their impact on the lives of all human beings requires that they be addressed in a universal way and that their solutions be planned and executed in the same way.

Climate changes, the globalized push for Human Rights, globalized security, international criminal jurisdiction, among many other aspects, are manifestations of the outcry evident throughout the contemporary world.

For the future, it cannot be determined with sufficient precision what in the globalization process, which has been going on for some decades, has been able to consolidate to this day. Especially in what particularly concerns the practical result of the attempts to universalize the Law.

At present, the need to form an urgent adequate response to the phenomenon of globalization may be more evident, the same that cannot be achieved by a more expeditious way than integration, despite the few results shown in Latin America. under consideration of the risks of isolation or political dependence.

After all these considerations, in matters of Law it should be reiterated that the so-called Global Law is not an imaginary product of the Academy. There are norms of coexistence and interstate relations that are applied globally, and unquestionably a process of globalization is underway, an unexpected product of a conscious construction of new orders (Chomsky, 1996). All this, as a result of the second post-war period and with the aim

of establishing a general framework of universal application, which avoids a third conflagration and institutionalizes world solidarity.

The new orders are also aimed at achieving respect for Human Rights, the care and protection of the environment, the proper use of the resources of the sea, the application of common standards for the negotiation of treaties, the minimization of impunity of criminals of war crimes and crimes against humanity, the development of International Humanitarian Law, the universal processes of foreign trade and intellectual property; and finally, other general frameworks of coexistence between States and individuals, cited to support the reality that surrounds globalization and the need for States to face it, in the best possible conditions.

There are certain indications that allow us to conclude that, indeed, globalization is a phenomenon that is advancing, regardless of the will of the States, but that it is not possible to substantiate it in a documented way. The other orders that were intended to be created and that have been developing, since the second postwar period, have documentary evidence: declarations, agreements, protocols, and resolutions of competent bodies, which can constitute reliable evidence that the current world coexists under parameters different in terms of their effects, but recorded in usual ways. On the contrary, in globalization, standardized, universal, but not formal attitudes and results are evidenced.

There is also a generalized view of the inflexibility of the global phenomenon. A phenomenon that does not stop to support the inclusion of a certain community that is in the process of formation, even worse to help a State, individually considered, that shows difficulties to adapt to the new realities of globalized paradigms.

While, on the one hand, globalization politically considered arises from the weakening of nation states, on the other hand, it is clear that such a decline in sovereign state powers becomes much more visible in relation to the specific power of each one of them. For this reason, globalization affects more medium-sized states and especially small ones, which already suffer from a dependency relationship that could easily worsen (Badie, 1995).

The solution that is envisioned for the States, especially for the small ones, is directly related to their contributions to globalization, which although it has not been sought by the powers and their allies or by the successful integration processes, it is taken advantage of for them. Therefore, it remains to look for the best possible conditions to specify an adequate response to the global phenomenon, by States with minor sovereign manifestations.

Global Law must be conceived as one of those tools that provide the "best possible conditions" for States. Either because they want to take advantage of globalization for their benefit and that of their allies, or because they are determined to build an adequate response to save as much as possible of their own legal-political institutions and avoid falling into greater dependency.

Being so, of generalized use by the States, but with totally dissimilar objectives, it is not possible to claim a precision in the paradigms that Global Law could eventually invoke, except for certain principles of Law, also general, that the States agree to accept as current and valid (Bello, 1873).

Then, the tool of common use for different purposes, Global Law, cannot enjoy legal autonomy for its formation, since it depends on the policies and actions that the States determine for their specific purposes in the face of globalization. Either because they want to take advantage of a phenomenon that

inflexibly follows its march and that denotes facets that can be exploited, or because it is necessary to hasten the configuration of the "adequate response" to globalization, especially by other less fortunate States in their attempts to integrate.

State policies, strategies and actions can be delineated according to the analyzes made of the current political games and interinfluences, always anticipating situations not currently established and the appearance of new political subjects with sufficient power to seek and achieve prominence. Global Law, in these planning, must be a mechanism to carry out actions and strategies that allow it to be useful for any State, regardless of its situation and intention in the face of globalization.

The value of Global Law is, consequently, in the Law itself. Its practical application will denote the convenience for society, within a global frame of reference. Policies to take advantage of globalization or to build an adequate response, have to have a real universal impact so that the influences that it is intended to achieve can be awarded.

Your own opinion on the convenience and certainty of Global Law, according to the criteria of planners and by inspiration of them or of national legislators who provide legal norms to support or complement global norms, is not enough. What really should prevail is the practical result, measured according to globalized parameters.

From what has been noted, an unavoidable element of consideration is the real capacity to achieve a global impact, each State individually or together with other "pairs" with similar capacities. The purpose of Global Law, under this meaning, is to demonstrate the benefit that some States can obtain from globalization. While others, generally medium and small, seek to reduce or mitigate its harmful effects through the magnification of rights and powers individually considered.

Thus, integration is emerging as a convenient vehicle to achieve impact, especially if national capacities and potential are scarce and politically vulnerable. In this case, the achievement of greater rights and real powers must be assumed as a convenient measure for national companies.

In the tasks of determining the structure of Global Law, seeking its usefulness for the international community, it is possible to foresee its classic sources, which are similar to those of national and community Law. This does not mean that other sources that are imposed by the results of political games and the inter-influence that allow us to anticipate certain results from the political analysis of current realities of each State, the region and the world must be discarded.

In any case and notwithstanding the foregoing, it is possible to design a structure of Global Law that, although it may be eminently theoretical, is close to the probable projections of development of the appreciated attempts of the powers that wish to benefit from globalization and development. verifiable of integration processes, in order to consolidate its global influence.

Under this scheme, it is also possible to foresee certain institutions for Global Law. Some of them are stable, which respond to principles universally accepted as valid and in force, even having considered the true risk of relative non-compliance by States of the international community and other institutions, essentially changing due to the development of globalization and the ups and downs of the political game and growing inter-influence (Posso Serrano, 2007).

If only those institutions were taken as a reference, the characteristics of Global Law would not correspond to conventional formulas. It is true that this Law has characteristics similar to national legal systems, however, its practical application is rather similar to that of Public International Law, due to the fact that: not all of its norms have sufficient force to force compliance; the lack of effectiveness, and even of global

actions or resources, give rise to Global and International Law, being considered imperfect; and the substantial difference between these two legal orders lies precisely in the inflexibility of the first, which responds to the characteristics of globalization.

Additionally, there is another contrast if it is considered that it is possible to defend, with the application of jus cogens, the binding nature of certain rules of Public International Law in the commitments that sovereign States have undertaken to fulfill. Always remembering that, in no way is it possible to resort to international conventions that formally support globalization, nor to Global Law standards, except perhaps the provisions of international conventions of universal scope, adopted by the States of the international community, and not imposed by the circumstances caused by the unstoppable march of the phenomenon of globalization.

Moreover, due to the absence of basic foundational conventions of globalization, the practical application of Global Law lies in the convenience and political utilitarianism that, if they do not come to exclude ethical contents, they diminish them mainly, especially within what can be called global derivative law.

For this same reason, the resources that can be provided for States and individuals to enforce the rules of Global Law depend on political expediency and are due to pressure from other States and civil societies.

Along these lines, the resources that are determined as protection systems must be, for convenience or as a result of political pressure, in the national legal systems, and ideally, in all the legal systems of each of the States immersed in the globalization.

Due to the particular characteristics of this Law, the eventual sanctions that are determined, by virtue of the

remedies provided for in the national legal systems, cannot be other than logic demands. In other words, the non-compliant and non-compliant States will be isolated from the globalization process and, consequently, will be excluded from its benefits.

However, it is possible to conceive the Global Law protection system with a principled content. Above all, because the state's subjection to the general principles of international coexistence is the result of a commitment, of the powers and of the successful integration processes, to allow the incorporation and development of new ones.

This, at the same time that such subjection constitutes the minimum guarantee of respect for the institutions and juridical-political personalities of small or ineffective States, which would be vital to carry out serious integration processes.

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The new perspective on the declaration of Damage Environmental in Ecuador: Application of the Proportionality as a conflict resolution mechanism

La nueva perspectiva de la declaración de Daño Ambiental en Ecuador, aplicación del Test de Proporcionalidad como mecanismo de solución de conflictos

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ABSTRACT: This article aims to develop a methodological proposal for the application of the proportionality test as a conflict resolution mechanism in the new environmental damage declaration procedure in Ecuador, based on the systematization of theoretical conceptions and legal and administrative procedures, and constitutional principles that regulate economic activities with criteria of environmental sustainability, and the recognition of the rights of nature. Consequently, the research allowed us to extract the main results: (a) to conceive proportionality as a methodological criterion and legal construction; (b) the proportionality test becomes a mechanism at the service of the judge that seeks to provide solutions to adequately resolve conflicts, subject to the principles that govern the rights of nature and economic activities, directly established in the Constitution; and, (c) the proportionality test can be a tool for the motivation of administrative resolutions of declaration of environmental damage, as it will be useful to determine: 1) whether a fact can

be considered environmental damage, 2) the amount of the fine imposed, 3) the minimum measures to approve remediation or environmental reparation plan, and 4) the amount of compensation to the victims of the environmental damage. Because of these results, it can be concluded that the normative vacuum in this matter lends itself to the discretion and arbitrary interpretation of the authority, justifying, therefore, the present methodological proposal of the proportionality test for the declaration of environmental damage.

KEYWORDS: Environmental legislation, resources, environmental law, sustainable development, energy resources.

RESUMEN: El objetivo de este artículo es desarrollar una propuesta metodológica para la aplicación del test de proporcionalidad como mecanismo de resolución de conflictos en la nueva perspectiva de la declaratoria de daño ambiental en el Ecuador, a partir de la sistematización de los principios, concepciones teóricas y procedimientos legales y administrativos que regulan las actividades económicas con criterios de remediación ambiental y sostenibilidad ecosistémica. En consecuencia, la investigación permitió extraer los principales resultados (a) Concebir la proporcionalidad como un criterio metodológico y de construcción jurídica; b) el test de proporcionalidad se convierte en un mecanismo al servicio del juez que busca dar soluciones para resolver adecuadamente los conflictos, con sujeción a los principios que rigen los derechos de la naturaleza y las actividades económicas, establecidos directamente en la Constitución ; y, c) El test de proporcionalidad puede ser una herramienta motivadora de las decisiones administrativas que declaran el daño ambiental, ya que será útil para determinar: 1) si un hecho puede ser considerado daño ambiental, 2) la cuantía de la multa impuesta, 3) las medidas mínimas para aprobar un plan de remediación o reparación ambiental, y 4) la cuantía de la indemnización a las víctimas del daño ambiental. Ante

estos resultados, se puede concluir que el vacío normativo de esta materia se presta a la discrecionalidad y a la interpretación arbitraria de la autoridad, lo que justifica la presente propuesta metodológica del test de proporcionalidad de la declaración de daño ambiental.

PALABRAS CLAVE: Legislación ambiental, recursos, derecho ambiental, desarrollo sostenible, recursos energéticos.

JEL CODE: F18, O13.

INTRODUCTION

In Ecuador, environmental regulations have undergone recent changes because of a new constitutional policy that recognizes rights to nature. The action for environmental damage has been one of the institutions that have undergone the greatest changes.

A short time has passed since the issuance of the Regulations to the Organic Environmental Code, this body of law does not fully regulate the procedure for environmental damage actions; and little or nothing has been written in the doctrine regarding the change in the procedure for declaring environmental damage included in this regulatory framework.

This article will provide background information on the recognition of nature as a subject of rights, with special emphasis on the context of the 2008 constitution, and the perspective with which it conceives of coupling extractive industries with respect for the 'Pacha Mama'; likewise, a brief historical account will be given of the evolution of environmental law centered on the institution of environmental damage, and how it has evolved in Ecuadorian legislation.

Similarly, basic concepts for understanding environmental damage will be analyzed, and then a comparison will be made

between the Environmental Management Law of 1999, and the Organic Environmental Code and it is General Regulations of 2018 and 2019 respectively; with the help of constitutional principles, a brief study will be made of the procedure for declaring environmental damage in Ecuador.

Finally, as a mechanism to control discretionally, and given the lack of normative development of objective parameters for the calculation of compensation and indemnities, it will be proposed to use the proportionality test as a tool to motivate the different moments included in a declaration of environmental damage.

1. HISTORICAL BACKGROUND AND RECOGNITION OF NATURE AS A SUBJECT OF RIGHTS

Ecuador currently has a recent constitution. In 2008, following a constituent assembly, a neo-constitutional supreme law was approved. It can be considered "the most advanced product of the new Latin American constitutionalism" (Melo, 2013, n. p.). The pillars on which this new Ecuadorian state is founded are the recognition of plurinational, the general orientation of development towards Sumak Kawsay[1] and the recognition of the Rights of Nature.

In the early 1960s, oil exploitation began in the north-eastern Amazon region. As a result, hydrocarbon exports led to an economic boom in the country; during the following years, income from oil exports represented between 26% and 34% of the total income of the non-financial public sector (Hernández, 2020, p. 212). However, the following years were also marked by both socio-environmental conflicts (Valladares & Boelens,

1 "Sumak kawsay, or full life, expresses this worldview. Achieving a full life consists of reaching a degree of total harmony with the community and the cosmos". National Plan for Good Living (2009-2013).

2019, p. 305) and natural disasters caused by this industry; the best known is the Texaco-Chevron case, in which it is estimated that between 1967 and 1992, more than 18 billion gallons of oil were dumped directly into the environment (Sanandrés and Otálora, 2015, p. 230). This was partly a consequence of the lack of environmental standards in the legislation regulating the matter at the time and the nature of the contracts entered (Switkes, 1994). Thus, it has been said that the incursion of the oil industry generated expectations of national growth and social progress, but ultimately failed. The judicial process surrounding these events began in 1993, and at the time of the discussion of the 2008 Magna Carta, there was still no final decision.

Likewise, Andean philosophy is one of the foundations on which the Montecristi Constituent Assembly was based. The sumak kawsay was considered from various perspectives (Llasag Fernández, 2009). It is considered in the preamble and as one of the primary duties of the State. Similarly, in the dogmatic part, the classification of rights as civil, political, economic, social, and cultural rights is left behind. Some, such as the right to water, food, a healthy environment, health, work, among others, are grouped under the category of "Rights of Good Living". Finally, the organic part of the Supreme Norm establishes a development regime focused on the realization of the good living.

In the preamble, the phrase "We decide to build a new form of citizen coexistence, in diversity and harmony with nature, to achieve good living, the sumak kawsay" reflects the influence of the indigenous cosmovision in the Constitution, and the need to build a coexistence of human beings in harmony with nature. Considering that Andean philosophy discards anthropocentrism; on the contrary, nature is an element with which the human being complements, corresponds, and interrelates reciprocally since nature requires the beings that inhabit it, and vice versa (Ávila, 2016, pp. 122-129).

In summary, there were four decisive factors for the incorporation of nature as subjects of law: (i) the historical moment provided by a constituent assembly charged with outlining the plan for a new Ecuadorian society; (ii) the previous struggle of the environmental movement that elevated the discussion of environmental problems to constitutional status; (iii) the destructive socio-environmental effects of oil extraction in the Ecuadorian Amazon in the wake of the oil boom and; (iv) the presence and power of the indigenous movement and the work of activists as part of an international network. (Laastad, 2020, pp. 406-408)

This recognition was the result of the articulation of actors from different cultural and geographical scales, including indigenous and environmental organizations (Valladares & Boelens, 2019, p. 309). It was in this historical context that the recognition of the rights of nature was forged. Thus, nature, or Pacha Mama[2] , is recognized as a space where life is reproduced and realized (CRE, 2008, art. 71). It ceases to be something and becomes someone, which is why a range of rights are recognized in its favor, established in articles 71 to 74 of the Supreme Law. Among the most important we can mention: i) To their integral existence, with emphasis on the maintenance and regeneration of their vital cycles; ii) To their restoration. The State will act as guarantor of these rights in cases of serious or permanent environmental impact.

In the same way, a series of state obligations are raised to constitutional rank concerning this new subject of law. These include encouraging and promoting respect for and protection of nature. And to apply precautionary and restrictive measures for activities that could lead to the extinction of species, the destruction of ecosystems, or the permanent alteration of natural cycles.

2 Kichwa indigenous expression means Mother Earth.

Prima facie, extractive activities are at odds with the rights of nature. However, the constituent proposed a perspective of harmonization of these activities with the rights now recognized. "By recognizing rights to nature, in essence, what is being achieved is that its use and exploitation be treated with much more care" (Ávila, 2012, p. 107). In other words, the constituent used a perspective of balance between extractive activities and environmental rights.

This vision of balance is the axis around which the use of non-renewable natural resources and the development of the so-called Strategic Sectors revolves. Under this criterion, these activities are exclusively administered by the central State; they are lawful and permitted if they observe the environmental principles of sustainability, precaution, prevention, and efficiency, established in article 313 of the Constitution.

However, the cases in which the development of extractive activities is prohibited have constitutional status. The Constituent Assembly established a general prohibition - protected areas and intangible zones. An exception was the declaration of national interest by the National Assembly -or Congress-, at the request of the Presidency. Sometime later, through a referendum[3] , a special prohibition was added to the metallic mining industry, whereby, in addition to the above, it may not be carried out in urban centers. All this was established in article 407.

Since the entry into force of the 2008 Constitution, environmental legislation has undergone a series of adaptations and reforms to bring it into line with the principles and rights enshrined in the Constitution.

3 Held on 04 February 2018, question 5: "Do you agree with amending the Constitution of the Republic of Ecuador to prohibit metallic mining in all its stages, in protected areas, in intangible zones, and urban centers, according to Annex 5?"

2. . HISTORICAL CONTEXT OF ENVIRONMENTAL LAW AND REGULATION OF ENVIRONMENTAL DAMAGE.

Contemporary states "have assumed the environmental issue as another public function. And this is because the deterioration suffered by the goods that make up the environment has an impact on the life, health, and quality of life of the population" (Bermudez, 2014, p. 25). Environmental protection is implemented through various tools, among which we find: Environmental public policy and Environmental law.

It is important to point out that environmental public policy can be supranational or national, in the supranational sphere in the 1970s several instruments for environmental protection emerged (Rojas Montes, 2019, p. 121). Thus, the United Nations, through its conferences in Stockholm in 1972 and Rio de Janeiro in 1992, gave the first international guidelines. The Stockholm Declaration on the Human Environment is considered "the founding act of modern environmental law" (Juste, 1999, p. 16). The Rio Declaration on Environment and Development, meanwhile, sets out a series of global principles for environmental protection, Principle 11 highlights the importance of the regulatory role of the state in environmental matters (Rojas Montes, 2019, p. 123).

In terms of national public policy. By way of background, we can mention the Forestry Law of 1958, which declares in its first article the "public interest of the conservation, protection, improvement, and promotion of forests". However, there was legal dispersion in environmental matters; likewise, as part of the public administration, numerous ministerial departments and units, autonomous and semi-autonomous entities dedicated to environmental policies were created, which acted in a disjointed[4] ; in 1996, with Executive Decree 195, was the

4 These aspects are referred to in the recitals of Executive Decree 195 of 1996.

Ministry of the Environment created as an entity with exclusive environmental competencies.

Environmental law, for its part, can be viewed from different perspectives. As legislation that creates bodies and attributes functions imposes limitations on the exercise of economic activities that ensure the protection of the environment. Or as the right to the use of common goods, through an authorization, concession, or permit. As it is cross-cutting, we can speak of environmental administrative law, environmental criminal law, environmental constitutional law, among others (Bermudez, 2014, pp. 35-37).

Thus, the tools used by environmental law can be of a repressive or preventive nature; when talking about environmental damage, we find ourselves in the repressive sphere, while the preventive spectrum is found, for example, in emission and environmental quality standards.

2.1. Environmental damage in Ecuador

To begin to talk about the treatment of environmental damage in Ecuador, it is necessary to go back to a period before the return to democracy. In 1976, the Supreme Council of Government issued the Law for the Prevention and Control of Environmental Pollution by Decree. This normative instrument can be taken as an antecedent to the conception of environmental damage since it imposes sanctions for conducts that produce "environmental contamination". These range from fines to imprisonment, using people's health as a cross-cutting issue; thus, a fine is imposed if it causes illness, and imprisonment if people die because of the pollution.

Subsequently, continuing with recent historical analysis, the institution of environmental damage, as such, was fully regulated since 1999, when the Environmental Management Law was issued, which, after a codification in 2004, was in

force until 2018. This law was replaced by the current Organic Environmental Code.

As will be analyzed, the approaches used by both regulations when referring to environmental damage differ from each other. To better understand the differences between both regulations, it is necessary to point out -in a preliminary way- the following concepts:

2.2. Environmental damage: pure ecological damage and environmental civil damage

As a premise, it is necessary to understand that not every event gives rise to damage. Thus, a double requirement must be met: (i) that the law establishes the conduct in a type that describes it (principle of typicality) and, (ii) that the event occurs "due to...", or "because of..."; expressions that allude to causality, which is the guiding principle in this matter. (Zárate González, 2019, p. 106).

In the same way, the term environmental damage evokes a concept that is not universal; each piece of legislation has shaped it according to its historical evolution, and it is present and future perspectives. Filling this term with content goes hand in hand with the tools that each legal system contemplates to give protection to nature as an entity, or to the right of people to live in a pollution-free environment.

By way of example, the COA (2017) defines environmental damage as:

> Any significant alteration which, by act or omission, produces adverse effects on the environment and its components, affects species, as well as the conservation and balance of ecosystems. This shall include unrepaired or inadequately repaired damage and other damage comprising such alteration. significant. (p. 90)

Whereas the repealed Environmental Management Law (2004) defined it as follows: "It is any loss, diminution, detriment or significant impairment of pre-existing conditions in the environment or one of its components. It affects the functioning of the ecosystem or the renewability of its resources" (p. 41).

Although in practice, the two definitions are very similar, their wording contains different elements. Thus, the COA understands that the alteration to the environment, or its components, must produce adverse effects, given that there may be alterations that produce benign effects. The effect must be on species or the conservation and balance of ecosystems. And finally, unrepaired, or poorly repaired damage is included, although it is evident that it is redundant to establish that environmental damage includes unrepaired or poorly repaired -environmental- damage, and other -damage-.

For its part, the Environmental Management Law uses the terms loss, decrease, detriment, or impairment to characterize the negative impact on the pre-existing conditions of the environment -or one of its components-; that is, it is necessary to make a comparison of the environment before and after the damaging impact. To determine the occurrence of damage, the functioning of the ecosystem, or the renewability of its resources, will be assessed.

A common element between the two definitions is significance. That is, not every alteration (loss, diminution, stoppage, or impairment) to the environment is environmental damage, it must exceed a certain threshold[5] .

Where there is uniformity of criteria is concerning the conception of environmental damage from a double sphere

5 Since the term evokes an indeterminate concept, it is usually up to the judges to determine its parameters, see (Femenías, 2017, pp. 220-230).

(Bedón, 2010-2011, p. 13). Environmental damage per se or pure ecological damage -in the words of Professor Femenías- is understood as that which exclusively affects nature and the environment without consideration of individual or collective ownership of rights. And civil environmental damage, which refers to civil damages suffered by individuals, and which are derived from the same event that caused the environmental damage (Femenías, 2017, p. 239); within this category, we find personal, patrimonial, or economic damages. René Bedón, citing Néstor Cafferatta, distinguishes between damage affecting the health and integrity of individuals, their property, and damage to the exercise of economic activities (Bedón, 2010-2011).

A second point should be made concerning regulated activities carried out in compliance with an environmental license or authorization, although they affect the environment, they cannot be considered as environmental damage because they are activities foreseen by the State within its environmental public policy. Unlike activities carried out beyond the authorized limit, which would constitute environmental damage and, therefore, should be subject to compensation, indemnification, and restoration (Bedón, 2010-2011, p. 14).

There has been constant discussion about the response that the State should give when sanctioning environmental damage. One position holds that this should be done through Environmental Criminal Law, that is, through the classification of crimes with their respective sanctions, due to the affectation of highly important legal assets (Márquez, 2007) or only through Administrative Sanctioning Law, under the figure of environmental administrative infractions, given that environmental criminal regulations would be illegitimate and ineffective (Gómez, 2015). An intermediate position is one in which the declaration of environmental damage is preceded by a judicial process, reserved for the analysis and decision of a

special -non-criminal- jurisdictional body, such as the Chilean case, which since 2012 has had specialized courts that resolve all environmental conflicts.

Regarding environmental civil indemnities, there are legislations such as Ecuador's that -since 2018- allow the same authority that declares the environmental damage to carry out the corresponding valuation, as will be analyzed below. Other models foresee separate actions and strings for both types of liability, as was the case in Ecuador before 2018.

Having clarified the above concepts, I will now analyze the changes made to Ecuadorian legislation.

3. COMPARISON OF THE DECLARATION OF ENVIRONMENTAL DAMAGE IN THE ENVIRONMENTAL MANAGEMENT LAW, THE ORGANIC ENVIRONMENTAL CODE, AND ITS GENERAL REGULATIONS, IN THE LIGHT OF ENVIRONMENTAL PRINCIPLES.

As mentioned, the approval of a new Magna Carta in 2008 caused environmental legislation to undergo significant changes, seeking to make it compatible with this new perspective, whose axis is the conception of nature as a subject of rights. The conception of environmental damage established in the Environmental Management Law changed radically with the issuance of the Organic Environmental Code and its General Regulations.

Firstly, the repealed Environmental Management Law contemplated a clear distinction of actions regarding environmental damage 'per se' or pure ecological damage, and civil environmental damage. In terms of standing, a public action was granted to denounce the violation of environmental regulations, i.e., any citizen is entitled to initiate an action for environmental damage. But only those directly affected

could initiate the civil action for compensation, because of the environmental damage suffered.

Jurisdiction in environmental damage actions was vested in the Presidents of the Superior - or Provincial - Courts of the place where the environmental damage occurred; it should be noted that these Courts were second instance judges. While the civil action for environmental damage had to be heard through a summary civil procedure before the Judges of the first instance. And it was expressly forbidden to accumulate both actions (Bedón, 2010-2011, p. 26).

That is to say, the Environmental Management Law designed an action that decided on pure ecological damage, or environmental damage 'per se'; whereas the compensation of private civil damages derived from the same fact that caused the damage was regulated by the classic regime of non-contractual liability, contained in the Civil Code.

As a second point, we will analyze the substantial changes that the declaration of environmental damage has undergone in the light of current Ecuadorian legislation, analyzing the environmental principles that are linked to this institution.

As discussed in the previous section, the definition of environmental damage was coined in a glossary of terms at the end of the Organic Environmental Code. Book Seven of the Code regulates the integral reparation of environmental damage and its sanctioning regime. The first two titles correspond to: I) the integral reparation of environmental damage and II) the sanctioning power, in these articles the new action for environmental damage was to be developed, but as will be seen, its explanation is insufficient.

As a starting point, Article 289 establishes the competence of the National Environmental Authority - Ministry of Environment - to determine the guidelines and criteria

necessary to characterize, evaluate and assess environmental damage, as well as to adopt prevention and restoration measures. If the legislator was seeking ways to modify the procedure for declaring environmental damage, as established in the Environmental Management Law, this article falls short, as it does not determine the central bases or criteria on which the state institutions should be based to assess and sanction an action that could be considered environmental damage.

Unlike the Environmental Management Law, the new organic code does not develop a procedure for declaring environmental damage. Despite this provision, the procedure was developed in the General Regulations of the Organic Environmental Code, issued by Executive Decree 752 of 21 May 2019, published in Official Gazette Supplement 507 of 12 June 2019. This will be analyzed in the following section.

On this point, it is worth mentioning that our Constitution, in Article 132, establishes the reservation of law concerning the classification of offenses and the consequent corresponding sanctions. The basis of the principle of criminalization is linked to the principle of legal certainty or security and has a twofold purpose.

> Although in the criminal field it is debated whether the basis of the principle of criminalization should be found in the subjective certainty that it should provide, or in a normative guarantee that reserves to the legislator the determination of punishable conducts, what is certain is that in administrative matters, criminalization fulfills this dual function. (Cordero, 2014, p. 416).

Thus, the Organic Environmental Code is not clear in establishing the sanction that follows from a declaration of the existence of environmental damage. Title IV, which regulates infractions and sanctions, does not include environmental

damage as an environmental administrative infraction in any of its different degrees.

3.1. Particularities of environmental damage in the light of environmental principles

Article 396 of the Supreme Law establishes three environmental principles that are later developed by the Organic Environmental Code. Firstly, the principle of strict liability for environmental damage, leaving aside the traditional regime of fault or malice. Similarly, it establishes the "polluter pays" principle[6] whereby "the producer of goods or services must be responsible for the costs of preventing, preventing or eliminating pollution caused by production processes" (Bermúdez, 2014, p. 49). And finally, the imprescriptibility of the action for environmental damage.

The legislator, in regulating these principles, included in the Preliminary Book of the COA: "Any natural or legal person that causes environmental damage will have strict liability, even if there is no malice, fault or negligence" (Organic Environmental Code, 2017, art. 11). Subsequently, when developing the polluter-pays principle, Article 290 establishes rules for the attribution of liability, which provide answers to cases in which a complex causality is evident ; in this way, liability for environmental damage can be both extended and transmitted and can even become joint and several. It is extensive towards the legal person that can make decisions, in the case of the action of a group of companies; and likewise, towards the partners or shareholders, when their extinction occurs. It is transmitted in the event of the death of the natural person responsible. And it is joint and several, for the administrators or legal representatives of the companies, as regards outstanding obligations during their management; as well as, if there is

6 Also known as "Polluter pays", or "Polluter should pay", as the naming of the principle is not uniform.

evidence of a plurality of causers of the same damage. Finally, the imprescriptibility of the action is developed in the following sense: "Actions to determine liability for environmental damage, as well as to prosecute and punish them will be imprescriptible" (Código Orgánico del Ambiente, 2017, art. 305). It should be specified that, concerning civil liability actions arising because of environmental damage, the statute of limitations that will apply will be that established in the applicable civil law.

The regime is strict liability. In terms of exonerating circumstances, it is extended by Articles 307 and 308, which regulate cases of force majeure or fortuitous event and third-party fault, respectively. The standard of liability in cases of force majeure or fortuitous event is high since it is up to the operator to prove that "such damage could not reasonably have been foreseen or that, even if foreseeable, it is unavoidable". Similarly, third party fault is exempt from liability only if certain conditions are met: Firstly, there must be no contractual relationship with the operator; And it is up to the operator to prove that he did not cause or participate in the occurrence of such damage and that he took all necessary precautions to avoid the intervention of the third party. It is important to note that, in both cases, the exoneration applies only to administrative penalties. And in the case of third-party fault, "the operator may bring such legal action against the responsible party as it deems appropriate to recover the costs incurred".

As for the precautionary and prevention principles, contained in Article 396 of the CRE, they do not have exclusive application in situations of environmental damage. It is important to establish that the former justifies the taking of measures and actions to prevent damage in situations in which there is no scientific evidence to support a causal link between the activities and the damage they supposedly cause. The second is based on the certainty of harm, i.e., there is already scientific

evidence to support the taking of measures (Durán and Hervé, 2002). These are transversal in all the institutions addressed by the COA, around liability for environmental damage we find them mainly in the evaluation of environmental impacts, and they are closely related to the principle of "Best Available Technology and Best Environmental Practices" established in article 9 of the aforementioned code. In the reactive sphere, once environmental damage has occurred, two obligations are placed on the operator in the application of these principles. Firstly, to notify the authority within 24 hours of the occurrence of the damage (Organic Environmental Code, 2017, art. 291), and to adopt measures. In the event of an imminent threat of environmental damage, these measures must be taken to prevent it; while, in the case of damage, the regulation establishes an order of measures to be taken: 1. Contingency, mitigation, and correction; 2. Remediation and restoration; 3. Compensation and indemnification; and 4. Monitoring and evaluation.

Although it is not an environmental principle per se, the Supreme Rule established a state obligation, whereby it must act immediately and subsidiarily, repairing the environmental damage and reserving the right of recourse against the operator causing it, without prejudice to the responsibility of the officials in charge of environmental control. (Organic Environmental Code, 2017, art. 397). Article 294 of the law limits the content of this obligation by establishing cases in which the Environmental Authority will intervene: when there is environmental damage that has not been repaired, or when the repair plan has not been complied with; when it has not been possible to identify the operator responsibly, and when due to the magnitude and seriousness of the environmental damage it is not possible to expect the intervention of the operator; additionally, in case of danger of new damage, the State will intervene when the operator is unable or unwilling to assume it.

Another point developed by the code corresponds to the rules governing the declaration of environmental damage. Article 303 provides for a reversal of the burden of proof, i.e., it is up to the operator or manager of the activity to disprove the existence of environmental damage; likewise, it establishes the non-applicability of statutes of limitation for purely environmental damage, and the civil or criminal statute of limitations for the corresponding actions because of the same.

4. PROCEDURE FOR THE DECLARATION OF ENVIRONMENTAL DAMAGE

In June 2019, the General Regulation to the Organic Environmental Code was issued. The procedure for declaring environmental damage is detailed from articles 807 to 821.

Firstly, an extension of the concept of environmental damage was established, whereby environmental liabilities are included in this category. Likewise, objective criteria were included to delimit the significance of the same, these are magnitude, extension, and difficulty of reversibility of the environmental impacts; the affectation to the state of conservation and functioning of ecosystems and their physical integrity, capacity for renewal of resources, alteration of natural cycles, the richness, sensitivity, and threat to species, the provision of environmental services; or, the risks to human health associated with the affected resource.

Regarding the authority that qualifies an act as environmental damage, this Regulation is ambiguous, as it determines that in administrative proceedings it is the competence of the Environmental Authority; and, in judicial proceedings by the competent judge. It is not clear whether it should be inferred that there is a jurisdictional action of environmental damage or whether it classifies environmental crimes under the category of environmental damage. This

confusion goes deeper, when analyzing the Code, it is evident that the Competent Environmental Authority is obliged to send the necessary information to the Prosecutor's Office when there is a presumption that an environmental crime has been committed. However, no mention is made of any jurisdictional action for environmental damage.

The administrative sanctioning procedure can have a diverse origin, either by self-denunciation, reports from environmental control and monitoring mechanisms, or by denunciation from a third party; it is then up to the Authority to carry out an on-site inspection to verify what has been described, and, depending on the case, to order a "Preliminary characterization" or "Detailed investigation". The difference between both mechanisms lies in the depth of the studies carried out to determine the existence of significant environmental damage.

With this information, it is up to the Authority, through a reasoned resolution, to initiate the Procedure, the times, deadlines, and procedural characteristics were not developed by this regulation, so the contents of Book Three of the regulation should be considered.

Once the Authority has determined the existence of environmental damage, it will order the operator to submit a "Comprehensive Remediation Plan". This is the most innovative instrument, as it is the mechanism by which the environment will be repaired or remediated, including a compensation to affected persons and communities. This must be proposed by the responsible operator and approved by the Environmental Authority. Finally, it is determined that the environmental civil action is only available in respect of compensation not agreed in the plan.

As for the amounts of compensation and indemnification, they must be made following "the methodological criteria

developed by the National Environmental Authority". Moreover, it is evident that this can be a highly discretionary element, so the regulation imposes the obligation to determine objective criteria for its calculation.

This new regulation is a paradigm shift, opening the way to liability for environmental damage declared in administrative sanctioning law, with an important innovation concerning civil environmental damage. If an environmental reparation plan containing a compensation is approved in favor of the persons affected by pure ecological damage, civil judges lose jurisdiction to hear the corresponding actions.

5. PROPOSAL: PROPORTIONALITY TEST

Concerning the legislation analyzed, and the regulation of environmental damage in administrative proceedings, I propose that the test of proportionality be used as a tool to control discretionally.

When speaking of principles, we must use the meaning given by Robert Alexy's theory their application in a specific case depends on the weighting that is given to the principles that collide with it. Furthermore, a principle is an optimization mandate. Ramiro Ávila Santamaría, in addressing this point, states:

> By saying that they are mandates he reinforces the idea that principles are legal rules and, as such, must be applied. By saying that they are optimizing, it means that their purpose is to alter the legal system and reality. The principle is an ambiguous, general, and abstract rule. Ambiguous because it needs to be interpreted and recreated, it does not provide decisive solutions but rather gives parameters of understanding; ambiguous also because, in its structure, it does not have

hypotheses of fact, nor does it determine obligations or solutions. (Avila, 2012, p. 63).

5.1. Brief introductory analysis of the principle of proportionality.

As a prerequisite to the analysis of the principle of proportionality, it is necessary to identify that, due to the abstract nature of human rights, they inevitably collide with other human rights and collective goods such as, for example, the protection of the environment and public safety. Consequently, they require a process of balancing. (Alexy, 2011)

On this point, Barak argues that the application of the proportionality rule can only operate at the infra-constitutional level, either through law or judicial decision. At the constitutional level, the norm is constituted by "fundamental values" with a high level of abstraction, which aspire to be realized in their maximum expression; however, in infra-constitutional application these ideals cannot be realized to their full extent and must be realized in varying degrees of intensity. This realization in the concrete case is not part of the factual assumption of the right, but of its scope of protection. Consequently, these restrictions do not change the scope of the fundamental right; rather, the rules of proportionality define the scope of such realization. (Barak, 2017, p. 65).

Thus, a democratic society must recognize the possibility of restricting fundamental rights. Barak considers that there are two types of restrictions: the first involves a restriction on one person's right to make way for the rights of another; the second involves restrictions in favor of public interest considerations, such as ensuring public education, public health, etc. Since fundamental rights belong to the individual as part of society, they can be restricted by measures aimed at achieving social goals.

Thus, the rights of nature are not absolute, since it is impossible to have a zero degree of pollution; Moreover, what the Constitution intends is that economic activities are carried out in accordance with the principles of environmental sustainability, precaution, prevention, and efficiency or, in other words, that they are carried out in harmony with nature. For its part, the right to carry out economic activities has various restrictions, such as, for example, the rights of workers, the rights of nature discussed above, and the collective right to live in a healthy and pollution-free environment.

Furthermore, the various means by which a fundamental right can be realized are determined at the infra-constitutional level. These restrictions are constitutional to the extent that they meet the requirements of proportionality. (Barak, 2017, p. 110). Whenever a fundamental right is defended through acts of the state, but this defense entails the restriction of another right, a conflict between these rights will arise within the legal "zone of authority" of the state. Given the characteristics of the Ecuadorian legal system, and the recent reform, which transferred the competence to determine environmental damage from the judges to the servants of the National Environmental Authority (Ministry of Environment and Water), my proposal extends the premise of the Israeli professor, and in this way a proportionality test is applied, not only in the legal and judicial venue, but also in the administrative venue.

The proposal of this research is that the decision taken by the authority in charge of determining an event as environmental damage, and ordering the measures for its reparation, should apply the proportionality test. Ultimately, the official's task will consist of preferring a fundamental right of nature, a person or a collective against the State, over the fundamental right of another natural or legal person against the State; that is to say, a weighing that will consider each of the rights in the

light of the facts of the specific case. In Barak's words, when a person brings a claim against the state, alleging that his or her fundamental rights have been improperly restricted, he or she is in fact claiming that such a measure is ultimately unconstitutional. Such a claim must be examined according to the rules of proportionality. (Barak, 2017, p. 116).

5.2. Components of proportionality

Proportionality can thus be defined as a legal construct. It is a methodological instrument composed of 3 components, according to Alexy and other authors, or 4 in Barak's understanding. Any restriction must consider these components to be in line with the Constitution. Consequently, proportionality is the legal instrument by which it is possible to determine the relationship between fundamental rights and their infra-constitutional restrictions.

As mentioned above, authors such as Alexy and Bernal Pulido argue that the principle of proportionality is made up of three sub-principles: suitability or adequacy, necessity, and proportionality in the strict sense or weighting. For his part, Barak argues for the existence of a fourth sub-principle, that of rational connection. To bring clarity to these concepts, I will adopt what Leiva explains, and consider the subprinciple of rational connection as part of suitability or adequacy.

In the same way, to better explain the methodology developed by the proportionality test, when describing each subprinciple, I will carry out a hypothetical analysis of the way in which these subprinciples could be realized, taking a case of environmental damage produced by the activities in the operation of a company. In the face of a conflict between the right to carry out economic activities and the right to respect and restore nature.

5.2.1. The principle of appropriateness or adequacy.

Linked to factual possibilities, it is that which 'precludes the adoption of inidoneous means that obstruct the realization of the principles or ends for which it has been adopted' (Alexy, 2011, p. 13). In other words, an expression of the postulate of the Pareto Optimum, whereby one position can be improved without harming the other. Bearing in mind that any intervention in fundamental rights must be adequate to contribute to the attainment of a constitutionally legitimate end. (Bernal Pulido, 2007, p. 693).

Now, in its application it is necessary to identify the legitimacy of the end and the technical adequacy or rational connection (Leiva, 2018, p. 108). The first concept refers to the end being adapted to the values of society in a constitutional democracy. Whereas, with the second, it is examined whether the means chosen can further the end pursued, or in Barak's words: it is required that "the means used by the restrictive measure conform to (or are rationally connected with) the end for which the restrictive measure is designed to fulfil" (Barak, 2017, p. 337).

With respect to the proposed hypothetical case, the official is aware of an environmental harm and its remediation. First, he or she must identify what ends are pursued by such a procedure. The cornerstone will be the rights of nature, especially its right to the integral respect of its existence, to the maintenance and regeneration of its vital cycles.

As a second point, the different measures that can be adopted in the event of environmental damage are described in Article 292 of the Organic Environmental Code; thus, the official must analyze in the specific case, which of these measures are suitable for the achievement of the end pursued by the Constitution.

5.2.2. The sub-principle of necessity.

Like the previous one, linked to the factual possibilities. It requires that between two equally suitable means for the realization of the first principle, the one that is less harmful to the second principle must be chosen. (Alexy, 2011, p. 14). In other words, it demands that the effects be the least harmful possible. (Leiva, 2018, p. 121) Or that there is no other hypothetical alternative that is less harmful to the right in question and at the same time equally promotes the purpose of the law, since, if there is another less restrictive alternative, capable of achieving the purpose of the measure, then there is no need for it. (Barak, 2017, p. 351).

As this is a hypothetical test, in the proposed case, the official should make a comparative analysis of all the measures that may be available to him, and that meet the appropriateness described in the previous point, which would be less harmful to the company's right to carry out economic activities. For example, in addition to remediation and restoration measures, compensation that entails declaring the company bankrupt or revoking the environmental license would be extremely damaging. Such measures would only be necessary in extreme cases.

5.2.3. The subprinciple of proportionality in the strict sense or weighting.

This sub-principle is linked to legal possibilities. It requires that, to justify a restriction to a fundamental right, there must be an adequate relationship between the benefits obtained from the fulfilment of the purpose, and the infringement caused to the fundamental right with the attainment of that purpose (Barak, 2017, p. 375). In other words, for an infringement of a right to be proportional, the advantages achieved by the intervention (by the measure established) must compensate for the sacrifices

that this measure imposes on its holder, or, that the infringement of a right is justified to the extent of the importance of the end pursued by said intervention. (Leiva, 2018, p. 135).

This sub-principle implies that the end pursued by the measure and the impairment of the fundamental right are weighed with a view to establishing the conditions under which one precedes the other. In other words, at one extreme, it will be measured how much satisfaction the measure will achieve with the impairment of the right (its degree of realization); at the other extreme, the intensity of the impairment of the right by the measure (its degree of restriction) must be determined. Likewise, both the legitimate aim and the fundamental right, respectively, can be realized and restricted in 3 magnitudes: low, medium, or high (Leiva, 2018, p. 136). At this stage, numbers can be relevant. To determine the intensity of a given limitation; then, the decision-making body can consider the number of people who would be affected, as well as the number of people who would benefit from the materialization of the determined end (Ferreres Comella, 2020, p. 180)

In conclusion, and considering the hypothetical case analysed, for a measure ordered by the authority that is aware of the environmental damage to be proportional in the strict sense, the degree of affectation of the right must be the same as the degree of satisfaction of the end that motivates the measure. For example, a measure ordering the revocation of an environmental license would restrict the company's right to carry out economic activities to a high degree. For such a measure to be proportional, it is necessary that a high benefit obtained through the measure is required, either because the environmental damage falls into the category of irreparable damage, or because the company's repeatedly harmful behavior is observed.

6.3. Possible use in the environmental damage declaration.

In administrative proceedings, an environmental damage procedure will culminate in an administrative act of a declaratory nature, understood as a resolution that will certify that the facts analyzed do or do not fall within the category of environmental damage, in the same way, will analyze the measures for remediation, restoration and compensation of nature.

Professor Soto Kloss, however, states that for an administrative act to be valid, it must necessarily have a rational basis, i.e., it must respond to criteria of reasonableness, understood as proportionality, convenience, and opportunity (Soto Kloss, 2012, p. 429).

From the regulations analyzed, it can be deduced that the work of the Administrative Authority that resolves this environmental damage procedure will revolve around two aspects. On the one hand, to determine the existence or not of environmental damage, and on the other hand, to approve or not an environmental remediation plan. As will be analyzed below, the application of the proportionality test is an appropriate and adequate tool to avoid arbitrariness in these cases.

Proportionality as a tool has been adopted by different legal systems. Its development took place in German constitutional law in the second post-war period, later it was adopted by the European Charter of Human Rights in 1976, and gradually by other European countries. The influence of European countries has had an important influence in Latin America, and moreover, the highest bodies of constitutional interpretation have been adopting the principle of proportionality. For example, the Colombian Constitutional Court established it in 1992, the Constitutional Court of Peru in 2005 and the Chilean Constitutional Court in 2007. (Barak, 2017, pp. 212-231).

Article 11 of the Ecuadorian Constitution determines the principles governing the exercise of rights. The third paragraph states that "The rights and guarantees established in the Constitution and international human rights instruments shall be directly and immediately applicable by and before any public servant, administrative or judicial, ex officio or at the request of a party". Accordingly, the fifth paragraph states that "In matters of constitutional rights and guarantees, public servants, administrative or judicial, shall apply the norm and interpretation that most favors their effective enforcement".

Furthermore, if an official is resolving a case of possible environmental damage, by the provisions analyzed above, he must apply the principles that govern the rights of nature and economic activities, established in the constitution directly; to the extent that their application is appropriate that it fulfills a constitutionally valid purpose. In other words, apply the principle of proportionality through its sub-principles.

Consequently, the official, among all the measures that fulfill the above purpose, choose the one that is the least harmful to the fundamental right in conflict. And carry out a weighing exercise in which he weighs the advantages obtained with the decision, in contrast to the sacrifices that it implies for the fundamental rights of those affected (Leiva, 2018). Similarly, it must observe the interpretation that best favors its validity; the proportionality test is the mechanism that would ensure the adequate validity of the principles in conflict or collision.

Thus, the proportionality test becomes a mechanism at the service of the judge that seeks to provide solutions to adequately resolve conflicts between fundamental rights and other fundamental rights or constitutional goods, through the reasoning that contrasts opposing legal interests to determine whether a restrictive measure is justified or adequate concerning the end pursued (Díaz, 2011, p. 171). Or as Professor Leiva argues, citing Barak:

> Proportionality is the methodological criterion - as a legal construct - according to which the realization of the fundamental right is measured, and more specifically by which the end of the means, the fundamental right, and the appropriate relationship between them are examined. (Leiva, 2018, p. 64)

The proportionality test can be a tool to motivate administrative resolutions declaring environmental damage, as it will be useful to determine: 1) whether an event can be considered environmental damage, 2) the amount of the fine imposed, 3) the minimum measures to approve an environmental remediation or reparation plan, and 4) the amount of compensation to the victims of the environmental damage.

Finally, it is not unusual that, in environmental proceedings for damages, millions of dollars are disputed; the use of this tool may be ideal to avoid the discretion of the administrative authorities and to ensure the effective enforcement of constitutional rights and principles.

CONCLUSIONS

Ecuador's bad experience with hydrocarbon exploitation in the 1970s and the recognition of plurinational influenced the constitution's recognition, which was subsequently approved by referendum in 2008.

This new perspective required that the entire legal and infra-legal environmental framework be modified in the search for an adequate implementation of the established constitutional precepts; given Ecuador's extractivist development model, coupling this model with the focus on guaranteeing the rights of nature was a very complex task. Balance and the principles of sustainability, precaution, prevention, and effectiveness are the axes around which the new environmental regulations revolve.

States, to a greater or lesser extent, have taken responsibility for the protection of the environment since it has a direct impact on the well-being of the population. One of the tools adopted is the punishment of actions or omissions that cause environmental damage. This institution has particularities that differentiate it from traditional civil liability.

In Ecuador, environmental damage has been regulated since 1999. With the approval of the Constitution of Montecristi, and the subsequent issuance of the Organic Environmental Code and its General Regulations, there was a radical change regarding the competent body to assess and decide on the occurrence or not of environmental damage, passing from the jurisdictional body to the administrative authority, which must follow an administrative sanctioning procedure. In the same way, this authority has the power to assess, quantify and accept or reject the compensations inherent to environmental civil liability, leaving as a subsidiary process, the extra-contractual civil procedure -only- concerning what was not agreed upon in the administrative venue.

The General Regulation leaves the door open for the amounts of compensation and indemnification to be established under methodological criteria developed by the National Environmental Authority, which is why it is proposed to use the test of reasonableness as a criterion for the control of discretion and protection of rights in cases of environmental damage. It can be a tool to determine whether an event can be considered environmental damage, the amount of the fine imposed, the minimum measures to approve a remediation or environmental remediation plan, and the amount of compensation to the victims of environmental damage.

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The imprevision in the reformed Civil Code

Acontecimientos imprevistos en la reforma del Código Civil

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ABSTRACT: The research, based on the examination of the traditional orientation established in the Canal de Craponne arrêt, traces the evolution of the French system concerning the institution of imprévision. We know, art. 1195 of the reformed civil code, highlighting critical issues especially regarding judge discretion.

KEYWORDS: contract law, legal theory, doctrine, legal system

RESUMEN: El artículo, a partir del examen de la orientación tradicional establecida en el arrêt Canal de Craponne, traza la evolución del sistema francés con respecto a la institución de la imprévision. Entonces, el arte. 1195 del código civil reformado, destacando las cuestiones críticas especialmente en lo que respecta a la discreción del juez.

PALABRAS CLAVE: contrato legal, teoría legal, doctrina, sistema legal.

JEL CODE: K41, P48.

INTRODUCTION

In international practise, we are now witnessing the diffusion of hardship clauses that allow the contract to be

adapted to unforeseeable and uncontrollable circumstances, as demonstrated by the Covid-19 pandemic. However, the problem arises in cases in which the contracting parties have not established any regulations in the face of an unexpected event. Part of the doctrine observes how in a complex and constantly evolving reality, the imprevision is relevant because it favours the preservation of the relationship, preserving its substantial justice. In particular, the advantages deriving from the renegotiation are highlighted[1].

This has led in recent years to the introduction of the institute in numerous codices (Momberg Uribe, 2011). Above all, the reform of the law of contracts and obligations of the French civil code of 2016 is significant of this new trend because it has led to the overcoming of the traditional orientation that consecrated the intangibility of contracts. On the influence of this model, the reform project of the Italian civil code would also like to introduce the same rule. However, despite the possible advantages, imprévision opens up to a possible judicial discretion, with repercussions on legal certainty.

1. THE TRADITIONAL ORIENTATION AND THE REASONS FOR A REFORM

In 1876 the Cour de Cassation was called upon to rule in Canal de Craponne on two contracts concluded in 1560 and 1567 concerning the supply of water to feed the canals. Given the passage of time, the agreed sum had become negligible, and the supplier was taking legal action asking for its revaluation. The application was rejected because - based on art. 1134 cc - "dans aucun cas, il n'appartient aux tribunaux, quelque équitable que puisse apparaître leur décision, to take into consideration the temps and the circonstances for modifier

1 This article was prepared as a partial fulfilment of my research projects at Universita degli Studi di Padova, Faculty of Law and Human Science's research group on Institutions, Justice and Legal Reform at Technological University of Peru (UTP) and GIDE – PUCE research group.

les conventions des parties et substituer des clauses nouvelles à celles qui ont été librement acceptées par les contractants "(Cass, 1876, p. 161). The reasons for the decision can be found in the sanctity of the contract as an expression of the autonomy of the parties and in the desire to ensure legal certainty, limiting the role of the judge. We are in the crisis years of the School of Exegesis, although new doctrines appeared in the background, the idea of the completeness of the code and of the function of jurisprudence as a mere "bouche de lois" was still widespread: fear and mistrust in the "Equitè de Parlaments" (Cabrillac, 2016, p. 137). However, the sentence did not concern a typical hypothesis of imprévision, since it was not so much a sudden and unforeseeable change in circumstances as it was an inadequacy of the agreement due to the passage of time.

Although the arret de Craponne was ignored for almost fifty years (Ancel, 2017, p. 1), it sets the principle to which the French courts followed until the entry into force of the reform in 2016 which introduced the imprévision. The choice, heralded by the reform projects, did not seem surprising and was, indeed, hoped for by the majority doctrine:

> Tant la Cour de cassation est soumise à une impressive doctrinal pression [...] d'autant plus remarquable qu'elle n 'est pas orchestrée par une chapelle ou une secte mais que, pour une fois, les hérauts du libéralisme contractuel, les gardiens de la tradition, les partisans de l'autilitarisme et les talibans du solidarisme, du moins certains d'entre eux, avancent main dans la main et adressent aux magistrats de la Cour de cassation, a vibrant << Osez!> > "In fact," the révision du contrat n'apparaît plus nécessairement comme une injure à la foi jurée, une entrave à la liberté contractuelle ou une arme contre la sécurité juridique. Elle se présente comme the instrument de la pérennité contractuelle,

> le remède contre la précarité économique et même, parfois, comme la garantie de la paix sociale. Autant de raisons pour faire preuve aujourd'hui de bienveillance à l'égard de la révision du contrat (Mazeaud, 2005, p. 1)

First of all, the administrative jurisprudence had already recognized the institute in 1916: in a case concerning the concession of gas (CE, 1916, req. No 59928), the Conseil d'Etat had, in fact, ruled that, being the economy of the contract completely distorted due to the increase, not foreseeable by the parties, of the cost of production due to the price of coal, the concessionaire could not be required to ensure the operation of the service under the conditions originally established. It was therefore necessary to balance the interests: the company remained obliged to provide the service but had the right to be compensated for the pecuniary consequences of the situation which exceeded the normal economic risk. Later it was clarified that it had to be unforeseeable, exceptional and beyond the control of the parties. but she had the right to be compensated for the pecuniary consequences of the situation which exceeded the normal economic risk. Later it was clarified that it had to be unforeseeable, exceptional and beyond the control of the parties. but she had the right to be compensated for the pecuniary consequences of the situation which exceeded the normal economic risk. Later it was clarified that it had to be unforeseeable, exceptional and beyond the control of the parties.

Civil jurisprudence had also shown in recent years some fluctuations which made it possible to believe a change of direction. In 2010 the Cour de Cassation (Cass. Civ., 2010) had ruled on a contract that had become excessively onerous and had affirmed its lapse due to lack of cause due to the change in circumstances that had significantly changed the economy of the agreement (Mazeaud, 2010, p. 2481). The use of the cause

and not of good faith as the legal basis of imprévision was due to the desire to limit it only to the most severe cases when the consideration is lacking, is illusory or derisory. This also tended to prevent the possibility of review by the judge. However, this much-celebrated decision,

Furthermore, starting from the arret Huard of 1992 (Cass. Com., 1992, Bull. IV, n ° 340) based on the duty of good faith in the execution of the contract, the obligation to renegotiate in the event of changes in circumstances has been progressively admitted by the Cassation (Zacchaeus, 1994; Macario, 1996; Gambino, 2004; Gabrielli, 2013, p. 76). Initially, the address had a sanctioning nuance, as it was imposed on the party to whom the change in the situation was attributable (Mazeaud, 2008, pp. 581-582) and in the context of distribution contracts. In 2004 the Court affirmed the general scope of this obligation, provided that the imbalance was after the conclusion of the agreement and the performance of the service had not been withdrawn or interrupted (Mazeaud, 2004, p. 1754). This jurisprudence, together with the progressive insertion of hardship clauses (Cesaro, 2000; Venturelli, 2017, p. 1035) in the contracts served to temper the rigidity of the principle established in Canal de Craponne. The discipline of cases in which the renegotiation had failed remained uncertain. Indeed, there was no obligation to accept the amendments to the contract proposed by the other contractor or to revise it. Therefore, in doctrine it was suggested to allow the judge to check the reasons that led to the refusal and, if they were unlawful or constituted an abuse, to condemn the responsible party to compensation for damages (Mazeaud, 2007, p. 765).

The role of comparative law (Cousin et al., 2015, p. 1115; Antipas, 2016, p. 1620) and European law was also decisive in the introduction of imprévision. There is, on the one hand, the desire to adapt to the legal context and modern trends

and on the other the aspiration to be a reference model again in the hypothesis of a possible European codification. In the Report to the President of the Republic, it is noted that:

> La France is the one des derniers pays d'Europe in the past reconnaître la théorie de l'prévision comme cause modératrice de la force obligatoire du contrat. Cette consécration, inspirée du droit comparé comme des projets d'harmonisation européens, permet de lutter contre les déséquilibres contractuels majeurs qui surviennent en cours d'exécution, conformément à l'objectif de justice contractuelle poursuivi par l'ordonnance. (Ordonnance n ° 2014-326, 2014, n. p.)

Among these, in addition to European projects and international principles, the Romanian code of 2011, which adopted the unforeseenness of art. 1271 (Savaux, 2012, p. 281; Ganfalea, 2014, p. 63).

2. THE INSTITUTE

The introduction of imprévision (Recueil Dalloz, 2010, p. 2485) has been defined as one of the most symbolic innovations of the reform (Chenede, 2018, p. 25) together with the disappearance of the cause, albeit of limited practical relevance, so much so that in the doctrine it has been recalled the Gattopardesque phrase "everything must change so that everything remains as it is" (Stoffel-Munck, 2016, p. 30). The institute responds to those needs expressed in the Report to the President of the Republic of modernization, the pursuit of contractual justice and improvement of the attractiveness of the system. However, it would have needed particular attention (Confino, 2016, p. 345) in its definition because:

> The changement même des conditions économiques ne devrait pas, en thèse générale, justifier le manquement à la parole donnée (...); the destruction du contrat est

> also cells of the confiance et de la sécurité juridique; si elle se généralisait, si, sous le complaisant prétexte d'ouvrir des soupapes de sûreté afin de sauvegarder la paix sociale, on la faisait entrer dans nos moeurs, elle entraînerait le retour à un régime non-contractuel qui (...) était celui des sociétés primitives (...); à quoi bon contracter lorsque l'on sait que les engagements pris n'engagent pas? Organization et socialisation du contrat, oui; désorganisation et anarchie contractuelle, not. (Josserand, 1939, no. 405 bis 228)

The art. 1195 provides that, "if an unforeseeable change in circumstances after the conclusion of the contract makes the execution excessively burdensome for a party that has not accepted to assume the risk, the latter may request a renegotiation of the contract from the other party. This continues to fulfil its obligations during the renegotiation. In case of refusal or failure of the renegotiation, the parties can agree on the termination of the contract, on the established date and conditions, or ask the judge to adapt it. In the absence of an agreement within a reasonable time, the judge may, at the request of a party, review the contract or terminate it on the date and under the conditions it determines "(Fages, 2016, p. 295). The standard indicates a gradual path, but perhaps not very adequate to the reality of business. First, it is doubtful whether there is an obligation of renegotiation even if a doctrinal orientation seems to exclude it (Chantepie y Latina, 2016, p. 447). The second phase is limited in scope: it is unlikely that parties who have not reached an agreement during the renegotiation will express their consent to the termination of judicial review. This complex mechanism could, however, discourage legal recourse for fear that the Court will rewrite the contract. It differs from the Avant-Projet Catala characterized by a restrictive position and from the Projet de Chancellerie which required the agreement of the parties for the judicial review, while it is quite close to the Projet Terré.

The second phase is limited in scope: it is unlikely that parties who have not reached an agreement during the renegotiation will express their consent to the termination of judicial review. This complex mechanism could, however, discourage legal recourse for fear that the Court will rewrite the contract. It differs from the Avant-Projet Catala characterized by a restrictive position and from the Projet de Chancellerie which required the agreement of the parties for the judicial review, while it is quite close to the Projet Terré. The second phase is limited in scope: it is unlikely that parties who have not reached an agreement during the renegotiation will express their consent to the termination of judicial review. This complex mechanism could, however, discourage legal recourse for fear that the Court will rewrite the contract.

The doctrine has focused on the analysis of the objective and subjective assumptions established by art. 1195. The change in circumstances, which can be different, must be unpredictable. The notion (Barbier, 2016, p. 611) may concern the event or even its entity (Deffains y Ferey, 2010, p. 719). An indication is provided by the French case law on force majeure, which considers both aspects. This solution, consistent with the function of the institute, is then confirmed in the discipline on prejudice previsible. In the Italian legal system, it is specified (Macario, 2001, p. 647) how unpredictability must be "average", but it is the socio-economic context that determines its evaluation in practice.

The examination of excessive burdens raises two sets of questions:

A. In the first place, the delimitation of this hypothesis concerning similar cases is problematic. While, in fact, in theory, the distinction between imprévision, and impossibility is clear, in practice, the differences often blur. In the projet de Chancellerie, which referred to cases of unpredictable

and insurmountable excessive burdens, this was even more evident. However, this is a significant problem since only the former allows the judge to review. A further difficulty arises in determining whether the burden may also concern cases in which the party no longer has any interest in continuing the contract. The answer seems negative and, instead, the transience according to art. 1186 cc, however, the criticality in drawing the boundary line between the two hypotheses emerges as evidenced by the jurisprudential orientation that had framed the change in circumstances in the transience for the loss of the cause. It is not very specific, then, whether art. 1195 also covers cases of indirect cost, i.e. when there is a decrease in the value of the consideration, such as to make it negligible. Probably, jurisprudence does not extend the rule to these cases due to the still current influence of the previous one.

The admissibility of imprévision positive is also controversial, which concerns the possibility for one party to request the adjustment of the conditions when the contract becomes exceptionally and unpredictably advantageous for the other. The doctrine has established that this will depend on the interpretation that will be given of the general principle of good faith codified in art. 1104 cc (Jutras, 2017, p. 138). A possible solution emerges from the decision of the Quebec Court of Appeal (Churchill Falls -Labrador- Corporation Limited v. Hydro-Québec, 2016, 1er août). In 1969 a contract was stipulated between CFLC and HydroQuebec which provided for the financing for the construction of a hydro-electric power plant with the commitment to purchase almost all of the energy at a fixed rate. The deal proved extremely beneficial to HydroQuebec, and CFLC was then taking legal action to review the terms. The request was rejected, and in the motivation, it is clarified how good faith can be used to make up for the choice of the legislator not to provide for the institution of imprévision to protect the party damaged by an unpredictable

and extraordinary change in circumstances. However, it cannot lead to a change in the contract to redistribute the earnings: "in a contractual relationship between experienced and well-informed individuals who have negotiated a complex contract for long months with considerable financial burdens, there is no obligation for the parties to" give priority to the interests of the other contracting party. "A contract like this is not a marriage, even for one simple reason. Such an almost final form of "contractual solidarity" would go far beyond what is required by the good faith "(Churchill Falls - Labrador - Corporation Limited v. Hydro-Québec, 2016). The thesis is acceptable: giving all'équité, "notion flour, difficile à cerner avec précision et encore plus à véritablement définir" (Churchill Falls -Labrador- Corporation Limited v. Hydro-Québec, 2016), the scope desired by CFLC meant " to introduce une forme de justice distributive en droit des contrats. Ce n'est pas le rôle que le législateur a confié aux tribunaux "(Churchill Falls -Labrador- Corporation Limited v. Hydro-Québec, 2016). The thesis is acceptable: giving all'équité, "notion floue, difficile à cerner avec précision et encore plus à véritablement définir" (Churchill Falls -Labrador- Corporation Limited v. Hydro-Québec, 2016), the scope desired by CFLC meant " to introduce une forme de justice distributive en droit des contrats. Ce n'est pas le rôle que le législateur a confié aux tribunaux "(Churchill Falls -Labrador- Corporation Limited v. Hydro-Québec, 2016).

B. Secondly, the benchmark of excessive burden must be provided. In the Italian legal system, it is believed that "it must affect the performance in its objectivity, not for the subjective conditions of the debtor" (Roppo, 2011, p. 950); otherwise, in the Dutch system the situation in which the obliged subject finds himself is also considered significant. The solution depends on the jurisprudential interpretation, even if adherence to the objective concept can be considered probable. The doctrine has highlighted how the question is also reflected

in the extension of the rule to unilateral acts, but at the moment, it does not appear easy. The examination of the extent of excess relates, then, to the assessment of the hazard and cannot be carried out without an examination of the specific case.

Controversial is the choice to adopt the imprévision in cases "in which the party has not accepted the risk", distinguishing itself from the Italian discipline which does not allow resolution for excessive burdens when the event falls within the normal range (Gambino, 2001) (Article 1467 of the Civil Code), was excluded by the parties or it is a random contract (1469 of the Civil Code).

An orientation (Deshayes, Genicon y Laithier, 2016, p. 400 ff.) identifies, therefore, the need to consider in the hypothesis in which there is no express acceptance of the risk: the contractual type with attention to the average risk of contract as in the Italian legal system (Gabrielli, 2001, p. 2); duration; the quality of the parts; the presence of particular clauses that indicate caution and the will to protect oneself against specific changes in conditions.

3. THE ROLE OF THE JUDGE

The introduction of imprévision can be seen as a positive aspect of the reform; however, it is uncertain whether it could contribute, together with other innovations, to improving the competitiveness of French contract law. Moreover, the questionability of relying on this criterion in writing a reform has been effectively emphasized as it is almost impossible to assess to what extent it will bring benefits to the country or encourage new economic investments (Usunier, 2017, p. 345). It is difficult to define which elements affect to determine the attractiveness of a legal system: the law chosen depends on often external factors such as the nationality of the parties (Cartwright, 2015, p. 691), the place of the dispute (Cuniberti,

2014, p. 253), the efficiency of the courts. It is also complex to predict how the new rules will affect. They will harmonize with each other and with the solutions already in place, creating a new and autonomous system. The interpretation that the courts will give is decisive. If we can speak of attractiveness (Sejean, 2016, p. 1151), the evaluation must, therefore, be made in a not short period and this also depends on the economic strength of the country.

Some elements, however, leave doubts about its effectiveness right now. The imprecise legislative technique has been highlighted, which involves gaps and does not allow sufficient certainty to be reached (Mekki, 2017, p. 431). There is an evident contradiction: on the one hand, the opportunities for judicial intervention seem numerically diminished, on the other hand, its powers are indeterminate and potentially more pervasive concerning the decision maker's ability to review or affect the contract. This emerges from the multiplication of relative standards and qualifications and some changes such as the abolition of the cause. Art. 1169 cc could become a way to control not so much the illusory or negligence of the consideration as to impose paternalistic or solidarity criteria. The same wording of art. 1195 gives rise to perplexity when it establishes that the judge, in the absence of an agreement within a reasonable time, can terminate the contract within the times and under the conditions set by it or modify it. The choice is analogous[2] . To that accomplished in art. 6: 258 of the Dutch code which authorizes the judge to review or terminate the contract at the request of a party in the event of unforeseeable circumstances that make its maintenance at the original conditions contrary to reasonableness and justice. The parties may, however, contractually allocate the risks or provide for adjustments that could then be used by the judge.

2 The possibility of a judge's review is also allowed in European projects

Unlike the French system, the rule (Meijers, vC Bezers, 2012) is imperative. The art. 6: 258 was, however, rarely employed.

Critical is the choice not to provide parameters that the judge must observe in the review, in this disagreeing with the Projet Terré, in which it was established that the judge had to have regard to the legitimate expectations of the parties (Stoffel-Munck, 2016, p. 35). The principles to be followed by the Court in the review are also clarified in the Unidroit Principles and the European projects. They relate to the need for the contractual balance to be re-established with an equitable division of the losses and gains deriving from the change in circumstances, or to the tracing of the excessively burdensome obligation to reasonableness and equity.

According to art. 1195 the judge can, therefore, decide according to his vision and his way of perceiving a case in point or he can seek the will of the contractors in order to determine which set of interests they would have liked. The indications that can be obtained from the reform would seem to favour this second solution. It is interesting to note that in the Belgian Avant projet there is a similar provision that requires the judge to adjust the contract to make it compliant with what the parties would have reasonably agreed if they had known about the change in circumstances. The difficulty in finding a correct solution should be emphasized in the case of complex contracts, with clauses that are the result of delicate compromises, balancing costs and benefits and have as parts subjects of different legal systems. Therefore, the party must identify the specific changes deemed appropriate. This option is preferable to a general review question, which would give the judge the power to mask his decision with the use of parameters such as good faith, reasonableness and fairness which are indeterminable rules, thus limiting his discretion.

It was, however, highlighted as:

> Les juges ne semblent pas très desireux d'être chargés de refaire les contrats. Certes, ils n'hésitent parfois pas à tailler dans un contrat mort en interprétant ardiment certaines de ses stipulations ou en en desactivant d'autres au nom de la bonne foi, de la cause ou de bien d'autres concepts. En revanche, retailler un contrat vif ferait peser sur les magistrats une responsabilité qu'ils ne sont guère formés pour assumer. Juger, c'est "<< rendre à chacun le sien >> selon la justice; the maîtrise du droit éclairé par un sentiment d'équité peut y suffire. Fixer pour avenir les termes d'un contrat, c'est métier d'homme d'affaires. Le juge n'est pas dans son élément, spécialement dans les secteurs dont la compréhension nécessite une culture technique qu'il n'a pas. (Stoffel-Munck, 2015, p. 262)

In some contracts, an effective judicial review, which also takes into account the context, the possible developments of the situation, the economic implications and the evolution of the market, seems utopian. The risk is that the changes lead to worse situations than those to which we wanted to remedy, also because it was highlighted as "il n'est pas sûr que, si elle (l'prévision) était admise chez nous, ce serait aux contractants économiquement les plus faibles qu'elle servirait le plus". (Carbonnier, 2000, p. 287). It does not even respond to a real will of the companies which are one of the main recipients of the reform:

An objection to the criticisms is found in the adoption of the judiciary revision in European projects and international principles. It should not be forgotten, however, that the former is currently the expression of a doctrinal will to unify the law that today seems increasingly utopian, while the others can be used as applicable law or integration in international contracts

that often provide for the devolution of disputes to specialized arbitrators; a certain mistrust of the rewriting of the contract also remains. This aspect is emblematic of a not completely convincing use of the comparative method.

Equally problematic is the absence of a hierarchy of remedies for the judge who seems to be able to decide freely between revision and resolution (Tuccari, 2017, p. 1536). The uncertainty is aggravated by the fact that "le juge peut mettre fin... à la date et aux conditions qu'il fixe". The doctrine questions how the termination of the contract will have to be managed (Stoffel-Munck, 2015), how the temporal question will have to be addressed if side effects must be considered. Everything seems to be left to the discretion of the judge.

The reform has now sanctioned the judicial interventionism from which it is difficult for the moment to go back (Aynes, 2016, p. 14). On the other hand, as it has been correctly noted, "it matters little if the French legislator tries to limit the role of the judge or not, the courts are, however, going to appropriate a vital role that of creators of normative rules. It remains to be known whether they should be applauded or criticized... "(Masch, 2013, p. 103). Above all, it should be assessed whether the enthusiasm of the doctrine and part of the judiciary for this expansion of powers is accompanied, on the one hand,

CONCLUSIONS

The art. 1195 cc is a clear example of the problems of the French reform that "ne rendra certiinement pas notre droit plus attractif. Elle fragilise la force obligatoire du contrat, multiplie les sources de contentieux et transforme le juge en une veritable troisième partie au contrat. Dans les contrats internationaux, les grandes entreprises soumettent déjà leurs relations à un droit et à un juge ou arbiter étranger. La réforme renforcera cette

tendance, au profit notamment du juge et du droit suisses, ce dernier étant plus prévisible et plus respectueux de la volunté des parties. Finally, la lourdeur et la rigueur du droit français ne s'imposeront qu'aux entreprises françaises traitant avec des entreprises localisées en France, ainsi soumises à un droit plus contraignant que leurs concurrents. Not seulement le nouveau droit ne sera pas attractif, but the fera subir aux entreprises françaises un nouveau déficit de compétitivité. Arguer en faveur de la neutralité du droit, condition indispensable de son efficacité, ne conduit pas à se désintéresser de la justice, mais signifie simplement que les questions de redistribution doivent être réglées par des dispositions spécifiques et non, comme le fait aujourd'hui le législateur français, dans le cadre du droit général des contrats ". (Voegel, 2016, p. 309) If the assertion according to which "reformer se souvent deformer" (Downe, 2016, p. 43) seems excessive, the criticalities are evident. It should not be forgotten that "an overall judgment on the civil code does not depend solely on the undeniable technical progress it may have made with respect to the pre-existing legislation, nor on its suggestive systematic design. It mainly depends on the vitality of the fundamental ideas that constitute its substratum and foundations and on the degree of exactness with which those ideas have been transformed and translated into legal formulas "(Nicolò, 1960, p. 248). Many expectations have been disappointed and the technical uncertainties seem to reflect the lack of a vision only hidden by the enunciation of generic objectives. Reforming a code is not easy and we can agree with the position expressed by the Swiss Conseil federal according to which "the coût d'une révision de la partie générale du CO est très élevé tandis que son utilité est jugée plutôt faible et que le risque d'échec est considérable .. Mais c'est surtout les avis très clairs émis par les praticiens qui occupent une place centrale dans the general appraisal du Conseil fédéral: les specialists ne voient de toute évidence dans le texte normatif, malgré ses

lacunes attestées, aucun préjudice mesurable pour leur travail. Il manque donc une condition essentielle d'une grande révision "(Modernization de la partie générale du code des obligations Rapport du Conseil fédéral en réponse aux Postulats 13.3217 Bischof et 13.3226 Caroni du 31 janvier 2018).

However, the French reform does not represent an isolated experience and seems to mark a return to the civil code, perhaps not by chance. In a moment of mistrust in globalization, of tensions that pervade the current reality, of the disintegration of society, we aspire to that world of security of which the codes were a symbol (Irti, 1979). Furthermore, even the states in crisis today are trying to find their past strength in this way. The jurist, on the other hand, is entrusted with the task of "understanding, reassembling the logic of one's time among the ruins of the past and the faint or uncertain signs of the future" (Irti, 1979, p. 34).

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When conceptual autonomy leads to in the (autonomous) absence: Where is moral damage going? A revision of Italian case law

Cuando la autonomía conceptual lleva a la inexistencia (autónoma): ¿hacia dónde va el daño moral? un panorama de la jurisprudencia italiana

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ABSTRACT: The starting point of this brief itinerary within the jurisprudence of legitimacy is constituted by the famous sentences of San Martino, pronounced by the United Sections in November 2008, a true and proper crucial moment concerning the subject matter of attention. If this is the starting point, it is not yet possible, on the other hand, to identify a real moment of conclusion of this path, since the point of arrival, far from being reached, looks more and more like a mirage. However, within this (secular) litaniae sanctorum, one may sometimes come across some statements that could be peacefully defined as unexpected, if not surprising: small deviations, in short, from the usual path of argumentation that struggle to fit into the latter in a logically coherent way, generating not a little confusion in the jurist.

KEYWORD: jurisprudence, theory of law, damages, morality, justice

RESUMEN: El punto de partida de este breve itinerario dentro de la jurisprudencia de la legitimidad está constituido por las famosas sentencias de San Martino, pronunciadas por las Secciones Unidas en noviembre de 2008, un verdadero y propio momento crucial con respecto al tema que nos ocupa. Si este es el punto de partida, todavía no es posible, por otra parte, identificar un momento real de conclusión de este camino, ya que el punto de llegada, lejos de ser alcanzado, se parece cada vez más a un espejismo. Sin embargo, dentro de estos litaniae sanctorum (seculares), uno puede encontrarse a veces con algunas afirmaciones que podrían definirse tranquilamente como inesperadas, cuando no sorprendentes: pequeñas desviaciones, en definitiva, de la senda habitual de la argumentación que pugnan por encajar en ésta de forma lógicamente coherente, generando confusión en el jurista.

PALABRAS CLAVE: jurisprudencia, teoría del derecho, daños, moral, justicia.

JEL CODE: K41, K12.

INTRODUCTION

Carlo Francesco Gabba, back in 1911, reflecting on the ontology (to use a term that is very common today in Italian legal theory and jurisprudence on the subject) and, consequently, on the compensability of moral damages, said that French and Belgian jurisprudence - in favor of the compensability of this type of prejudice - never defined the concepts relating to it and, therefore, the indeterminacy of ideas that followed was the cause of the continuous flooding of the doctrine of compensation for non-asset damage (Gabba, 1911, pp. 219-220), "which today is a spectacle in civil jurisprudence, especially Italian" (Gabba, 1911, pp. 219-220). The indefiniteness of ideas, according to the

illustrious scholar, was caused "only by the generic expression non-material damage" (Gabba, 1911, pp. 219-220).

Well, I would use these brief and incisive words of a master of Italian civil law doctrine as the starting point and guiding thread for the reflections we wish to propose here. The analysis, however, is not intended to be a historical reconstruction of the doctrinal reflections and jurisprudential evolutions on moral damage from the last century to the present day, but an attempt to demonstrate that these words can be considered well-applicable also to the most recent jurisprudence of legitimacy of the Italian Court of Cassation, whose modus operandi seems more and more often (and to an increasing extent) to be assimilable to a show.

Closely related to this last aspect, almost as if to complete this brief introductory overview, is the attitude that, in recent times, seems to have reached a veritable phase of exasperation: the reference is to the way of formulating the motivating part of the judgments of legitimacy. The latter has now become the natural place in which to proceed - in addition to the facetious display of the personal level of culture achieved[1] - to a continuous (but very tired and always irritating) repetition of arguments (legal and otherwise) that have now exhausted what, according to their supporters, was their persuasive force (assuming they ever had any).

And it is not so difficult to identify the reasons behind such an attitude: the need to spasmodically repeat as many times as possible a speech that has already been made, at best may be aimed - thanks to the hypnotic and obtunding power of repetition

1 "A certain idea of nomofilachia, coupled with the Italian legal and jurisdictional tradition's unfamiliarity with the culture of judicial precedent, has made possible the Court's slide towards a sort of 'doctrinalistic' drift, often uncritically applauded" (Sassani, 2019, p. 60).

- at generating in the reader the conviction (but perhaps also the self-conviction of the speaker) of the goodness of the theses sustained; In the worst-case scenario, on the other hand, such behavior may be considered to be maliciously preordained to create a large number of concordant case law precedents, to give rise - in an entirely artificial manner - to an interpretative orientation that takes on the power of "established precedent".

1.THE SAN MARTIN JUDGMENTS OF NOVEMBER 2008

An important moment of reflection on non-asset damage by jurisprudence was, without a shadow of a doubt[2], November 2008, when the unified sections of the Court of Cassation (2009) were called upon, as they say, to "take stock" (Procida Mirabelli di Lauro, 2009, p. 33)[3]. The main reason that prompted the third section to request the intervention of the highest court of the Court (Court of Cassation, no. 4712/2008, 2008) was the uncertainty regarding the conceptual admissibility of an autonomous subcategory of non-asset damage such as existential damage. However, the questions put to the Joint Sections we're not limited to existential damage only but showed some interesting profiles of extension to so-called moral damage as well: the reference is to those statements[4] -

2 San Martino (2008) 'has represented, and still represents, an excellent argumentative model, both concerning conceptual and systematic requirements and concerning the requirements of legal policy' (quoted by Grondona, 2021, p. 40).

3 "It was frankly to be expected that the United Sections, worried by the number of disputes already started and, above all, by the much higher number of those that could have been started, would intervene in a strictly counter-reformist manner" (Scognamiglio, 2009, p. 261), speaks of a "construction of a new system of non-asset damage for the third millennium" (Scognamiglio, 2009, p. 261).

4 Ibid, c. 1458. See, in particular, the last four points of the list drawn up by the Third Section, which asks: i) whether subjective moral damage, characterized by different ontogenesis compared to existential damage, is characterized by the fact that it is limited to the inner sphere of feeling; ii) whether subjective moral damage and existential damage are uncon-

which were requested to be confirmed, clarified, or modified - regarding the correct configuration of moral damage (and, consequently, albeit implicitly, the relations with other types of damage not characterized by patrimonial nature). It should be noted, however, that even in this case the question of the autonomy of the specific type of prejudice was not placed in the background, but played a particularly important role; a role so important that it can be stated, in general terms, that the most important theoretical and dogmatic questions concerned these two aspects: the clarification of the content of the different types of damage and their configuration, within an (alleged) sub-system[5] of non-asset damage, as autonomous sub-categories[6] .

The sentences handed down by the unified sections, therefore, should have brought order to a panorama which the order of reference itself had not hesitated to define as characterized by strong moments of contrast and confusion on the morphological and functional aspects of non-asset damage (Court of Cassation no. 4712/2008, cited above, c.

ditionally indemnified within the limits of the legal reserve as per article 2059 of the civil code; iii) moreover, whether they are also indemnifiable beyond the limit as per article 2059.

c.c. if (and only if) the conduct of the aggrieved party has affected values or interests that are constitutionally protected; iv) and, finally, whether they are compensable only if the aggrieved party provides actual proof of the damage (including by way of allegations and presumptions).

5 The expression seems to recall (deliberately) the doctrinaire reflections on medical liability, defined, precisely, as a 'subsystem' of civil liability 'endowed with an intrinsic rationality' (Matteis, 1995, p. IX).

6 point 3 of the list cited above in note 8, where it is asked whether the broad category of non-asset damage is divided into a subsystem made up of biological damage in the strict sense, existential damage, and subjective moral damage. The fact that the types of damage are to be understood as autonomous from each other emerges even more clearly from a question that can be read a little earlier (cf. ibid., c. 1456): ¬" Concerning the tri-partition of the categories of non-asset damage made by the constitutional court in 2003, it is legitimate and current to discuss, alongside subjective moral damage and biological damage, existential damage, meaning damage deriving from the violation of constitutional values/interests.

1456)[7]. Since we cannot go into every single aspect of the sentence here, we will limit ourselves to analyzing the figure of so-called moral damage.

From this point of view, there appear to be two main moments of reflection by the Supreme Court: firstly, the "pure and simple" moral damage is analyzed, as consigned to us by the nineteenth and twentieth-century civil law tradition; subsequently, attention is shifted to those situations in which the "moral" component of the prejudice is not the only one to come to the fore after the damaging action carried out by the damaging party. To dispel any doubts, it should be noted first of all that neither of the two parts mentioned above can be considered more important than the other or, worse still, to be read separately from the other: the sentence gives us a unitary and harmonious picture of so-called moral damage, which may or may not be liked, but certainly cannot be roughly "sectioned off" (on pain of losing the organic nature of the same).

The first point, as mentioned above, concerns non-pecuniary damage in and of itself, and it is perhaps in this area that the most marked break with the civil law tradition referred to above can be seen. In fact, non-material damage was considered compensable only in cases where the wrongful act of the damaging party was configurable (even if only in the abstract) as a crime and where the consequences of that act were limited to what, with a cultured but verbose diction, was usually defined as "contingent suffering, transeunt disturbance of the soul".

Now, the Joint Sections take a clear position on the question of the time limitation of the inner suffering suffered

7 Scognamiglio (2009) speaks of a 'construction of a new system of non-asset damage for the third millennium' (p. 261).

by the injured party for the configurability of moral prejudice, unhinging a doctrinaire system that jurisprudence had over time accepted, but which had no normative basis. And the words used could not have been more effective: it is affirmed that the (narrow, we would add) figure of transeunt subjective moral damage must be definitively surpassed, as it has a very doubtful normative basis and is lacking in terms of the adequacy of protection for the injured party (Court of Cassation, section one, no. 26972/2008, 2008, p. 107).

In this way, the position is truly radical: once the constraint of the temporary nature of suffering has been dropped, there is no obstacle to the harmful effects of the harmful action also unfolding over the long term[8] . Therefore, the temporal extent of the suffering will be relevant only to quantify the amount of compensation, and not - as previously occurred, erroneously - for its existence and legal relevance.

The court, proceeding in this way, provides the answer to the first of the two (dogmatic) questions identified above, and then - almost as if it were a corollary of the answer itself - also provides the answer to the second question: since the so-called moral prejudice is not necessarily limited to the moments immediately following the harmful event (and, therefore, destined to disappear over time), it does not seem necessary (and, indeed, not even correct from a legal point of view) to

8 "the unified sections attribute the same [traditional categories] to distinct cases and give them a content that is so extensive as to absorb the entirety of the indemnifiable injury: moral damage, expanded to embrace an injury that accompanies existence, is referred to the illicit crime; existential damage, including suffering, is linked to the violation of fundamental rights; biological damage, extended to pain, exhausts the effects of the violation of the right to health" (Navarretta, 2009, p. 86). In a critical sense, Mazzamuto (2009, p. 610), who highlights the inability "of the Supreme Court to set aside the categories received from the previous phase of the debate on the protection of the person against civil liability [...] to inaugurate a new season of language and concepts with which to describe non-asset damage".

proceed to the identification of "moral" prejudice. Since the so-called moral prejudice is not necessarily limited to the moments immediately following the damaging event (and, therefore, destined to disappear with time), it does not appear necessary (and, indeed, not even correct from a legal point of view) to identify a further and autonomous conceptual sub-category of non-asset damage[9] that goes alongside moral damage and that would have served to emphasize (conceptually and in terms of compensation) the further negative consequences of the wrongful act on the life of the injured party. Once the content of so-called moral damage has been extensively remodeled[10] , all those fascinating (but erroneous and artificial) "existentialist" constructions seem to have been fragile, whose alleged objective was precisely that of giving compensatory (rather than juridical) importance to the so-called "long-term" consequences that had modified in plus the existence - precisely - of the injured party[11] .

The criticism of the previous conception of non-material damage, as noted, is the result of a careful re-reading of the

9 In addition to the outright rejection of a configuration in autonomous terms of what had been presented as sub-categories of non-asset damage, the correct reading key for approaching the latter is provided: the Court is clear in affirming the merely "descriptive" value of the individual names previously adopted by jurisprudence (Court of Cassation, section one, no. 26972/2008, 2008, p. 108), whose scope had been misunderstood and, as a result, had generated considerable confusion. For a singular interpretation of this passage, see Ziviz (2011): "It should be [...] noted that - at the time when it is stated that the various items of injury have a descriptive value - it is recognized that they concern impairments of a different nature: which, therefore, differ from each other on an ontological level" (p. 1737).

10 In fact, in a subsequent passage of the reasoning, a 'renewed configuration' of the moral damage is discussed (p. 116).

11 The terms used in point 5 of the final list of the order of reference are unequivocal (Court of Cassation, no. 4712/2008, 2008, c. 1458), where existential damage is defined as prejudice about the sphere of the subject's habitual actions and which takes the form of damage to a previous "system of life" that has been permanently and seriously modified in its essence following the offense.

normative data already present in Italian law. However, on closer inspection, a further element of interest can be found in the Court's reasoning, which must be highlighted as much as possible to highlight from the outset how some of the criticisms that have subsequently fallen on the San Martino rulings are based on erroneous assumptions motivated only by a priori hostility.

The reference is to the particular point of observation also adopted in the interpretation, a perspective angle that made it possible to look at the concrete reality of the facts (or, in other words, at the phenomenology of moral damage) and to assess, consequently, whether the ontology of moral damage was reflected in the legal framework, so as not to create (or, possibly, accentuate) one of those (rightly vilified) situations in which there is a mortifying disgrace between factual reality and legal reality. Well, the Court, by giving importance to suffering as such and freeing it from the terrible noose of temporal limitation, does nothing but look at the concreteness of the prejudice suffered by the subject: the enhancement of the phenomenology of damage is inherent in this very passage because it recognizes how even the negative changes in the life of the injured party destined to accompany him for a long time (potentially - and, indeed, this frequently happens - even for the rest of his life) are the result of the permanence of suffering that the subject is unable to overcome; a permanence that, from within, is projected outside the person, negatively affecting the activities that the latter can carry out[12].

12 Where it is stated that, once "the traditional orientation that limited compensation to subjective moral damage only has been overcome, identified with the transient uneasiness of mind, and the compensability of non-asset damage in its widest sense has been affirmed, non-asset damage consisting in not being able to do (but it would be better to say: in moral suffering caused by not being able to do) is also compensable" (Court of Cassation, section III, no. 26972/2008, 2008, page 110). A similar argument is used for damages deriving from the violation of constitutionally protected rights: "the joint attribution of moral damage, in its new configuration, and

The picture that emerges from the grounds of the judgment, therefore, seems to favor - thanks to the extensive reinterpretation of the specific figure of damage - a harmonious reconstruction of this small fragment of the legal system: harmonious, because legal reality and empirical reality now go hand in hand and there do not seem to be, compared to the past, any particular gaps worthy of censure due to an alleged defect in the protection granted to the injured parties.

The same considerations can be used to express an evaluation on the second point of reflection of the Court that was previously indicated, i.e. the case in which moral suffering is not the only component of the injury to come to the fore. If in the case just examined, suffering that is prolonged over time produces further consequences that are not, however, susceptible to medical assessment, in the second case under consideration, the intensity of suffering (or its duration, but also a combination of both) affects the injured person so severely that it results in a medically ascertainable impairment of psychological and physical integrity.

For this reason, the Court maintains that suffering is a constituent component of biological damage13 deriving from the above-mentioned ways in which suffering can occur: the affirmation is based on the observation of the ontogenesis path of the final lesion, a path which the medico-legal expert - during the assessment - cannot but observe and evaluate in the widest possible way to give importance to the peculiarities of the

damage due to the loss of a parental relationship determines a duplication of compensation, since the suffering experienced at the time when the loss is perceived and that which accompanies the existence of the subject who has suffered it are only components of the complex prejudice, which must be fully and unitarily compensated" (Civil cassation, section III, no. 26972/2008, 2008 p. 110). 26972/2008, 2008, p. 116)

concrete case since the medico-legal assessment is not an aseptic (as well as impossible) transposition of the entity of suffering and lesion into cold numbers. The possibility of evaluating the above-mentioned peculiarities is also recognized by the judges of the panel of judges who decide to make use of the 'known tables' (Court of Cassation, section un., no. 26972/2008, 2008, p. 116) (but we will return to this point shortly).

In this case, too, therefore, the multiplicity of subjects (competent in the fields of their specialization, i.e. forensic medicine and law) who intervene to try to quantify in the best possible way the compensation to be awarded to the injured party seems to constitute an important guarantee for the protection of the injured party.

2. INITIAL RESISTANCE TO THE NEW ORIENTATION

This, very briefly, seems to be the (agreeable) framework outlined in November 2008 by the unified sections at the request of the third section. This framework was almost immediately accepted by the Observatory on Civil Justice in Milan through the modification of the tables for the[13] settlement of non-asset damage, which would provide - from now on - an all-inclusive amount for all the items of non-asset damage deriving from injury to psycho-physical integrity (without prejudice to the possibility, for the judge, of departing from the amount provided for by the tables based on the particularities of the concrete case).

13 An excellent overview of the "historical" evolution of the tables is contained (p. 2) in the "Orientation criteria for the settlement of non-asset damage arising from injury to psycho-physical integrity and from the loss - serious injury - of the parental relationship", which accompanies the "2018 edition" of the tables themselves (https://www.tribunale.milano.it/index.phtml?Id_VMenu=1&daabstract=847). On the tabular method, see an interesting (and critical) paper by Benatti (2018, p. 105 ff.).

Moreover, the tables were subsequently recognized (Court of Cassation no. 12408/2011, 2011)[14] , due to the continuing absence of the regulatory tables provided for by the private insurance code, as having a para-normative value such as to allow their application - at least potentially - throughout the country.

But the history of non-asset damage, far from moving towards calm reflections[15] and - why not? - even possible improvements to certain aspects of the San Martino verdicts considered by some to be not fully satisfactory, has seen an increase in the hostility of those who, at the time, had requested the intervention of the Supreme Court, revealing ill-concealed dissatisfaction with a result that was not shared and unexpected[16] . Here, we will consider only a few decisions of the Third Section of the Court of Cassation made in the five years after 2008, highlighting - albeit very briefly - the passages that seem to be in contrast with the precedent jurisprudence analyzed above.

First, for a purely chronological reason, a ruling from 2011 (Court of Cassation no. 18641/2008, 2012) comes[17] into play, which came a little later than the one mentioned above concerning the Milanese tables. Well, only three months later,

14 Incidentally, it should be noted that the president of the panel of judges in 2011 is the same person designated as the draftsman in 2008. Franzoni (2011), speaks of a "rewarding reason for the victims", because "with the Milanese tables more is given". (p. 1088).

15 Scognamiglio (2010) pointed this out with hopeful hope: "The image of non-asset damage that they give us back [...] is an image that is organic and balanced in substance [...] and that is destined to open [...] a new chapter in the problem of non-asset damage" (pp. 264265).

16 Ponzanelli (2008), speaks of a "framework of reference [...] less and less dominated by a scientific sensibility and more and more [...] altered by ideological-cultural temptations" (p. 681).

17 Again, it should be noted that the draftsman of the judgment in question was the draftsman of the order of referral to the Joint Sections cited above in note 5.

the situation seems to change: the change is not radical and passes almost unnoticed because there is no serious criticism of the San Martino rulings, but it exists. If in judgment no. 12408/2011 there are relevant references to the dicta of the Joint Sections - the aim of which is to reaffirm the validity and the agreement of the judging panel -, in judgment no. 18641/2011 there are only quick hints with a slightly nostalgic flavor, which seem to give exclusive importance to the mere factor of discontinuity. With specific regard to this last factor, we cite only a few passages considered to be illustrative: the ground of appeal:

> is broken [...] by the correct motivational structure adopted by the magistrate of appeal in the part where he considered that the joint settlement of biological damage and moral damage, in the case in question, was made by applying the (then-current) Milanese tables which, before their revision following the sentences of the unified sections [sic] of 11 November 2008, provided, based on a now consolidated living law, for the settlement of moral damage as a fraction of biological damage unless personalized. (Court of Cassation no. 18641/2008, 2012, s. p.).

But again: the judgments of the United Sections:

> on a more careful reading, they have never preached a principle of law functional to the disappearance by ipso facto absorption of the moral damage in the biological damage, having, on the contrary, only indicated to the judge of merit the need to avoid, through a rigorous analysis of the probative evidence, duplication of compensation. (Court of Cassation no. 18641/2008, 2012, p. 54).

This last passage serves as a link between what could be defined as the general aspect (the way the sentences are formulated and the vocabulary used, as mentioned above) and the particular aspect of the judgment (the reasons in law adduced in support of the thesis): In this short passage (but also elsewhere), an attempt is made to silently re-evaluate the scope of a previous decision, but it seems that - in doing so - one is guilty of generality (and one could at least have indicated the passage that should have been the subject of the most careful re-reading suggested, while nothing is said in this regard, limiting oneself to a very vague "re-reading") or, worse still, of irrelevance (by referring to normative or jurisprudential data that do not seem suitable for the purpose).

The points to be overturned[18] are precisely those that, above, were indicated as issues of theoretical interest that were the subject of the Supreme Court's reflections in 2008, namely the content of non-material damage and its relationship with other types of damage.

On the first question, the reader could rightly be astonished and even disconcerted by the attitude of the panel of judges (or the drafter?), since in the motivating part of the judgment, previous judgments of the Court itself are listed, which continue to discuss moral damage in terms of "contingent suffering" and "transient disturbance of the soul". Well, such a way of proceeding must be criticized, since the ex officio elimination of the teaching of the Joint Sections on the content of moral damage takes place not only without any normative reference (unlike what was done by the Joint Sections) but even without taking into consideration the re-reading (this one, yes, precise and intelligible) of the regulations made only a few years earlier.

18 Ponzanelli (2016) speaks of a 'trend towards an anarchic use of liability rules [...] in the territory of personal injury' (p. 222).

In short, a substitution - we might well say - made by authority (even if we do not know which one).

The second question concerned the relationship between non-material damage and other types of damage, in particular biological damage. In this case, concerning the one just examined, some normative references can (fortunately) be found; however, the slightest argument in favor of the theses obstinately sustained by some interpreters cannot be drawn from them, so much to suggest that their specious reference is only a convenient accessory element with which to embellish an idea and thought already well outlined. Therefore, two decrees of the President of the Republic have been presented[19] which, due to their extreme sectorial nature[20] , one would never have expected to encounter in this forum: these measures, in addition to regulating numerically reduced cases of compensation for non-pecuniary damage (and, consequently, no general and wide-ranging value can be attributed to them), are so close in time to the San Martino sentences that it does not seem at all reasonable to expect, not so much an acknowledgment of the dicta of the Joint Sections, but even their (explicit) subversion. Detailed measures, we could say, we're used to reviving an "autonomist" conception of individual non-asset damages (in particular, in our case, moral damage).

19 Presidential Decree No. 37/2009 - concerning the regulation governing the terms and procedures for the recognition of particular disabilities from causes of service for personnel employed in military missions abroad, in conflicts, and on national military bases (emphasis added) - and Presidential Decree No. 181/2009, concerning the medical-legal criteria for the assessment and determination of disability and biological and moral damage for victims of terrorism and massacres of the same matrix

20 On this point, the acute observation by Scognamiglio (2016): "It is certainly not possible to overemphasize the meaning of these regulatory data, which are not at all sectoral and do not even refer specifically [...] to a context of civil liability in the proper sense; all the more so since the formulation of the same is effected by the language of the case law practice widely accredited up to the unified sections of 11.11.2008 [...]". (p. 251).

Lastly, the heavy emphasis insistently placed on the term "cancellation" of moral damage seems specious and misleading: no one - and certainly not the Joint Sections - has ever sustained a wicked cancellation sic et simpliciter of the so-called moral damage (which - on the contrary - has been renewed, as seen, by the examination to which it was subjected only three years ago).

The ruling just analyzed was not destined to remain without (worthy) company, since the following year a judgment would be handed down (Court of Cassation no. 20292/2012, 2013, p. 315 ff.) which, in addition to the factors mentioned above, would add to the already unconvincing arguments a regulatory reference that was certainly broader in scope than the previous ones (i.e. the aforementioned private insurance code), but still not suitable for the purpose pursued. Indeed, it is not possible to argue that Articles 138 and 139 of the Insurance Code in force at the time:

> did not allow (nor do they still allow) [...] a different interpretation from that which advocated separating the criteria for settling biological damage codified in them from those functional to the recognition of non-material damage: in other words, the "non-continuity", not only ontological, in the syntagm "biological damage" also of non-material damage. (Court of Cassation no. 20292/2012, 2013, p. 319).

As, in the same text of the judgment, it is correctly recognized that:

> the same "tables" used by the court of Milan [...] provided for a separate settlement [of moral damage], indicating the percentage of biological damage which could be used as a parameter for the settlement of the

(different) subjective moral damage as one third. (Court of Cassation, no. 20292/2012, 2013, pp. 318-319).

It is difficult to understand how such an argument can have any persuasive force, given that the tables and the settlement mechanisms provided for therein (the first version of which dates back to 1995) have exerted some form of influence on subsequent regulatory provisions (in this case, the 2005 Private Insurance Code): Therefore, the use of a regulatory provision that came into force before the disputed ruling (the 2008 judgment of the Joint Sections), and influenced by extra-regulatory elements (not yet para-regulatory) also before the ruling, does not appear to be a sufficiently well-founded reason to seriously consider the hypothesis of a critical review of the orientation assumed only a few years earlier[21] .

In short, one could say that it could not have been worse. Moral damage, inexplicably given up for dead, is even resurrected with its oldest features, an exceptional case of resurrection (and even rejuvenation!) of something still... alive! Well, after this "first act" of the spectacle that Italian jurisprudence has offered us - as Gabba would say - to give an image of the modus procedendi of the Court, we could use, modifying it, a famous Latin saying: regredi est progredi.

21 At a later stage, the rulings analyzed above will be widely cited as precedents to be brought in support of the new orientation that can now be peacefully called "autonomist": Cass. 19402/2013, Cass. 22585/2013. (whose rapporteur is the same magistrate who drafted the above-mentioned rulings). With specific reference to this last pronouncement, Ponzanelli (2013), notes: "Today's drafter, who had already urged the united sections in February 2008 in this direction, after five years wants to re-discuss the conclusions reached then, perhaps without necessarily going through a further examination of the united sections [...]" (p. 3449). As we have seen, however, the desire to re-discuss the outcome of 2008 is not new in 2013 but has already been present for (at least) two years.

3. ACT TWO: THE ASSAULT ON THE STAGECOACH

With a not excessive time lag, we can therefore pass - in this third part - to the analysis of some rulings made during 2018 and 2020. The latter deserve interest and careful reading, as they aim - and the reference is to the rulings made during 2018 - to consolidate and "strengthen" the results previously achieved, even if, in the last period (and here we refer to the recent, very recent rulings of 2020), the consequences of the orientation that we wanted to give life to previously seem to reach completely unexpected results, the result of moral damage badly understood and even worse engineered.

The leitmotif of the orientation in question - as we have seen - is the desire to make all the different types of non-asset damage independent of each other again. It can be considered that this desire is aimed at achieving two identifiable objectives: one made explicit by the supporters of the "autonomist" current themselves - i.e. satisfying the need (real or presumed as it may be) to bring the legal categories back into line with the reality of the facts, to avoid useless and abstract superfetation's -; the other, although implicit, is easily intuitable - i.e. increasing the amount recognized to the injured parties.

As mentioned, in the course of 2018, several judgments were rendered which - by convincingly reaffirming the adherence to the[22] aforementioned case law precedents - sought to strengthen that line of case law which had put up such resistance to the November 2008 decisions. Since it is not possible to go into all the aspects of the case, we will limit

22 See the enlightening words of Libertini (1990): "There is today, on the contrary, a widespread and uncritical tendency towards the self-legitimization of jurisprudence: this can be seen in the diffusion, already mentioned, of self-referential motivations in judgments or in the doctrinal legitimization of solution criteria that refer to the jurisprudential practice as such" (pp. 145-146) (original italics).

ourselves to the analysis of a single (new) piece of legislation, cited by the Court as a decisive element in support of its thesis.

In 2017, the legislator had revised Articles 138 and 139 of the Private Insurance Code, changing both the heading of the articles in question (from "biological damage" to "non-asset damage") and their wording. Presented as diriment the new text of Article 138, in which:

> after the extremely significant modification of the heading [...] we read, verbatim, in letter e), that "to take into account the component of non-material damage due to injury to physical integrity, the quota corresponding to biological damage established in the application of the criteria set out in letters a) to d) is increased on a percentage basis and progressively by point, identifying the percentage increase in such values for the overall personalization of the settlement". (Cass. no. 901/2018, 2018, pp. 466-467)

Following the first paragraph of Article 12 of the so-called "Prelegislations", the first criterion to be taken into account here to interpret the provision as amended is the literal one, referring only to the textual content (and, to be more precise, not also to the heading[23]). Using this criterion, it is not clear how the new wording of the provision can be used to support the autonomist conception adopted by the Third Section of the Court of Cassation, since the word "component", in the Italian language and the meaning of the syntagma, indicates

23 On this point, see the words of Tarello (1980): "[T]he fact remains that the habit of precluding internal titles and headings in attributing meaning to legislative documents in the civil law field has become entrenched (although perhaps not reasonable) and the interpreter - at least when forecasting the attribution of meaning by others - cannot but take this into account" (p. 105).

a "constituent element". In this case, to understand what is a constituent element, it is necessary to proceed to a reading of the entire provision in question (and not just a small part of it, taken out of context, because of its interpretability in a sense favorable to the interpreter who proposes such a reading). 138, speaks of "a specific single table on the whole territory of the Republic [...] of impairments to psycho-physical integrity ranging from ten to one hundred points", which must be drawn up considering also the above-mentioned principle (see paragraph 2 of the same article) and used by the Court of Cassation. A single national table, therefore, for impairments to psycho-physical integrity to be drawn up based on the criteria envisaged in the list under paragraph 2, a list which includes the moral damage component. Nothing more, nothing less.

More. The word "component" is the same as that expressly used by the Joint Sections in November 2008: in the reform, therefore, it was not chosen to use a synonym (harbinger of possible misunderstandings), but the same term. Without wishing to revive (let alone take a position on) the long-standing debates on the historical interpretation criterion, this specific factor cannot be ignored, if only because it indicates a desire not to reject the result reached less than ten years ago.

And so, we come to the second interpretative criterion explicitly indicated by Article 12 of the Prelaws: the criterion of the *voluntas legislatoris*[24] . The will to give continuity to the orientation that emerged from the San Martino rulings (and, therefore, to transpose it at the regulatory level) is made clear if one only has the patience to consult the report accompanying the draft law no. 3012 (annual law for the market and competition):

24 Again, see Tarello's words (1980): "[T]he psychological argument by its very nature is all the more effective the closer the time at which the utterance subject to interpretation is uttered to the time at which the attribution of meaning is decided, motivated or proposed".

> Article 7, paragraphs 1 and 3, revise articles 138 and 139 of the code based on the interpretative guidelines issued by the unified sections of the Supreme Court of Cassation (the highest expression of nomofilachy), which in several 2008 sentences confirmed the unitary nature of non-asset damage in the case of health injuries, identifying it in the all-inclusive category of biological damage. In the light of this reconstruction, the concept of biological damage includes all the consequences of the impairment suffered, including possible forms of physical or psychological suffering experienced by the victim, which can also be assessed when personalizing the case according to the specific subjective condition of the injured party. This guideline needs to be implemented by law since the sector regulations in force (for third party motor liability insurance) were devised before this definitive classification was outlined, and the economic aspects are therefore lacking in the non-asset damage component referring to subjective suffering. (Cass. no. 901/2018, 2018, p. 4)

It is therefore incomprehensible how the 2017 reform of the Private Insurance Code can be brought - loudly, among other things - in support of a current of thought that preaches the exact opposite of what is expressed in the reform itself and the clear intentions of the legislator: the violent interpretative twist, even doubly contra legem (doubly because it is contrary both to the rules guiding the interpretative activity and to the interpreting rules themselves), is in itself evident.

But, despite this, nothing has prevented the Third Section from continuing undaunted on its autonomist path, rendering - after judgment no. 901/2018 - other pronouncements of

the same tenor, in which the magnificent fate of the theory of the autonomy of individual injuries is extolled, which almost seems to rise to the status of a new (indisputable) dogma of civil liability (one ruling even indicates ten points summarising the principles set out by the Court: The ambition to replace the dicta of the San Martino verdicts with a new "statute" of non-asset damage is increasingly marked): any possible jolt of resistance to the prevailing theory is destined to be nipped in the bud, having to clash with an interpretative monopoly that is unlikely to give way. Peace, therefore, and interpretative uniformity, but... at what price!

4. EPILOGUE

At this point, it should not have been long before the Milanese tables were also affected, the last real obstacle still to be eliminated to proclaim the full force of the new "statute". The latter - suffering the "mortal sin" (as it is quite easy to guess) of having complied with what was established by the Joint Sections and of having provided, as a consequence, for a unitary settlement of non-asset damage deriving from injury to psycho-physical integrity - embodied a mechanism that was intolerable for the now dominant autonomist conception: the individual items were to be "atomized", to make it easier (and more incisive) for the judge to intervene on them, to pursue the (implicit) objective highlighted above of being able to adjust upwards the quantum of compensation, constantly accused of being excessively ungenerous towards the injured parties.

Therefore, relying on the "most recent and well-established case-law of this court (among others, Court of Cassation, 17 January 2018, no. 901 [...]; 27 March 2018, no. 7513 [...]; 28 September 2018, no. 23469 [...]) on the subject of compensation for personal injury" (Court of Cassation, no. 2461/2020, 2020,

s. p..), it is stated that "it does not appear correct to invoke a standard criterion of liquidation also concerning moral damage", since "moral damage, i.e. subjective suffering, which does not have a medical-legal basis, by definition escapes an aprioristic assessment, but must be attached, proved and assessed in its concrete, multiform and variable phenomenology which no logical reason, as well as no positive foundation, allows relating in standardized terms to the seriousness of the lesion to psycho-physical integrity" (Court of Cassation, no. 2461/2020, 2020, s. p. 1). No. 2461/2020, 2020, s. p.).

On this point, just a few brief remarks. Stating that the "a priori" assessment (defined, with a strongly negative meaning) of suffering has no positive basis does not correspond to the truth. It is, in fact, article 138 of the code of private insurance companies (also cited in this sentence) which foresees, in the part used as a picklock to unhinge the previous system, an increase "in a percentage and progressive manner per point", "to consider the moral damage component": the regulatory support is, therefore, present and establishes a strong presumptive mechanism aimed at greater protection of the injured party.

Moreover, this statement also contradicts the more general objective (also seen above) of bringing the tort system more into line with phenomenal reality again after the 2008 interlude: from this point of view, the presumptive mechanism just mentioned is nothing more than the legalization of a fact that is easily ascertainable by everyone since it is normal that in almost every case (practically in every single case) of injury to psycho-physical integrity the subject experiences physical and/or psychic suffering (the greater the higher the invalidity score resulting from the injury itself). What emerges from the ruling is moral damage that is now 'autonomous', which, however, since it is autonomous, must be proved and attached, thus

running the risk of nullifying the special protection accorded to the injured party inherent in the presumptive mechanism and shareable reflection in the legal world of material reality. The question then arises spontaneously: what need was there to go against the system of tables to grant (only in certain cases, mind you) compensation greater than the average because of the particular nature of the suffering suffered, when the tables themselves provide for the possibility for the judge to depart from the value indicated and increase the quantum? To provide greater protection in a few cases (which is already possible, we repeat), it was decided to forcibly modify a regulatory and jurisprudential system, at the risk of depriving - at the same time - many injured parties of an important evidentiary facility.

Exactly in the wake of this judgment is the latest ruling that we will analyze in this brief itinerary. There is nothing new in terms of the precedents cited in the case law or the normative elements (in fact, article 138 of the code of private insurance companies is referred to, which is the real cornerstone of the new orientation, given that the measures used in 2011 have been abandoned after having exhausted their function). Nothing new about the autonomist assertions of moral damage. The real novelty lies in the fact that - this time - moral damage, from being an autonomous element and, as such, independently assessable, is presented as a prejudice that may not even exist in the event of injury to psycho-physical integrity:

> in settling the damages to health, the magistrate must 3) in the event of a negative assessment, and consequent exclusion of the moral component of the damage (assessment to be carried out on a case by case basis [...]), consider only the biological damage item, purified by the increase in the table provided for moral damage

> according to the percentages indicated therein, settling, consequently, only the dynamic-relational damage [...]. (Court of Cassation no. 2461/2020, 2020, s. p.)

The statement in question, however, is incorrect. Well then, preaching the autonomy of the individual damages has certainly brought advantages concerning the increase in the quantum of compensation, but it has exposed - at the same time - a risk which here, punctually, occurs: autonomy can be used not only in the positive sense to affirm the existence of a type of damage but also in the negative sense to sustain its non-existence. And it is precisely this second outcome that does not seem acceptable because it is in direct contradiction with that distant objective just mentioned of making the legal reality a mirror of the phenomenal reality (but, in the end, also with the implicit objective of increasing the amount of compensation): in fact, how can it be argued that a subject whose psyche or physicality has been damaged does not feel suffering?

On the other hand, on the contrary, as seen in the passage quoted above, the Milanese Tables, previously condemned to be destroyed by the sentence passed at the beginning of the same year, seem to be regaining strength (and legitimacy): if the magistrate recognizes the existence (autonomous, heaven forbid!) of a moral prejudice, he can apply the Tables in their entirety, once again giving importance - to prove moral damage - to the inferential reasoning linked to the seriousness of the injury and which also informs the Milanese Tables.

On the one hand, this latest judgment corrects distortion of the previous ruling (which, however, it does not even mention), recognizing the validity of the presumptive tabular mechanism and putting a stop - it is hoped - to the excessively generous drifts in compensation; on the other hand, it takes

the theory of the autonomy of individual injuries to its extreme consequences, going against the objective that the orientation in question had set as its basis years ago and failing to explain how a statement of this kind can be reconciled harmoniously with the previous statement on the increasingly strong presumptive force deriving from the greater seriousness of the injury.

CONCLUSIONS

At the end of this brief itinerary through Italian case law, all the problems that the so-called "autonomist" orientation has brought with it emerge.

The non-acceptance of the legal framework that had been proposed in 2008 gave rise to a real hostility towards the results achieved and, consequently, all subsequent efforts have been driven more by the objective of canceling what was portrayed as an "inauspicious parenthesis", than by a serene confrontation among practitioners. Therefore, mindful of this experience, the supporters of the line of thought rejected by the United Sections, to subvert the dicta of San Martino, have been careful not to resort again to the body that - instead - would have been deputed to resolve any hermeneutic conflicts to ensure the uniform interpretation of the law.

Perhaps, and the suspicion is at least legitimate in the light of what has been said above, a further factor that has led the Third Section not to invoke the intervention of the Joint Sections - even if only to confirm the new structure, as had also done the order of referral of 2008, in the part where it asked for "confirmation" of a series of statements - is to be found in the awareness (intimate, but not expressed, of course) of the inconsistency of the reasons given: In fact, it is one thing to argue and subject the product of such argumentation to critical scrutiny by others

(with all the risks associated with such an operation); it is quite another to continually re-propose an argument until it becomes dominant by mere repetition (weakening the resistance of others) and to present it, finally, as a consolidated orientation no longer in need of the approval of others.

However, by avoiding confrontation and a moment of shared reflection, guided by the will to demolish, there is a risk of constructing a system whose premises are clear, but whose ultimate implications and the line to be followed are not so clear: examples of this are the attitude taken towards the Milanese Tables (first condemned and then rehabilitated), and the affirmation of moral damage that might not even exist, as if one could give the case of a non-sentient subject and, therefore, stoically devoid of emotions for the injury suffered.

Well, 110 years after Gabba's words, we can see that Italian case law on moral damage has once again put on a 'show', at the end of which we can only exclaim: Acta est fabula, plaudite!

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Equal protection for differentiated con sumers: *The paradox of Heterogeneity* in Consumer Law

Tutela igualitaria para consumidores diferenciados: la paradoja de la heterogeneidad en el Derecho del Consumidor

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ABSTRACT: Consumers have different preferences, needs and limitations. Despite this unquestionable fact, consumer protection systems tend to bet blindly on egalitarian protection schemes. Even more seriously, many egalitarian schemes operate as mandatory schemes. In this work, it is argued that such schemes severely injure the principle of consumer sovereignty and harm the consumer since they move away from the spontaneous market process and replace it with rigid designs.

KEYWORDS: Consumer, market, liberty, competition, economics.

RESUMEN: Los consumidores tenemos diferentes preferencias, necesidades y limitaciones. No obstante ese dato incuestionable, los sistemas de protección al consumidor suelen apostar ciegamente por esquemas de tutela igualitarios. De manera incluso más grave, muchos esquemas igualitarios operan como esquemas mandatorios. En este trabajo, se plantea que tales esquemas lesionan severamente el principio de soberanía del consumidor y agravian al consumidor

dado que se alejan del proceso espontáneo de mercado y lo reemplazan por diseños rígidos.

PALABRAS CLAVE: Consumidor, mercado, libertad, competencia, economía.

JEL CODE: D41, F12.

INTRODUCTION

All individuals are different. We each have our own needs, expectations, desires, frustrations, virtues, budget constraints, and so many other traits that make us genuinely unique. This does not mean, of course, that individuals cannot share needs and preferences, but this is a possibility that will be verified to a greater or lesser extent empirically and depending on the extent of the grouping tested. The group of wine lovers may be composed of a relatively large number of subjects while the group of Cabernet Sauvignon - Merlot blend lovers is likely to be more limited. Given the heterogeneity of individuals' preferences and budgetary constraints, designing a consumer protection system composed of egalitarian rights established by mandatory rules is an undertaking doomed to introduce harm to multiple consumers rendered invisible by the proposed grouping.

John F. Kennedy's famous 1962 speech, recognized as a milestone for the development of the discipline of consumer protection, begins with the phrase: "consumers, by definition, include us all" which conveys precisely the idea that the term "consumer" is comprehensive of all individuals. That this is so, however, does not mean that all consumers must imperatively be protected equally. The reinforcement of unitary protection in consumer law - under an explicitly or implicitly statutory logic - undermines what should be the foundation on which a sensible

consumer law is built: the principle of consumer sovereignty. This paper aims to argue that any reflection on consumer law, and the design of any regulation on the matter, must have as an unavoidable starting point the recognition of heterogeneity. Failure to do so will pave the way for protective rules that will harm a good portion of those consumers that we want to protect.

Consumers have different budgetary constraints and different expectations, so it necessarily follows that their interests are also differentiated on both fronts. Consumers do not ordinarily expect the highest possible level of protection regardless of the price to be paid for this protection. On the contrary, each consumer calibrates his or her interests in such a way that he or she tries to get the best that can be obtained at the lowest possible price. The result of this calibration is unique: each consumer identifies the best offer presented to him taking into account the economic front (price) and the tuitive front (security).

In the same vein, it has been pointed out that a distinction must be made between the consumer's economic interest - in lower prices and more convenient purchases - and the guardianship interest - protection against product or service insecurity, for example (Whitman, 2007). The artificial elevation of guardianship, i.e. guardianship set at an arbitrary level by the legislator or authority, has an impact on price. For example, if an administrative authority or a judge considers a clause in a consumer contract to be unfair and therefore finds it unenforceable against the consumer, it will raise the risk for the supplier (the risk that the clause was intended to mitigate). The increased risk will lead to higher prices or eventually, if the risk is very high, to a disincentive to supply to the detriment of consumers.

In our example, the alleged unfairness of the hypothetical clause in the consumer contract is analyzed without consideration for the individual calibration referred to above. The authority assumes that the clause introduces unacceptable disproportionality for all consumers and that all consumers would also be willing to pay a higher price in order not to be bound by such a clause. The assumption is, of course, hasty and, as we shall develop, contrary to the principle of consumer sovereignty. Moreover, by assuming that all consumers equally wish not to be bound by such a clause, it generates in practice a differentiated impact since consumers, as we have already said, have differentiated expectations and budgetary constraints.

1. TOWARDS A FULL UNDERSTANDING OF THE PRINCIPLE OF CONSUMER SOVEREIGNTY

In a market economy, the price of products or services responds to the interaction between supply and demand. Supply, in particular, is delineated by taking into consideration the needs and expectations of demand. In other words, there is a process of discovery whereby certain individuals discover the needs and wants of other individuals and develop a response for them in exchange for something. A supplier's success comes from being closer to what consumers want. The supplier who offers something that consumers do not value will suffer the consequences. The consumer determines with his consumption decision which offer deserves a positive response and which does not.

Indeed, if demand for a product falls to a very low level, the profits -if any- from producing or manufacturing that product will not be a sufficient incentive to engage in such productive activity. It is often assumed that the exit of companies from the market is an unfortunate reality, but the truth is that the

exit from the market, in the first place, of those with higher production costs, is efficient. Note that it is the consumer, with his preference, who is signaling when production should stop or in any case should be concentrated on fewer (more efficient) producers. This effect, at the same time, frees up capital or labor for the expansion of another possible industry (the one in which consumer preference signals the need for an increase in supply).

Put in simpler terms, what drives the use of resources in an economy is the behavior of consumers in buying or not buying based on their quest for greater satisfaction. Market interactions coordinate economic life. To the extent that the establishment of mandated egalitarian configurations - for all products - is established, it distorts the price system and, with it, its ability to guide the spontaneously occurring process of discovery and adjustment (Boettke, 2010).

It is a choice that is at the heart of consumer sovereignty. In line with this, it has been pointed out that it is through the choice of certain options over others that consumers satisfy their desires and send signals to the economy, and thus the protection of the exercise of consumer choice is critical (Averitt and Lande, 1997). Products, it should be noted, are shaped in response to this discovery process and it is consumers whose decisions determine the final fit. Thus, how safe, for example, a product is, depends on consumers and, in particular, on their willingness to pay. It is consumers who determine what level of security is worth paying for, and thus what level of security is worth offering.

Precisely along these lines, Ramseyer (2012) argues that beyond the security standard defined by law, the providers that survive and thrive are those that offer the level of security that

consumers want to buy. One product may be more secure than another, and its price will predictably be higher than that of the less secure product. The same, returning to our previous example, can be said of the content of the rights and obligations set out in a proposed contract. One consumer might value more a price reduction in exchange for waiving the right to take legal action at a later stage and another consumer might be willing to pay a higher price in exchange for more possibilities to complain. Thus, ordinarily, when the market functions without unnecessary distortions, the offers that tend to be made are in line with consumers' choices.

The principle of consumer sovereignty implies that consumers should be able to make the calibration exercise that fits their needs, expectations, and budgetary constraints. In a simplified way, the consumer has the right to decide whether he/she prefers a "lower price - riskier product" combination or a "higher price - less risky product" combination. When it is consumer law that imperatively sets a level of risk, without giving the consumer the option to choose a different combination, it empties the principle of consumer sovereignty of its content. In such a regulatory context, it is the law that indirectly determines the type of product offered to the consumer and the price at which he can obtain it.

Of course, it is no secret that many authors have been emphasizing the informational and cognitive problems that may conspire against the consumer's right to choose. This emphasis has served to justify paternalistic interventions in the face of problems arising from the exercise of choice under an assumption of bounded rationality. At the same time, the findings of certain experiments can hardly serve as an unquestionable basis for or against the full exercise of

consumer sovereignty. Indeed, some studies seem to confirm that consumers make better decisions when these decisions are made for their benefit, which corroborates that consumers engage in this calibration process and that this process does indeed lead to choices that lead to a better valuation of the individual (Waldfogel, 2005).

This is not the place to discuss behavioral analysis approaches and their complications. Of relevance to our development, suffice it to point out that, even taking the extensive evidence of biases and limitations at face value, none of it sheds light on what the consumer's hidden preference might be when making a decision. In other words, for better or worse, we need to take consumers' revealed preferences as a clear indicator of what maximizes their welfare given the impossibility of speculating on what the preference would have been in the absence of these biases and constraints (Wright and Ginsburg, 2012).

The call for caution must be eloquent. Nothing in the recognition of genuine limitations on consumer choice justifies the transfer of decisive consumer power to the legislator or to interest groups oriented to advocate the introduction of certain regulations under the guise of being "pro-consumer" proposals. The denial of the principle of consumer sovereignty would result in steering consumers away from those products that they actually or misleadingly want (Dam, 1970) and would fundamentally affect the most budget-constrained consumers by depriving them of a range of choices. In a sentence, to disregard the principle of consumer sovereignty is to expropriate them from control over the resources available in the market (Hutt, 1940).

Some conceptual care is, however, necessary. If one understands the expression "consumer sovereignty" as

limited to the fact that production is geared towards satisfying consumption, we move into a terrain with which we can feel more or less comfortable. The problem with misusing the concept of "consumer sovereignty" is that it could be misinterpreted as referring to the superiority of the consumer's interest - in the sense that the consumer can exercise power over the supplier by compelling or forcing him to take some action - over that of the supplier, to construct, based on this misreading, precisely those regulations aimed at securing misunderstood consumer sovereignty (Murphy, 2018).

This misleading reading suggests a consumer-supplier trade-off and reinforces the equally misleading belief that the free market operates as a zero-sum game. It emphasizes the popular (but misleading) idea of competitive process as a competitive process rather than the (correct but unfortunately little understood) idea of competitive process as a cooperative process. Indeed, the main point of supplier A and supplier B competing is not that one beats the other but that the supplier who does a better job is rewarded by giving the consumer what he wants (a faithful expression of the principle of consumer sovereignty as we are defining it). The notion of competition as mere competition ignores the consumer and loses sight of the fact that the process is aimed at generating a positive-sum outcome (Rubin, 2019).

As we will see below, the establishment of egalitarian and mandatory protective rules in consumer law necessarily offends the principle of consumer sovereignty - therefore, we deem appropriate - because it takes away choice from consumers. We use the term "consumers" to express that the affectation may extend to each consumer - albeit in a differentiated manner - and not as an example of what we are questioning: the false assumption that all consumers want the same level of protection.

2. PROTECTING THE CONSUMER WITHOUT SPECIFYING WHICH ONE: THE ASSUMPTION OF HOMOGENEITY OVER HETEROGENEOUS CONSUMERS

The use of the term "consumer" often distracts us from the obvious fact that each individual has different preferences. In the same way that some consumers are willing to pay extra for an extended warranty on an appliance while others are not, each faces different trade-offs that are responded to according to their preference, according to their freedom of choice. Thus, the decision to purchase from supplier A a certain product at a certain price with a delivery time of approximately five days or the decision to purchase from supplier B that product at a higher price with a delivery time of 24 hours depends on the subjective assessment of the individual.

The reasoning is often clouded by the fact that in both cases the consumer is buying the same product. However, the illusion of being faced with the same product must be dispelled. A given good may be physically identical but the product is not confined to the good but comprises the set of features associated with the good offered - including the contractual terms on which the good is offered. For example, the greater availability of stock in an establishment or the more expected attention from the staff, or even a more attractive decoration affect the consumer's subjective valuation of the product as a whole (Sowell, 2013). It is therefore not the same to order a plate of food in a modest business as it is to order the same dish in an award-winning restaurant run by one of the most prestigious chefs in the city.

A good portion of the attributes of the product chosen by the consumer are not apparent (Baird, 2006). Not all mobile phones have the same features even though they all allow us to communicate by phone. The consumer may not know the

speed of the microprocessor in the personal computer he is using in the same way that when buying a flat in a building he may not know the technical specifications of the lift he will use morning, noon, and night. All these attributes make up the product and make it different from other products, even if they appear to be identical goods or services.

Each consumer, of course, according to his or her interests and capabilities, will inquire to a lesser or greater extent about the attributes of the product and will value each of them. There is not and cannot be a rule that obliges the consumer to privilege the speed of the microprocessor over the aesthetic appearance of his personal computer in the same way that there cannot be an obligation to privilege the quality of the coffee over the comfort of the place where it is served. An imperative rule aimed at protecting consumers as a group - as if it were class-based protection - ignores the heterogeneity of consumers and harms the principle of consumer sovereignty.

The note of heterogeneity does not preclude that consumers may have certain more or less homogeneous needs (e.g. the need for food beyond preferences which, of course, will always be individual). The existence of this possible grouping of needs explains the benefits of mass procurement given that, on the supplier's side, grouping reduces the cost of producing products and also reduces the level of investment that must be made in discovering what the consumer wants; and, on the consumer's side, it reduces the cost of acquiring information on a given product as well as the price at which it can be accessed (Saavedra, 2019).

However, offering a standard product or service in response to a grouping of homogeneous needs does not undermine the principle of consumer sovereignty as it preserves the possibility

of choosing a specific product or service that satisfies a specific need. Thus, standard offers and offers aimed at satisfying more specific needs will converge in the market and it will be up to the consumer to choose the combination of attributes (price, quality, safety, among others) that suits him/her according to the exercise of personal calibration.

The consumer who wishes to buy a birthday cake can go to a supermarket and buy a standard cake for a given price or hire someone to prepare a special cake that will meet the specific requirements formulated in exchange for an undoubtedly higher price. Nothing in the bundling exercise has emptied the principle of consumer sovereignty of its content, as the exercise of consumer choice in the market is unaltered as long as actual or potential competition is preserved.

Bundling by suppliers based on the discovery of homogeneous needs does not allow a leap towards bundling by the state as a justification for unitary and mandatory "protection". The former, as we have seen, is compatible with the principle of consumer sovereignty because it preserves freedom of choice, whereas the latter type of bundling falsely assumes that all individuals, falling into a generic category, necessarily prefer one calibration:

that which the legislator or authority has drawn up for all of us.

Some authors (Durand, 2015) take this confusion to extremes when they refer to a generic category of consumers in need of protection in the face of information asymmetry. Firstly, because information asymmetry is, as is obvious, variable, given that the amount of information held by market agents is not homogeneous. Secondly, because informational asymmetry is

characterized by an elusive opposite - informational symmetry. This would presuppose that everyone has the economic resources to acquire information, that everyone has the preference to acquire it, and that everyone knows to understand and execute it at a "symmetric" level (Ely, 2015).

To argue that all consumers want to know the information of a product ingredient on the label, that all consumers want to know a certain floor plan when purchasing a property, and that all consumers want to be allowed to prepay a loan, to mention three examples, assumes that the legislator or authority knows the subjective preferences of all consumers as well as their willingness to pay for such prerogatives or rights.

Not only that, by making the aforementioned assumption and not allowing the consumer to choose an alternative to the imaginary calibration of the legislator or the authority, the principle of consumer sovereignty is emptied of its content. As can be seen, there is no longer freedom of choice under this model. It is the legislation or the action of the competent authority that determines the level of consumer protection and, in that sense, it is a totalitarian system that denies the market process.

This mandatory level of enforcement translates into a price that does not respond to the interaction between supply and demand so that those consumers who do not have the economic resources to access the product or service are mainly affected. In other words, the definition of an equal and forced standard of protection reduces the options for consumers to two: to purchase or contract the product or service at the increased price or to be left without access to the product or service and have to look for an option that can, in some way, operate as a substitute.

Eloquently, it has been pointed out that "when consumers are heterogeneous, an egalitarian mandatory solution inevitably disadvantages certain subgroups of consumers" (Ben-Shahar and Bar-Gill, 2014). Just as one group of consumers would not agree to take out an extended warranty, many consumers would be unwilling to purchase insurance to cover the risk of any cracks appearing in their homes. By mandating protection against such a risk, the same effect is created as imposing insurance on the consumer.

We find the analogy with insurance illustrative. In a competitive market, it is the very interaction of consumers with suppliers that reveals the valuation that is assigned to the product or service by the former. Establishing protection, and consequently, liability, on the supplier above the level defined by the market is tantamount to bundling insurance with the product that would result in a price above what the consumer would voluntarily pay (Priest, 1992). This causes many products or services to become unprofitable due to the effect of mandatory egalitarian trusteeship by reducing the incentives to supply products or services, which affects consumers by reducing competition.

Indeed, when the government tries to force suppliers to give consumers a better deal than what emerges through competition and voluntary exchange, the results can easily be counterproductive because the imposed option is not worth it (Tacker, 2019). If a supplier does not earn enough, it will stop offering its products, and that hurts consumers. If the consumer is forced to pay a certain amount of money, those with fewer economic resources are unable to access the product and must resort, for example, to the black market. It is not possible to replace the coordination generated by the market in interaction with the assumptions - however well-intentioned - of a group of public officials.

Imagine that we oblige companies offering parking services to assume liability for any damage to a vehicle. For those people who value such "insurance", the obligation generated would not affect them. However, for those who had to choose between expensive insurance and placing their vehicle on an unsafe public road, the "in-between" options may be of paramount importance. Those "in-between" options vanish when the person who intended to merely offer a space for the vehicle is forced to package forced insurance. That entrepreneur wanted to offer space, not security. And some consumers wanted that space, not a comprehensive insurance premium. This is an aspect that is also often forgotten: a product is not safe or unsafe. An attribute such as security can be offered in marginal units (Hoppe, 2006) with each individual determining how much security suits his or her personal preference.

The attribution of liability for not observing the level of safety - or information, or the suitability or any other standard set by legislation - on the supplier generates an equally differentiated effect on consumers. Ideally, the consumer protection authority would like the price of products to also reflect the expected impact that the product could have on the consumer. Thus, a product could have a hypothetical price X that takes into account the cost of production of such a product and the expected harm that the product would generate. The consumer would buy the product if he or she values it at more than X. However, if litigation introduces an additional cost Y to the supplier of the product and an additional cost Z to the consumer himself for bringing the litigation, the minimum price would have to be X + Y (the price that allows the supplier to recover his costs including the cost of litigation) and, for the consumer, the valuation of the product would have to be X + Y + Z (he would have to value the product more than the

cost he would bear for litigating the litigation). In this scenario, consumers who value the product at more than X + Y - but less than X + Y + Z - would not buy the product, which would remove that consumer from the possibility of making a profit (Polinsky and Shavell, 2010).

An additional consequence associated with the implementation of an equal and mandatory guardianship regime is that it reduces competition and innovation among suppliers. A company has incentives to offer better customer service because it is a differentiator. A supplier can differentiate itself in the market by offering the possibility of a return of the product without cause or by allowing the consumer to fragment a debt without interest, to mention a few examples. If legislation mandates that every supplier must allow the return of the product without cause, the differentiator is lost because the purpose of the legislation is precisely to standardize certain features of the product or service.

Curiously, consumer protection legislations are committed to standards of this kind that have the same effect as a collusive agreement between suppliers.

Thus, if several companies agree to offer their product on a certain condition, this is anti-competitive conduct. However, if the legislation makes the same companies offer the product with a certain condition, this is an intervention in the name of consumer protection. In both cases, the purpose is the same - to equalize a certain attribute of the offer - but the regulatory treatment changes depending on whether it is promoted by the state or sought by private parties.

The situation is particularly unfortunate if we take into account that small and medium-sized suppliers have special

incentives to be creative precisely as a differentiating element. These suppliers try to establish a special communication with consumers and adjust their offer, as far as possible, to the needs that have been identified. Forced egalitarian tutelage forces small suppliers to design their products or services with the same attributes as the offer of large suppliers, thus depriving them of the ability to deploy their creativity (Zywicki, 2015) and consequently depriving consumers of the possibility of obtaining an offer on the market that is more in line with their individual preferences.

Small suppliers play an important role in the economy from the point of view of consumer welfare because they particularise their supply a little more, i.e. they bring it closer to the demand of specific consumers (Priest, 2003). Large suppliers certainly benefit from economies of scale which reduces costs, but it is the preference of each consumer that determines whether a reduced price is more valuable than an offer closer to his or her need. Each consumer would prefer, if willingness to pay were not relevant, that products or services come closer to his or her particular preference. Ordinarily, however, the costs of producing for specific demands discourage large suppliers from undertaking such a task and lead them to concentrate on more general (standardized) offers. The consumer with a very particular demand needs more choice in the market, not less.

Note that the introduction of regulatory costs does not impact equally on all providers. In the same way that equal guardianship does not have an equal effect on consumers, regulatory cost does not impact equally on all suppliers. For a small supplier, regulatory compliance is more costly. Since small suppliers find it more difficult to carry out their economic activity than large suppliers, the regulatory cost tends to affect

especially consumers with specific demands that are those that presumably could have been more likely to be satisfied by the offerings of small suppliers.

This brings us to the last consequence of a mandatory equal protection regime: the potential generation of regressive effects as the protection afforded to wealthier consumers comes at the expense of the welfare of less wealthy consumers. Imagine a regulation mandating shopping centers not to charge for parking visitors' vehicles. Potentially, this is equal access as any visitor will be able to enjoy free parking. In reality, however, the egalitarian outcome is an impossibility, since not all visitors drive to the mall in their vehicle (some of them, foreseeably, will not be in a financial position to own a vehicle). Since ensuring supposedly free parking is undoubtedly costly, and since that cost is spread across all consumers (whether or not they have a vehicle) to ensure free parking rights for those with their vehicles, the measure diverts economic resources from lower-income consumers in favor of higher-income consumers. In sum, legally mandated equal access cannot ensure an equal outcome (Ben-Shahar, 2016).

In short, the establishment of mandatory features, attributes, or characteristics of the offer necessarily generates a differentiated impact given the heterogeneity of consumers. Assuming that equal protection protects us all equally is probably the first major assumption that must be discarded when approaching the study of consumer law. Unfortunately, we have the impression that the legislative technique in the form of unwaivable rights for all consumers is an unfortunate rule and not an exception, which, as we have seen, is a significant aggravation of the principle of consumer sovereignty.

CONCLUSIONS

Even advocates of the thesis that consumers are especially weak given existing cognitive biases and limitations will have to recognize that such weakness is not homogeneous. Then, no mandated egalitarian response can be the way to help each consumer in his or her particular situation. Thus, even those who accept a space for the existence of general default rules and tailor-made default rules seem to admit that free choice should be preferred if the decision architects -the legislator, in our case- lack relevant information, when it comes to situations familiar to the consumer, when the consumer prefers to choose, when learning is relevant and, in general, when there is relevant heterogeneity (Sunstein, 2012).

The situation is no different for products or services that one might consider more complex. For example, the credit card market is a dynamic one in which more choice means allowing each consumer, according to his or her preferences and possibilities, to choose the alternative he or she considers appropriate. Imagine now that financial institutions are mandated not to charge an annual membership fee. Predictably, the operational costs of issuing such financial products will have to be recovered in other ways, e.g. by raising the requirements for accessing a credit card. In this scenario, a measure aimed at benefiting all consumers is again particularly detrimental to those consumers who find it more difficult to become creditworthy. The legislator cannot equally and mandatorily establish the level of simplicity of a financial product - or any product - given that such simplicity must be valued as an attribute of the product or service by each consumer (Zywicki, 2016).

Consumers are different in several ways - observed and unobserved. Strengthening consumer sovereignty, i.e.

consumer choice, is incompatible with a consumer protection system structured based on mandatory protective rules. Along these lines, we believe, as a first step, that legal systems should abandon any protection scheme composed of non-waivable rights for consumers. Then, as the next item on the agenda, a comprehensive review of consumer protection systems is required so that we move away from regulations aimed at standardizing or mapping attributes or characteristics of products or services. Finally, it is important to note that technological progress is opening up an interesting space for discussion around the feasibility of customized rules (BenShahar and Porat, 2019) that can gradually bring us closer to a system that is more sensitive to heterogeneity.

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Conflicts of application of the Organic Administrative Code in Ecuadorian Competition Law

Los conflictos de aplicación del Código Orgánico Administrativo en materia de Derecho de Competencia Ecuatoriano

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RESUMEN: La entrada en vigor del Código Orgánico Administrativo ocasionó una diversidad de interpretaciones respecto de la aplicabilidad de sus disposiciones a los procedimientos de investigación y sanción a cargo de la Superintendencia de Control del Poder de Mercado. Varias disposiciones de este cuerpo normativo generan oportunidades para unos y riesgos procesales para otros, por lo que su aplicación fue ampliamente controvertida hasta que la Procuraduría General del Estado zanjó la controversia mediante un pronunciamiento

que resolvió que la autoridad ecuatoriana de competencia debía aplicar sus normas procedimentales propias, siendo supletoria la aplicación del Código Orgánico Administrativo. Este pronunciamiento deja nuevas interrogantes, ¿cuáles aspectos regulados por el Código Orgánico Administrativo, y cuáles no son aplicables de forma supletoria a la Ley Orgánica de Regulación y Control del Poder de Mercado, su Reglamento y el Instructivo de Gestión Procesal Administrativa de la Superintendencia de Control del Poder de Mercado?

PALABRAS CLAVE: Competencia, procedimiento legal, norma jurídica, administración pública, mercado

ABSTRACT: The entry into force of the Organic Administrative Code caused various interpretations regarding the applicability of its provisions in investigative and fining procedures before the Superintendence of Market Power Control. Several provisions of this regulatory body generated opportunities for some, and procedural risks for others, so its application was widely controversial until the State Attorney General settled the dispute through a ruling which determined that the competition authority should apply its own procedural rules, the application of the Organic Administrative Code being supplementary. This statement leaves new questions as to which aspects regulated by the Organic Administrative Code are applicable in a supplementary way to the Organic Law of Regulation and Control of Market Power, its regulations and the Instruction of Administrative Procedural Management of the Superintendence of Market Power Control, and which are not.

KEYWORDS: Competition, legal procedure, legal standard, public administration, market.

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INTRODUCTION

Since the entry into force of the Organic Law on Regulation and Control of Market Power ("LORCPM") in October 2011 and the possession of the first superintendent in September 2012, the competition authority was created for the first time in Ecuador, comprising 4 investigative bodies or intendencies[1], a resolution authority[2], and an appeals body headed by the Superintendent.

During these almost nine years of application of the regulation and exercise of the authority's powers, we have seen the application of the procedural rules provided by the LORCPM, its Regulations, and internal instructions in the various cases, generating a turning point with the entry into force of the Organic Administrative Code ("COA") on 7 July 2018. Since the application of this rule, there have been numerous interpretations regarding its applicability to the investigative and sanctioning process provided for in the LORCPM; making the emergence of incompatibilities and contradictions between the rules of the COA and the rules provided for by the LORCPM, its Regulations and the Administrative Procedural Management Instructions of the SCPM unavoidable.

This article seeks to address the evolution of this apparent problem up to the pronouncement of the Attorney General of the State ("PGE") in the face of a consultation by the SCPM in October 2019 and the analysis of the pre-legislative and legislative discussions surrounding the intended application of the COA to determine whether or not there was a real conflict

1 The intendancies are the following: Intendencia de Abuso de Poder de Mercado, Acuerdos y Prácticas Restrictivas; Intendencia de Prácticas Desleales; Intendencia de Control de Concentraciones; and Intendencia de Abogacía de la Competencia

2 The resolution body is composed of 3 commissioners and is called the First Instance Resolution Commission

between the COA and the procedural rules of the LORCPM, its Regulations, and the Instructions of the SCPM. We then analyzed which COA rules should be applied in a supplementary manner in investigative and sanctioning procedures.

1. CONFLICTS BETWEEN THE ORGANIC ADMINISTRATIVE CODE, THE ORGANIC LAW ON THE REGULATION AND CONTROL OF MARKET POWER, AND ITS REGULATIONS

The most relevant and innovative provisions of the COA, which originally could have been interpreted as applicable to the investigative and sanctioning procedure before the SCPM, are mainly the following: a) rules on abandonment, prescription, and expiry of the sanctioning power; b) deadlines for filing administrative appeals; c) deadlines for the SCPM's resolution; and d) the figure of administrative silence.

Before the decision of the State Attorney General's Office, analyzed in depth in section 2.3., articles 42 and 43 of the COA (2017), which regulate the material and subjective scope of its application, state that, in principle, this rule should apply to proceedings before the SCPM:

> Art. 42.- Material scope. This Code will be applied in 1. The administrative legal relationship between persons and public administrations. 2. The legal activity of public administrations. 3. the bases common to all administrative procedures. 4. Administrative procedure. 5. Challenging administrative acts in administrative proceedings. 6. Non-contractual liability of the State. 7. Special administrative procedures for the exercise of the power to impose penalties.
>
> 8. Challenging disciplinary proceedings except for those which are regulated under their own rules,

> and which apply this Code in a subsidiary manner. 9. Coercive enforcement. For the challenge of administrative acts, in administrative proceedings, and for the coercive procedure, only the rules provided for in this Code shall apply.
>
> Art. 43.- Subjective scope. This Code applies to the bodies and entities that make up the public sector, following the Constitution. In the case of public companies, the provisions of this Code shall apply insofar as they do not affect the special rules that govern them. When reference is made in this Code to the terms public administration or public administrations, this identifies the public bodies and entities included in its scope of application.

These two provisions determine that, in principle, the rule was designed and drafted to apply to all administrative instances of public sector bodies and entities. Unlike the Statute of the Administrative Legal Regime of the Executive Function ("ERJAFE"), which during its validity could not be applied to a body that did not belong to the Executive Function, such as the Transparency and Social Control Function, to which the SCPM belongs, the text of the articles of the COA would apply to the SCPM as it refers to all bodies and entities that make up the public sector. Futhermore, unlike what happened years ago with one of the main legal bodies of Ecuadorian administrative law, the SCPM could no longer use the argument that, since it was not the Executive Function, the SCPM's procedures enjoyed independence and autonomy from the provisions contained in the ERJAFE.

On the other hand, the repealing provisions of the COA (2018) clearly state that "all provisions concerning the administrative procedure, administrative sanctioning procedure, administrative appeals, expiry of powers and procedure and the prescription of sanctions that have been applied" are repealed (s. p.), which, except for the pronouncement of the PGE, include those of the LORCPM, its Regulations, and the Instructions.

In this regard, the COA (2018) provides for the termination of the administrative procedure by abandonment, stating in Art. 212 that it proceeds when the interested party ceases to promote it for two months. This provision of the COA could conflict with the procedural times set out in the LORCPM, its Regulations, and the Instructions, as they have much longer investigation and resolution procedural times, and the abandonment time provided by the COA could directly undermine the investigative and sanctioning capacity of the SCPM in its investigations, as the power to investigate and the burden of proof, according to Art. 48 of the LORCPM, corresponds to the SCPM.

On the other hand, and concerning the statute of limitations, the COA provides for a different statute of limitations period to that of the LORCPM (2011), stating that it is: a) one year for minor infringements; b) three years for serious infringements; c) five years for very serious infringements. The LORCPM does not have a statute of limitations linked to the seriousness of the infringement but provides for a broad statute of limitations of four years from the date of knowledge of the infringement, or in the case of continuous infringements, from the date on which they ceased.

By way of illustration, if the statute of limitations of the COA were applied, a minor infringement, for example, the late notification or lack of notification of an economic

concentration, would be time-barred after one year from "the date of the commission of the act", which would hardly allow the setting of sanctions between the time of investigation and sanction foreseen by the rule.

Regarding the expiry of the sanctioning power of the competition authority, Art. 213 of the COA (2018) provides that in proceedings initiated ex officio, the expiry occurs two months after the expiry of the maximum period for issuing the administrative act, following the rules of the COA itself. On the other hand, Art. 179 of the COA (2018) determines that, once preliminary proceedings on a given matter have been initiated, the decision to initiate them must be notified within a maximum period of six months from the time the preliminary proceedings are ordered at the end of which the exercise of the sanctioning power lapses. Considering the LORCPM, its Regulations, the Instructions, and the various investigative phases (sweeping, preliminary, and others), the COA places the authority in a very complex legal situation and the latent possibility that the sanctioning power will expire in most cases in progress.

Concerning appeals, Art. 217 of the COA (2018) only provides for an appeal to the superior hierarchical authority, while Art. 66 of the LORCPM provides for an appeal for reconsideration, granting 20 days for its formulation. Art. 67 provides for an appeal, with an identical term of 20 days, which differs from the time limits provided for in Art. 224 of the COA (2018), which regulates the time limit for appeals to a term of ten days from the notification of the administrative act.

From this perspective, there was a complex antinomy for the application of the COA in proceedings before the SCPM and confusion as to the availability of remedies and their timing.

Another recipe for chaos is the one that regulates the resolution deadlines. The COA significantly limits the resolution deadlines of the LORCPM, its Regulations, and instructions, by stipulating in Art. 203 that the maximum term for resolution is 1 month after the end of the trial period. It should be noted that this rule seeks procedural speed, considering that the authority must process the different phases with absolute dynamism, considering that failure to do so leads to the expiry of its sanctioning power or even the prescription of the sanction.

Finally, it remains to refer to the figure of administrative silence provided for by the COA. The LORCPM only foresees a possibility for it to operate with the approval of notifications of economic concentration that has not been resolved within a maximum period of 60 calendar days, extendable for an additional 60 days. For its part, the COA foresees in Art. 207 that requests must be resolved within 30 days, after which administrative silence operates. This provision would be inoperable in matters of economic competition since the resolution of petitions in such a short period would be impracticable.

All the above shows us that the application of these provisions to the special proceedings before the SCPM would have generated significant difficulties for the authority in the face of proceedings that require long periods to carry out the exhaustive assessments of each case and the economic analyses required for an investigation into infringements of free competition rules.

These apparent contradictions had to be resolved through a consultation of the SCPM to the State Attorney General's Office, which was issued almost 1 year and 4 months after the entry into force of the COA and a window of time during which

there were many attempts by economic operators to use the special processes and deadlines of the COA to their advantage.

To dimension the complexity and particularities of the procedures before the competition authority, in the following section we will address these processes, their timing, and specific rules provided by the LORCPM, its regulations, and the instructions.

2. THE PROCESS PROVIDED FOR BY THE LORCPM, ITS REGULATIONS, AND THE SCPM'S ADMINISTRATIVE PROCEDURAL MANAGEMENT INSTRUCTIONS

The authority in charge of enforcing competition law in Ecuador is the SCPM, an institution that belongs to the Transparency and Social Control Function. The LORCPM, its Regulations, and the Instructions establish a special administrative procedure for those cases brought before this authority concerning cases of abuse of market power (absolute and relative), restrictive practices, unfair practices, and economic concentrations. According to the LORCPM, the proceedings before the SCPM are regulated through a specific process and are initiated in three different ways.

a. Ex officio, when the authority itself initiates an investigation, after having become aware directly or indirectly of conduct that could constitute an infringement of the legal system; or because of the results of market studies and special reports.

b. At the request of another public administration body when another public administration body requests the initiation of an administrative competition procedure after having become aware of potentially anti-competitive practice.

c. By complaint filed with the SCPM, formulated by the affected party, or by any natural person (consumers and users) or legal entity, who demonstrates a legitimate interest. (Superintendencia del Control del Poder de Mercado, 2020, s. p.)

On the other hand, investigations initiated by complaint must be qualified by the corresponding intendancy depending on the type of conduct denounced, the intendancy must verify that the complaint complies with the requirements established in article 54 of the LORCPM. If the complaint complies with the requirements, it will be notified to the accused so that they can provide explanations within fifteen days. At the end of this period, a reasoned decision will be issued to close the case or to initiate the next phase, i.e., the (formal) investigation phase.

In all three procedures, the investigation phase will last for 180 days, extendable by up to 180 days. This phase culminates in a report of findings and, if appropriate, the formulation of charges.

Once the charges and results report has been notified, the alleged offender must present his or her exceptions within fifteen days. At the end of this period, a sixty-day probation period is opened, extendable for up to thirty days, after which the final report of the investigation will be issued. The final report is sent to the First Instance Resolution Commission (CRPI), which is responsible for taking cognizance of the case, transferring the report, and issuing a decision. As soon as the CRIRC receives the final report from the prosecutor's office, it will do the following: first, it will take cognizance of and forward the final report of the prosecutor's office to the parties. Secondly, it will draw up a work plan in which it will define estimated resolution dates. Subsequently, the parties will be able to file pleadings. The CRPI has ninety days to issue the final resolution. In the

meantime, it may convene a public hearing. The final resolution will impose sanctions and/or corrective measures.

2.1. Preventive measures

Following article 62 of the LORCPM, before or at any stage of the investigation procedure, ex officio, or the request of a party, preventive measures may be requested, which will be suggested by the intendancy to the CRPI within five days. This request issued by the intendancy must be made through a duly reasoned report, based on which the CRPI will decide to dictate the appropriate measures through a reasoned resolution.

The CICR may at any time order the suspension, modification, or revocation of such measures. In addition, and at any time, the CRPI may request a report from Intendencia on compliance with the measures. While these measures are being implemented, the economic operator may request that they be modified, suspended, or revoked.

2.2. Remedial action

According to Article 73 of the LORCPM (2011), the purpose of corrective measures is "to restore the competitive process, prevent, impede, suspend, correct or reverse conduct contrary to this Law, and avoid such conduct from occurring again". Such measures may be of three types, the first, the cessation of the practice, the second, the performance of activities or conclusion of contracts that seek to restore the competitive process, and finally, the unenforceability of anti-competitive provisions of certain legal acts.

When there is information on the commission of conduct contrary to the law, the Intendencia may suggest to the CRPI, in its final report, the application of any corrective measures

it deems necessary, without prejudice to the total freedom of the CRPI to adopt the measures it deems necessary. The CRPI, when it considers it necessary to make corrections in the relevant market, will impose as many corrective measures as it deems necessary in the resolution that resolves the case. This resolution shall stipulate that the competent quartermaster shall monitor compliance with these measures.

In the event of non-compliance with the measures imposed by the economic operator, the intendancy will open an investigation file and notify the CRPI. Once the investigation is completed, the intendancy will send the final report to the CRPI for its resolution, which will issue a resolution declaring non-compliance or compliance with these measures. In case of non-compliance, the CRPI will set a new deadline for compliance with the corrective measures, as well as apply new measures, imposition a sanction, and the appointment of a temporary auditor to monitor compliance with these measures.

2.3. Termination commitments

Third, it is worth analyzing the nature of the cease-and-desist commitment provided for by competition law. During any stage of the proceedings, until before the final decision of the CIPRC, the operators under investigation may submit a proposed cease-and-desist commitment whereby they undertake to cease the conduct under investigation and to remedy the harm caused. Once the commitment has been submitted, a new file will be opened ancillary to the main file, through which the parties to the file will be notified so that they can present their arguments within fifteen days.

In parallel, the SCPM will evaluate the proposal considering mainly three conditions:

a Operators to acknowledge the infringement.

b Offer corrective measures to verify the cessation of the anti-competitive practice.

c The damage caused to the market should be rectified.

The CIPRC, following a report by the investigative body, shall issue a resolution accepting, modifying, or rejecting the proposed commitment to terminate.

If the commitment is denied, the process will continue from the stage it was at. If the commitment is modified, the operator must submit a new proposal based on the CRPI's observations or withdraw its commitment, continuing with the stage it was at. If the commitment is accepted, the file will be closed, and the operator will have to comply with the measures imposed by the authority.

2.4. Administrative remedies

Finally, it is worth mentioning the types of administrative appeals that exist in proceedings before the SCPM (2017):

(a) Appeal for reconsideration

The appeal for reconsideration must be lodged by the economic operator under investigation within 20 days of notification of the contested administrative act. The body responsible shall decide on the appeal within 60 days.

(b) Appeal

The appeal shall be addressed to the Superintendent within 20 days of notification of the contested administrative act. The Superintendent shall resolve the appeal within 60 days from the date on which the Superintendent acknowledges the

appeal. This appeal shall not be subject to any appeal except for horizontal appeals for amplification and clarification.

(c) Extraordinary review action

This appeal may only be lodged against administrative acts within 3 years after the decision that is the subject of this appeal has become final. The Superintendent shall issue his decision within 60 days from the date on which the matter was referred to him. This appeal shall not be subject to any appeal except for horizontal appeals for amplification and clarification.

As illustrated, the LORCPM and its Regulations have provided for special procedures and very specific phases for the proceedings before the SCPM.

3.PRONOUNCEMENT OF THE STATE ATTORNEY GENERAL'S OFFICE (PGE) REGARDING THE ORGANIC ADMINISTRATIVE CODE AND THE ORGANIC LAW ON REGULATION AND CONTROL OF MARKET POWER.

Given the numerous interpretations and disputes that have arisen in proceedings before the SCPM, on 17 September 2019 the Superintendent of Market Power Control asked PGE whether the entry into force of the COA tacitly repealed the administrative sanctioning procedure established in the LORCPM, as well as the administrative remedies contained therein. In this regard, the Attorney General's Office responded (Oficio No. 06578, 2019), stating that the COA did not expressly or tacitly repeal the provisions of the special sanctioning procedure and the administrative remedies contained in the LORCPM. The basis for the PGE's response is the principle of specialty, which has been taken up by Article 39 of the Civil Code (2005) and reads: "The previous special law is not repealed by the subsequent general law if it is not expressed".

Specifically, PGE (2019) stated in its response to the consultation that:

> The conflict between the criterion of specialty and the chronological criterion. This conflict occurs when an earlier-special rule is incompatible with a later-general rule. There is a conflict because when applying the specialty criterion, the former rule prevails, and when applying the chronological criterion, the latter rule prevails. Here, too, a general rule has been established: lex posterior generalis non derogat priori speciali. Based on this rule, the conflict between the specialty criterion and the chronological criterion must be resolved in favor of the former: the later general law does not override the earlier special law. This introduces a further exception to the principle lex posterior derogat priori, since this principle disappears not only when the lex posterior is inferior, but also when (sic) it is generalis (and the lex prior is specialis). (s. p.)

If one looks closely at the acquittal of the above-mentioned consultation, it will seem that both the SCPM and the PGE have assumed that the potential derogatory effects of the COA could only be generated by way of tacit derogation of the procedural provisions of the LORCPM.

Against this background, certain questions arise. If the procedural provisions of special laws of the equal hierarchy are not understood to be expressly repealed by the First Repealing Provision of the COA, why did the legislator include two General Provisions to expressly exclude administrative procedures in tax and intellectual property matters from the application of

the COA? How should the Third[3] and Third General Provisions be understood then?

Is this a legislative redundancy, or does the true intent and spirit of the law lie in them?

Undoubtedly, the entry into force of the COA raised questions about the processes and administrative provisions of the LORCPM, both for the authority and for the economic operators subject to it.

To this end, the analysis used in the Ombudsman's consultation provides insight into the application of the COA; however, to resolve any concerns, it is essential to expand on the elements considered for the formation of a sound legal opinion on the matter.

As is often the case in the process of law formation, the approved and published COA underwent some important changes concerning its primary text. Thus, the draft Organic Administrative Code presented by Assembly Member Vethowen Chica Arévalo on 15 December 2015, had the clear and express objective of unifying all administrative processes collected by the Ecuadorian legal system under the new process provided for in the COA. It is sufficient to read the objectives of the norm contained in the explanatory memorandum which state:

> The main purpose of the Code is to regulate relations between individuals and the Public Administrations in their service, to establish the legal regime of

3 The third general provision states the following: "In the area of taxation, the provisions contained in the Organic Tax Code and other regulations in force are applicable, notwithstanding this, the provisions of this Code will be applied in a supplementary manner, except for the provisions of Article 185 of the Organic Tax Code, which is repealed, and the provisions of the Organic Administrative Code must be observed for the basis for the auction bids" (COA, 2019).

> administrative acts and their review in administrative proceedings, and to establish a common administrative procedure applicable by all public bodies and entities. (...)
>
> The approval of this Code represents a historic milestone in the Ecuadorian legal system, which for the first time has a general rule regulating the administrative procedure, which will apply to all public sector bodies and entities, and which disciplines all interrelations between individuals and administrations. (COA, 2019, art. 1)

In the same vein, the text of the draft included a transitional provision which read:

> Art. 413 Administrative Procedures Sanctioning. - Administrative proceedings in which a Public Administration exercises a sanctioning power, whatever their nature, and which have been initiated before the entry into force of this Code, shall expire in six months from the date of publication of this Code.
>
> If the sanctioning power in question has not expired following this Code, the competent body may initiate the corresponding administrative sanctioning procedure following the procedure provided for in this Code.

And, for the sake of clarity, the draft expressly included Reformatory and Repealing Provisions of several articles of the LORCPM (2011), namely:

> Art. 424. Amendments and repeals to the Organic Law on Regulation and Control of Market Power. - After the last paragraph of article 48 of the Organic Law on

> Regulation and Control of Market Power, published in the Supplement to Official Gazette No. 555 of 13 October 2011, add the following:
>
> The preliminary and investigative powers of the Superintendence for the Control of Market Power are subject to the provisions of the Organic Administrative Code, and in all matters not expressly provided for in said Code to this Law. (...)
>
> Repeal Articles 55, 57, 59, 60, 60, 61, 64, 66, 67, 68, 69 and 70. (...)

Article 58, replaced by the following:

> Article 58 - Administrative sanctioning procedure. - Once the preliminary investigation proceedings have been concluded following the Organic Administrative Code and this Law, if there is merit to continue with the procedure, the substantiation body shall issue the administrative act of procedure with which it shall initiate the administrative sanctioning procedure and shall order the interested party to be notified with the formulation of charges. (...)

Article 65 is replaced by the following:

> Art. 65. - Legal activity of the Superintendence for the Control of Market Power. - The actions of the Superintendency for the Control of Market Power are subject in all respects to the provisions of the Organic Administrative Code and the specific rules provided for in this Law.

> The administrative appeals that may be lodged by the interested parties are also regulated by the Organic Administrative Code (...)".

After the first debate, the repealing provisions were replaced by a provision with the same effect, which proposed the total repeal of Chapter V of the LORCPM, entitled "On Proceedings". Thus, the Report for the second debate of the Justice and State Structure Commission of 21 December 2016 included in its conclusions:

> It simplifies and unifies administrative and sanctioning procedures in public sector bodies and entities to guarantee citizens' rights and ensure the prompt and effective satisfaction of the general interest. (Commission on Justice and Structure of the State, 2016, n. p.)

Subsequently, on 17 January 2017 and 9 May of the same year, the SCPM, noting that the bill was not brought to its attention before the first debate, submitted observations regarding the derogation sought by the COA bill. As a result, in the second debate, among other changes, the repealing provision that proposed the elimination of all of Chapter V of the LORCPM was eliminated and the bill was sent to the President of the Republic for approval. The National Assembly accepted the President's partial objection with its respective alternative texts and, as a result, the final version of the Code did not include the express repeal of Chapter V of the LORCPM.

The draft Organic Administrative Code was originally intended to make administrative proceedings and the rest of the administrative provisions of the LORCPM subject to the COA; however, in the process of drafting the Code, the express

provisions that produced this effect were eliminated, but very broad general and derogatory provisions remained in the Code, which produced this uncertainty regarding the application of the COA and its administrative sanctioning process in the investigations conducted by the SCPM.

Having put the analysis of the derogatory effects of the entry into force of the COA into context, let us turn to the analysis made by the State Attorney General's Office.

As highlighted by the Ombudsman's Office, it remains in doubt whether technically and legally the COA repealed the administrative procedure provisions contained in other special laws that have the character of organic laws, without having an express repeal in this regard in the COA, since its material and subjective scope of the application contains the elements to include the SCPM proceedings within its scope. At the same time, as has been established, it is also clear that the legislator's original intention was to unify all the administrative procedures contemplated in other laws, or at least most of them. However, the result is far from this intention: only five organic laws out of the existing eighty-two have been directly affected by derogations from the COA. Having included only six express derogatory provisions, the procedures, and administrative provisions of the remaining seventy-seven organic laws and codes would be understood to be in force. It is worth noting that the organic laws whose procedural norms are not affected by the COA regulate most of the administrative processes provided for in the Ecuadorian legal system and, undoubtedly, these laws regulate the most relevant administrative procedural matters.

Under these considerations, it is inevitable to question whether the COA will become the transcendental law it was

intended to be or whether it will produce tangential effects compared to what was intended at the time of its conception.

In any case, the legislator deliberately excluded from the final text of the COA the express derogatory provisions of the procedural rules of the LORCPM, so it is clear that, under the principle of specialty, the entry into force of the COA does not repeal the procedures and administrative provisions of the LORCPM, so that investigations, appeals and other processes conducted by the Superintendence for the Control of Market Power must continue their processing following the provisions of the LORCPM and the COA should only be considered in a supplementary manner.

In this context, an important question remains. Beyond the specific case of the legal impact of the entry into force of the COA on the procedural provisions of the LORCPM, whose ambiguities are the result of a final text poorly assembled because of the law-making process employed by the National Assembly, do the acquittals of consultations by the PGE constitute a source of law? Should the PGE heed consultations that seek to have the PGE carry out a genuine legislative act and not an interpretative one?

4. PROVISIONS OF THE ORGANIC ADMINISTRATIVE CODE APPLICABLE TO THE SCPM PROCESS

As noted above, the First Repealing Provision of the COA (2017) reads: "All provisions concerning the administrative procedure, administrative sanctioning procedure, appeals in administrative proceedings, expiry of powers and the procedure and the prescription of sanctions that have been applied are repealed". In literal application of the repealing rule, due to the entry into force of a special rule with a repealing provision, the

procedural provisions of the LORCPM, its Regulations, and the Instructions could be interpreted as tacitly repealed, however, the SCPM continued to apply them in its procedures, in certain cases refusing to take into consideration the COA even in a supplementary manner. It remains to be defined, then, which provisions of the COA will be applicable and which will be inapplicable under the legislator's intention, the opinion of the PGE, and the legality of this exclusion.

The special processes and deadlines that govern the substantiation of the SCPM have a reason for being, as the complexity of the processes, the degree and rigor required of an investigation of this nature, and the necessary studies, require a duration that exceeds the speed promoted by the COA. It was this logic that led the SCPM itself to formulate its observations and requests to the National Assembly during the pre-legislative and legislative process of the COA, which unfortunately did not appear in the final approved text, nor were they included as exceptions to the broad derogation and were the reason for the confusing interpretation and application of the procedural rules to the Authority's procedures.

However, as we will see below, there are certain precepts of the Organic Administrative Code that could apply to proceedings before the SCPM.

Firstly, why not apply the legal principles set out in the COA to administrative proceedings before the SCPM? Using these principles would only set limits and/or rules for the parties, without conflicting with the nature of the special procedure. For example, using the principle of efficiency to facilitate the exercise of people's rights, or the principle of proportionality to avoid excessive burdens or charges, as is often the case in

competition law proceedings. The same could be applied to the rights and duties of individuals, competence, grounds for excuse and recusal, and even to the actions of the public administration and the COA's definitions of an administrative act, the act of simple administration, administrative contract, administrative act, or the normative act of an administrative nature.

As for the administrative procedure itself, there are also certain provisions of the COA that are not contrary to the provisions of the LORCPM, its Regulations, and the SCPM's instructions. For example, the provisions regarding the direction of the procedure, forms and models, reason for receipt, procedural impulse, rectification, accumulation, form of keeping the files, interested persons, representation, calculation of terms and deadlines, and form of notification, following the provisions of Articles 134 and 174 of the Organic Administrative Code. By way of example, the following:

According to COA (2017), the notification means:

> Article 164 - Notification. This is the act by which the interested person or an undetermined group of persons is notified of the content of an administrative act so that the interested persons are able to exercise their rights.
>
> The notification of the first action of the public administrations shall be made in person, by ballot, or by the means of communication ordered by them.
>
> The notification of the actions of the public administrations is carried out by any means, physical or digital, that allows the transmission and reception of its content to be recorded.

This definition could be fully applicable within the

proceedings conducted by the SCPM, without altering in any way the nature and specialty of each proceeding. This form of notification is already used daily in the proceedings conducted by the SCPM.

On the computation of terms, the COA (2017) states that:

> Article 159 - Calculation of terms. Saturdays, Sundays, and declared holidays are excluded from the calculation of terms.
>
> The days declared as holidays in the jurisdiction of the person concerned shall be understood as such in the headquarters of the administrative body or vice versa.

For its part, the LORCPM contains provisions that seem to confuse this provision, for example, Art. 21 on the decision in the merger process, where it speaks of a "term of sixty (60) calendar days", confusing the concept of the term with a deadline, and later, stating that this term can be extended for an additional 60 days. This provision introduces a temporary regime of 60 days term, combined with an extension of 60 days term, subject to confusions, accentuated by the regulation that in its Art. 20 clarifies that effectively the first concept is a term, without prejudice that the regulation amends Art. 21 of the LORCPM by contradicting the moment from which the term runs, which according to the law is from "presented the request and respective documentation" and according to the regulation is computed from the moment this request is qualified as complete.

The rules of the COA (2017) would also be fully applicable concerning the statement of reasons:

> Art. 100.- Statement of reasons for the administrative act. In the statement of reasons for the administrative act, the following shall be observed: 1. The indication of the applicable legal rule or legal principles and the determination of their scope. 2. The qualification of the relevant facts for the adoption of the decision, based on the evidence contained in the administrative record. 3. an explanation of the relevance of the legal regime invoked concerning the facts established. Reference may be made to other documents, provided that the reference is incorporated in the text of the administrative act and is included in the file to which the person concerned has had access. If the decision contained in the administrative act does not derive from the procedure or does not follow logically from the grounds set out, it shall be deemed not to have been reasoned.

Finally, the SCPM itself has based its analysis on the definition of acts of the administration provided by the COA, using it to reject appeals against acts that, according to the authority, would not be administrative acts, such as, for example, a simultaneous decision to accumulate files and formulate charges.

> Art. 89.- Activity of the Public Administrations. Administrative actions are:
>
> 1. Administrative act
>
> 2. Act of simple administration
>
> 3. Administrative contract
>
> 4. Administrative action

5. Normative act of an administrative nature. (COA, 2017)

Each of these categories of actions is precisely defined by Articles 98, 120, 125, 127, and 128 of the COA.

It is therefore clear that there are many COA provisions that are not contrary to the provisions of the LORCPM, its Regulations, and the SCPM's instructions, but rather complement them and even put in writing practices that are already in use, giving greater legal certainty to those administered.

CONCLUSIONS

The analysis carried out determines that, although the legislator's original intention in promoting the enactment of the COA was to unify all the substantive and procedural administrative rules in a single body of law, during the evolution of the discussion and approval of the COA it underwent fundamental reforms, mainly the exclusion of the express repeal of Chapter V of the LORCPM.

Although this discussion is found in the original texts of the rule and an analysis of its evolution in the legislative process reveals this reality, the final approved, published and current text of the COA effectively generated a lot of justified uncertainty regarding the possible applicability of the COA due to its provisions which, on the one hand, promote the general principles of speed and efficiency in the administration's management, but on the other hand, and from the perspective of the rigor required for the SCPM's investigations, they constituted a death sentence for many investigation processes which, if the COA had been applied, would have led to the expiry of the sanctioning power or the abandonment of a large majority of cases.

The inapplicability of the COA to the proceedings before the SCPM, both due to the reading of the express exclusion made by the legislator, as well as the decision of the PGE, have been widely questioned and discussed, for example, in the article "La LORCPM frente al COA: El fin justifica los medios? (Rubio, 2020) where the author openly questions the PGE's position by arguing that the interpretation of the effects of the broad derogation does not reach the procedural rules of the LORCPM, its Regulations, and the Instructivo. On the other hand, the same article also refers to the power of the PGE to make interpretations regarding the applicability or inapplicability of a rule, as it did in this case. Without prejudice to the errors that the PGE's opinion may or may not have, what is certain is that the exclusion of the SCPM's rules goes back to the legislative process, where the legislator expressly excluded the express derogation that was originally envisaged for the procedural provisions of the LORCPM, its regulations, and instructions. However, that the legislator's intention provides clarity as to what happened in the process of enactment of the rule, but does not remedy an interpretation that could exceed the scope of a PGE opinion as to the applicability, or not, of a rule, and that a decision by a competent body with powers to make such interpretation will be needed to definitively settle the dispute as to which provisions of the COA will apply to the procedure before the Competition Authority, and which will not.

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Social security for unpaid domestic workers: Death benefits, a relevant protection in the pandemic

La seguridad social de los trabajadores domésticos no remunerados: las prestaciones por causa de muerte como protección relevante en las pandemias

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ABSTRACT: This article analyzes the protection of unpaid domestic workers through social security in the current context. The Organic Law for Labor Justice and the Recognition of Work at Home incorporated unpaid domestic workers into social security, guaranteeing them economic protection against the contingencies of old age, disability, and death. The analysis of the target population of this law, its spirit as well as the conditions of access to the benefits established for such contingencies, specifically for the contingency of death, show that such protection is adequate to protect people who perform unpaid work at home and mainly their beneficiaries in the current situation, considering that the pandemic caused by the SARS-coV2 coronavirus has impacted families not only in their state of health but also in their economic situation.

KEYWORDS: Social security, work, pensions, widowhood, orphanhood, COVID-19.

RESUMEN: El presente artículo analiza la protección de las personas trabajadoras no remuneradas del hogar a través de la seguridad social en el contexto actual. La Ley Orgánica para la Justicia Laboral y el Reconocimiento del Trabajo en el Hogar incorporó a las personas trabajadoras no remuneradas del hogar a la seguridad social garantizándoles una protección económica frente a las contingencias de vejez, invalidez y muerte. El análisis de la población objetivo de dicha ley, de su espíritu así como de las condiciones de acceso a las prestaciones establecidas para tales contingencias, específicamente para la contingencia de muerte, muestran que dicha protección resulta adecuada para proteger en la actual coyuntura a las personas que realizan trabajo no remunerado en el hogar y principalmente a sus derechohabientes, considerando que la pandemia causada por el coronavirus denominado SARS-coV2 ha impactado a las familias no sólo en su estado de salud sino también en su situación económica.

PALABRAS CLAVE: Seguridad social, trabajo, pensiones, viudedad, orfandad, COVID-19.

JEL CODE: O15, P14.

INTRODUCTION

The Organic Law for Labor Justice and the Recognition of Work at Home passed on 14 April 2015 and published on 20 April 2015 in the Official Gazette, Third Supplement, No. 483, incorporated persons performing unpaid household work into the social security system.

The objective of this law was to protect people who perform unpaid work in the household against the contingencies of old age, disability, and death through economic benefits granted by the Ecuadorian Institute of Social Security –IESS– and financed

both by the family economic unit, according to its contributive capacity, and by the State.

This protection scheme is particularly important in the current situation since the COVID-19 pandemic has caused a large number of deaths in the Ecuadorian population, as a result of which many families have lost their income to support their families and have even been unable to pay the funeral expenses. In this context, it is therefore relevant to analyze the social security protection scheme for people who perform unpaid work at home and to identify whether the benefits provided by law are indeed accessible and can fulfill their purpose. It means to protect unpaid domestic workers and their families against the social risks provided by law, in this case exclusively the contingency of death.

Although old age and permanent incapacity are also part of the social risks foreseen by the Organic Law for Labor Justice and the Recognition of Work at Home, they will not be analyzed for two reasons: firstly, because the specific conditions for accessing the old-age benefit, such as being 65 years of age or older and accrediting a minimum of 240 monthly contributions, prevent the existence of unpaid domestic workers as pensioners by 2020, since the Organic Law for Labor Justice and the Recognition of Work at Home was approved in April 2015 and the affiliation process started in October 2015; and secondly, because permanent disability benefits cover the most severe disabilities, for example, the total permanent disability[1] and absolute permanent disability[2], which was not observed in any COVID-19 survivors.

1 Total permanent incapacity implies the loss of all capacity to carry out the protected person's usual activity but does not prevent the carrying out of a different activity.

2 Absolute permanent incapacity implies the loss of all capacity to carry out any activity.

For this reason, we will analyze exclusively the protection of unpaid domestic workers in the event of the contingency of death. This protection consists of the widow's and orphan's pensions and the funeral allowance whose access conditions established by the Organic Law for Labor Justice and the Recognition of Work at Home allow them to be applied for as of this date by the beneficiaries of the right derived from the deceased unpaid domestic worker.

Thus, our analysis will be developed in two parts: a first part devoted to the spirit of the Organic Law for Labor Justice and the Recognition of Work at Home, it includes the intention of the legislator, the reasons behind its action, as well as its target population; and a second part devoted to the functioning of death benefits and their relevance in the current situation caused by the COVID-19 pandemic.

1. CHARACTERIZING UNPAID DOMESTIC WORKERS

Positive law is framed in a specific context that takes into consideration the lifestyle of its population, its freedom, its religion, its activities, its uses, and customs, as well as their relationship with each other, their origin, and the objective that the legislator seeks to achieve through them (De Secondat de Montesquieu, 1995, p. 24). This set of elements is what Montesquieu calls the spirit of the law.

In this sense, in analyzing the spirit of the Organic Law for Labor Justice and the Recognition of Work at Home, we will study both the social characterization of people who carry out unpaid work at home and the intention of the legislator in the drafting and approval of the aforementioned law.

1.1. The social characterization of persons engaged in unpaid work in the household

Based on the studies presented for the elaboration of the aforementioned draft law, the people who carry out unpaid work in the household are those who call themselves, housewives3.

According to the Financial and Actuarial Sustainability Study of the Coordinating Ministry of Social Development (2015), with data from 2013, 99.8% of the people who self-identify as housewives in the National Survey of Employment, Unemployment, and Underemployment –ENEMDU– are women and less than 0.2% are men (p. 38). 66% of this population is between fifteen and forty-nine years old, while 34% is fifty years old or older. If this percentage is calculated only over the total number of people between fifteen and sixty-five years of age, it rises to 87% (p. 39).

For the year 20194, this reality is maintained, although with a slight variation, thus about the total population of housewives, 61% are between age fifteen and thirty-nine and 39% are fifty years old or older; and concerning the total number of people between fifteen and sixty-five years old, this percentage rises to 85%.

Regarding the marital status of this population, the aforementioned study shows that 78% of housewives are married or live in a common-law partnership, while 9% are

3 The term used by the Ecuadorian Institute of Statistics and Census in the National Survey of Employment, Unemployment, and Underemployment -ENEMDU- in which the interviewee is asked to indicate his/her activity and self-identify in one of the activity categories. In the case of the economically inactive population -PEI- these categories are income earner, retired, student, housewife.

4 According to the ENEMDU as of December 2019, the PEI aged 15 years and over was 4,303,536 persons of whom 1,691,567 self-identify as housewives.

single. This situation remains the same as for year 2019, which shows that the gender division of labor persists as well as the inequalities derived from it.

On the other hand, and concerning the geographical concentration of this population, the same study shows that people who perform unpaid work in the household are mainly concentrated in the provinces of Guayas, Pichincha, and Manabí, followed by the provinces of Los Ríos, El Oro, Esmeraldas, Azuay, Santa Elena, and Santo Domingo de los Tsáchilas (Ministerio Coordinador de Desarrollo Social, 2015, p. 41), a situation that has not changed in 2019 according to the National Survey on Employment, Unemployment, and Underemployment –ENEMDU– as of December 2019.

As can be seen, this is a population largely made up of women, of different ages but mostly young, mostly married or in a common-law partnership, who carry out activities in and for the benefit of their households such as housekeeping and maintenance, and caring for people (children, the elderly and the sick), who do not receive any remuneration or economic compensation and whose territorial concentration follows the national concentration of the population.

From these data, it can be inferred that this population is particularly vulnerable, given their economic dependence on the person or persons who carry out paid work and on whom the economic survival of this population and, in general, of the household depends.[5] This vulnerability is accentuated by

5 According to the Gender Equality Observatory for Latin America and the Caribbean (2017), 29% of women over the age of 15 in the region had no income of their own in 2017, which means that "almost one-third of women in the region depends on others for their subsistence, which makes them economically vulnerable and dependent on income earners, who are usually men". If we refer only to Ecuador, 33.8% of women over 15 years of age have no income of their own, while the percentage of men of the same

the loss of the "breadwinner" and with age[6], as women's life expectancy is longer, and it means that "women live longer, with less income than men, and this income also decreases significantly over the years" (Gender Equality Observatory for Latin America and the Caribbean, 2013).

1.2. The spirit of the Organic Law for Labor Justice and the Recognition of Work at Home

The Organic Law for Labor Justice and the Recognition of Work at Home defines an unpaid domestic worker as a person who "carries out exclusively domestic care tasks without receiving any remuneration or economic compensation and does not engage in any of the activities contemplated in the previous paragraphs".

Consequently, for a person to be considered as an unpaid household worker for social security affiliation, three conditions must be met:

a. To devote themselves solely and exclusively to the performance of household tasks. Such housework shall be care refers both to the activities formerly known as household chores and to the tasks of caring for family members such as the elderly, people with disabilities, or children and adolescents.

That these activities are carried out without receiving any remuneration or economic compensation, which is different from paid work at home or better known as domestic work,

age with no income of their own is 10%.

6 In this regard, see Huenchuan S. (2010), "Envejecimiento y género: acercamiento a la situación específica de las mujeres mayores en América Latina y Recomendaciones Internacionales", where the author points out that "in old age, women can see the problems they face worsen (...)", that women "receive less income than men during their working lives and reach old age with economic and social disadvantages" and that "even in old age, they can be the only source of care in situations of illness and disability" (p.16).

which is carried out for the account of third parties and, therefore, the type of affiliation that corresponds is that intended for dependent workers; and

Not being a dependent worker, including both workers in the private sector, including those engaged in paid domestic work, and in the public sector; not being self-employed or independent, which excludes professionals in free practice, owners of companies, businesses, social joint-ventures, artisans, agricultural and fishing workers, the "head" of a family7 in the peasant social security system and, in general, any person who carries out a paid activity.

As can be seen, the legal qualification of unpaid work in the household does not differ from the social characterization of this activity. On the contrary. The law takes this reality into account in its specificity and creates a specific form of affiliation that is consistent with the other forms of affiliation. Thus, by using a descriptive definition (what it is) combined with a negative or exclusive definition (what it is not), the Law prevents fraudulent affiliations, and it implies that this type of affiliation is used to evade social security affiliation under another type; and, on the other hand, that there be simultaneous affiliations to take advantage of the system and improve the basis for calculating pensions.

If we refer to the draft law submitted on 15 November 2014 by the President of the Republic to the National Assembly in the exercise of the provisions of Article 134, paragraph 2 of the Constitution of the Republic, we can appreciate the will of the co-legislator to recognize the value of unpaid work at home and

7 Note that, in the case of the special peasant social insurance scheme, only the "head" of the family is protected against old age, death, and disability contingencies, including disability, but not the spouse or partner, who enjoys only health care.

to protect those who are engaged in it in the most vulnerable situations. Thus, the explanatory memorandum states that, even though unpaid work at home fulfills an important economic and social function for society, the majority of people who carry out such work are outside any protection, which increases the risk of social exclusion, especially for the elderly (p. 2). This is in line with the Report for the first debate of the Permanent Specialized Commission on Workers' Rights and Social Security of the National Assembly, which points out the need to protect people doing unpaid work in the household through pensions to break the cycle of poverty in old age (p. 42).

This motivation is made more explicit in the interventions made by representatives of the executive, in which it was specified that unpaid work at home is a socially useful work that contributes to the economic and productive development of the country. However, despite this contribution, housewives have historically been excluded from the right to social security (Vaca, 2014; Vaca, 2015).

Likewise, the classification of unpaid work at home within the economically inactive population –PEI– was questioned, since within the population that groups together "people aged 15 and over who are not employed, are not looking for work and were not available for work" (National Institute of Statistics and Censuses, 2018), since such categorization considers only market or paid work as productive work and makes invisible the work of housewives who perform labor from Monday to Sunday, without working hours and who will surely die working without receiving a pension (Correa, 2015). This affirmation is consistent with the economic doctrine that promotes the recognition of the value of unpaid work at home and criticizes the economic thinking that invisibility and normalizes the

sexual division of labor and the situation of women in the home. Already in the 19th century, as Carrasco (2006) points out, the statistical categorization of women in censuses was questioned and the fact that work in the home was not considered as real work was criticized (p. 36).

In the same vein, reference was made to the opportunity cost8 that unpaid household work represents for the people who carry it out (Vaca 2014; Correa, 2015) and the fact that unpaid household workers do not have access to a pension as right-holders was questioned, in contrast to their spouse who, thanks to the work of the unpaid household worker, can exercise a remunerated activity that opens up access to obtaining a pension (Correa, 2015).

These clarifications once again show the intention of the legislator and the Executive, as co-legislator, to recognize the contribution and importance of unpaid domestic work for the country's economy, as well as to make the mandate of the 2008 Constitution viable to make effective the enjoyment of the right to social security for unpaid domestic workers.

It is therefore understandable that the Law is called "Law for [...] the Recognition of Work at Home", that the contribution to finance this affiliation scheme falls on the family economic unit and the State as the direct beneficiaries of unpaid work in the home, that this contribution depends on the contributory capacity of the family economic unit and that the risks covered are those that have the greatest impact on people's lives[9].

8 Opportunity cost in this context translates into "the monetary amount that the unpaid worker would have obtained in the labor market for the same amount of work time invested" (Instituto Nacional de Statistics and Geography of Mexico, 2013, p. 7).

9 In Ecuador, the legislator decided to universalize pensions, considering that the health system is universal and free at all levels of care for all people without any distinction whatsoever. Consequently, health care,

Consequently, based on the characterization of the target population and the intention of the legislator, in a broad sense, it can be concluded that the spirit of the Organic Law for Labor Justice and the Recognition of Work at Home was first recognized as socially useful and economically productive the unpaid household work performed mostly by women, who do not receive any income and are therefore outside any social security protection; and secondly, to recognize people who perform unpaid work at home as entitled to social security and to make this right effective through the creation of a specific form of affiliation that takes into account their contributory capacity and the social risks that perpetuate and accentuate their vulnerability and that of their families, namely old age, permanent incapacity, and death.

1.3. The affiliation process for unpaid domestic workers

The fourth transitory provision of the Organic Law for Labor Justice and the Recognition of Work at Home granted the IESS sixty days from the issuance of the Law to issue all the necessary regulations for the implementation of this new affiliation modality. Accordingly, Resolution C.D. 492 dated 18 June 2015 and Resolution C.D. 496 dated 18 September 2015 were issued.

Resolution C.D. 492 regulates the affiliation process for unpaid household workers and establishes the contribution tables and the distribution of the corresponding contributions. Resolution C.D. 496 amends Resolution C.D. 492 to facilitate the affiliation of unpaid household workers beneficiaries of the Human Development Voucher who will be automatically registered pursuant to the inter-institutional interoperability

through the services of the Ministry of Public Health, depends only on the condition of being a human being and not on the quality of affiliation, migratory status, or employment situation.

between the Ecuadorian Institute of Social Security, the Ministry of Economic and Social Inclusion, and the Coordinating Ministry of Social Development.

Affiliation under this modality has been open to the public since the beginning of October 2015. According to public data available to date, two hundred and twelve thousand and thirty-three people nationwide were affiliated under the modality of unpaid work at home in 2017 (Instituto Ecuatoriano de Seguridad Social, 2017, p. 18). Most of those affiliated were concentrated in the provinces of Manabí (49,790), Guayas (44,923), Los Ríos (24,071), Esmeraldas (16,414) and Loja (10,361). The provinces of Santo Domingo, Azuay, Imbabura, Pichincha, Santa Elena, Orellana and Sucumbíos had an average of 4,500 members (Instituto Ecuatoriano de Seguridad Social, 2017, p. 21).

In addition, and following Resolution C.D. 496, it is important to consider that a large part of these affiliations corresponds to beneficiaries of the Human Development Voucher, whose territorial concentration is similar to the concentration of affiliates presented in the previous paragraph. Thus, according to the Interconnected Registry of Social Programs, beneficiaries of the Human Development Voucher in 2017 are concentrated in the provinces of Guayas (77,962), Manabí (73,766), Los Ríos (40,875), Esmeraldas (28,166), Loja (21,354). This distribution remained unchanged in 202010.

Finally, regarding the contribution basis recorded, the Ecuadorian Institute of Social Security (2017) does not present data according to the socio-economic level of the family

10 For 2020, this distribution is maintained with variations in the number of beneficiaries: Guayas 89,889 beneficiaries, Manabí 71,766, Los Ríos 41,494, Esmeraldas 26,218, Loja 19,143 (Registro Interconectado de Programas Sociales, 2020).

economic unit but only an average contribution basis, which for 2017 was USD 94.28 (p. 24).

2. PROTECTION ON THE DEATH OF THE UNPAID WORKER IN THE HOUSEHOLD

The death contingency protects the situation of need caused by the death of the member or pensioner that results in the loss or reduction of family income (González and Barcelón, 2015, p. 332). It is a classic contingency of social security systems whose origin, of welfare and mutualist nature, seems to date back to the time of classical Greece where craftsmen in the same branch of activity contributed to help each other and protect their orphans (Borgetto and Lafore, 2019, p. 13).

Under the Bismarckian model, the death contingency was included in the occupational risk insurance. However, it was not until the Reichsversicherungsordnung11 (Social Insurance Code) of 1911 that death insurance became institutionalized in the 20th century, providing for widows' and orphans' benefits for both occupational and common causes, and would henceforth be included in most social security systems.

In Ecuador, the creation of this contingency followed the Bismarckian model. The Law on monetary compensation to the worker or day laborer for accidents at work, issued on 30 September 1921 and published in the Official Register No. 316 dated 1 October 1921, provided for the employer's obligation to cover funeral expenses and the right of the widow, legitimate or natural descendants under the age of sixteen or ascendants

11 The "Reichsversicherungsordnung" or Social Insurance Code of 1911 codifies three laws of 1883 on health insurance, the law of 1884 on occupational risk insurance, the law of 1889 on invalidity and old-age insurance; it creates widows' and orphans' pensions and extends the subjective scope of protection of these laws.

unable to work to receive compensation in the event of the death of the worker, the amount of which depended on the number of dependents.

From the Law of Retirement, Civil pensions of death, Savings, and Cooperative approved on 8 March 1928, the contingency for death would be institutionalized and with the Supreme Decree No. 12 that creates the General Compulsory Insurance and establishes the National Welfare Institute of 2 October 1935, for "public and private employees and salaried workers, regardless of the order of activities in which they are engaged and regardless of their nationality" and the approval of the Statutes of the Private Employees and Workers Insurance Fund by Supreme Decree No. 63 of 31 March 1937, its coverage would be extended.

Under the same model, the Organic Law for Labor Justice and the Recognition of Work at Home provided for this contingency and the consequent economic benefits in the event of the death of the pensioner or member of the modality of unpaid work in the home, namely: the widow's pension, the orphan's pension, and the funeral allowance.

2.1. Widow's and orphan's pensions

2.1.1. Conditions of access to widow's and orphan's pensions

According to the provisions of this law, to be entitled to widow's and orphan's pensions, as the case may be, the unpaid work in the household at the time of death must meet both the general conditions and the specific conditions of access to these benefits, except in the case of a person who is a pensioner for retirement or for total or absolute permanent disability under this type of affiliation, in which case these conditions do not apply.

Regarding the general conditions, the unpaid work of the household at the time of death must be affiliated, registered as active in the system, and up to date with his or her obligations to the IESS.

As far as the specific conditions are concerned12, the unpaid household worker at the time of death must prove a certain number of contributions according to his or her age. Thus, the unpaid household worker who at the time of death is between fifteen and twenty-five years old must count on six-monthly contributions (six months); those between twenty-six and forty-five years old will have thirty-six monthly contributions (three years), and those who are sixty years old or older must have sixty contributions (five years).

2.1.2. Beneficiaries of widow's, widower's and orphan's pensions

The Organic Law for Labor Justice and the Recognition of Work at Home identifies three beneficiaries of death pensions:

The surviving spouse or legally recognized common-law partner provided that he/she has not remarried or entered into a new common-law partnership; or the common-law partner who, without having lived with the deceased for at least two years, proves the existence of common children.

The parents of the deceased unpaid household worker provided that three accrued requirements are met: a) they have lived under the care of the deceased, b) they do not receive any other pension from the Social Security System, and c) there is no surviving spouse or legally recognized common-law partner

12 First unnumbered article of Chapter IV On widow's, widower's and orphan's pensions of the Organic Law for Labor Justice and Recognition of Work at Home.

as beneficiaries.

2.1.3. The amount and distribution of widows' and orphans' pensions

The number of widows, widower, and orphan pensions varies according to the contributory effort of the family unit. However, they may not be less than a minimum amount established by law, which is seventy dollars at the first level of the contribution basis, one hundred and six dollars at the second level, one hundred and forty-six dollars at the third level, and one hundred and ninety-four dollars at the fourth level of the contribution basis.

Once the death pension has been calculated, it will be allocated to the beneficiaries described above. Thus, 60% of the pension will be awarded to the surviving spouse or the legally recognized common-law partner or to the common-law partner who, without having lived with the deceased for at least two years, proves the existence of children in common; and in their absence, to the dependent parents of the deceased. The difference, such as the remaining 40%, will be divided proportionally between minor children and children with severe disabilities.

2.2. The funeral allowance

The funeral allowance is a benefit intended to cover the funeral expenses of IESS beneficiaries, since both affiliated persons and pensioners.

The Social Security Act generally describes the funeral allowance as a cash benefit, a description that has been maintained since 1942[13] and reflects the intention of the

13 Article 27 of the Compulsory Social Security Law issued on 14 July 1942

legislator at the time to assist the entitled persons to ensure a dignified disposal of the insured person or pensioner.

2.2.1. Conditions of access to the funeral allowance

To be eligible for the funeral allowance, the insured person must have made six monthly contributions during the twelve months preceding the death of the insured person.

2.2.2. Beneficiaries of the funeral grant

This allowance is granted to the person who can prove that he or she has paid the funeral expenses of the deceased member or pensioner of the unpaid family work scheme. This means that not only the deceased's dependents but also any person who is not a member of the deceased's family and can prove that he or she has paid the funeral expenses can be a beneficiary.

2.2.3. The amount and expenses covered by the funeral grant

The amount of the funeral allowance is a maximum of four minimum wages. Although the Board of Directors of the IESS has not reformed Resolution C.D. 100 to include the pension scheme for unpaid work in the home, and considering that this form of affiliation is part of the compulsory general insurance, we would understand that this benefit would follow the same logic, it means, funeral expenses would be considered to be the expenses for the purchase of a coffin, wake services, carriage, religious service, burial or cremation costs, and costs for the rental or purchase of a niche, columbarium or ash heap, and would be covered either in the form of reimbursement or the form of a refund; and would be covered either in the form of

and published in the Official Register No. 574 of 25 July 1942, provided: "In the event of the death of a member or pensioner, the bereaved shall be entitled to a cash allowance, under the title of a mortuary fund or funeral allowance (...)".

reimbursement or through external funeral service providers accredited by the IESS.

Finally, it is important to mention that the Organic Law for Labor Justice and the Recognition of Work at Home introduced the figure of portability of contributions. This figure applies to all subjects of IESS protection and implies that all contributions made under any affiliation modality will be counted to calculate the contribution periods necessary to access the economic benefits of social security. Undoubtedly, the portability of contributions facilitates access to benefits in general, and specifically, in our case study, it facilitates even more access to death benefits; however, the IESS Board of Directors, to date, has not issued the necessary secondary regulations for its application.

CONCLUSIONS

Before the passing of the Organic Law for Labor Justice and the Recognition of Work at Home, people who perform unpaid work at home could only access social security through voluntary affiliation with a contribution basis equal to or greater than the unified basic wage. Such a contribution basis undoubtedly constitutes a limitation to the affiliation of this group, not only because it is an activity that is carried out without income, but also because the amount of the contribution is still perceived as being high, even for those who receive their income[14].

The design of a contribution basis according to the contributory capacity of the family economic unit made it

14 For more information see Results of Focus Groups of Employers' and Insured Representatives on the Governance, Coverage, Quality, and Sustainability of the Ecuadorian Social Security Institute May 2020. A survey was conducted by the International Labour Organization (ILO) and published on the ILO Andean Countries website.

possible for unpaid household workers in poverty or extreme poverty to access social security protection. This is mainly the case for unpaid household workers who receive the Human Development Voucher, but also for those whose family economy is not sufficient to cover the common social security contribution amount[15].

In the case of deaths caused by COVID-19, the protection for the cause of death provided by the Organic Law for Labor Justice and the Recognition of Work at Home is undoubtedly relevant. According to the statistics of deaths caused by COVID-19 of the Ministry of Public Health (2020), most deaths have occurred in the provinces of Guayas, Manabí, Santa Elena, Pichincha, Los Ríos, and El Oro. These provinces, which happen to be the most affected by the pandemic, coincide with the provinces with the highest concentration of people affiliated under the modality of unpaid work in the home. Although we cannot affirm that the deceased persons were affiliated or were pensioners of the unpaid domestic work affiliation modality, some of the families affected by the pandemic may be beneficiaries of the benefits for widowhood, orphanhood, and the funeral subsidy created by the Organic Law for Labor Justice and the Recognition of Work at Home.

In the same sense, we can affirm that it is very likely that these benefits will reach the most vulnerable households, since according to Resolution C.D. 496, the affiliation of beneficiaries of the Human Development Voucher is automatic, and if we analyze their territorial concentration, we can see that this coincides both with the provinces most affected by the pandemic and with those with the highest concentration of affiliates in this modality.

15 For the year 2020, the contribution basis is USD 400 which implies a monthly contribution of USD 70.40.

Furthermore, the specific conditions of access to widow's and orphan's pensions for unpaid work in the household show that persons insured under this scheme enjoy better protection than those insured under other forms of compulsory general insurance or the special peasant social insurance scheme, since entitlement to these benefits depends not only on the number of contributions but also on the age of the insured, unlike the other forms of insurance, which do not take into account the age of the insured but only the number of contributions[16]. Widow's and orphan's benefits for unpaid work in the household are therefore more accessible and allow wider coverage of beneficiaries.

Consequently, the death protection for unpaid domestic workers established by the Organic Law for Labor Justice and the Recognition of Work at Home, focus on widow's and orphan's pensions, as well as the funeral allowance, is a relevant protection for their families in the current situation.

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16 Article 203 of the Social Security Act stipulates that the other persons covered by the compulsory general insurance scheme must pay at least 60 monthly contributions to qualify for widow's, widower's, and orphan's pensions.

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Derecho Constitucional y Economía

Constitutional Law and Economics

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RESUMEN: El derecho constitucional y la economía plantean preguntas como: "¿Cuál es el alcance del poder del Congreso de los Estados Unidos para regular el comercio?"; "¿Cuánta autoridad legislativa se puede delegar a los adminis tradores?"; y "¿Cuándo debería ocurrir un cambio constitucional a través de una actualización judicial en lugar de una enmienda formal?". Para abordar estas cuestiones, el derecho constitucional y la economía combinan análisis positivo, normativo e interpretativo, por lo cual este texto aborda un importante y fértil programa de investigación.

PALABRAS CLAVE: Economía, derecho constitucional, interpretación, norma jurídica, análisis económico.

ABSTRACT: Constitutional law and economics pose questions such as: "What is the scope of the power of the U.S. Congress to regulate commerce"; "How much legislative authority can be delegated to administrators"; and "When should a constitutional change occur through a judicial update rather than a formal

amendment". To address these issues, constitutional law and economics combine positive, normative, and interpretive analysis, so this text addresses an important and fertile research agenda.

KEYWORDS: Economics, constitutional law, interpretation, legal norms, economic analisis.

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INTRODUCCIÓN

LAntes de la década de 1960, la ley limitaba el uso de la economía a las leyes antimonopolio, industrias reguladas, impuestos y temas especiales como daños monetarios. Esto cambió drásticamente en la década de 1960 cuando el análisis económico se expandió a áreas más tradicionales del derecho, especialmente el derecho privado (propiedad, contratos, agravios) y el derecho penal (Rowley, 2005). La economía transformó la erudición jurídica y la comprensión común de las normas e instituciones jurídicas. El campo recibió el mayor reconocimiento en 1991 y 1992 cuando se otorgaron premios Nobel de economía consecutivos a los académicos que ayudaron a fundarlo, Ronald Coase y Gary Becker. En los últimos años, la economía se ha expandido al derecho constitucional, donde es igualmente prometedora.

Este texto describe el análisis positivo, normativo e interpretativo, pero enfatiza la interpretación, que es nueva para muchos economistas y fundamental para los abogados. Después de introducir estos modos de análisis, pasamos al derecho constitucional. Seis procesos hacen y sustentan constituciones: negociación, votación, delegación, atrincheramiento, adjudicación y ejecución. La teoría económica ilumina estos procesos y el derecho constitucional los refleja. No

podemos describir aquí toda la teoría económica relevante, pero proporcionamos algunas instantáneas. Posteriormente, aplicamos la teoría a problemas concretos del derecho constitucional. Demostramos lo que ha logrado el derecho constitucional y la economía y mostramos su potencial.

El derecho constitucional es un subconjunto importante del derecho público. El derecho público abarca todo, desde la separación de poderes hasta los límites de velocidad. Estamos escribiendo un libro sobre derecho público y economía que esperamos unifique y promueva el campo. Este texto tiene dos objetivos: presentar el derecho constitucional y la economía, y dar una vista previa a nuestro proyecto más amplio.

1. TRES MODOS DE ANÁLISIS

El análisis económico del derecho procede de tres modos: positivo, normativo e interpretativo. La teoría positiva predice cuándo surgirá la ley y cómo responderá la gente a ella. La teoría normativa evalúa el derecho de acuerdo con diferentes concepciones de eficiencia y distribución. La teoría interpretativa aplica la teoría positiva y normativa al significado de las leyes. Abordamos cada uno de estos modos por turno.

1.1. Teoría positiva

La economía proporciona una teoría del comportamiento para predecir cómo responde la gente a las leyes. Esta teoría sobrepasa la intuición al igual que la ciencia sobrepasa el sentido común. La respuesta de las personas siempre es relevante para hacer, revisar, derogar e interpretar leyes. Un famoso artículo sobre derecho y economía describe el derecho como una catedral: un edificio grande, antiguo, complejo, hermoso, misterioso y sagrado (Calabresi y Melamed, 1972, p. 1089). La

teoría del comportamiento de la economía se parece al mortero entre las piedras que sostienen el edificio.

La economía modela las elecciones de las personas como la colisión de gustos subjetivos y oportunidades objetivas. Tres conceptos subyacen en el análisis: preferencias, maximización y equilibrio. Los explicaremos brevemente. Los economistas asumen que cada actor puede clasificar los posibles beneficios a los que se enfrenta de mejor a peor. "Función de utilidad" es el nombre técnico que los economistas dan a una clasificación de preferencias. Por lo tanto, un consumidor puede clasificar los bienes: café gourmet, zapatos de gamuza, guantes de boxeo, autos veloces y píos de malvavisco. Un político puede clasificar cargos: concejal, alcalde, senador estatal, congresista y presidente. Un estudiante universitario puede clasificar carreras: contabilidad que promete riqueza o música que da placer.

Una clasificación debe satisfacer las propiedades formales, pero no es necesario asumir nada sobre las razones detrás de ella[1]. Los valores subyacentes a las preferencias pueden ser casi cualquier cosa: placer, amor, felicidad, autorrealización, riqueza, poder, prestigio, posición social, ecologismo, altruismo o justicia. Las preferencias reales de la gente son complicadas. Los economistas suelen hacer suposiciones para simplificar el análisis, como la suposición de que a las personas solo les importa su riqueza, poder y prestigio. Los modelos económicos de interés material son relativamente simples y convincentes. Sin embargo, el análisis no termina ahí. Los valores inmateriales influyen en las personas, incluidas las filosofías políticas, los compromisos morales y las creencias religiosas.

1 La lista habitual tiene tres propiedades formales: reflexividad, integridad y transitividad (Cooter y Ulen, 2012).

Habiendo discutido las preferencias, pasamos a su satisfacción. Cada persona tiene oportunidades limitadas para satisfacer sus preferencias. Cuando se clasifican las alternativas, una persona racional elige la alternativa de mayor rango que le permiten las oportunidades, satisfaciendo así sus preferencias en la mayor medida posible. Al restringir los valores individuales a alternativas clasificadas, los economistas pueden implementar las matemáticas de la maximización. La maximización de la utilidad constituye un modelo general de racionalidad instrumental. Es "general" porque se aplica a muchos fines posibles, "instrumental" porque se refiere al logro de fines y "racional" porque persigue fines en su máxima extensión.

Un modelo de maximización de la utilidad es un buen comienzo para predecir los efectos de una ley. Sin embargo, es un mal final, porque las personas reales son psicológicas, no lógicas. Después de predecir las consecuencias del comportamiento racional, un modelo económico debe ajustarse introduciendo la psicología. Muchas personas cometen errores sistemáticos en sus elecciones, especialmente debido a la presión del tiempo, la novedad y la incertidumbre. La "racionalidad disminuida" se refiere a un déficit en el comportamiento en comparación con la racionalidad totalmente instrumental. La racionalidad disminuida es el tema de gran parte de la psicología cognitiva y la economía del comportamiento. Los experimentos psicológicos muestran la importancia del encuadre, el anclaje, la prominencia, la heurística, la representatividad y la disonancia cognitiva[2].

Hasta ahora, hemos hablado del comportamiento individual. Ahora considere las interacciones entre individuos. Una interacción social tiende a persistir cuando nadie puede aumentar su satisfacción cambiando su comportamiento,

2 Para obtener una introducción accesible a estas ideas por parte de un académico que ayudó a desarrollarlas, consulte Kahneman (2011).

dado que los demás no cambian su comportamiento. Todos maximizan simultáneamente. Esta característica define un "equilibrio de Nash" (Nash, 1950, p. 48). Si otros conducen por el lado derecho de la carretera, no puedo aumentar mi satisfacción conduciendo por el lado izquierdo de la carretera. De hecho, el accidente resultante disminuirá mi satisfacción. Conducir por el lado derecho de la carretera es un equilibrio de Nash.

El derecho constitucional y la economía se refieren a los incentivos. La ley constitucional crea incentivos y la gente responde a ellos. Los incentivos positivos crean oportunidades para aumentar la satisfacción de preferencias, como cuando una constitución protege la expresión política. Los incentivos negativos crean oportunidades para evitar la frustración de preferencias, como cuando una ley sanciona la discriminación. Juntos, los incentivos positivos y negativos canalizan el comportamiento. La economía se especializa en predecir los efectos de los incentivos. Su modelo de incentivos combina la maximización de la utilidad para los individuos y los equilibrios de Nash para los grupos. Predice las causas y efectos de las leyes constitucionales.[3]

1.2. Teoría normativa

Algunas predicciones en economía se refieren al carbón quemado, a la producción de automóviles o al consumo de patatas. Estas predicciones describen sin evaluar. Se les llama apropiadamente 'valor neutral' o 'positivo'. En contraste, otras predicciones evalúan describiendo. Las descripciones utilizan términos moralmente cargados como pobreza, desempleo,

3 En un trabajo clásico, Buchanan y Tullock (1962) aplican la teoría económica positiva al derecho constitucional. Persson y Tabellini (2003) aplican los métodos empíricos de la economía positiva al derecho constitucional. Para otros trabajos sobre economía positiva y derecho constitucional, ver, por ejemplo, Voigt (1997); Voigt (2011).

estancamiento, contaminación, prosperidad, crecimiento, aire limpio. Las predicciones que evalúan mientras describen se denominan apropiadamente 'cargadas de valor' o 'normativas'[4].

Como los médicos que mejoran la salud, la economía sirve a valores que son ampliamente compartidos. El valor principal es la eficiencia. La mayoría de la gente está de acuerdo en que la eficiencia es mejor que la ineficiencia. El hecho de que una ley logre un objetivo de manera más eficiente que otra suele ser un argumento a su favor, independientemente del contenido de la ley. Los economistas evalúan las leyes con respecto a tres estándares de eficiencia: eficiencia de Pareto, eficiencia de costo-beneficio y eficiencia de bienestar social.[5] Un cambio en la ley se define como Pareto eficiente si alguien prefiere la nueva ley y nadie se opone a ella. La disposición a pagar por el cambio es positiva para alguien y negativa para nadie. Determinar la eficiencia de Pareto solo requiere información sobre el signo del cambio en las preferencias individuales.

La evaluación de muchas leyes requiere información sobre magnitudes, no solo signos. Asignar una magnitud a un cambio en las preferencias requiere medir costos y beneficios. Los beneficios y costos individuales generalmente se miden por la disposición a pagar, no por la capacidad de pago. Este método otorga el mismo valor a un dólar de beneficio para una persona rica y una persona pobre. La ponderación equitativa de dólares por ley a menudo tiene sentido. Sin embargo, muchas situaciones surgen en la ley donde la redistribución hacia la igualdad es un objetivo. En estas circunstancias, la ponderación equitativa de dólares no tiene sentido. Un legislador debería dar más peso a un dólar de beneficios para un pobre que para un

4 En una obra clásica, Hayek (1960) aplica la economía normativa al derecho constitucional.

5 Para una discusión más completa, ver Cooter (2000, pp. 32-37).

rico, para que la redistribución favorezca a los pobres, como ocurre con los pagos de la seguridad social.

Una larga tradición en el utilitarismo justifica dar más peso a los beneficios y costos de las personas relativamente pobres. Una persona pobre usa más dinero para satisfacer necesidades urgentes, como comida, refugio, ropa y transporte. Una persona rica usa más dinero para satisfacer deseos, como entretenimiento, ocio y belleza. Cuando gana aún más dinero, compra lujos: buena comida en restaurantes, ropa de diseñador y vacaciones de esquí. En consecuencia, la utilidad marginal que una persona obtiene de un dólar adicional disminuye a medida que obtiene más dinero. Un cheque de $ 1,000 aumenta la utilidad de una persona sin hogar en más de lo que aumenta la utilidad de una persona rica. Los programas públicos que transfieren riqueza de ricos a pobres, como los impuestos progresivos y la atención de la salud, pueden justificarse como un aumento del bienestar (Adler, 2016, p. 264).

1.3. Teoría interpretativa

El derecho y la economía positivos predicen los efectos de las leyes, y el derecho y la economía normativos los evalúan. En conjunto, estas dos actividades constituyen el "análisis económico del derecho". El análisis económico del derecho es muy parecido al análisis económico de otras actividades como el comercio internacional y la organización industrial. Sin embargo, predecir y evaluar los efectos de las leyes no es la primera habilidad de un abogado. Las leyes imponen requisitos a las personas y los clientes de un abogado quieren saber cuáles son. La primera habilidad de un abogado es decir lo que la ley exige que las personas hagan. Lo que la ley requiere que la gente haga es el contenido de la ley, o lo que la ley significa, o una explicación de la ley misma.

A veces, un abogado puede decirle a un cliente lo que exige la ley seleccionando y recitando un documento oficial, como un estatuto, reglamento o decisión judicial. La mayoría de los documentos legales, sin embargo, necesitan interpretación, no solo recitación. En la práctica del derecho, la interpretación se basa en diversas fuentes, como documentos oficiales (casos, reglamentos, estatutos, la constitución), la intención de los legisladores y la historia de la ley. Por razonamiento jurídico, el significado de la ley se encuentra en diversas fuentes. La práctica de la abogacía requiere dominar el razonamiento legal, no solo recordar reglas. El razonamiento jurídico es una disciplina humanística que se expresa en la práctica y la teoría jurídicas, y se aprende mediante la educación y la experiencia jurídicas.

El derecho interpretativo y la economía combinan la disciplina humanista del derecho y las ciencias sociales de la economía. Combinar dos metodologías diferentes es confuso. El razonamiento jurídico no se parece al razonamiento económico. La prueba en la corte no se parece a la prueba en una revista de economía. Sin embargo, combinar los dos es gratificante, porque las ciencias sociales aumentan el rigor en el razonamiento jurídico y el razonamiento jurídico aumenta la relevancia de las ciencias sociales para la vida pública.

La economía puede ayudar a la interpretación de diferentes formas. Aquí nos enfocamos en una forma. Una fuente importante de interpretación es el propósito de una ley. Las leyes tienen varios propósitos, como preservar la libertad, aumentar la igualdad, reducir la discriminación, preservar las especies en peligro de extinción, promover la prosperidad o reducir el desempleo. La interpretación correcta de una ley imprecisa suele ser la que mejor cumple su propósito. Los incentivos creados por una ley a menudo predicen sus efectos

mejor que cualquier otra cosa. Por lo tanto, el principio de interpretación de los incentivos sostiene que la interpretación correcta de una ley proporciona los mejores incentivos para cumplir su propósito.[6] La economía es la ciencia social que se especializa en incentivos. El principio de incentivo de la interpretación, en consecuencia, es un enfoque económico para interpretar el derecho.

Los economistas a veces piensan que la interpretación correcta de una ley, al menos para el common law, es la más eficiente[7]. Algunas leyes tienen como finalidad la eficiencia. Para estas leyes, la interpretación eficiente suele ser la interpretación correcta. Para ilustrar, diferentes personas a menudo tienen el mismo reclamo contra un acusado. La consolidación de los casos y la resolución de muchos de ellos a la vez reduce el número de demandas y promueve acuerdos. La reducción de los costos de los litigios es un propósito explícito de las leyes para la consolidación de casos. Según la Corte Suprema de los Estados Unidos, el "propósito principal" de las demandas colectivas es promover la "eficiencia y economía del litigio" (American Pipe & Const. Co. contra Utah, 1974). Interpretar las reglas de acción de clase para promover la eficiencia logra su propósito.

Sin embargo, la mayoría de las leyes tienen propósitos distintos a la eficiencia. El hecho de que una interpretación de una ley sea más eficiente rara vez implica que sea la interpretación correcta. La interpretación jurídica no se reduce a la evaluación económica. Para ilustrarlo, suponga que una ley prohíbe los "vehículos" en el parque.[8] ¿Puede la ciudad conmemorar a

6 El principio de incentivo se asemeja a un enfoque interpretativo desarrollado por van Aaken (2008), quien se basa en Alexy (2003).

7 Posner (1979), por ejemplo, ha abogado por la maximización de la riqueza como un principio para guiar las decisiones sociales, incluidas las decisiones de los tribunales.

8 Este ejemplo proviene de un famoso debate jurídico emtre Hart (1958) y

los héroes de guerra colocando un tanque en el parque? Un tanque en el parque tendrá costos y beneficios. Suponga que los beneficios superan los costos, por lo que la eficiencia requiere colocar el tanque en el parque. La interpretación eficiente del estatuto permite el tanque en el parque, pero no es así como suele funcionar la interpretación. Para interpretar el estatuto, los abogados estudiarán el texto, la historia y el propósito de la ley. Si estas fuentes indican que los redactores se opusieron a tener un tanque en el parque, entonces la interpretación correcta prohíbe el tanque, aunque permitirlo sería eficiente.

El principio de incentivo de la interpretación permite otros propósitos además de la eficiencia.[9] Combina la disciplina humanística del derecho y las ciencias sociales de la economía. El razonamiento legal es necesario para identificar el propósito de una ley, cualquiera que sea. El razonamiento económico es necesario para predecir hasta qué punto las interpretaciones alternativas cumplen los propósitos de la ley[10].

El principio de incentivo se centra en el significado de las leyes, no en los conflictos entre ellas. La Constitución de los Estados Unidos protege la libertad de expresión y la libertad de religión. Estos propósitos chocan cuando el estado regula el discurso para facilitar ceremonias religiosas como los

Fuller (1958).

9 Estamos de acuerdo con van Aaken (2008) en que "el análisis económico en el derecho constitucional gana relevancia ... si los objetivos y principios de una sociedad determinada" (s. p.) en lugar de la eficiencia económica "se aceptan como los criterios relevantes para juzgar las leyes" (s. p.).

10 El principio de incentivo no ignora los materiales legales (texto, estructura, historia). Los usa para identificar el propósito de la ley. También los utiliza para identificar los medios legalmente permitidos para lograr el propósito de la ley. Si los materiales revelan un medio singular para lograr el propósito de la ley, entonces esos medios gobiernan y el principio de incentivo no brinda orientación. Si los materiales revelan múltiples medios, como cuando la ley es ambigua o vaga, entonces el principio de incentivo guía la elección entre ellos.

funerales.[11] ¿Cómo deberían los tribunales abordar conflictos legales como este? Los tribunales pueden utilizar la economía para optimizar los valores legales en competencia del mismo modo que los banqueros pueden utilizar la economía para optimizar las inversiones. Apoyamos la optimización.[12] Sin embargo, la optimización es vaga en abstracto. Dirigir a los jueces a 'equilibrar los valores legales utilizando la economía' no es más preciso que dirigir a los jueces a 'equilibrar los valores legales'. El principio de incentivo opera en un nivel más bajo de abstracción, uno más útil para jueces y abogados. Su objetivo es sustituir las directivas vagas por directivas precisas. Más adelante daremos algunos ejemplos.

En suma, el razonamiento jurídico identifica los propósitos, la economía predice su cumplimiento mediante interpretaciones alternativas y su combinación da como resultado la interpretación correcta. El modelo de incentivos en economía es poderoso para la interpretación legal, independientemente de si el propósito de una ley es la eficiencia o algún otro valor. La interpretación económica es tan amplia o estrecha como los propósitos de una ley. El principio de incentivo de la interpretación no tiene una conexión necesaria con las mercancías, el libre intercambio o el capitalismo. Dado que los incentivos no se limitan al material, el mercado o el interés propio, tampoco lo es la interpretación económica de la ley.

2. PROCESOS CONSTITUCIONALES

El derecho público es producto de procesos fundamentales: negociación, votación, delegar, atrincherar, adjudicar y hacer cumplir. Describimos estos procesos y utilizamos la economía para analizarlos. La comprensión de estos procesos ilumina las

11 Por ejemplo, el estado estadounidense de Nebraska prohibió los piquetes a menos de 500 pies de los funerales (Kenning, 2017).

12 Para un argumento convincente sobre la aplicabilidad de la optimización económica al derecho constitucional, véase Aaken (2008).

leyes que producen. En aras de la brevedad, nos concentramos en dos procesos, negociación y votación.

2.1. Teoría de la negociación

La negociación impregna al gobierno: las naciones en guerra negocian la paz, las partes rivales enmendar la constitución, dos cámaras del Congreso concilian diferentes proyectos de ley, un panel judicial regatea una decisión, etc. Los legisladores negocian entre sí porque las negociaciones exitosas pueden beneficiarlos, al igual que los sellos comerciales pueden beneficiar a los coleccionistas. Cuando los legisladores representan bien a sus electores, las negociaciones exitosas benefician a la sociedad.

Según el Teorema de Coase, las negociaciones asignarán los derechos legales de manera eficiente, siempre que los costos de transacción no obstaculicen el proceso de negociación (Coase, 1960).[13] Desarrollamos el teorema con un ejemplo. Supongamos que un tribunal permite que un club nocturno toque música después de la medianoche. Al operar después de la medianoche, la discoteca gana $ 500 y la vecina sufre una pérdida por ruido que ella valora en $ 100. Por lo tanto, operar produce un valor neto de $ 400, mientras que no operar produce un valor neto de $ 0. La discoteca funciona. Esto es más eficiente que no operar, lo que produciría $ 0 cada uno y, por lo tanto, $ 0 en total. Bajo el 'derecho del club', el club nocturno operará y ganará $ 500 y el vecino sufrirá una pérdida de $ 100.

Reconsidere el escenario con una regla legal diferente, 'derecho del vecino'. El tribunal prohíbe que la discoteca opere después de la medianoche a menos que la vecina renuncie a su derecho a permanecer en silencio. Si el vecino y el dueño de la discoteca no pueden negociar —quizá hablan idiomas

13 El teorema de Coase se aclara y desarrolla Cooter (1982).

diferentes, o tal vez están comprometidos en un amargo divorcio—, la discoteca cerrará a la medianoche. Esto es ineficaz. Si pueden negociar, el club nocturno podría pagarle al vecino, digamos, $ 300 por permiso para operar después de la medianoche. El vecino ganaría $ 200 ($ 300 en efectivo menos $ 100 en daños por ruido) y el club nocturno obtendría $ 200 ($ 500 en ganancias menos $ 300 pagados al vecino). Ambas partes prefieren este trato a ningún trato. Operar es más eficiente que no operar.

El teorema de Coase generaliza este ejemplo. Si los costos de transacción de la negociación son bajos, la discoteca funcionará, prevalecerá el resultado eficiente, ya sea que la ley sea 'el derecho del club' o el 'derecho del vecino'.

Como se afirma convencionalmente, el Teorema de Coase se refiere a las negociaciones sobre los derechos de bienes privados: vallas, seguros, computadoras, automóviles, etc. ¿Qué pasa con las negociaciones sobre las leyes públicas? La negociación sobre las leyes ocurre entre ejecutivos, legisladores, reguladores, administradores, miembros de comités, comisionados, cabilderos, grupos de interés e incluso algunos jueces. Podemos reformular el teorema de Coase para aplicarlo a las leyes públicas. El Teorema de Coase Público afirma que a medida que los costos de transacción de la negociación entre legisladores se acerquen a cero, cooperarán entre sí y asignarán derechos públicos a los legisladores que más los valoren.[14] Si los legisladores representan bien a sus electores, su cooperación beneficiará a la sociedad.

En conjunto, las formas pública y privada del Teorema de Coase tienen una implicación para la elaboración de leyes: las negociaciones privadas y las leyes públicas a menudo se

14 Una propuesta similar tiene Cooter (2000, p. 53).

sustituyen como soluciones a los problemas de cooperación. Considere el ejemplo de la discoteca y el vecino. Si pueden negociar en privado, cooperarán haciendo un acuerdo privado: el club nocturno paga al vecino y el vecino no se queja del ruido. Si no pueden negociar en privado, el vecino puede exigir restricciones de ruido al ayuntamiento. Si el costo de la negociación entre los concejales de la ciudad es bajo, y si son representativos, brindarán la solución eficiente a la disputa.

He aquí otro ejemplo. Emily es dueña de una fábrica de cemento y Frank es dueño de una granja adyacente. El polvo de la fábrica de Emily contamina las cosechas de Frank, y los tractores de Frank congestionan la carretera, impidiendo los camiones de Emily. Si los costos de transacción de la negociación privada son bajos, Emily y Frank pueden llegar a un acuerdo en el que Emily reduce el polvo y Frank reduce la congestión. Si los costos de transacción de la negociación privada son altos y las partes no logran llegar a un acuerdo, Frank puede exigir regulaciones de contaminación y Emily puede exigir regulaciones de congestión. Los legisladores representativos proporcionarán la solución eficiente si sus costos de negociación son bajos.

Estos ejemplos dan lugar a una generalización: una negociación privada exitosa reduce la presión por nuevas leyes y una negociación privada fallida aumenta la presión por nuevas leyes. Si la negociación privada fracasa, la ley puede responder reduciendo los costos de transacción o imponiendo una solución. Así, un tribunal reduce los costos de transacción cuando empuja a una pareja que se divorcia a una mediación e impone una solución cuando otorga la custodia de los hijos de la pareja a uno de los padres. En el caso de Emily y Frank, la ley reduce los costos de transacción cuando hace cumplir los contratos que les obligan a cumplir sus promesas mutuas, e impone una solución cuando regula la congestión y el polvo.

Se aplican las mismas soluciones cuando fracasa la negociación pública. Considere el problema de las externalidades legales. Surgen cuando la ley tiene efectos más allá de las fronteras del gobierno. Para ilustrarlo, imagine la ley de Nebraska sobre los corrales de engorda. Los corrales de engorde aportan beneficios y costos a Nebraska, e imponen costos a los estados a favor del viento. Es de suponer que Nebraska no tiene en cuenta los costos que sus corrales de engorda imponen a otros. Al igual que las externalidades del mercado, las externalidades legales causan ineficiencia: Nebraska permite demasiados cebaderos. La escala de ineficiencia depende del alcance de la ley. Si los corrales de engorda en Nebraska afectan a Iowa, la ley de Nebraska causará algún daño (permite demasiados corrales de engorde). Si los corrales de engorda en Nebraska afectan a docenas de estados, la ley de Nebraska causará un gran daño (permite demasiados corrales de engorde).

¿Qué puede curar las externalidades legales? La negociación ofrece una solución. Suponga que la ley de Nebraska solo afecta a Iowa. Si los costos de transacción son bajos, Nebraska e Iowa pueden llegar a un acuerdo en virtud del cual Iowa paga a Nebraska y Nebraska reduce sus corrales de engorde. Suponga que los corrales de engorda de Nebraska afectan a los otros 49 estados. Ahora los costos de transacción son altos; 50 estados lucharán por llegar a un acuerdo. Si la negociación no puede resolver las externalidades legales, la internalización puede hacerlo. La expansión de las fronteras de un gobierno hace que los efectos externos sean internos. Si Nebraska y los otros 49 estados no pueden negociar, pueden fusionarse. Si un solo estado abarca todos los lugares, sus leyes no tienen externalidades. El nuevo estado internaliza los efectos de su ley. En este ejemplo, el nuevo estado es el gobierno federal.

En resumen, si fracasa la negociación entre estados, el gobierno central puede responder reduciendo los costos de transacción o imponiendo una solución. La Constitución autoriza a los estados a hacer pactos interestatales, a menudo sin el consentimiento del Congreso. Esto reduce los costos de transacción entre Nebraska y sus vecinos. El gobierno federal puede imponer una solución adelantándose a la ley de Nebraska con regulaciones federales sobre corrales de engorda.

Los gobiernos más grandes implican menos externalidades legales, entonces, ¿por qué no depositar todo el poder en un gobierno más grande? Los gobiernos más grandes tienen una desventaja: carecen de información sobre asuntos locales. Para explicar esta idea, considere la distinción entre bienes públicos nacionales y locales. La defensa nacional beneficia a todos dentro de las fronteras de la nación, convirtiéndola en un bien público nacional. Por el contrario, Central Park en Manhattan beneficia principalmente a las personas que viven o trabajan cerca, lo que lo convierte en un bien público local. La congestión en el puente Golden Gate daña principalmente a los viajeros en San Francisco, lo que lo convierte en un mal público local.

En comparación con las personas no afectadas, las personas afectadas por una ley tienen más razones para informarse sobre ella e influir en ella. Por lo tanto, es más probable que las personas afectadas emitan votos informados, monitoreen a los políticos, se impongan impuestos, diseñen regulaciones óptimas y realicen los actos de ciudadanía que hacen que la democracia funcione. Las consideraciones de información y motivación implican una prescripción para la asignación del poder gubernamental llamado principio de internalización: asignar poder a la unidad más pequeña de gobierno que internalice los efectos de su ejercicio.[15]

15 Olson (1969) propuso una idea similar, el "principio de equivalencia fis-

El principio de internalización proporciona una guía para el diseño del gobierno. Si un bien público es nacional, o casi, el gobierno central debe proporcionarlo. El gobierno central debería recaudar ingresos y utilizarlos para suministrar bienes públicos nacionales. De manera equivalente, si una externalidad negativa es nacional, o casi, el gobierno central debería controlarla. Si los corrales de engorda de Nebraska afectan a todo el país, el gobierno federal debería regularlos. Por el contrario, si un bien público es local, como un pequeño parque urbano, el gobierno local debe suministrarlo. El financiamiento para el parque debe provenir de una fuente local, como un impuesto comunitario, que afecta principalmente a los beneficiarios del parque y no a los no beneficiarios. Asimismo, los gobiernos locales deben regular los males públicos locales. Si los corrales de engorda en Nebraska solo afectan al estado, Nebraska debería regularlos.

2.2. Solicitudes de negociación

Hemos esbozado algunas relaciones entre la teoría de la negociación y el derecho. A continuación, aplicamos la teoría de la negociación a un problema concreto de interpretación constitucional: la asignación vertical de autoridad. Muchos países dividen el poder entre unidades de gobierno nacionales, regionales y locales. En los Estados Unidos, la división de poder entre los gobiernos federal y estatal se llama federalismo. El Artículo I, Sección 8, de la Constitución de los Estados Unidos enumera los poderes del gobierno federal. Si un poder no está listado en el Artículo I, Sección 8, el gobierno federal no puede ejercerlo. Los poderes no delegados al gobierno federal están reservados a los estados. Por lo tanto, el Artículo I, Sección 8, asigna poder entre los gobiernos federal y estatal. Aquí está su texto:

cal", según el cual el alcance del gobierno para las finanzas debería ser equivalente a los efectos del bien público. La idea también se asemeja al principio de subsidiariedad practicado en la Unión Europea.

El Congreso tendrá poder para:

1. Establecer y recaudar impuestos, derechos, impuestos y arbitrios, para pagar las deudas y proporcionar la defensa común y el bienestar general de los Estados Unidos; pero todos los derechos, impuestos e impuestos especiales serán uniformes en todo Estados Unidos;

2. Pedir dinero prestado a crédito de los Estados Unidos;

3. Regular el comercio con las naciones extranjeras y entre los varios estados y con las tribus indígenas;

4. Establecer una regla uniforme de naturalización y leyes uniformes sobre el tema de las quiebras en todo Estados Unidos;

5. Acuñar moneda, regular su valor y de moneda extranjera, y fijar la norma de pesos y medidas;

6. Disponer el castigo por falsificación de valores y moneda corriente de los Estados Unidos;

7. Establecer oficinas de correos y carreteras de correos;

8. Promover el progreso de la ciencia y las artes útiles, asegurando por tiempo limitado a los autores e inventores el derecho exclusivo sobre sus respectivos escritos y descubrimientos;

9. Constituir tribunales inferiores a la Corte Suprema;

10. Definir y sancionar la piratería y los delitos graves cometidos en alta mar y los delitos contra el derecho de gentes;

11. Declarar la guerra, otorgar cartas de marca y represalia, y establecer reglas sobre capturas en tierra y agua;

12. Para levantar y apoyar ejércitos, pero ninguna asignación de dinero para ese uso será por un período superior a dos años;

13. Proporcionar y mantener una marina;

14. Elaborar normas para el gobierno y regulación de las fuerzas terrestres y navales;

15. Disponer el llamado a la milicia para ejecutar las leyes del sindicato, reprimir insurrecciones y repeler invasiones;

16. Para organizar, armar y disciplinar a la milicia, y para gobernar la parte de ella que pueda ser empleada al servicio de los Estados Unidos, reservando a los estados, respectivamente, el nombramiento de los oficiales y la autoridad de entrenar a la milicia según la disciplina prescrita por el Congreso;

17. Ejercer legislación exclusiva en todos los casos, sobre el Distrito (que no exceda las diez millas cuadradas) que, por cesión de estados particulares y aceptación del Congreso, se convierta en la sede del gobierno de los Estados Unidos y ejerza como autoridad sobre todos los lugares adquiridos con el consentimiento de la legislatura del estado en el que se encuentren, para la construcción de fuertes, revistas, arsenales, astilleros y otros edificios necesarios; - y

> 18. Hacer todas las leyes que sean necesarias y apropiadas para llevar a la práctica los poderes anteriores y todos los demás poderes conferidos por esta Constitución al gobierno de los Estados Unidos, o a cualquier departamento o funcionario del mismo. (Constitución de Estados Unidos, 1787, Art. I, s. 8)

Para muchas personas, estos poderes parecen una mezcolanza. ¿Por qué el Congreso tiene autoridad sobre cosas como quiebras (cláusula 4), oficinas de correos (cláusula 7) y las 'artes útiles' (cláusula 8)? ¿Y qué significan las cláusulas? Responder a estas preguntas requiere interpretación. Los abogados y jueces han interpretado (y en ocasiones reinterpretado) muchas de las cláusulas. Nos centramos en la interpretación de una cláusula fundamental para el federalismo: la Cláusula de Bienestar General.

La cláusula 1 faculta al Congreso a "velar por la defensa común y el bienestar general de los Estados Unidos". La defensa común se explica principalmente por sí misma, pero ¿qué pasa con el bienestar general? En el siglo XIX, los legisladores pensaban que la cláusula era bastante limitada. Como presidente, Madison vetó un proyecto de ley para financiar carreteras y canales porque, en su opinión, el Congreso carecía de autoridad constitucional para hacer tales "mejoras internas" (Brest et al., 2006, p. 83). Muchas décadas después, la Corte Suprema en Estados Unidos v. Butler (1936, pp. 64-66) en desacuerdo. El Tribunal sostuvo que la Cláusula de Bienestar General otorga al Congreso amplia autoridad para gastar el dinero que recauda mediante impuestos. Por lo tanto, el Congreso puede cobrar impuestos a los ciudadanos para pagar cosas como carreteras, canales y programas de Seguridad Social.

La Cláusula de Bienestar General otorga al Congreso un amplio poder adquisitivo, pero no otorga poder regulatorio. La interpretación de la cláusula para otorgar poderes regulatorios haría superfluo el resto del Artículo I, Sección 8. ¿Por qué molestarse en otorgar poder sobre quiebras en la cláusula 4 y oficinas de correos en la cláusula 7 si el Congreso ya tiene ese poder (y mucho más) en la cláusula 1? Considere el equilibrio entre el poder federal y estatal. Se supone que el gobierno federal ejerce algún poder, no todos. La interpretación de la cláusula 1 para otorgar autoridad reguladora general parecería otorgar al gobierno federal todo el poder. Como escribió la Corte en Butler, interpretar la cláusula de esta manera convertiría a los Estados Unidos en "un gobierno de poderes generales e ilimitados, a pesar de la posterior enumeración de poderes específicos" (Estados Unidos v Butler, 1936) (citado por Story, 1905, p. 907)

La interpretación de la Corte puede parecer acertada, pero crea problemas prácticos. Gastar y regular a menudo son intercambiables. Para proteger los humedales, el gobierno puede subsidiar su uso sostenible (gasto) o sancionar a las personas que los destruyan (reglamentando). Además, la interpretación de la Corte no otorga autoridad al Congreso para abordar problemas nacionales como una pandemia. ¿Se puede interpretar que la Cláusula de Bienestar General otorga al Congreso algún poder regulatorio, pero no todo el poder regulatorio?

Creemos que la respuesta es sí.[16] Reconsidere las cláusulas del Artículo I, Sección 8, a través de la lente de la teoría de la negociación. Muchas de las cláusulas abordan externalidades legales como la defensa. El gasto en defensa de un estado protege a otros estados. Como ocurre con los corrales de engorde,

16 Este análisis es de Cooter y Siegel (2010, p. 115).

esta externalidad generará ineficiencia (en este caso muy poca defensa). Las cláusulas de defensa facultan al gobierno federal para imponer una solución: la defensa nacional, en contraposición a la defensa estado por estado. Las cláusulas sobre oficinas de correos, quiebras, propiedad intelectual, mercados nacionales, todas ellas facultan al gobierno federal para imponer soluciones a los estados cuando no pueden resolver los problemas de acción colectiva por sí mismos.

¿Qué pasa con la Cláusula de Bienestar General? Al interpretar las leyes, los tribunales a menudo usan un principio llamado '*ejusdem generis*', que en latín significa 'del mismo tipo'.[17] *Ejusdem generis* aclara el significado de los términos generales en una lista. Por ejemplo, considere una ley que prohíbe 'automóviles, camiones, motocicletas y otros vehículos' en la vía pública. *Ejusdem* generis ordena a los tribunales que lean "otros vehículos" de manera coherente con los términos "automóviles", "camiones" y "motocicletas". Así, los tractores cuentan como 'otros vehículos' prohibidos en el camino porque son pesados, ruidosos y motorizados como los demás. Las patinetas y las bicicletas no tienen estas características, por lo que no cuentan como "otros vehículos".

Aplicado a la Constitución, ejusdem generis ordena a los tribunales que lean la Cláusula de Bienestar General, que es una cláusula general, consistente con las cláusulas específicas del Artículo I, Sección 8. Esas cláusulas facultan al gobierno federal para actuar en situaciones que involucren externalidades interestatales. Por lo tanto, se puede interpretar que la Cláusula de Bienestar General autoriza al Congreso a actuar sobre las externalidades interestatales cuando los costos de transacción de la negociación entre los estados son altos y el

17 Véase, por ejemplo, Nelson (2011, p. 87).

poder del Congreso no está autorizado por otra cláusula.[18] Para demostrarlo, supongamos que una enfermedad se extiende por todo el país. Los programas de vacunación en un estado tienen externalidades positivas y los estados no cooperan. El Artículo I, Sección 8, no autoriza explícitamente al Congreso a regular las enfermedades. Según nuestra interpretación, la Cláusula de Bienestar General autorizaría al Congreso a actuar.

Esta es una aplicación del principio de interpretación del incentivo. Ese principio nos dirige a comenzar por encontrar el propósito del federalismo en los Estados Unidos. Alexis de Tocqueville expresó la opinión de consenso cuando dijo que el sistema federal fue diseñado para combinar "las diferentes ventajas que resultan de la magnitud y la pequeñez de las naciones" (Tocqueville, 1862, p. 206). Habiendo identificado el propósito del federalismo, utilizamos la economía para satisfacer el propósito de la manera más eficiente. La ventaja de la 'pequeñez' es el conocimiento de los asuntos locales, por lo que los estados deberían tener autoridad cuando sus acciones no se derramen o los costos de transacción sean bajos. La ventaja de la 'magnitud' es la internalización, por lo que el gobierno federal debería tener autoridad cuando las acciones estatales se desborden y los costos de transacción son altos. La interpretación correcta del Artículo I Sección 8, de acuerdo con el principio de interpretación del incentivo, equilibra las ventajas del conocimiento local y la internalización para encontrar la mejor combinación de descentralización y centralización.

18 Aquí hay otra declaración de la proposición: "El federalismo de acción colectiva considera que la Sección 8 autoriza al Congreso a abordar problemas de acción colectiva que los estados no pueden resolver" (Cooter y Siegel, 2010, p. 172).

2.3. Teoría del voto

En una democracia, los ciudadanos votan por los legisladores, los legisladores votan sobre los estatutos, los jueces votan en paneles cuando interpretan las leyes y los jurados votan cuando deciden los casos. A veces, los ciudadanos votan en un referéndum sobre una ley, como cuando los habitantes de Colorado votaron para legalizar la marihuana. Algunas personas esperan que votar en las Naciones Unidas reemplace a la guerra, como cuando el Consejo de Seguridad vota para sancionar a los países por violar el derecho internacional. Votar es fundamental para la democracia.

Comenzamos a desarrollar una teoría del voto con un ejemplo simple. Imagina tres votantes: Harry, Larry y Mary. Tienen diferentes preferencias sobre la tasa impositiva. Específicamente, Harry prefiere una tasa alta a una tasa moderada y prefiere una tasa moderada a una tasa baja. Larry prefiere una tasa baja a una tasa moderada y prefiere una tasa moderada a una tasa alta. A continuación, se muestra un resumen de sus preferencias:

Harry: alto> moderado> bajo

Larry: bajo> moderado> alto

María: moderada> alta> baja

Los votantes votan sobre las tasas impositivas alternativas utilizando la regla de la mayoría. La mayoría, Harry y Mary, prefieren moderada a baja, y la mayoría, Larry y Mary, prefieren moderada a alta. Así, prevalece la tasa moderada.

En este ejemplo, los votantes establecen la tasa impositiva. En realidad, los votantes suelen elegir representantes

que establecen la tasa impositiva. Suponga que dos candidatos compiten por los votos de Harry, Larry y Mary. Cada candidato elige una plataforma sobre impuestos. En esta circunstancia, la plataforma 'impuestos moderados' superará a cualquier otra plataforma. Para ver por qué, suponga que el primer candidato apoya impuestos moderados y el segundo apoya impuestos altos. Una mayoría, Larry y Mary, votarán por el primer candidato, por lo que ella gana. Considere el caso contrario. El primer candidato apoya impuestos moderados y el segundo apoya impuestos bajos. Una mayoría, Mary y Harry, votarán por el primer candidato, así que nuevamente ella gana. El candidato que descubre y anuncia la plataforma 'impuestos moderados' es inmejorable.

Tenga en cuenta algunas características de este ejemplo. Primero, la plataforma ganadora es la preferida por Mary. Mary está en el medio de la distribución de preferencias en el sentido de que el impuesto preferido por un votante es más alto y el impuesto preferido por un votante es más bajo. María es el votante medio. En segundo lugar, todos los votantes tienen preferencias únicas. Esto significa que cada votante tiene una única tasa impositiva ideal y, a medida que la plataforma se mueve desde ese punto, ya sea más bajo o alto, la utilidad del votante disminuye. En tercer lugar, los votantes emiten votos sobre un solo tema de política: las tasas impositivas. Cuarto, los votantes hacen una elección por parejas. Eligen entre dos y solo dos opciones, la primera y la segunda candidata.

Ahora podemos establecer el equilibrio de la votación. Cuando los votantes tienen preferencias de un solo punto y cuando emiten votos sobre un solo tema de política, el punto ideal del votante medio derrota a todas las demás plataformas potenciales en la votación por pares bajo la regla de la mayoría. Este es el teorema del votante mediano (Hotelling, 1929, p. 41;

Downs, 1957). Implica que, desde cualquier posición inicial, las plataformas gravitarán hacia el centro. Los votantes pueden hacer elecciones por pares hasta que alcancen el punto ideal del votante mediano, y luego cesará el cambio. La mediana es el equilibrio.

Este teorema es poderoso debido a su generalidad. No importa si hay unos pocos votantes o millones, si los votantes están motivados por el interés propio o el bien público, o si los votantes tienen preferencias fuertes o débiles. Si se satisfacen los requisitos del teorema del votante mediano, gana la plataforma ideal del votante mediano.

Cuando se cumplen las condiciones del teorema del votante mediano, la regla de la mayoría conduce a un equilibrio estable único. Sin embargo, puede surgir una situación en la que no exista equilibrio. Suponga que las preferencias de los votantes se ven así:

Harry: alto> moderado> bajo

Larry: bajo> alto> moderado

María: moderada> baja> alta

Dos candidatos que compiten por el mismo escaño deben elegir una plataforma fiscal que atraiga a estos votantes. Se enfrentan a una tarea imposible. Para ver por qué, aplique la regla de la mayoría para votar entre estas tres alternativas. Harry y Larry prefieren alto a moderado, Harry y Mary prefieren moderado a bajo, y Larry y Mary prefieren bajo a alto. Como grupo, las preferencias de los votantes se pueden resumir así: alto> moderado> bajo> alto. La votación por mayoría se ejecuta en círculo. El nombre de la votación circular es intransitividad. Cuando las preferencias de los votantes son intransitivas, la

votación no tiene equilibrio. En lugar de converger en la política ideal del votante medio, la votación se realiza en círculos[19].

Para generar intransitividad, relajamos el supuesto de preferencias de un solo pico. En este ejemplo, Larry tiene preferencias de doble punta. Si graficara su utilidad en función de la tasa impositiva, alcanzaría un pico en el nivel bajo, disminuiría a medida que la tasa se moviera a moderada y luego aumentaría nuevamente cuando la tasa se moviera a alta.

Las preferencias de doble punta pueden ser poco comunes en la realidad. Otra fuente de intransitividad es común en la realidad: múltiples problemas. Suponga que los votantes son legisladores y no votan solo sobre los impuestos. Votan un proyecto de ley sobre impuestos, financiación escolar, vacunas, aviones de combate, puentes y control de la natalidad. Está prácticamente garantizado que votar sobre múltiples cuestiones producirá intransitividad (McKelvey, 1976, p. 472). Los legisladores votan habitualmente sobre múltiples temas. En 2014, el Congreso de los EE. UU. Aprobó un proyecto de ley de 1.600 páginas que aborda la inmigración, las enfermedades tropicales, el gasto militar, el aborto, la venta de armas y otros asuntos.

Aunque votar sobre múltiples temas es común, no observamos habitualmente a los legisladores votando en círculos. La intangibilidad es inevitable en principio, pero rara de hecho. ¿Por qué tanta estabilidad? Dos mecanismos evitan que ocurra intransitividad en la práctica: el establecimiento de la agenda y la negociación. Empezamos por el primero. La votación suele estar estructurada por reglas de procedimiento, como las Reglas de orden de Robert. Dichos procedimientos

19 Esta discusión ilustra la 'paradoja de Condorcet', que fue desarrollada por Condorcet (1785).

generalmente incluyen una prohibición de reintroducir una propuesta rechazada. Si las propuestas derrotadas no se pueden reintroducir, no puede ocurrir un ciclo interminable de votaciones. En lugar de un ciclo de votación interminable, la votación termina cuando termina la agenda.

Dada una agenda fija, prevalece la propuesta que gane la última votación. La propuesta que gana en la última votación suele ser predecible a partir de la propuesta que gana en la penúltima votación, y así sucesivamente. Por lo tanto, el ganador final en el conjunto intransitivo puede ser determinado por quien establezca la agenda. Para demostrarlo, suponga que Larry establece la agenda. Empareja las alternativas alto y moderado en la primera votación. Altas derrotas moderadas. Luego empareja las alternativas bajo y alto en la segunda votación. Baja derrota alta. Debido a la regla contra la reintroducción, la propuesta baja entra en vigor. Votar no produce intransitividad y Larry obtiene exactamente lo que quiere.[20]

Considere la segunda solución a la intransitividad: la negociación.[21] En general, la votación no tiene en cuenta la intensidad de la preferencia. Por el contrario, la negociación brinda la oportunidad de expresar la intensidad de las preferencias. Una negociación exitosa entrega la política favorita de cada legislador sobre el tema que más le importa. Todos los votantes están mejor porque se satisface su deseo más intenso, y pueden preferir este resultado a cualquier otro resultado factible. El resultado es eficiente y estable.

Para demostrarlo, considere a Harry, Larry y Mary. Dado el segundo conjunto de preferencias anterior, votar produce

20 Sobre el poder del control de la agenda en el espacio multidimensional, ver McKelvey (1976, p. 472).

21 Para una descripción general de la conexión entre logrolling e intransitividad, con citas de la literatura, ver Mueller (2003, pp. 108-109, 118-119, 126-127).

intransitividad. Harry puede ofrecerle a Larry un trato: 'vote por impuestos altos como yo quiero, y votaré por un gasto alto en programas de reciclaje como usted quiere'. Si Larry favorece los programas de reciclaje, puede aceptar la oferta. Debido al trato, Larry vota por tasas impositivas altas en lugar de tasas impositivas bajas, rompiendo el ciclo intransitivo. La votación implementa un trato estable entre Harry y Larry. Después de negociar, los legisladores votan sobre varios temas, pero no hay resultados de intransibilidad.

La teoría del voto expone una línea divisoria en el gobierno: democracia mediana versus democracia de negociación.[22] La democracia mediana se refiere a un sistema que empodera al centro político para tomar decisiones colectivas. Para institucionalizar la democracia mediana, separe los diferentes temas políticos entre sí y vote sobre ellos de forma independiente. La mediana decide el voto. Por lo tanto, un referéndum de ciudadanos separa un tema para la decisión independiente de los votantes. La democracia mediana se promueve mediante iniciativas de votación, elección directa de un ejecutivo como el presidente de los Estados Unidos, distritos especiales para bienes públicos individuales como la educación e interpretación legal que responda al votante mediano (Gilbert, 2013, p. 1621).

La democracia de negociación se refiere a un sistema para tomar decisiones colectivas mediante un acuerdo negociado. Para institucionalizar la democracia de negociación, agrupe diferentes temas y decídalos simultáneamente. Los proyectos de ley ómnibus agrupan diferentes temas en la misma legislación. En comparación con la separación de temas, decidir varios temas al mismo tiempo facilita la negociación. Cuando

22 Esta distinción se desarrolla por Cooter (2000, pp. 361-363).

se realiza una votación, se implementa en la ley un trato que ya se cerró. La democracia de negociación es promovida por el bicameralismo, la presentación, los comités legislativos y la interpretación legal que responde a los legisladores fundamentales (McNollgast, 1992, p. 705).

La democracia de negociación permite que cada facción política se salga con la suya en el tema que más le importa. La negociación se da cuenta de las ganancias de los intercambios políticos. Sin negociación, las facciones políticas no pueden obtener lo que quieren y las ganancias de los intercambios políticos no se realizan. La desventaja de la democracia de negociación surge cuando las facciones políticas no pueden ponerse de acuerdo. Cuando la negociación falla, la votación no implementa un acuerdo político. Se convierte en una lucha de poder. En múltiples dimensiones de elección, la votación suele ser intransitiva. Los votantes giran en círculos o los que establecen la agenda imponen soluciones.

Cuando la negociación fracasa, la democracia mediana ofrece una cura. En lugar de que el que establece la agenda seleccione cualquier resultado que le plazca, el votante medio elige el resultado. La democracia mediana empuja a la ley hacia el centro político y produce resultados estables. La democracia mediana es como invertir en una acción segura que tiene un rendimiento moderado y predecible, mientras que la democracia de negociación es como invertir en una acción riesgosa que tiene un rendimiento potencialmente alto pero impredecible. Podemos enunciar las ideas como prescripción. Si los costos de transacción impiden la negociación, entonces vote. Si la intransibilidad impide votar, entonces regatee.

2.4. Solicitudes de votación

Ahora presentamos algunas aplicaciones de la democracia mediana y de negociación. Muchas constituciones otorgan a los ciudadanos el poder de hacer leyes ellos mismos utilizando iniciativas de votación y un referéndum. Normalmente, cualquier ciudadano puede proponer una iniciativa, por lo que no hay un programador. Una vez que se propone una iniciativa, los costos de transacción de la negociación entre miles de votantes son altos. Sin establecer una agenda o negociar, la votación de las iniciativas debería resultar en intransitividad. De hecho, votar sobre iniciativas a menudo produce resultados estables. Atribuimos esto a la regla de un solo sujeto.

La regla de un solo sujeto limita las iniciativas a un 'sujeto'. Al separar diferentes temas entre sí y forzar votos independientes en cada uno, la regla de un solo sujeto impone una democracia mediana en las iniciativas de votación (Cooter y Gilbert, 2010, p. 687). La ley se mueve hacia el centro político y se pega. La regla de un solo sujeto se aplica a iniciativas en los Estados Unidos y en países como Suiza y Ecuador.

A veces, la regla de una sola asignatura es fácil de aplicar. Supongamos que una iniciativa aborda la pena de muerte y los búhos manchados, o el sushi y los drones aéreos. Evidentemente, ambas iniciativas parecen tener dos temas, no un solo tema. Ahora considere un caso más difícil. Una iniciativa prohíbe el matrimonio entre personas del mismo sexo y las uniones civiles entre personas del mismo sexo. (Las uniones civiles son acuerdos contractuales que otorgan a las parejas algunos, pero no todos, los derechos y responsabilidades del matrimonio). Desde un punto de vista, la iniciativa contiene dos temas: el matrimonio y las uniones civiles. Desde otro punto de vista, la iniciativa contiene un solo tema: las relaciones. Si la iniciativa viola la regla, si se mantiene o cae, depende de cuán abstracta se categorice su contenido[23].

23 Sobre el problema de la abstracción, véase Lowenstein (2006, p. 803).

El problema de la interpretación de un solo tema es muy importante. Las iniciativas funcionan mejor cuando instancian la democracia media. La regla de un solo sujeto es el mecanismo principal para lograrlo. La regla no logra alcanzar la democracia mediana cuando los jueces no la aplican adecuadamente.

La economía ofrece un método para interpretar la regla de una sola asignatura (Cooter y Gilbert, 2010, p. 687). Anteriormente presentamos la teoría de la interpretación de incentivos. Según esta teoría, la interpretación correcta de una ley proporciona los mejores incentivos para cumplir su propósito. Para aplicar esta teoría, identificamos el propósito de la regla de un solo sujeto. Los tribunales están de acuerdo en que la regla tiene un propósito central: evitar el registro, lo que significa intercambio de votos.

¿Qué interpretación ofrece incentivos para cumplir ese propósito? Considere algunos conceptos. Un votante tiene preferencias separables por dos propuestas de políticas se convertirá en ley[24] . Imagine dos propuestas de pólizas, una sobre seguros de automóviles y otra sobre conflictos de intereses entre políticos. Para la mayoría de los votantes, su voto sobre la primera propuesta no se ve afectado por si la segunda se convierte en ley y viceversa. Por lo tanto, la mayoría de los votantes tienen preferencias separables por estas propuestas.[25]

24 Traducir preferencias en votos requiere una suposición sobre el comportamiento. Suponemos que los votantes votan simultáneamente sobre las iniciativas y descartan las elecciones futuras porque no pueden pronosticar la agenda. En consecuencia, los votantes votan con sinceridad, lo que significa que votan por cada propuesta que rinda al menos tanta utilidad como el status quo.

25 Este ejemplo involucra propuestas independientes. Un votante también tiene preferencias separables por dos propuestas de políticas cuando esas propuestas están débilmente unidas. Las propuestas se unen débilmente cuando se complementan o se sustituyen débilmente entre sí. Dos propuestas se complementan / sustituyen débilmente entre sí cuando la aprobación de la primera aumenta / disminuye el apoyo de un votante a la segunda, pero no tanto como para que su voto sobre la segunda dependa de

Un votante tiene preferencias inseparables por dos propuestas de políticas cuando no puede decidir cómo votar por una sin saber si la otra se convertirá en ley. Esto ocurre cuando las propuestas son fuertes complementos o sustitutos. Las propuestas son un fuerte complemento cuando un votante solo vota por una si está seguro de que obtendrá la otra. Las propuestas son fuertes sustitutos cuando un votante solo vota por una si está seguro de que no obtendrá la otra. Imagine una propuesta para reducir las tasas de impuestos a la propiedad y una propuesta para reducir el valor imponible de la propiedad. [26]Si un votante quiere reducir los impuestos a la propiedad, pero cree que aprobar ambas medidas tendría consecuencias desastrosas para el presupuesto, ese votante tiene preferencias inseparables. No puede decidir cómo votar la primera propuesta sin saber si la otra será aprobada.

Ahora pasemos a enrollar. El *logrolling* ocurre cuando los votantes intercambian votos. Imagínese un par de legisladores, A y B. A apoya más dinero para las escuelas, B apoya más dinero para la policía y ambos se oponen a la propuesta del otro. Suponga que A y B son decisivas, lo que significa que ninguna propuesta se aprobará sin el apoyo de ambos legisladores. Si A está de acuerdo en votar por la propuesta de B, y si B está de acuerdo en votar por la propuesta de A, entonces ambas propuestas pasan. A y B se han enrollado. La disputa ocurre cuando (1) dos o más propuestas que (2) tienen el apoyo de la minoría individualmente (3) obtienen el apoyo de la mayoría cuando se combinan, y (4) los miembros de la mayoría aceptan una propuesta que no les gusta para aprobar una propuesta que les gusta más.

si se aprue ba la primera. Una etiqueta más precisa para nuestro concepto es "preferencias suficientemente separables".

26 Los votantes a veces se enfrentan a situaciones como las que describimos. Este ejemplo se basa en las Medidas 9 y 11, que fueron votadas simultáneamente por los habitantes de Oregón en noviembre de 1986 (Gilbert y Levine, 2009, p. 415 tbl. A1).

Los votantes pueden registrarse cuando tienen preferencias separables, pero no pueden registrarse cuando tienen preferencias inseparables. Para ver por qué, vuelva a A y B. Suponga que tienen preferencias inseparables sobre las propuestas sobre la policía y las escuelas. Específicamente, ven las propuestas como fuertes sustitutos. Esto significa que apoyarán una de las propuestas solo si la otra propuesta no se aprueba. ¿Un proyecto de ley que combine las propuestas sobre policía y escuelas cumpliría con la definición de *logroll*? No, porque fallaría el tercer criterio anterior. Esta combinación no tendría el apoyo de la mayoría. Por supuesto, A y B son votantes decisivos y votarían en contra de esta combinación.

¿Qué pasa si A y B ven las propuestas sobre policía y escuelas como fuertes complementos? Esto significa que apoyarán una de las propuestas solo si la otra propuesta también se aprueba. ¿Un proyecto de ley que combine las propuestas sobre policía y escuelas cumpliría con la definición de logroll? No, porque fallaría el cuarto criterio anterior. A no aceptó algo que no le gustaba, algo que eliminaría del proyecto de ley si pudiera, para obtener algo que apoyara. Lo mismo ocurre con B. Ambos votantes querían ambas propuestas o nada.

Hemos demostrado que cuando los votantes tienen preferencias inseparables por dos propuestas, combinar esas propuestas no constituye un logrolling. ¿Qué pasa cuando los votantes tienen preferencias separables por dos propuestas? Regrese a nuestras suposiciones originales sobre A y B. A quiere más fondos para las escuelas. Apoyaría una propuesta para aumentar la financiación escolar, ya sea que aumente o no la financiación policial. B quiere más fondos para la policía. Ella apoyaría una propuesta para aumentar los fondos de la policía, ya sea que aumenten o no los fondos escolares. Tienen

preferencias separables sobre estos temas. La separabilidad les permite iniciar sesión. Pueden intercambiar votos para aprobar una combinación de propuestas que fracasarían por sí solas. A y B renuncian cada uno a algo para obtener algo a cambio.

Ahora podemos generalizar. La teoría del incentivo produce la siguiente interpretación de la regla de un solo sujeto: "propuestas de políticas separadas sobre las que la mayoría de los votantes tienen preferencias separables y propuestas de políticas unidas sobre las que la mayoría de los votantes tienen preferencias inseparables" (Cooter y Gilbert, 2010, pp. 714). Cuando los votantes tienen preferencias separables por dos propuestas, pueden votar esas propuestas de forma aislada. La combinación de las propuestas facilita el registro y viola la regla de un solo sujeto. Por el contrario, cuando los votantes tienen preferencias inseparables por dos propuestas, no pueden votar esas propuestas de forma aislada. Combinar las propuestas ayuda a los votantes y no facilita el registro, por lo que no viola la regla de un solo sujeto. Nuestra interpretación asegura que las iniciativas ejemplifiquen la democracia media.[27]

2.5. Otros procesos constitucionales

El derecho constitucional es producto de seis procesos fundamentales. Hemos analizado dos de ellos, la negociación y la votación, con cierto detalle. Decimos más sobre esos procesos y analizamos los otros —delegar, atrincherar, adjudicar y hacer cumplir— en nuestro libro. Aquí proporcionamos una instantánea de cada uno.

Delegar. En la mayoría de las democracias, los ciudadanos no hacen las leyes por sí mismos. En cambio, confían en los legisladores. En la mayoría de los sistemas judiciales, los tribunales

27 La evidencia empírica sugiere que nuestra interpretación es consistente con la práctica de los tribunales (Gilbert, 2011, p. 333).

inferiores no tienen precedentes. En cambio, dependen de tribunales superiores. Del mismo modo, el presidente de los Estados Unidos no hace cumplir los estatutos de derechos civiles y el alcalde de la ciudad no multa a los conductores imprudentes. Encomiendan al Departamento de Justicia y a la Policía realizar esta labor. En todo el gobierno, algunos funcionarios tienen el poder de tomar decisiones por otros. La delegación de poderes por ley es fundamental para el gobierno.

Los economistas modelan la delegación utilizando un marco principal-agente. La relación principal-agente se ha analizado intensamente en la teoría de juegos. Ese marco ilumina asuntos importantes en el derecho constitucional, como la representación, la corrupción y la delegación de autoridad de los políticos a los burócratas.[28]

Atrincherar. La ley es jerárquica, como el ejército. Las constituciones triunfan sobre los estatutos, los estatutos sobre los reglamentos y los reglamentos sobre el derecho consuetudinario. Para estabilizar la jerarquía, las leyes superiores suelen ser más difíciles de cambiar. Cuando una ley es difícil de cambiar, está arraigada. Muchas constituciones afianzan profundamente los poderes del ejecutivo y los derechos de las minorías, la legislación consolida levemente los estatutos que protegen a los funcionarios públicos de represalias por denunciar casos de corrupción ('denunciantes'), y la regulación no afianza los límites de velocidad en las carreteras. La teoría económica del voto se extiende al atrincheramiento. Usamos ese análisis para abordar temas como los derechos de las minorías y la elección entre enmiendas y convenciones constitucionales.[29]

28 Para una introducción, véase Cooter (2000, pp. 79-99).
29 Sobre enmiendas y convenciones, ver Gilbert (2017, p. 667-668).

Adjudicando. La ley requiere la interpretación de los tribunales y los tribunales suelen estar organizados en jerarquías. En los Estados Unidos, la Corte Suprema se encuentra en la cima de la pirámide, con tribunales de apelación y tribunales de primera instancia debajo. Los tribunales superiores delegan autoridad en los tribunales inferiores. A medida que un caso sube por la pirámide, los jueces individuales son reemplazados por grupos de jueces que votan para decidir los casos. Usamos las mismas teorías que se utilizan para analizar la delegación y el voto de los legisladores para analizar la delegación y el voto de los jueces. Aplicamos estas teorías a cuestiones de derecho constitucional como la independencia judicial, la discreción judicial, los métodos de interpretación constitucional y el desarrollo de la doctrina constitucional.

Hacer cumplir. Las industrias contaminan, los abogados malversan, los conductores aceleran y los empleadores discriminan por motivos de raza. El gobierno viola su propia constitución al maltratar a los presos. Las leyes tienen como objetivo disuadir malos comportamientos como estos, pero la mera promulgación de leyes suele ser insuficiente. Las leyes deben hacerse cumplir para que surtan efecto. Los economistas han desarrollado amplias teorías sobre la aplicación. Gran parte de este trabajo se centra en los palos: la amenaza de sanciones disuade el mal comportamiento. Pero las zanahorias, la promesa de subsidios por buen comportamiento, también funcionan. La aplicación también funciona informando a las personas y coordinando su comportamiento. Aplicamos las teorías económicas de la aplicación a cuestiones constitucionales como estas: "¿cómo se hacen cumplir los derechos contra los estados?" "¿Cuándo la transparencia promueve la legalidad?" "¿Cuándo la presión del gobierno de los Estados Unidos sobre los estados equivale a coerción inconstitucional?"

CONCLUSIONES

A partir de la década de 1960, el derecho y la economía revolucionaron el estudio del derecho privado. Sin embargo, ha tenido poco impacto en el derecho constitucional. Atribuimos este fracaso a tres fuentes. En primer lugar, los economistas se han centrado en el análisis positivo y normativo y han prestado escasa atención a la interpretación, que es primordial en el derecho constitucional. En segundo lugar, la interpretación de una ley depende de su propósito. Los propósitos del derecho privado a menudo se reducen a la economía normativa (eficiencia y distribución). En contraste, los propósitos del derecho constitucional rara vez se reducen a la economía normativa, o al menos no de la misma manera inmediata y manejable. Al interpretar las constituciones, los economistas deberían centrarse más en los propósitos articulados por los abogados y menos en la eficiencia del mercado. En tercer lugar, nadie ha escrito un libro accesible sobre derecho constitucional y economía para fundamentar el campo.

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Progressivity of marriage, history and new paradigms in Family Law

La progresividad del matrimonio, historia y nuevos paradigmas en el del Derecho de Familia

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ABSTRACT: Traditionally, the family model established in the Ecuadorian state was built on the fusion between Roman marriage and canon law, rooted in this concept since 1563, through the Council of Trent, which imposed the obligation to formalize the relationship between man and woman before the ecclesiastical authority and subject to the rites of that time. The aim of this work will show that today we have overcome these conditioning factors with the evolution of institutions such as the family, which has new perspectives and variations, due to demographic, economic, political, social, and cultural issues, etc.; promulgating the freedom to fully exercise the rights of people, and mainly, of those who make up a family group in diversity. Methodologically, an analytical-descriptive study is carried out of the main institutions addressed, such as the family, filiation, marriage, investigating from their beginnings until culminating with a current approach. After the argumentative development, we will address the conclusions that show specific aspects such as breaking schemes, confronting current situations and accepting with respect and without discrimination the new

forms of family constitution, from the current framework of marriage, thus determining its progressiveness and influence throughout Ecuadorian history in its social, public policy, cultural and other dimensions, in short, the development of our own society.

KEYWORDS: Family, discrimination, identity, marriage, sex.

RESUMEN: Tradicionalmente, el modelo de familia instaurado en el estado ecuatoriano se construyó sobre la fusión entre el matrimonio romano y el derecho canónico, enraizado este concepto desde el año 1563, a través, del Concilio de Trento, que imponía la obligación de formalizar las relaciones existentes entre varón y mujer ante la autoridad eclesiástica y sujetarse a los ritos de aquel entonces. El objetivo de este artículo evidenciará que hoy en día hemos superado estos condicionamientos con la evolución de instituciones como la familia, la cual tiene nuevas perspectivas y variaciones, que se debe a cuestiones demográficas, económicas, políticas, sociales y culturales, entre otros; promulgando la libertad del ejercicio pleno de los derechos de las personas, y principalmente, de aquellas que integran un grupo familiar en la diversidad. Metodológicamente, se realiza un estudio analítico-descriptivo de las principales instituciones abordadas como la familia, filiación, matrimonio; indagando desde sus inicios hasta culminar con un enfoque actual. Luego del desarrollo argumentativo, abordaremos las conclusiones que evidencian aspectos puntuales como el romper esquemas, afrontar situaciones de actualidad y aceptar con respeto y sin discriminación las nuevas formas de constitución familiar, desde el marco actual del matrimonio, determinando de esta manera su progresividad e influencia a largo de la historia ecuatoriana en sus dimensiones sociales, de políticas públicas, culturales, entre otros, en definitiva del desarrollo propio de nuestra sociedad.

PALABRAS CLAVE: Familia, discriminación, identidad, matrimonio, sexo.

CÓDIGO JEL: J12, J7

INTRODUCCTION

There are multiple aspects to consider from the point of view of family law and its focus on legal institutions such as filiation, voluntary recognition, and the right to an identity that are shown in various studies; the present study will not focus exclusively on the study of families but will establish a timeline of marriage to determine those variations and issues in the conjugal sphere that have given rise to the generation of the family, its typology and diversity.

To open a range of discussions on these issues would entail an endless amount of work, and it is necessary to indicate that we are currently continuing in the approach, discussion, and research from various spheres such as philosophical, dogmatic, research, pedagogical, social, public policy, among others, which from various approaches direct their studies like the present one.

When we refer to the family as the fundamental cell of society, from which several rights and obligations emerge between each of its members, a whole scaffolding of situations is generated that each legal system in a given country has been concerned or is concerned with resolving; nevertheless, the application of its internal regulations is also based on the international regulations of which they form part.

The institution of the family is undoubtedly a source of inspiration for various studies that lead to situations from which legal studies emerge in different areas and subjects, given

its diverse conformation. The mere fact of thinking that there is only one way of constituting a family, or to consider it as such to the integration of a man, a woman, ascendant children, and descendants, is to ignore its progress and evolution. Nowadays, families are presented in a variety of conformations and an infinity of connotations, which will occupy special attention in this work.

The customs, idiosyncrasies, beliefs, values, etc., of our Ecuadorian people, have instituted a conservative culture in most of its inhabitants; even more so when it comes to the formation of a family. Based on this fact, we ask ourselves, how are families born in Ecuador, what roots do they have? In these times we still allow that imposition, mental schemes and the weight of an absolutist and conservative society do not allow us to open our minds and move forward with the inclusion and acceptance of diversity. These are some of the questions and issues that will be addressed in the development of this article.

Advances in science have given rise to questions that as developing people is difficult for us to understand, but above all, they prevent us from accepting and stagnate us in positions that other legal systems would often consider retrograde and even adverse to the principles of international law; especially those that have to do with the inclusion and acceptance of these new forms in which families present themselves today.

But it is not only the fact of studying the family and its diversity that makes it convenient, for the sake of the development of the present work, to configure the event of the union of couples through the bond of marriage, to then conceive the fact that we are facing the birth of a type of family organization as a product of entering a marriage contract.

This study in the nineties, particularly in Ecuador, would

have generated an infinite number of questions because those were times when the stereotype of appearance, good customs, religion, but above all the refusal to accept a situation that is precisely the formation of a couple under the terms mandated by the laws of man and divinity, prevailed. I believe that today this vision as a people is changing and adapting to these new forms in which families are presented.

The passage of time has been the best ally in adapting behavior, overcoming barriers, and allowing the inclusion of what was once considered unacceptable. It can be observed, in a natural way, that they no longer cause astonishment, and the existing social questioning has gradually faded away, which leads us to think that we are becoming an open, inclusive society, willing to adapt to these diversifications, starting even from the conformation of the institution of marriage. The important thing is that this kind of study allows us to know and analyze points of view with which we share or also to generate discussions that give rise to the opening of spaces for dialogue that leads to the proposal of reform initiatives or projects in favor of social improvement that led to peaceful coexistence.

Knowing the institution of marriage leads us to analyze the conformation and acceptance of diverse families in Ecuador, although it is no longer a taboo; however, stigmas and resistance are still perceived, to a lesser extent, but they do exist. We hope that little by little they will be overcome, due to the frequency with which these types of family conformations are presented; supported also by studies on these aspects, preparing ourselves, discussing, promoting debates, contributions, in which the conclusions are beneficial and are also bearers of solutions and initiatives that allow a country such as ours to move forward.

The law is changeable, but it must adapt to the needs and

evolution of those it administers, of the principal, the people. But just as the law regulates people's relationships to achieve social peace, this society, in its diversity, must be open to innovation and development, that is, it must allow us to learn about the development of the institution of marriage and the forms of family conformation; although many still do not share or do not practice these conformations because of family customs and moral rules, they are not allowed to ignore them, but to learn about them, to respect them, without confrontation, censure or social scandal.

1. TYPOLOGIES OF THE FAMILY

The development of this work implies starting with a preamble, initially aimed at conceptualizing the family; thus, from the point of view of various doctrinaires, they indicate that it is based on kinship relations, while others consider it as a social institution that orients, regulates and grants cultural and social significance to reproduction and sexuality. It is difficult to agree on a single concept because, depending on the field of study, the social vision, the subject matter, etc., an infinite number of meanings can be given which, on many occasions, will coincide, involving aspects such as biological, social and legal aspects in general, which vary from one culture to another, making it difficult to include the family in a single definition, however, we will try to take as a basis some doctrinal criteria, studies, and essays which refer to it.

The family, as well as other institutions of the Ecuadorian legal system, has presented variations, due to the evolution over time, the circumstances of changes in state policy, the type of government, culture, society, and innovation itself. Globalization has even been a great promoter for the family to present itself in different forms or types.

To recapitulate, we will point out a definition by Palacio (2009) which refers to the family as the world par excellence with a diversity of immeasurable feelings, where there is room for the deepest emotions, affections, disaffections, relationships of trust, the certainty of what has been lived, with the treatment of issues that are formed and intertwined in response to the legal, moral, and economic obligations imposed by a parental fabric. In short, it can be argued that the family is one of the most intimate and effective spaces for the development of human beings.

Since the existence of modernity, families in Latin America have for the most part ceased to be traditional (mother, father, and children) and in the case of Ecuador, other models of composition are recognized, whether for economic, social, or gender reasons.

Article 67 of the Constitution of the Republic of Ecuador (2008) recognizes the family in its diversity and promotes its protection as the fundamental nucleus of society, guaranteeing it conditions that fully favor the achievement of its goals. Furthermore, a very important aspect to highlight in this normative article is the provision that families are constituted by legal or de facto ties and are based on equal rights and opportunities for their members.

The fact that a family is constituted by legal or de facto ties means that the Ecuadorian legislator, through this regulation, has sought the full exercise of the rights of persons; In this way, it not only included those who intertwine their relationships contractually but also recognizes de facto relationships, through the provisions of Article 68 of the Constitution, which refers to the de facto union, which in our country is considered a stable and monogamous union between two people free of marriage

and who form a de facto household, which will generate the same rights and obligations that families constituted by marriage have (Constitution of the Republic of Ecuador, 2008).

By the supreme norm, the conformation of families is considered legally, that is, through the institution of marriage, which is only allowed in Ecuador between a man and a woman. Not so the de facto union, given its constitutional provision that it is the union of two persons, which tacitly implies the acceptance of the de facto union of those persons of the same sex.

As we have been arguing, the institution of the family has undergone a legal evolution, mainly since 2008, where it is stated in a supreme norm such as the Constitution, that the family should receive the support, protection, and legal security of the Ecuadorian state for each of its members, so that they can fully exercise their rights and consequently assume their obligations.

The main fact of this evolution of the family, some sociologists such as Dr. Julio Echeverría, consider that the birth of these new family structures is largely due to the existence of alterations in the roles of the members, which has implied the creation of even new identities (Echeverría, 2008).

In addition, circumstances such as migration, levels of schooling, sexual affinities, the emancipation of women, economic situations, are some of the factors that have influenced these new family conformations, according to the same sociologist Echeverría.

At present, it would be a step backward to think only of the "ideal" family, composed of a father, mother, and children.

Currently, in Ecuador, there is a prevalence of single-parent families and various types of family formation, which implies that only one of the parents is responsible for raising the children, that new families are formed, or that the care of the children is entrusted to different members of the family. This is related to the divorce figures that exist in our country, which according to the National Institute of Statistics and Census (2016) between 2006 and 2016, marriages decreased by 22.01% from 74,036 to 57,738 nuptials. Meanwhile, divorces increased by 83.45% in the same period, resulting in 1,249 men taking custody of their children compared to 14,669 women (p. 3).

As a consequence of the separation of the parents united through marriage, a new family form is created in this area, or the simple fact that each of the ex-spouses is responsible for the care of one of their children may become evident, or that the complete custody of all the children is agreed to be in the hands of a single parent, the contracting of new marriages and the fathering of children with the current partner, in short, these are some of the different forms of family formation that can be found, but for this study, we will refer mainly to the following: Nuclear,

Extended or complex, Single-parent-Mother, Single-parent-Father, Reorganized reconstituted or binuclear, Homoparental-Gay, Homoparental-Lesbian.

1.1. Nuclear family

Some sciences such as anthropology, psychology, sociology, and other social and related sciences consider this type of family as a hegemonic model, traditionally called to preserve a structure formed by the father, the mother, and the biological sons and daughters of both; thus those people who submitted

to and were involved in another type of conformation were not precisely considered family, assigning them labels such as "unstructured" "lacking in" "non-families", etc.

The nuclear family in its beginnings was governed by the norms of canon law and Roman law, and its rigidity in its conformation was shaped by the submission of women, the raising of children, and the great presence of patriarchy. It was conceptualized by some critics, sociologists, psychologists, etc., as a family, symbol of the existence and natural coexistence of people, where several dimensions converged, mainly religious and deep-rooted customs prevailed; at that time, the members of a nuclear family were the only ones to be considered as such, regardless of the questioning, especially in the seventies.

As time progressed and the transition from a simple society to a complex one, leaving behind this traditional historical-social formation and moving on to challenging modernity, families changed and showed a transcendental evolution in the nuclear family, reflected in the way of internal coexistence, because they continued to be made up of the same people, the spouses, and biological children, but their dynamism was different; a more democratic, multifunctional structure was observed, with control of property and satisfaction of the reciprocal needs of the people who made up the family.

Thus, the progress of the nuclear family is also seen in Ecuador as a symbol of overcoming not only stereotypes but also of those customs that we had carried over from our ancestors, where women's space was closed off and children were disposed of in an authoritarian manner. In this and other respects, although the nuclear family comprises a large part of the Ecuadorian population, it is also true that its modes of functioning have varied due to the circumstances we have

mentioned.

1.2. Extended or complex family

An extended family is defined as a family that includes several relatives and/or persons with recognized ties as such. For this type of family, identifiers such as "blood family" or "foster family" are used. Generally, this type of family is made up of different households or nuclei, with different characteristics such as, for example, the cohabitation of members of three or more generations, in short, with collateral relatives, and even multi-nuclear or polygamous models, and even allows the concept to be extended to members of a tribe or clan (Valdivia, 2008).

As can be seen within this type of family, there are sub compositions that form part of what is considered an extended family, placing us before a totally broad dimension, projecting from a vertical axis that includes generations from parents to children and from the horizontal, the various groups formed by collaterals, siblings, their spouses, and children.

Generally, from an exhaustive bibliographical review, sharing the criteria of the writers, they agree that the profile of an extended family is also known as "foster family", and most of those who carry out this activity are the grandparents of the fostered children, with ages ranging from 41 to 60 years old or over 60 years old, most of whom are unemployed and lack sufficient economic resources. In the face of this, a series of social problems can be observed which we will not go into in this paper, but which are visible, and which should be of concern and should be the focus of public policies on the part of the State (Molero et al., 2007).

Currently, in our country, extended families can be observed

very sporadically, because situations of non-acceptance of people who distort the concept of what is known as a natural family persist in our actions, or simply do not show themselves, often as such, and take positions such as hiding or simply not showing themselves, or even worse, accepting the fact that they belong to a type of family such as the extended family.

1.3. Single-parent-Mother, Single-parent-Father

Considered as an event in which only the father or the mother is present, the fact of the presence of only the mother is known as Single Parent-Mother, and the opposite when the family is made up of the father, it is considered as Single Parent-Father (Valdivia, 2008).

This concept appeared in the 1970s when this type of family was referred to as Valdivia (2008) "broken, incomplete or dysfunctional family" (p. 15). Attributable to events such for example the lack of a spouse, widow, or widower, the results of a divorce action, the fact of being a single mother or father, in short, are some of the scenarios that can present this type of family.

The single-parent family brings with it various problems, which arise in the different types of single-parent families, such as the loss of the parental reference point, a complex economic situation, and the consequences of single parenthood itself.

One of the main characteristics is that it tends to be predominantly female, it is associated with a higher level of poverty, lack of the necessary means to subsist, or it is too complicated for a single parent. Access to employment is difficult, especially for women.

Data according to the National Institute of Statistics

and Census (2016) of Ecuador show that there are around 8'087,914 women, which represents 50.5% of the country's population, and that 1'069,988 of them are heads of household, which shows a considerable number of single-parent families concerning women. In addition to this, INEC statistics show that of the marriages that divorced between 2006 and 2016, 1,249 men were left with custody of the children, compared to 14,669 women in the same situation, reflecting a high degree of single parenthood among Ecuadorian mothers.

The fact that only one parent has direct custody of the children implies many responsibilities, and this cohabitation also requires comprehensive care given their complex situation which can lead to a myriad of social problems, considering the case that the parent is immersed in vulnerable situations, having to cope doubly as the sole breadwinner, provider, and custodian of the family.

1.4.Rearranged or binuclear reconstituted

The reconstituted family is that formed by couples, within which at least one of the spouses has a child or several children from a previous relationship. This type of family conformation breaks the hegemonic and ideological scheme of a family model, producing this new form of family integration.

This type of family grouping has been assigned other identifiers by which it is also known, as follows: Gonzalez and Gonzalez (2005) "reconstructed, transformed, reassembled, recomposed, back families, assembled, 2nd round families, etc." (n. p.).

In Ecuador, according to the National Institute of Statistics and Census (2016), the divorce rate between 2006 and 2016 increased by 83.45%, from 13,981 to 25,468, while marriages fell

by 22.01%, with 74,036 marriages registered in 2006, compared to 57,738 in 2016. And according to the marital status of the parties before marriage, 11940 persons were recorded as divorced and remarried (p. 8).

The data also show that Ecuador has a high rate of reconstructed families, given its high rate of remarriage; in other words, we are faced with the presence of composite families often made up of two divorced adults, or one of them, who may also be separated or widowed, in which there is room for the minor or adolescent children of each of them.

Among the characteristics that stand out in this type of family is that its integration can go through an initial period of integration that can last between 4 to 7 years, and around two years to reach stability, considering that the first years are the most difficult due to the adaptation and emotions within the family that is about to be reconstituted.

González and González (2005) state other characteristics that are evident in this type of conformation, which we point out below:

1. The reconstructed family has its characteristics and therefore differs from the family of the first marriage.

2. Within this type of family, it takes time for relationships to grow and for affection to develop between family members.

3. The stepmother is seen as evil

4. Statistically, it has been shown that one-third of children do not adapt to this new union, which is why it is advisable to go to therapy.

5. When there is estrangement from the biological

parent, the children's relationship with the other parent and their new commitment becomes more difficult.

6. If one parent is widowed and subsequently remarries, family relations are affected, as it is considered a betrayal of the deceased parent.

7. Lack of a family history shared by all family members

8. They are considered as families in transition, which must assume important changes in short periods, different from those of conventional families.

9. There is no clarity, nor can it be established what the relationship between children, adolescents, and the parent's new partner will be (pp. 19 and 21).

La dimensión filial de la persona que integra este tipo de familia llega a trastocarse, por la reconstrucción de la que son parte, por lo que es recomendable solicitar ayuda a profesionales de áreas como la psicología, sociología, etc., para superar los múltiples incidentes que podrían ocasionar la conformación de este tipo de familia.

Como lo pudimos observar de los índices de divorcios y de contraer nuevas nupcias, en Ecuador tenemos un alto número de parejas que deciden divorciarse y también se puede evidenciar los nuevos hogares formados por parejas que tuvieron un estado civil anterior de divorciado o viudo, lo que nos lleva a concluir que es muy común en nuestro país la conformación de este tipo familias; las cuales, eventualmente están siendo consideradas como naturales, y que de presentar inconvenientes en su convivencia, se cuenta con los mecanismos precautelatorios

de protección que coadyuvan a lograr una pacífica y tolerada relación entre sus miembros. Normativa, reglamentos, Unidades de Violencia, Juntas Cantonales de Niñez, Unidades de Asistencia Familiar, etc., son los llamados a garantizar la convivencia pacífica y relaciones afectividades de una familia, cualquiera sea su conformación.

1.5. Homoparental-gays, homoparental-lesbianas

In European countries and some Latin American countries, these types of civil unions and same-sex marriages have been recognized.

According to Corporación Radiotelevisión Española (2017):

> Among the pioneers in the Netherlands, with a law passed in September 2000 that came into force on 1 April 2001, the first country to give the green light to same-sex marriage, followed by Belgium (2003), Canada, and Spain in 2005. South Africa (2006); Norway and Sweden (2009); Portugal, Iceland, and Argentina (2010) and Denmark (2012) followed in recognizing same-sex marriages; and in 2013 it was judicially recognized in Brazil and approved by laws in Uruguay, New Zealand, and France. (p. 23)

Society has evolved and lived together under the protection of national and international regulations where the prevalence of and respect for the life options chosen by individuals has in some cases divided it. An example of this is our own country, where the union of people of the same sex has been allowed since June 2015, but it was forbidden, that is, marriage between them was not legalized, until the issuance of sentence No. 0011-18-CN, dated 12 June 2019 issued by the Constitutional Court, which recognizes “equal marriage”, that is, same-sex couples can access

the marriage contract.

The respect of people's rights, considering them as such, has not been affected by the rules that regulate us today, however, the evolution of our society and this new family type conformation, we believe, will open in the future some revolutions that will have their corresponding analysis and study, as was the landmark sentence issued by the High Court.

It is also pertinent to point out that this type of family confirmation is not very accepted in our environment, given the stereotypes that generate resistance, and that on many occasions these families face homophobia, which is still present in a minority of society; and that this could be reflected in a lack of references and situations of discrimination, social, labor, symbolic when accessing certain services on the part of the members of this type of family.

For the time being, these gay Homoparental couples made up of two men and lesbian Homoparental couples, made up of two women, have had their rights recognized in all their forms, and have evolved, breaking schemes and taking unexpected turns with the issuing of the ruling considered a milestone in our country, that of equal marriage; without these couples being able to opt for the institution of adoption, or other similar, to integrate more members for the time being. Figures such as assisted reproduction, surrogate wombs, etc., are currently not regularized or regulated in our legal system, nor is access to adoption, which is forbidden to same-sex couples who are currently allowed access to marriage.

2. FILIATION FROM THE DIVERSE FAMILY ENVIRONMENT

The word filiation traces its origins to the Latin filius, filii, meaning son. This refers to a descending line that exists between two persons, where one is the father or mother of the other, and consists of the relationship that exists between two beings, one of whom emanates from the other by generation.

We can see filiation from two perspectives, the first as the legal relationship that links a father and/or mother and their child bilaterally, and the second as the position of a person about their society, contained in typified norms. We consider these two substantial elements to point out how these relationships can be evidenced within a family environment and the repercussions they would have from a social point of view.

The fundamental basis for the identification of individuals as such and concerning the family and social group to which they belong has made filiation that reference, which allows dealing with issues concerning divergences and an infinity of situations that could be generated from filiation in diverse families.

According to Larrea Holguín (2008) in his Manual Elemental de Derecho Civil de Ecuador, he states that filiation "is not only the physical fact of procreation but also the set of humans, sentimental, economic, etc. links that exist between parents and children, which is regulated by civil law" (p. 94).

Focused on the vision of diversity, when we review the existing family conformations, and other possible and future ones are pointed out, it is an evident sign of progress and evolution of our society; a fact that leads us to imagine soon where it is possible the emergence of other types of families, which will also imply new critical studies. However, in the diversity of today's world, it is difficult to determine the exact parentage of the groups we have identified.

However, we contribute our position by pointing out that

"filiation would correspond in a natural way to the biological relationship between parents and children, but also based on the criterion of the jurisconsult" (Larrea Holguín, 2008, p. 96). This opens other perspectives on this subject, in the sense that filiation is not only considered as a biological bond, but also as human ties, feelings, and economic and social aspects.

Therefore, it is valid to clarify that, in all family conformations, filiation ties will exist in one way or another, and in a more visible way in families such as nuclear, single-parent, reconstituted families, etc. We point out that according to our Ecuadorian legal system, in terms of same-sex families, it will be almost unrecognizable to be able to distinguish filiation as such, safeguarding the fact that there could be couples with previous commitments because of which there are children and by the union with a person of the same sex, a filiation concerning one of them is already evident. However, it is not ruled out that the existing relationship with the new partner of the parent may also begin to show filial relationships.

Now it is arid and complex to enter into an in-depth analysis of the conformation of same-sex couples, due to the lack of a regulation referring to the case, even though there are pronouncements by the Constitutional Court in this regard, mainly regarding the recognition and access to the institution of marriage for same-sex couples. Something different happens with the other family formations, which do not generate major controversy or consternation in society, but rather are commonly accepted, and of which we can determine, given the meaning of filiation, how this institution is presented in each of them.

According to the Ecuadorian Civil Code (2005), the filiation that is established corresponds to the father or mother for having been conceived in marriage or a de facto union and voluntarily

recognized or judicially declared by said father or mother. Furthermore, we can locate these aspects in each of the different forms of family confirmation that we have reviewed and show that, in each of them, we have filiation as such.

3. MARRIAGE IS A LEGAL INSTITUTION, ITS PROGRESSIVENESS, AND HISTORY IN ECUADOR

The search for regularization of institutions that are part of people's daily lives allows the law to evolve and its passage through time to leave its mark on the issuing of regulations that once served the interests of a population.

Moreover, we will focus on history and its progress in the institution of marriage, in this way, we will highlight past eras and the vestiges marked at that time about the figure of a marriage.

Conceiving marriage as a legal institution in our country takes us back in time to the Constitution of the Republic of Ecuador (1884) in which, in Article 13, the religion of the Republic was defined as Catholic, Apostolic, and Roman, excluding any other religious creed. Taking this constitutional antecedent as a basis, we have that the Catholic religion was the basis for the conception of the meaning of marriage.

Thus, in 1889, publications or editions of Ecuadorian civil law converged and precisely in the Civil Code (2005), in its article 81, we find one of the first definitions of marriage, referring to it as a solemn contract by which a man and a woman are united currently and indissolubly for life to live together, procreate, and mutually assist each other. And later, in Article 100 of the body of law, the ecclesiastical authority is empowered to decide on the validity of marriage, granting them the power to pronounce on the existence or not of this conjugal union (Código Civil Ecuatoriano, 2005).

The same definition of marriage was subsequently assumed for several years, and in 1904, divorce on the grounds of adultery was included in the body of civil law, and divorce by mutual consent was also incorporated.

Later in the Constitution of the Republic of Ecuador (1979), Article 22 states that the State shall protect the family as the fundamental cell of society, ensuring moral, cultural, and economic conditions that favor the achievement of its goals. It shall also protect marriage, maternity, and the family, specifying that marriage is based on the free consent of the contracting parties and the principle of equality of rights, obligations, and legal capacity of both spouses. This shows that as early as 1979, the responsibility of the state for the interests of marriage and, consequently, of the family, was enacted.

In 1998, during the presidency of Fabián Alarcón, interim president, after the dismissal of Abdalá Bucaram, the Political Constitution of the Republic of Ecuador (1998) was promulgated in Ciudad Alfaro-Montecristi: Article 37 establishes the recognition and protection of the State towards the family as the fundamental cell of society, guaranteeing the conditions that favor integrally the achievement of its aims; the family will be constituted by legal or de facto links and will promote equal rights and opportunities for its members, marriage, maternity, and the family will be protected, supporting women heads of household.

The Political Constitution of the Republic of Ecuador (1998) maintains the concept of marriage based on the free consent of the contracting parties and the equality of rights, obligations, and legal capacity of the spouses, with a variation, focused on the direct protection of women heads of household. This same constitutional regulation in Article 38 introduces and recognizes

the legal figure of the de facto union, describing it as the stable and monogamous union of a man and a woman free of marriage ties with another person, who form a de facto household, for the period and under the conditions and circumstances established by law, generating the same rights and obligations that families constituted by marriage have, including concerning the legal presumption of paternity and conjugal partnership.

Subsequently, when Rafael Correa Delgado became President, a popular consultation was called and in 2008, through a constitutional referendum, the new Ecuadorian Constitution was established, classified as a guarantor, turning the country into a constitutional state of rights and justice. Article 67 of this legislation recognizes the family in its various forms, the State protects it as the fundamental nucleus of society and guarantees conditions that fully favor the achievement of its goals. These families shall be constituted by legal or de facto ties and shall be based on the equality of rights and opportunities of their members.

As can be seen in the narrative above, over the years the institution of marriage has undergone slight variations, which are more noticeable when the country enacted the Constitution that governs us to this day. As we consider ourselves as a constitutional state of rights and justice, this emblem gave rise to countless petitions in the framework, as an example and referring to our developing theme, we have the LGBTI movement, who through their organization fight to this day for the recognition of their rights, equality before the law and non-discrimination among their main objectives.

The struggle to undertake a socio-cultural normative change for the sake of the vindication and recognition of rights made this LGBTI group, with the support of other types of feminist

organizations, social collectives, among others, raise several actions in the constitutional sphere; And, in this framework, as a result of the action for protection, the Court of the Criminal Chamber of the Superior Court of Justice of Pichincha consulted, based on the action for protection, whether Advisory Opinion OC24/17 of the Inter-American Court of Human Rights, which recognizes the marriage of same-sex couples, is compatible with Article 67 of the Constitution, which establishes that marriage is between a man and a woman. In this regard, the Constitutional Court analyses the legal value of the Advisory Opinion interprets the constitutional norm and establishes the legal effects of this constitutional interpretation.

The Constitutional Court issued a decision on this consultation, and thus, with 5 of the judges voting in favor and 4 against, same-sex marriage was recognized in Ecuador. The Court determined that there was no contradiction between the constitutional text and the conventional text (Advisory Opinion), but rather complementarity. And consequently, by the most favorable interpretation of rights, the right to a marriage recognized for heterosexual couples is complemented by the right of same-sex couples to marry. The Constitution, according to Article 67, and the American Convention on Human Rights, according to Articles 1.1, 2, 11.2, 17, and 24 of the Convention, as interpreted by the Inter-American Court of Human Rights through Advisory Opinion OC24/17, recognize the right to marriage between a man and a woman and the right to marriage between same-sex couples; and thus with the issuance of this resolution by the Plenary of the Constitutional Court, as of 12 June 2019, access to marriage for same-sex couples is considered and is in force.

This shows that the social construction of developing people determines the functionality of legal institutions and thus

generates and makes room for new forms of recognition and creation of legal figures that were impossible to access at other times. As discussed in this section, in our beginnings we belonged to an absolutist and conservative society, with time we have witnessed changes that involve the recognition, adaptation, and respect of the rights that are recognized through the Constitution and pronounced by its highest body, the Constitutional Court.

We will be watching these advances in the regulatory system since the development of our society requires contributions, studies that involve rethinking our legal system as we have known it, which with the passage of time aims not to be left out of technological advances, social development, and creative involvement in all sectors; seeking the inclusion of all of us who submit to and form part of a constitutional state of rights and justice.

CONCLUSIONS

During the last forty years, the family has undergone profound and convulsive changes, breaking the traditional pattern that had been maintained, with the appearance of many models of family constitution, which have altered the parameters with which family life was conceived.

In Ecuador, the most recognized family has been the "conjugal" family, instituted biologically and in the union of a heterosexual couple, whose purpose is procreation.

The UN differentiated between household and family, stating that the family is defined as nuclear, i.e. the natural conformation assigned to it and within it made up of persons who establish a private household. That is, those who make up a family could be spouses, a father or mother with an unmarried child, or an adopted child, a married or unmarried couple with

one or more unmarried children, or a parent with an unmarried child, among others (United Nations, 1987).

Democratic countries, such as ours, have accepted their reality and through their legislative body have modified the laws in such a way that women and men are treated equally, and child protection is ensured.

There is a break with the old-fashioned conception of the family, treating women's and men's rights and responsibilities in childcare and care equally and equitably.

Any change generates resistance, but it is necessary to democratize institutions such as the family, marriage, among others, so that they contribute significantly to their coexistence, and undoubtedly improve personal relationships, thus obtaining families that are recognized, but above all protected by the State.

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Intelligenza artificiale (AI): oltre i confini legali

Artificial Intelligence (AI): Beyond Legal Limits

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ABSTRACT: In the last years, the Ecuadorian legislator has dedicated to treating as a priority the economic topics, ignoring the diverse technological advances, the reason why the legal reflection on Artificial Intelligence (systems of algorithms that learn of themselves) is practically nonexistent, although it has been incorporated in several scopes of our daily life. Although the human being has not developed vital Artificial Intelligence yet, the impact in many areas, including the legal one, is undeniable, so we must think about the legal regulation both in the present and in the future, to establish specific fundamental rules. We cannot ignore that already exists in the world a citizen android, Sofia, whose case leads us to reflect if perhaps it is necessary to recognize as the holder of rights to the Artificial Intelligence, a subject without face nor necessarily human appearance, as it happened, in the year 2008, with Nature.

KEYWORDS: Intellectual property, copyright, patent, civil law, legal systems..

RESUMEN: En los últimos años, el legislador ecuatoriano se ha dedicado a tratar como prioridad los temas económicos, desconociendo los diversos avances tecnológicos, por lo que la reflexión jurídica sobre Inteligencia Artificial (sistemas

de algoritmos que aprenden de sí mismos) es prácticamente inexistente, pese a que se ha incorporado en varios ámbitos de nuestra cotidianeidad. Si bien el ser humano no ha desarrollado aún Inteligencia Artificial fuerte, el impacto en muchas áreas, incluida la legal, es innegable, por lo cual debemos pensar en la regulación jurídica tanto en el presente, como a futuro, para establecer ciertas reglas fundamentales. No podemos desconocer que ya existe en el mundo una ciudadana androide, Sofía, cuyo caso nos conduce a reflexionar si tal vez se deba reconocer como titular de derechos a la Inteligencia Artificial, un sujeto sin rostro ni apariencia necesariamente humana, tal como sucedió, en el año 2008, con la Naturaleza.

PALABRAS CLAVE: Propiedad intelectual, derecho de autor, patente, derecho civil, sistemas legales.

INTRODUCTION

Throughout our lives, human beings and especially in developing countries, we consider that once our basic needs are satisfied, we have nothing to fear and that the Law, with its regulations, reaches its goal now in which, even partially, satisfies them.

Therefore, our Assembly treats any of the Bills that refer to economic issues as urgent, especially forgetting Private Law matters that, as they do not address these basic needs, detract from the attention of our legislator. Then, without understanding that perhaps the key to this economic development so often sought is, precisely, not to put aside those matters that other States analyze almost routinely.

Thus, our legislation is very far removed from the global legal regulation on Artificial Intelligence, which has gone from being the dream of science fiction authors like Isaac Asimov to being part of the daily life of all humans, including Ecuadorians.

1. WHAT IS ARTIFICIAL INTELLIGENCE?

In the words of the French scientist Kourosh Teimoorzadeh (2018): "it is the observation/reproduction of the performance of nature to design machines with the capacity to reason/solve problems autonomously" (s. p.).

However, this terminology is much older than we generally believe, since the expression is considered to have been coined in 1956 by John Mc Carthy, who defined it as "the science and ingenuity of making intelligent machines, brilliant computer programs" (cited by Velasco, 2012, s. p.).

Nevertheless, the human dream about Artificial Intelligence had its origin a long time ago: Ramón Llull in his Ars Magna in 1275, laid the theoretical foundations for an artefact that, using levers and wheels, combined words, grammatical constructions, and scientific theories to reach valid conclusions. Alternatively, false and Leonardo Da Vinci (1452-1519) with his fabulous designs seemed to predict this reality (Velasco, 2012).

However, it is from the second half of the twentieth century to the present, that more and more, the old "utopia" has become a reality in force in all areas of our action, from the artificial intelligence of games such as "Furbys", small electronic toys that feed and" communicate "to distract our children, or that of the drones that we use to take stunning panoramic photos from the air to much more advanced artificial intelligence such as that of some androids.

Currently, there are some ways to classify Artificial Intelligence, according to the greater or lesser complexity of its functions, of which we consider that we can adapt the following:

1. Weak Artificial Intelligence: It only specializes in one area or target, so although it can surpass some human capabilities and has a significant impact

on several areas, it is considered weak. We can subclass it like this:

1.1. Weak / Basic Artificial Intelligence: Programs such as Siri, Alexa or Waze are included in this classification. Already within these simple programs, it is observed how Artificial Intelligence learns from us, reaching what could be considered a certain level of manipulation, for example, the case of the Waze program, which induces us to take specific paths with the indication that they are the shortest ones, but at the same time, are the ones that can have more sponsors of said program.

1.2. Weak / Narrow Artificial Intelligence: for example, the "Deep blue" chess program that has already beaten the human world chess champion, intelligent video games with massively multiplayer, or the case of the android Sofia, which we will analyze in more detail below.

2. Strong Artificial Intelligence: To date, we have not managed to develop a robust Artificial Intelligence (AI) that can perform any task that human beings perform, even worse than it surpasses it in all its capacities. Among the characteristics that it should possess, they would be self-programming (without the need for a human being), be proactive (not only reactive like Weak AI), solve open problems (not only for the one they were programmed for), have several neural networks such as being human. (Webedia Brand Services, 2018, p. 22-23)

Although it is predicted that we will reach the development of Strong Artificial Intelligence in approximately a decade, already today the scope of Artificial Intelligence is unpredictable, as several cases have shown:

> In November 2017, the online video game company "Ccp games" released an update that expanded the possibilities of the so-called "non-player characters", but it turns out that, in this massively multiplayer online role-playing game, those "characters non-players "began to fight for control of the territories and did it in secret from everyone: for a while, neither the developer company nor the users knew anything about that. The "pirates" began to seize the territory and resources of the "miners" when suddenly the fraction of the "vagabonds" appeared in the sector. It is unknown if it was an accident, or if Artificial Intelligence responded to their actions. "So, the pirates and another faction – the Amarr empire flotilla – united and fought together against the common enemy, The mooring flotilla defeated the vagabonds, but the pirates betrayed them and came out winners of that battle, and no one among humans saw this fight: they only found out after it ended. Ccp games are investigating an unusual situation to learn more about the risks of out-of-control artificial intelligence. (RT, 2018, p. 82)

Likewise, in 2017, Facebook had to deactivate Artificial Intelligence that it had created to improve chatbots. To test it, they left two AIs to talk to each other and, they were surprised that they generated their language to do so, so they decided to turn off this AI since a language that we do not understand could be dangerous as it would imply that the AI could get out of control (Rodríguez, 2017).

2. CURRENT IMPACT OF ARTIFICIAL INTELLIGENCE

Various areas of human development have already received the positive (negative?) Impact of AI Let us try a definitive list, chosen at the whim of the author, but which in no way intends to exhaust the human areas in which this effect has been felt, in the which has been tried not to have to go to do it, as the popular imagination sometimes believes, only to distant Asian countries, where, for example, it is already possible to be served in coffee shops by Artificial Intelligence (Alvarez, 2018).

2.1. In the work area

In Colombia, in 2019, the Millennium BPO company launched the thalon hotel assistant robot, which is close to one and a half meters in size, with fifty different cavities to carry and store food and a mechanical arm, responds to voice commands, and walks without stumble thanks to a mapping and tracking system. Then "room service" can be done in a single trip to several rooms, without errors, and you can even pick up and take the clothes to the laundry, with facial recognition functions.

In Bolivia, Nayra, a robot for teaching Aymara, is one of the initiatives presented to promote the study of native indigenous languages, recognizes specific voice commands in that language and was promoted by the organization of Ibero-American states to education, science and culture. Nayra (new aymara robotic assistant) is the size of a doll and is dressed in a pollera, the traditional garb of indigenous women (Latin Press, 2017).

2.2. In the consumer area

When any of us enter data on the networks, they allow to establish preferences, tastes and customs, information that is very valuable for companies at the time of product development and to put them on sale:

Having clearer and more accurate information facilitates decision-making, the offer of products and services can be efficiently segmented, and key processes for retail and consumer preference can be optimized such as inventory management and dispatch logistics. (Abarza, 2019, p. 21)

Since 2015, the Kikker company has developed AI to promote responsible and sustainable consumption at points of sale in markets and supermarkets in Brazil: "Kikker manages to understand demand based on 25 variables of trained and trained algorithms to create a neural network capable of the project the demand and need for purchase" (Terra, 2019).

2.3. In medicine

Artificial Intelligence has become a powerful ally of Medical science, from the area of data storage to the diagnosis of serious diseases such as cancer, for example, the Watson program for Oncology, developed by the international business machines corporation (IBM), which in 2011 amply defeated two of the best human contestants in the jeopardy television contest, has been trained to detect more than 13 types of cancer and has been applied to more than 45,000 patients worldwide (Warrior, n. d.).

Also in recent months, AI has been used for the diagnosis of COVID 19 in several countries, such as in Brazil where, since April 2020, the RadVid-19 tool helps to "identify what is the probability of having covid and indicates the percentage of the lung that is sick" (El Comercio, 2020, s. p.).

We can also cite intelligent prostheses in cases of loss of anatomical limbs, such as those developed in Spain by the laboratory of the University of La Rioja (Logroño, 2020), and the collaboration of AI in the generation of drugs or vaccines, accelerating their development processes, especially at the same time for the COVID-19 pandemic (Bankinter Foundation, 2020).

2.4. In the family environment

The possibility of development of affective bonds between humans and artificial intelligence that seemed distant to us, given the weakness of the existing AI. Thus, in November 2018, world newspapers published the news of the "interdimensional" marriage between the Japanese Akihiko Kondo and a famous singing hologram, Hatsune Miku, who moves and speaks from a device. When the new husband was asked if he did not consider the money spent on the wedding of forty guests (more than seventeen thousand dollars) a waste, he was able to indicate that the hologram was everything could wish for, because:

> He turns on the lights when calls on the phone to tell him that she is coming home and sleeping next to him with her wedding ring on her finger ... Two-dimensional characters cannot deceive, they neither age nor die, points out. (El Universal, 2018, s. p.)

This last statement, unfortunately for him, was not correct, since, due to a software update, he was "widowed".

This type of virtual relationship is increasingly common in Japan: "In 2019 a survey in Japan noted that about 12% of young people reported that they sometimes or often fall in love with an anime or video game character" (The Third, 2020, s. p.). Indeed, this situation, with the Covid-19 pandemic, has increased throughout the world, given the prohibition of meetings, crowds and in general contact that allows the closest socialization between human beings.

2.5. In the legal field

Since 2018, in Brazil, the supreme Brazilian federal court installed an artificial intelligence tool, dubbed "Victor", in charge of reading all the extraordinary resources that are uploaded to the system and identifying which ones are linked to individual

issues of general repercussion. This action represents a part of the initial phase of the processing of resources in the court and implies a high level of complexity in machine learning, publishes the tech target portal: "it is the largest and most complex Artificial Intelligence project in the judiciary and, perhaps, the Brazilian public administration" (El Telégrafo, 2019, s. p.).

In the United States, the Artificial Intelligence system of the robot "Ross", created by Canadian startup from the University of Toronto that also used the Watson supercomputer technology (used as we have seen in Medicine as well), can listen to human language, scanning more than 10,000 pages per second and formulating a response faster than any lawyer.

Their responses include legal quotes, suggest more articles to study, even calculate a confidence rate to help attorneys prepare cases. Besides, since it is artificial intelligence, the more inquiries it receives, the more it learns and increases its effectiveness. Likewise, due to its algorithms, "Ross" can consider the ideology of the judge, the parties involved in the trial and the lower-ranking courts from which the cases arrive; Once the information is assimilated, it responds based on current laws and translating the terminology. Likewise, the robot tracks in real-time the results of sentences and lawsuits that have established jurisprudence, so that it can detect any risk that represents a threat to its clients and correct it. "Ross" responses are not a copy-paste. Interprets and executes value judgments according to a study on jurisprudence, which it stores in its database. Thus, in 2016, the American firm "Baker & Hostetler" hired Ross to integrate the bankruptcy management department, with a large team of 50 human lawyers at his service (El Telégrafo, 2019, s. p.).

Also, in New York, the Premonition system provides a history of judge litigation, with data on victories and defeats of plaintiffs and defendants (Granero, 2020).

> In Argentina:
>
> Sherlock-Legal was developed, the Artificial Intelligence program of Albremática SA, the publishing company of elDial.com, which analyzes through natural language processing the rulings of Argentine courts based on questions formulated by its clients, the software produces a list of the most relevant cases, relevant citations and an evaluation in percentage terms of the client's chances of winning or losing, stating, at the discretion of the program, which, in turn, is based on algorithms developed based on jurisprudence data, if we ask about the applicant, it is positive or negative. (Granero, 2020, p. 28)

However, the use of Artificial Intelligence goes much further: we are beginning to talk about predictive justice.

Thus, we have as an essential antecedent the Compas algorithm (Correctional Offender Management Profiling for Alternative Sanctions), produced by a private company, used by the American Criminal Courts to assist them in calculating the risk, dangerousness and recidivism of the accused, which is based, among other things, on a questionnaire and criminal history, but has been questioned by some experts who claim that the algorithm calculates a higher risk of recidivism if the accused is African American. However, other studies contradict this claim, indicating that this assumption comes from the fact that the data on which the risk calculation is based are biased, as pointed out, for example, by Sofía Olhede, professor of statistics at University College London.

The fact that the algorithms draw on criminal records may be beneficial for some, says Nikolaos Aletras, who, with other colleagues, developed software that, in four out of five trials, delivered the same verdict as the European Court of Rights judges. Humans (El Telégrafo, 2019).

With detractors and defenders, Artificial Intelligence has continued to be incorporated into the legal world, and today, apparently, we already have "robot judges". Thus, in China, "... the first artificial assistant was named Xiao Fa, which can be translated as:

> Tiny right "or" tiny law ", and the first pilot was tested in 2004 in Shandong on criminal matters. The system was designed to analyze 100 crimes, and the idea was to standardize sentences and automatically generate draft sentences. The first virtual or cyber court was established in the Chinese city of Hangzhou in August 2017. Later, similar chambers were opened in Beijing and Guangzhou. These so-called Internet courts are competent for some issues related to network operations, electronic commerce and intellectual property. (Granero, 2020, p. 23)

However, due to the lack of transparent information from the Chinese government, it is questioned whether these judges really exist or are simply assistants to a human judge (Soltau, 2020). On the other hand, in June 2019, Estonia, a highly digitized country, indicated that it intends to use artificial intelligence to judge small cases (value less than 7,000 euros) whose ruling would be supervised by a human judge (Law World, 2019).

3. CURRENT GLOBAL LEGAL FRAMEWORK FOR AI

Currently, legal regulation is scarce since the rapid technological advancements in the matter far exceeded that anticipated by any jurist. For this reason, although it seems incredible, the first legislation to which we will refer, the European one, was based on science fiction, with a great exponent, the author Isaac Asimov, who, in a short Story of 1942, later, compiled in his work, Yo robot (1950), enunciated what has become known as the three laws of Robotics:

> 1. A robot cannot harm a human being or, by inaction, allow a human being to be harmed. 2. A robot must carry out the orders of human beings, except if those orders conflict with the First Law. 3. A robot must protect its existence to the extent that it does not conflict with the First or Second Law. (Research and development ID, 2017, p. 96)

Thus, based on these three laws, in January 2015, The European Parliament decided to set up a working group on legal issues related to the evolution of robotics and Artificial Intelligence in the European Union, dedicated to particular to Civil Law aspects. The group held ten meetings between May 2015 and September 2016 and received advice from various stakeholders, scientists, and lawyers. In June 2016, the eprs scientific perspective unit published a specialized study on the ethical aspects of cyber-physical systems (SCF) that are intelligent robotic systems, linked to the internet of things, or technical systems made up of network computers, robots and artificial intelligence that interact with the physical environment, such as automatic cars and drones,

This study drew attention to the possible risks derived from the development of robotics, in aspects such as employment, protection of privacy, security and civil liability (European Parliament, 2017).

In January 2017, the legal commission approved its report with recommendations to the Commission on Civil Law Norms on robotics. Thus, the Commission was asked to propose Union legislation to define as "intelligent robot" the robot that has autonomy. ía using sensors and interconnectivity with the environment, which has at least one support, that adapts its behaviour and actions to the environment and that cannot be defined as "alive" in a biological sense.

The introduction was also proposed of an advanced robot registration system, to beta managed by an agency of the Union European for robotics and Artificial Intelligence. This agency would also provide public agents with specialized advice on technical, ethical, and regulatory issues in the field of robotics.

Regarding liability for damage caused by robots, the report suggests that it could be based on strict liability, no-fault requirement, or on a risk management approach (responsibility of the person who minimizes risks); Thus, the responsibility must be proportional to the level of instructions given to the robot and its degree of autonomy, so that the rules on liability could be complemented with a mandatory insurance scheme for robot users and a fund for compensation in case an insurance policy does not cover the risk.

The report proposes as an annexed to the resolution, two draft codes of conduct: a code of ethical conduct for robotic engineers and a code for research ethics committees. The first code presents four ethical principles for robotic engineering: 1) beneficence (robots must act for the benefit of the human being); 2) non-maleficence (robots must not harm human beings); 3) autonomy (human interaction with robots must be voluntary); 4) fairness (the benefits of robotics should be distributed equitably). No robot can be created without the on / off button (European Parliament, 2017).

Finally, we cannot fail to mention that, on February 19, 2020, the White Paper on Artificial Intelligence was presented in Brussels, aimed at generating a regulation for human-based AI and based on what it has already generated. The European Union mentioned in previous lines. It is essential to highlight the control over Artificial Intelligence based on this on-off button, as a highly relevant issue. In effect, this allows us to project the legislation of the future for strong AI.

4. FUTURE REGULATION OF ARTIFICIAL INTELLIGENCE?

The case of the android Sophia, created in 2015 and presented in 2016, which was declared a citizen in Saudi Arabia, has been known worldwide. Beyond the interest of her citizenship, given her status as an android in the shape of a woman in an Arab country where until recently women could not even drive vehicles or make public appearances without a veil, the statements of its manufacturer, the company Hanson Roberts, indicating that his long-term objective is to fulfil the promise imagined by great names in science fiction literature such as Isaac Asimov, that is: "to manufacture fully alive, conscious robots that can adapt to the world by themselves" (EFE, 2017, s. p.). On the other hand, nationality generated controversy, since questions were raised about whether we have the right to vote or reproduce, and fundamentally, if being a subject of rights, we should have an on-off button?

In this regard, it should be mentioned that, in the current context, we are witnessing a change in the legal paradigm, and we can venture to indicate that the category of subjects of law is a much broader category than the one that we were taught as a synonym for a person. Indeed, although the development of Artificial Intelligence is not very advanced in Ecuador, however, could become one of the pioneer countries at the legislative level in this matter, since, unlike most countries worldwide, it surpassed (although without further discussion, we must admit

it), the traditional categorization subject of law is synonymous with the human person, in 2008, with the Constitution of Montecristi.

In effect, the Ecuadorian Supreme Norm, in its art. 10, indicates that Nature is the subject of Rights. Therefore, it is a "normative imputation centre, the entity to which the legal system imputes rights and duties" (Fernández Sessarego, 2009, s. p.), owner to which rights are attributed for being a subject and not for being a person, so it is necessary to be a subject of law to have the capacity, but not to be a human person to be a subject.

In Ecuador, therefore, the complexity of legislating for realities without a physical subject has been overcome since Nature is a subject "without a face". Thus we open the door more efficiently so that other different classes are accepted within the categorization of the subject to the human being individually or collectively considered at different moments of his life (Fernández Sessarego, 2009), as in Peru, and that the legal relationship perhaps contains an intermediate subject, as has been proposed for animals, which would be a new holder called " subjective or pernicious" (Varsi, 2020, s. p.), which could be applied to strong Artificial Intelligence (when it exists), creating a new subject, which we could call electronic person.

The detractors of new categories such as those indicated, usually argue that dignity is only a human quality, so ontologically only the human being can be subject to the law since it is also the one who creates the legal norm based on their own needs.

Nevertheless, in Ecuador, we can object to what is indicated and test, for that purpose, the essentialist or intrinsic value justification that was applied to nature (Gudynas) for

other faceless subjects, such as robust Artificial Intelligence, recognizing a value, independent of the one assigned to it by the human being. It means then that:

> When the rights of Nature are recognized - read then for the case, in my opinion, Artificial Intelligence -, they are admitting their own or intrinsic values in it, attribution of a right that is linked to an "Essence", this could come from three "approaches", which are confused and superimposed in the postulates of the so-called "deep ecology": 1) the well-being and flourishing of human and non-human life has a value in itself same, regardless of the usefulness they render to humans; 2) the recognition that an object is valuable insofar as it possesses properties that do not depend on relationships with the environment or other objects; and, 3) things have an "objective" value that does not depend on the evaluations given by third parties. (Simon, 2017, p. 243)

Likewise, we can turn to the culture of science fiction cinema and refer to the film Blade Runner, which contains an idea that may gravitate towards the recognition of AI as a centre of normative imputation: human dignity is only circumstantially human, it is That is to say, that although it has been classified as human because it is that of human beings, it can nevertheless cease to be its exclusive heritage from the moment in which, what we consider valuable is also owned by other beings or, if wanted, from the moment we become aware that this is so. What we value in human beings is not the mere fact of their belonging to a common gender (or it should not be), but the fact that they possess certain qualities (to express it as Ramón Valls, capacity for moral autonomy, although there would be other ways of thinking and saying it). As most of the members of the human race possess such qualities, we grant nobility to

the human race to which they belong, especially if we believe that no other gender possesses them (Manrique, 2006).

It turns out then that, if we accept this idea, understanding that we are all digital beings, algorithmic data banks, the apparent barrier between human beings and Artificial Intelligence are removed. This idea already underlies the "computational metaphor" of Steven Pinker, one of the most prominent specialists in cognitive sciences, who in 1997 published in his work "How the mind works" that the human mind is a system of "organs of computation. "Which has allowed us to understand objects, hunt or escape animals, learn about the diversity of plants and learn to recognize and differentiate themselves from each other, thus establishing an analogy between the way our minds function by modules and that of the Artificial Intelligence (Gómez, 2018).

CONCLUSIONS

The digitization of humanity is indisputable, we are, or we exist in the data uploaded to social networks, and: "connecting with the system becomes the origin of all meaning" (Harari, 2016, p. 429), so we must agree with Yuval Noah Harari because:

> Although we cannot predict the future, science converges on what seems like a universal dogma, which states that organisms are algorithms and that life is data processing, then intelligence is disconnected from consciousness, and non-conscious but intelligent algorithms soon know us better than we do, intelligence no longer it is conscience. (Harari, 2016, p. 430)

Without a doubt, the risk that this reflection implies will be objected, so let us clarify that we do not intend to simplify a debate within which several disciplines must be involved, in which perhaps we should create a Bioethics Commission like Warnock (1978) who discussed at the time the legal

regulation for assisted reproductive techniques. However, what has indicated in previous lines allows us to propose, by way of conclusion, a hypothesis not so far-fetched: the imperative of the legal integration of Artificial Intelligence, since perhaps the future of all digitized humans, are cyborgs, which we will be all of us, integrated into Artificial Intelligence in our essence.

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Change of labor occupation of the worker and its impact on the right to *job stability*

Cambio de ocupación laboral del trabajador y su incidencia en el derecho a la estabilidad laboral

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ABSTRACT: The main objective of this article is to analyze the incidence that the change of employment occupation has on the full exercise of the right to stability guaranteed by the Constitution, the International Treaties and the Labour Code, carrying out this analysis by means of a bibliographic and descriptive research, where the historical background of the right to work was determined, as well as the elements that make up the employment relationship, what makes up an employment contract, the principles that support the rights of workers, employment stability and its types, determining the main causes or practices that violate this right, especially the change of occupation. In this study, the incidences that occur with this type of action taken by the employer against the worker are analysed in a critical and doctrinaire manner, taking the change of occupation as an untimely dismissal from work. To achieve the objectives, a quantitative and qualitative

study was carried out, using surveys and interviews with labour lawyers and judges as data collection tools. The results show that 84% of those surveyed consider that the right to stability is violated by means of a change of occupation, contradicting the mandate established in the Magna Carta, which is why it is necessary to reform the Labour Code to protect the rights of workers that are currently being undermined by employers

KEYWORDS: labour, rule of law, personnel management, labour conflict, employment.

RESUMEN: Este artículo tiene como objetivo principal analizar la incidencia que tiene el cambio de ocupación laboral sobre el ejercicio pleno del Derecho a la estabilidad que está garantizada al mismo en la Constitución, los Tratados Internacionales y el Código de Trabajo, llevándose a cabo este análisis por medio de la realización de una investigación bibliográfica y descriptiva, donde se determinaron los antecedentes históricos del Derecho al trabajo, también los elementos que conforman la relación de trabajo, lo que conforma un contrato laboral, los principios que sostienen los derechos de los trabajadores, la estabilidad laboral y sus clases, determinándose las principales causas o prácticas que vulneran este derecho, especialmente el cambio de ocupación. En este estudio es analizado de manera crítica y doctrinaria las incidencias que se producen con este tipo de acciones realizadas por el empleador contra el trabajador, tomándose el cambio de ocupación como un despido laboral realizado de manera intempestiva. Para el logro de los objetivos se desarrolla un estudio cuantitativo y cualitativo, aplicándose como herramientas de recolección de datos las encuestas y las entrevistas, realizados a abogados en materia laboral y jueces del área, expulsando entre sus resultados que el 84% de los encuestados consideran que, si es vulnerado el derecho a la estabilidad por medio del cambio de ocupación, contradiciendo el mandato establecido en la carta magna, por lo que es

necesaria la reforma del Código del trabajo a fin de precautelar los derechos de los trabajadores que son menoscabados por parte de los empleadores en la actualidad.

PALABRAS CLAVE: Trabajo, imperio de la ley, gestión de personal, conflicto laboral, empleo.

JEL CODE: J28,J81.

INTRODUCTION

It is important to note that article 192 of the Labour Code determines that if the employer decides to change the employee's occupation by order of the employer, this will be understood as an untimely dismissal. Through this type of action by employers to change the employee's occupation, dismissals have increased in the country, and this type of policy not only operates in the private sector, but also in public institutions, despite the existence of certain measures that seek to limit this type of action by employers, which so far are not sufficient.

Therefore, this research is developed due to the importance of analysing and studying the problem in depth, such as the incidence of labour stability, a right that must be guaranteed and fully satisfied for all workers in Ecuador, without exception, as this right has constitutional protection, in the various treaties and norms that regulate labour relations.

Social law is the set of rules that govern the life of man in society, within this compendium of rules are the conditions and rights that are granted to people who are immersed in a relationship of dependence, which must comply with the fundamental elements for its determination, these are: provision of service, subordination, remuneration and working hours. This relationship is known as an employment relationship, where both parties are guaranteed their rights according to the Constitution and the Labour Code. The State is obliged

to guarantee the development and protection of the right to work, as established in article 325 of the Constitution (2008): "The State shall guarantee the right to work. All forms of work, whether dependent or autonomous, are recognised, including self-supporting and human care work, and all workers are recognised as productive social actors" (art. 325).

But over time it has been observed that the rights of workers to job stability have been violated by changing their occupation, despite the conclusion of international treaties by entities such as the International Labour Organisation (ILO) and the United Nations (UN), among others, rights such as job stability continue to be violated, which is why it is necessary to continuously study and develop the social principles on which work is based, expressed broadly in the Constitution (2008) in Article 33, which reads:

Work is a social right and duty, and an economic right, a source of personal fulfilment and the basis of the economy. The State shall guarantee working persons full respect for their dignity, a decent living, fair remuneration and wages, and the performance of healthy and freely chosen or accepted work. (art. 33)

Consequently, this study aims to analyse the effects that the right to employment stability suffers when the employer arbitrarily and without consultation changes the occupation of the worker for which he/she was hired; this situation being understood as a deterioration in working conditions, with the effect that the worker is obliged to voluntarily terminate the employment relationship, constituting an untimely dismissal.

In recent years, through the publication of the Organic Law for Labour Justice and Recognition of Work in the Home, in Official Gazette 483, 20-IV-2015, labour stability was recognised for women in a state of pregnancy or associated

with their condition of pregnancy or maternity, sanctioning and qualifying it as an ineffective dismissal; However, it is necessary to indicate that this right is not covered or guaranteed in its entirety, because through "strategies" applied by the employer, the employment stability of workers is violated, one of these is the use of the change of occupation as a figure to break the protection of this right and seek the resignation of the worker, in order to avoid paying compensation for untimely dismissal. According to the National Institute of Statistics and Census (INEC), reported by the newspaper El Universo in 2019, it says:

> Unemployment in Ecuador has reached a high level in the last three years compared to previous years, with the official figure standing at 4.9 per cent. The entity's records show that this rate is the highest since December 2016, when it stood at 5.2%. INEC publishes this indicator every three months. Adequate employment was 38.5%. The reduction of this indicator, at national and urban level, was statistically significant, a year ago it was 39.6%, said the researcher in the report. Underemployment stood at 19.7 per cent; the rate of other non-full employment was 25.9 per cent and unpaid employment was 10.4 per cent. (El Universo, 2019, n. p.)

As evidenced by the above quote, the official unemployment figure is 4.9, revealing its increase compared to 2016. This is a clear evidence of the violation of the right to employment stability. The protective norms that ensure job stability are not sufficient at present; there are still situations where employers place the worker in an environment where he/she feels obliged to resign from his/her job, one of these situations are the changes of job occupation, without consultation and worsening his/her working conditions.

Currently, the Labour Code does not provide sufficient protection against these irregularities that may be suffered by the employer, considering that this situation occurs frequently,

and the worker does not take any action for fear of losing his job; in other words, he does not feel that he is guaranteed the right to job stability and there are not enough legal tools to protect him from this violation.

It is important to highlight that the right to job stability guarantees the worker to remain in the job, to maintain the position and activity for which he/she was hired, as long as he/she is fully capable of working, until he/she becomes disabled, reaches the right to retirement or incurs in serious faults committed by the worker, as determined by law; But when the worker's occupation is changed arbitrarily, Article 192 of the Labour Code foresees that it will be considered an untimely dismissal, leaving the worker with the burden of claiming within 60 days, and while this process is being processed, the worker must carry out the new occupations that have been assigned to him/her, often causing the worker to face situations of harassment, frustration and annoyance in the workplace, most of which results in the worker resigning.

Therefore, within this research, it is proposed to establish new mechanisms that guarantee and establish conditions that can favour the worker, when he/she has been arbitrarily changed of occupation without his/her prior consent and consultation, being taken as an untimely dismissal, so that the right to employment stability can be guaranteed.

1. THEORETICAL UNDERPINNINGS

1.1. Historical background: Ecuador

According to author Quiloango (2014):

> With the appearance of the Labour Legislation, the workers of Ecuador attained liberties that until then they had never had, because when it did not exist, the abuse against their human condition had

> no limits, they lacked the most elementary justice, and their life was consumed in the slowness of an inexhaustible working day. (p. 12)

It was clear that, at the time, these workers had no freedom and no equality, being denied any participation in the progress in which society was developing, with all their own labour power being used to enrich others. Their mistreated dignity was reflected in the impossibility of enjoying the most elementary guarantees as subjects of law or as participants in their own work.

That society arrived from the conquistadors of America, because of its injustices, imposed the Spanish legal system, establishing institutions that chained without time limits; labour obligations that fell as a heavy inheritance; as an evil stain on those who would come after them, from generation to generation (Costa, 2016, p. 15).

The working class during this period was the victim of many abuses by the bosses and employers they had at the time, despite the legal changes that were taking place in society.

By the year 1830, the time of the Republic arrived without any change in the field of labor, and once this new form of government was proclaimed, the guilds and servitude continued to be in force. Only in Art. 62 of the Constitution that governed the new Republic at that time, contains the first steps that sought to curb the abuse without measure of the workforce, providing that no one is obliged to provide personal services that are not prescribed by law, are the first achievements of the working class, but nevertheless with many limitations (Quiloango, 2014, p. 33).

1.2. Elements of the Employment Relationship

2.2.1. Employer

This figure originates directly from a person who is the owner of a certain operational capital, who arranges other activities, assignments, and functions that each dependent worker must perform in the execution of his or her labor role and to whom he or she must pay remuneration in accordance with the law, convention or custom (Salazar, 2012, p. 34). According to this definition, the employer appears as a subject with absolute power to determine in the worker the labor activity to be performed in the development of the agreed contract.

2.2.2. Worker

Within the employment relationship, one of the most vulnerable parties is the worker, a person who dedicates his or her physical or intellectual effort to the development of some type of activity that for legal purposes must be remunerated.

Barzallo (2012) explains that:

> Similarly, the worker is any individual who makes a physical or mental effort for remuneration to satisfy economic needs. That is to say, the employee is the worker whose priority in providing his service is the intellectual part and the worker is the worker whose priority in providing the service is the physical part. (p. 18)

If the person who is obliged to provide a service is called a worker, whose obligation must be framed in the law as legal, because it may be the case that someone acquires an obligation that is not legal, it may also be the case that an obligation may be legal but not moral, and there are many examples of this.

In all cases, the concept of worker is broad, and its scope goes beyond the legal and even reaches the sociological and even the psychological field, because it is describing a task, of which every human being naturally has that force of production and puts on sale to society in order to be able to subsist as a productive entity that makes up the national treasury.

2.2.3. Employment contract

The author Cevallos (2015) states that a contract is defined as: "The agreement that two parties undertake to fulfil, where one party will provide its services in a lawful manner and under subordination and the other party must pay a fair remuneration in accordance with the law" (p. 18).

Therefore, it can be indicated that the establishment and signing of a contract between the parties of an employment relationship, having benefits for both parties, allows the worker to know the terms of the contract, related to the working hours, the amount of his salary, working hours, causes of termination, etc.; and it will also serve as a means of proof regarding the employer's obligations at the time of a trial.

The traditional concept of employment contract specifies it as that which commits the worker to provide work or service to the employer and under his direction or dependence in exchange for remuneration or reward. The commitment may be for a fixed term if the work or service is certain in time, or indefinite, in general. In turn, it creates reciprocal obligations, consensual and can be perfected with the consent of the parties; onerous commutative, since the parties obtain equivalent reciprocal benefits (Zegarra, 2015).

2.2.3.1. Personal provision of the service

This is directly linked to the fact that what is contracted is the labour force of a natural person, and that it is the conditions

of that person that serve as the motive for the contract. Likewise, it allows establishing that it must be that person who has been hired and not another, the one who performs the work or activity that is the object of the contract, an aspect that, as will be analysed later, generally implies a substantial difference with other types of civil or commercial relationships of a civil or commercial nature of provision of services (Molero, 2014, p. 55).

It is important to highlight that this element will have implications from the point of view of the termination of the contract, since, if the worker ceases to provide services due to death, this will be conceived as a means of termination of the employment relationship.

2.2.3.2. Subordination

According to the author Urquizo (2015), it is defined as:

> The power of the employer to require the employee to comply with orders, regulations, and instructions, which, understood as a true subordination of a legal nature, is a distinctive and defining element of the employment contract. (p. 54)

Subordination is perhaps one of the most important elements of the employment contract, because once it is understood, it represents the obligation of the worker to follow the orders and instructions of the employer. According to doctrine and jurisprudence, this element has been defined as a permanent legal power of the employer to direct the labour activity of the worker, through the issuance of orders and instructions and the imposition of regulations, in relation to the way in which the worker must perform the functions and comply with the obligations that are proper to him, with a view to the fulfilment of the objectives of the company, which are generally economic (Nieto, 2013, p. 44).

2.2.3.3. Remuneration

Author Frieds (2017) notes that:

> Remuneration for the service rendered is an essential element of the individual employment contract, it is so indispensable that without it there would not strictly speaking be an employment relationship, but a gratuitous provision of work, as prescribed by the Labour Code, Art. 3 in its last paragraph stating: "in general all work must be remunerated. (n. p.)

Remuneration represents a right of the worker and an unavoidable obligation of the employer to provide an economic consideration for the activity that the employee carries out. The remuneration or salary may be in cash, but the values and rates that the law imposes on the employer must be respected.

According to Altamiranos (2012): "The remuneration called Salary can be paid in daily, weekly, fortnightly and at most monthly periods" (p. 34). It can also be indicated that the amount of the remuneration can be freely fixed by the parties in the same contract, in the absence of express stipulation, it will be determined by the Law, and in the absence of this, the employer must pay the remuneration that it is customary to pay for the work performed by the worker in the place where it has been executed, Art. 8 and 38 of the Labour Code.

2.3. Job stability in Ecuador

The doctrine has established two main types of employment stability:

Absolute Stability occurs when the worker, after passing a probationary period, cannot be dismissed by the employer, unless he/she incurs in a cause of serious misconduct and proven before the competent judicial authority. If such misconduct is not proven, the worker can be reinstated in the same job (Marín, 2016, p. 23).

This type of stability gives the worker the right to be reinstated in his or her job or position, if he or she has been dismissed untimely by his or her employer, because the employer took such action without the permission of the authority of the Ministry of Labour. It is also closely related to the trade union privilege or that position of immobility at work, which is enjoyed by certain workers who cannot be dismissed, as is the case of pregnant women.

According to Ochoa (2018), Ecuadorian legislation distinguishes several types of absolute stability, which are:

a. When the worker obtains a scholarship for studies abroad.

b. When the worker must perform military service.

c. When it comes to protecting pregnant women.

Consequently, the protection provided to pregnant women is subject to a time limit, twelve weeks, during which the employer may not terminate the employment contract with the pregnant woman.

Relative stability occurs when the employer is entitled to terminate the employment relationship without just cause, only with the payment of a special indemnity or by giving the employee a specific period of notice. Relative stability also occurs when, when the dismissal of the worker is challenged and judicially resolved in favour of the worker, the judge cannot order reinstatement but only the payment of a special indemnity (Marín, 2016, p. 23).

This type of stability is generated in favour of the worker only to receive compensation when he/she is dismissed for cause attributable to the employer or is retired, which means that this stability does not ensure the permanence in the place

or position that he/she had in the job. This regime is the one that has generally been established in labor relations, guaranteeing the payment of the worker when he/she is dismissed.

The stability of the worker has other norms of protection to prevent it from being affected, and when the employer proceeds unilaterally against it, he/she is sanctioned with the payment of economic indemnities. Untimely dismissal is the disrespect of the guarantee of the individual employment contract, which is sanctioned with compensation.

In Ecuadorian legislation, this type of relative stability is accepted, due to the fact that the employment contract for an indefinite period of time is the one that does not contemplate a fixed date for its termination, but it is also worth saying that it is not a contract for life, an indefinite period of time that is advantageous because for the termination, unless the express will of the parties intervenes, there is a need to prove legal causes contemplated in articles 172 and 173 of the current Labour Code, It is necessary to prove legal causes contemplated in articles 172 and 173 of the Labour Code in force, trying to curb the arbitrariness of the employers, which is still insufficient, highlighting that workers rarely resort to the causes established in article 173, due to the need they have for employment to support their families and themselves.

Stability classes also include stability by origin, which are classified as follows:

> a. *Legal Minimum:* defined by Viteri and Quiloango (2014), stating that: "it is the stability enshrined and protected by law, a circumstance that makes it operate as of right. It is said to be minimum because the parties cannot agree below or contradict what is stated in the norm" (p. 11).
>
> b. *Conventional legal:* According to the doctrinaire Bogliano (1957) this type of stability is comprised when:

> The State seeks stability without establishing it, so it allows the parties to agree on it either in the employment contract or through collective bargaining agreements in which the law allows the mediation of clauses that benefit the workers, but in no way can it be less than the legal minimum, even with the consent of the worker. (n. p.)

Therefore, this stability is achieved by means of collective agreements, but it has the problem of not being considered as fixed, as it has to be renewed when the agreement expires, which inevitably causes a struggle between employers and workers when it is time to ask for the agreement to be ratified, and if the agreement is not ratified, the workers are left unprotected, as in some way it serves as stability for the worker and for all those who are in charge of him/her.

2.4. Job stability and its types according to doctrine

The author Zegarra (2015) quotes the doctrine of Ferrero (n. d.), who defines employment stability as: "The contractual relationship in terms of its duration is considered to be indefinite, unless this term results from the particularity of the relationship" (p. 1). Employment stability is considered a fundamental principle and an important source for the acquisition of certain rights recognized in our social environment. Within the Ecuadorian legislation, relative stability is determined in Art. 14 of the Labour Code, which recognizes the principle of job stability under the title of minimum stability and exceptions.

In addition, it is important to note that, this article determines that it protects the stability of the worker for one year who signed a fixed-term or indefinite contract.

Taking into consideration that job stability seeks to benefit both parties in the employment relationship and society in general, it is important to explain that, with the execution of this principle, it is creating in the worker the satisfaction of

being secure in their jobs, which has the effect that the worker provides a service free of worries and unnecessary anxieties of losing their jobs in cases where there is no just cause.

It should be noted that the rights and principles relating to labor law, which are widely determined in international conventions and treaties, have been admitted as one of the main sources of consultation, as stated in the Constitution of the Republic of Ecuador, published in the Official Register 449 of 20 October 2008.

So, basically, the meaning and purpose of the right to stability is to ensure the protection of the worker in general. Consequently, this stability regime seeks to limit and restrict to some extent the unconditional freedom and autonomy of the employer to take actions or decisions that are detrimental to the welfare of the workers, thus avoiding the occurrence of arbitrary dismissals that cause problems and insecurities to the worker, whose only source of income and livelihood is his or her job.

The author Núñez (2016) points out that:

> The academic concept of the principle of Job Stability comes from the meaning of the three words:
>
> a) Principle: an abstract guiding norm or mandate for optimization of an inalienable, unrenounceable, indivisible, and interdependent nature; b) Stability: having the quality of stability, corresponding to the meaning of: That it is maintained without danger of changing, falling or disappearing; and c) Labor: referring to work. (n. p.)

From this we can deduce that the principle of job stability refers to the right of a person to remain in his or her job, producing a livelihood for himself or herself, his or her family

and contributing to society, without the danger of being dismissed from his or her job without legal justification.

In doctrine, the principle of stability can be found in the following contributions:

According to Cabanellas (1979), the principle of job stability: "It consists of the right that a worker has to keep his job indefinitely, if he does not incur in previously determined faults, or if very special circumstances do not occur" (p. 87).

Another labor scholar puts it this way: "It is the basis of the economic life of the worker and his family, whose purpose lies in living today and tomorrow, it is the certainty of the present and the future" (Milanta, 1972, p. 11).

The principle of employment stability, therefore, ensures and protects the permanence of the employment relationship with an important transcendence related to the present, but also to the future, which is equivalent to saying that it has a direct impact on the life project of individuals it is of vital importance.

2.5. Labor practices that undermine employment stability in Ecuador

2.5.1. Untimely dismissal

Untimely dismissal is known as the termination of the employment relationship, which is carried out unilaterally by the employer, understood as the notice given by the employer to the worker of the termination of his work, where the employer also lets the worker know that it is his will to terminate the employment relationship. The decision taken by the employer is carried out without the consent of the worker, in an unjustified manner and without prior notice, which causes the worker to be unemployed and, failing this, obliges the employer to pay the worker compensation for untimely dismissal, in accordance

with the provisions of article 188 of the Labour Code. In cases of untimely dismissal, the employer must pay the worker, in addition to the proportions of the thirteenth salary, fourteenth salary and holidays, a mandatory dismissal bonus, in accordance with the provisions of article 185 of the Labour Code (Mingo, 2018, p. 36).

2.5.2. Harassment at work

The author Torres (2019) defines it as:

> Any repeated and potentially injurious behaviour that violates the dignity of the person, committed in the workplace or at any time against one of the parties to the employment relationship or between workers, and which results in the person concerned being undermined, mistreated, humiliated, or whose employment situation is threatened or undermined. (p. 22)

Therefore, harassment in the workplace is understood as when discriminatory acts are carried out, generally motivated by reasons of age, sex, gender identity, cultural identity, marital status, religion, ideology, judicial past, among other conditions, which lead to the suffering worker being under pressure and taking the decision to voluntarily resign from the job, it should be noted that this resignation, despite being voluntary, is guided by the pressure and harassment to which the worker is subjected in the work area.

By Torres (2019) it is understood that:

Mobbing or mobbing is a phenomenon that has existed historically, however, in recent times it has come to the forefront of discussion. This type of harassment has become such an escalating problem that it has begun to be referred to as a psychological crime. (p. 6)

It is important to point out that harassment suffered by a female or male employee in the workplace is a form of gender-based violence that is mostly suffered by women, where their quality of life is seriously affected, thus violating the exercise of their rights.

2.5.3. Occupational change of job and its effect on job stability in Ecuador

The jurist Leiva (2014), in his work Diccionario Jurídico defines Dismissal as: "To deprive of occupations, employment, activity or work" (s. p.).

Accordingly, jurist Mayorga (2019) defines it as follows:

> When the employer terminates the employment contract and dismisses the worker, without having legal cause to do so, or when there is legal cause and the employer does not observe the procedure established in the Labour Code for dismissing the worker, we say that the termination is illegal, and the dismissal is untimely. Likewise, there is untimely dismissal if the termination of the fixed-term employment contract has been carried out abruptly, i.e. without the respective dismissal, unless the dismissal has been omitted because it has been approved. (p. 24)

Art. 192 of the Labor Code establishes the change of employment occupation without authorization of the worker by the employer as untimely dismissal, provided that the worker claims it within the following 60 days, and for these cases the approval of the Labor Inspector is not necessary, the claim for severance pay, and this has been established in several rulings by the National Court of Justice.

This article prohibits the employer from infringing on the rights of the worker, which cannot be waived, representing a

balance with respect to the legal relationship, by establishing that the employer cannot order arbitrary changes of occupation or require the employee to carry out work for which he/she is not hired or prepared.

This legal protection that the worker has, and which cannot be ignored by the employer, who may not improve the worker's current position, may not reform it or try to make changes that affect the acquired rights. The change of the worker's occupation, to be valid, requires the worker's consent; otherwise, it is considered a case of unjustified untimely dismissal, with the consequent responsibilities of the employer to compensate for the violation of the contract through the payment of compensation provided for in the labor law (Pilataxi, 2014, p. 26).

That is to say that the current legal provision does not fully guarantee the worker the right to reinstatement and job stability, but only recognizes the worker's right to claim compensation for untimely dismissal, which is why many workers do not complain about the change of occupation, because they prefer to keep their job and accept the arbitrary provisions imposed on them by the employer; This situation should be better regulated by our Labor Code, in order to protect the worker from these arbitrariness and to guarantee his right to stable and permanent work, to work in a safe place, to receive a fair remuneration, to carry out the activities for which he was contracted, to work in the same place where he is employed, to work in the same job, to work in the same place where he is employed, to work in the same place where he is employed, and to work in the same place where he is employed.

Comparative doctrine and legislation have called dismissal the unilateral decision of the employer to terminate the employment relationship, whether there is a justifiable cause. Thus, dismissal can be defined as the unilateral manifestation

of the employer's will, of which the worker is aware, and which evidences the unequivocal intention to terminate the employment relationship. Dismissal is then consolidated as an act (Altamiranos, 2012, p. 21).

For its part, the National Court of Justice, Labor Chamber, in No.840-10, Report of Dr. Johnny Ayluardo Salcedo, states that:

> Untimely dismissal, as a way of concluding the contractual relationship, consists of any direct or indirect procedure used by the employer with the purpose of unilaterally terminating the employment relationship; and, in the case of a change of occupation, it is known as indirect dismissal. The work is not agreed between the worker and the employer, it is produced by the needs of the company and for the convenience of the employer, the agreed labor benefits undergo changes and modifications. Therefore, changes in working conditions, when they do not go against the worker, are considered normal. (Judgment No.840-10, 2012, s. p.)

3. METHODOLOGY ASPECTS

3.1. Study and type of research

Due to the doctrinal and theoretical-legal influence, a study has been implemented According to Hernández Sampieri, Fernández Collado and Baptista (2017), a descriptive study is defined as follows:

> Descriptive studies seek to specify properties or any other phenomenon that is subject to analysis. They measure, evaluate, or collect data on various aspects, dimensions or components of the phenomenon to be investigated; from a scientific point of view, to describe is to collect data. (p. 60)

This article details the situations suffered by many workers who are changed of occupation, which is taken as an untimely dismissal, affecting the full enjoyment of job stability.

According to Fidias (2012), documentary research is defined as:

> A study process based on the search, analysis, retrieval, and interpretation of data obtained from primary and secondary sources on the phenomenon under investigation. In this research, the examination and analysis of norms, jurisprudence and doctrine related to the worker's change of occupation and employment stability was carried out. (s. p.)

In addition, field research is applied, as it is applied by extracting information and data that are directly related to reality, carried out using data collection techniques, by means of surveys or interviews, in order to obtain conclusions and solutions to a given situation or problem (Chernobyl, 2018).

3.2. Research approach

The quantitative method is implemented, as its main objective is to give a numerical assessment of the development of the elements proposed in the field research.

According to Rodriguez (2010):

> The quantitative method focuses mainly on the facts or causes of the phenomenon under study, with little interest in the subjective states of the individual. In the development of this study, inventories, questionnaires, demographic analyses are applied, where the results are summarised in percentages, with statistical tables and graphs. (s. p.)

This approach was applied in this study when surveying free practicing lawyers in Guayaquil.

In addition, a qualitative study is implemented, which Maya (2014) points out that: "This involves the use and collection of a wide variety of materials, such as interviews, life stories, personal experiences, observations, images, historical texts and competent observers" (p. 14). The qualitative method aims to collect judgement on some objective fact, the result of which contributes to the research work.

3.3. Population and sample

3.3.1. Population

The population to whom the data collection instruments indicated in this study will be applied are the free practice lawyers in the labour area of the city of Guayaquil, registered in the Forum of Lawyers in Guayas, with several 16,152 registered up to the time of this research.

3.3.2. Sample

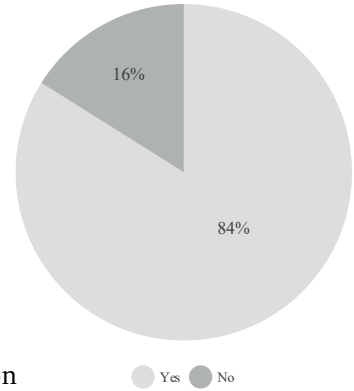
The following formula was used to calculate the sample size:

$$n = \frac{N \quad Z_{\propto}^{2} \quad p \quad q}{e^{2}(N-1)+Z_{\propto}^{2} \quad p \quad q}$$

4. RESULTADOS

4.1 Do you consider that the change of occupation has an impact on the worker's right to stability?

Table 1: Results Question No. 1

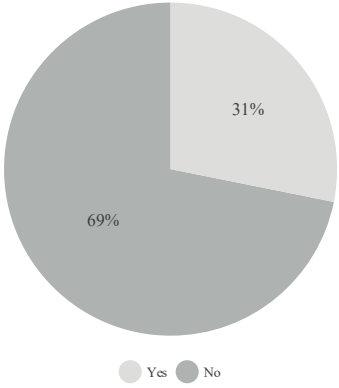


Own elaboration

Of the 100% of the labour lawyers surveyed, 84% indicated that the change of occupation suffered in certain cases by the worker has a direct impact on and affects the Right to Employment Stability, being considered as an untimely dismissal that the employer is carrying out to the detriment of the employee.

4.2 Do you think that the control measures and sanctions to prevent untimely dismissal due to change of occupation currently existing in the Labour Code ensure respect for employment stability?

Table 2: Results Question No. 2

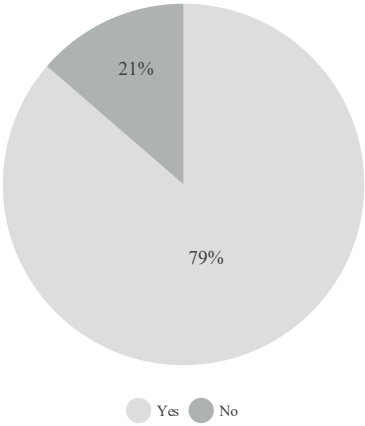


Own elaboration

Of the 100% of the labor lawyers surveyed, 69% stated that the current control measures established in the Labor Code in force are not sufficient to stop cases of abuse by employers, who make changes of occupation without reaching an agreement with the worker and that it is practically an untimely dismissal, while 31% said yes to the approach taken.

4.3 Do you consider that a change of occupation experienced by an employee should be regulated as harassment at work by the employer or manager?

Table 3: Results Question No. 3

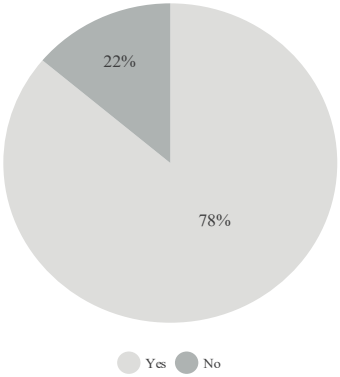


Own elaboration

Of the 100% of the labor lawyers surveyed, 84% indicated that the change of occupation suffered in certain cases by the worker has a direct impact on and affects the Right to Employment Stability, being considered an untimely dismissal that the employer is carrying out to the detriment of the employee, while 21% indicated that this was not the case.

4.4. Do you think that the change of occupation has a negative impact on the worker?

Table 4: Results Question No. 4

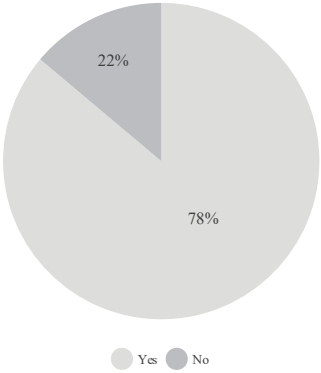


Own elaboration

The labour lawyers surveyed stated that 78% said that it does have a negative impact on the worker who is changed of occupation, generating drastic changes in their economy, while 22% said that there are no such psychological effects on the person.

4.5. Do you consider that the Labour Code should be reformed to establish new legal protection mechanisms for arbitrary change of occupation in order to guarantee job stability?

Table 5: Results Question No. 5

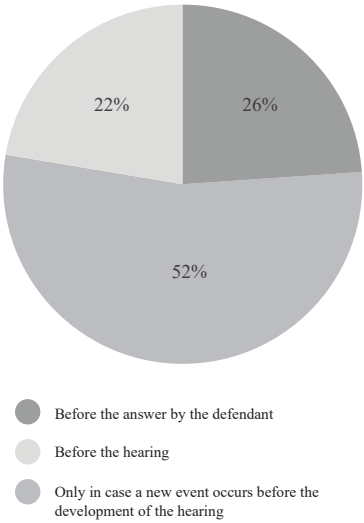


Own elaboration

Of the 100% of the labor lawyers surveyed, 84% indicated that the change of occupation suffered in certain cases by the worker has a direct impact on and affects the Right to Employment Stability, being considered as an untimely dismissal that the employer is carrying out to the detriment of the employee.

4.6. . At what procedural moment do you consider that it is most useful to reform the claim within the processes established in the COGEP?

Table 6: Results Question No. 6

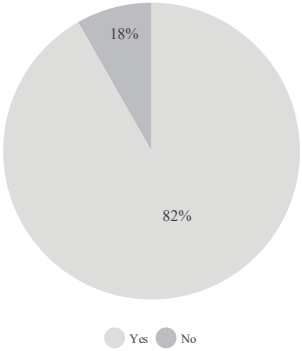


Own elaboration

Of the 100% of the respondents, 52% stated that the amendment of the claim is advisable before the hearing, while 26% considered that the amendment should be carried out before the defendant's defence, followed by 22% only in the case of events that occur before the hearing.

4.7. Is it useful for the plaintiff to amend the claim in the summary procedure?

Table 7: Results Question No. 7

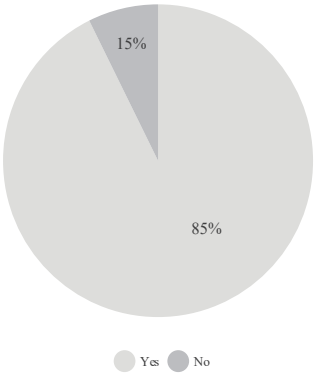


Own elaboration

The graph shows that 82% of the respondents indicated that the reformation of the claim is an act of great benefit for the parties in the process, because through it they can add some relevant facts before the hearing takes place, while 18% consider that it does not represent much benefit to carry out this act in the summary procedure.

4.8. Is the refusal to amend the claim in the summary procedure under the COGEP an inconvenience for the plaintiff?

Table 8: Results Question No. 8

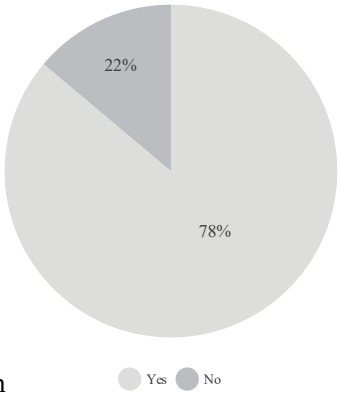


Own elaboration

The graph shows that 85% of those surveyed indicated that the refusal to amend the complaint in the summary procedure represents an inconvenience for the plaintiff in the event that he/she has to add some element or fact of conviction in the complaint that will serve to clarify or prove the facts that he/she alleges and that due to the prohibition to amend, he/she cannot add these new facts or has to withdraw the complaint; on the other hand, 15% indicated that it does not represent any inconvenience at all.

4.9. Do you consider that the COGEP should be reformed in order to allow in the summary procedure to amend the claim and defences in the defence?

Table 9: Results Question No. 9



Own elaboration

Of the 100% of respondents, 78% stated that they considered it necessary and appropriate to reform the COGEP to eliminate the refusal to amend or reform the complaint in the summary procedure so as not to violate the rights of the parties in the development of this process, which is expeditious, while 22% did not consider this reform to be necessary.

5. ANALYSIS OF RESULTS

Of the total number of respondents, 84% consider that the change of occupation does have a negative impact on the worker's right to stability, as it is nothing more than an untimely dismissal, which many employers use this strategy in order to avoid paying the worker the corresponding compensation, thus generating work and psychological pressure on the worker with the change of occupation, which leads him/her to resign, thus violating the rights of workers, directly related to the full enjoyment of job stability, as mentioned above.

The survey also asked the population whether they considered it necessary to reform the Labor Code to solve this problem. 78% of respondents agreed that it is necessary and important to make these changes to the labour law, with the aim of establishing and strengthening measures to ensure that workers' rights, especially the right to job stability, are protected and guaranteed in an effective manner.

CONCLUSIONS

Based on the bibliographical research carried out in the theoretical framework of this study, it is evident that the employment relationship must be based on the principles and guarantees established in the Constitution and other related regulations. The doctrinal and legal foundations of labor stability were also analyzed, but it was found that despite the development of these, controversies still arise in their environment, generally leaving the worker in eminent neglect, with their rights being violated, and it was determined that one of them is labor stability, after being changed occupation by unilateral mandate by the employer.

With the development of the theoretical framework, the second objective of identifying the doctrinal foundations was fulfilled, determining the importance and classification of

employment stability in the doctrine and the legal framework. The conventions signed by the ILO were extensively reviewed, proving the legal protection provided to the worker's employment stability, which is one of the essential rights in the employment relationship.

Constitutional Court sentences and rulings were also reviewed, in reference to the change of occupation, considering that in those cases where a change of occupation is generated, which was not agreed with the worker, it is known as indirect dismissal. Interviews with judges also indicate that it is necessary to expressly conceptualize what a change of occupation is and that it should be regulated as a cause for termination of employment.

In the development and application of the surveys and interviews, the need for the law to be reformed to guarantee the right to employment stability became evident. 84% of those surveyed stated that the change of occupation does have a direct impact on the full enjoyment of employment stability, which is guaranteed to workers in the Constitution.

Similarly, it was determined that the current control measures and sanctions to avoid the violation of labor stability are not sufficient to prevent and prevent employers who disrespect these guarantees, 69% of them stated that the guarantees currently established in the Law are not sufficient.

Finally, it was found that the change of occupation should be considered as an act of labor harassment that is carried out by the employer against the worker and should therefore be regulated in the norm.

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The importance of *proportionality* in penalties in the Ecuadorian Penal Code for violence against women and family members

La importancia de la proporcionalidad en las penas en el Código Penal ecuatoriano de la violencia contra la mujer y miembros del núcleo familiar

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ABSTRACT: Violence against women or members of the family is an act that affects society in every corner of the world, because it destroys the family in many ways, such as morally, physically, psychologically, and even intellectually, as in the case of children or adolescents who are underachieving at school, since they have to endure different types of violence from the aggressor. Considering the importance of the family in society since it is on the family that the healthy and orderly growth of a society depends. This social problem has a lot to do with how, throughout history, there has been a misconception on the part of men that it is they who are superior and that it is women who must obey and be subdued, as it is they who impose authority on women in a violent manner that reaches the point of threatening their integrity and that of their whole family.

KEYWORDS: Violence against women, victim, crime, domestic violence, sexual violence.

RESUMEN: La violencia contra la mujer o miembros del núcleo familiar, es aquel acto que afecta a la sociedad en cada rincón del mundo, pues destruye la familia en muchos aspectos, como en la forma moral, física, psicológica e incluso intelectual, pues es así el caso de los niños o adolescentes que están bajo el rendimiento escolar, ya que estudiando deben soportar los diferentes tipos de violencia por parte del agresor. Poniendo en cuenta la importancia que genera la familia en la sociedad, pues es de ella que de quien depende el crecimiento de forma ordenada y saludable de una sociedad. Esta problemática social tiene que ver mucho sobre cómo se ha venido dando por lo largo de la historia aquel concepto equivocado por parte del hombre, que es el, el que tiene criterio de superioridad y que la mujer es quien debe de obedecer, siendo sometida, pues es el quien impone autoridad contra la mujer de una manera violenta que llega al punto de atentar contra la integridad de ella y toda su familia.

PALABRAS CLAVE: Violencia contra la mujer, víctima, delito, violencia doméstica, violencia sexual.

CÓDIGO JEL: K14

INTRODUCTION

The victims of aggression against women and members of the nuclear family are the couple, i.e., the wife, husband, and children; those who endure and suffer abuse and punishment are the woman and the children. The woman receives violent acts such as physical violence, psychological violence, sexual violence, and gender violence, while the children receive punishments such as beatings and mistreatment. Being the mother who becomes on many occasions the voluntary victim because she depends on the man emotionally, economically, and effectively, being thus the one who considers that she has

been wrong and justifies the violent actions of the aggressor, becoming a vicious circle, because they are the minors who will be reflected with this type of conduct and now they will be the future aggressors or assaulted.

Currently, there are more frequent cases of extreme violence against women or members of the family, reaching such a point that the violence becomes murder. For this reason, the realization of this research project is based on the importance of the family for society and the importance of taking care of it, protecting it, and watching over it, so it is very important the type of penalty that should have these crimes.

In the present article, it consists with the pertinent information, exposing all that information, legal, doctrinaire, and conceptual referring to this delicate subject; beginning with the identification of the proportionalities of the penalties and the origins of the family and in turn its importance, searching on the different terms that are linked and are inherent in this action of violent character. From there it is passed to determine and to consult the different criteria of specialists in the subject and of the most important scholars.

After this, information about domestic violence is presented, the type of violence, classes, effects, and degrees that exist within the family nucleus, analyzing why the victim tolerates this type of acts and which are the laws that protect and protect within this issue that occurs at world-wide level.

In addition, files were made to compare the laws that are related to violence against women and members of the nuclear family that is related to the legal regulations of Ecuador in comparison with those of other countries. The legal aspect was also analyzed in terms of the penalties that an aggressor receives when he or she commits some type of violence.

1. THE FAMILY AS THE BASIS OF SOCIETY

Tabera and Rodríguez (2010) defined the family as "the institution or basic social system par excellence. The family is the primary frame of reference and belonging of an individual, which enables the development of their capabilities" (s. p.), which means that the family is the organism where the foundations of the individual will be constituted, which will take place throughout life, positively or negatively.

1.1. Criminal Dosimetry

The dosimetry of the penalties and sanctions for the Constitutional Court of Colombia determines that it is a loose matter to the legal definition. Manifesting this at the moment that the legislator commits a punitive excess of type expelled or not written in the constitution, being its social character of human reality, principles, and autonomy. Basing itself fundamentally on the principles of proportionality and subsidiarity of the penalty, so that it is only when it is precisely necessary. The penal dosimetry is an issue left to the legal definition; however, it is up to the judges to ensure the respect that must be given to the principles of proportionality and reasonableness (Garcia, 2011).

In addition, Dr. José García Falconí (2011) indicates that, in our Constitution of the Republic of Ecuador, the principle of equality is typified in Art. 11 numeral 2, which talks about all people are equal before the law, guaranteeing the same duties, rights, and opportunities for all; they are governed in principles, such as. No one may be discriminated against based on socio-economic status, disability, gender identity, age, sex, cultural identity, political affiliation, judicial background, language, religion, etc. The state is the one who will take the necessary

measures to guarantee and promote equality for those who want to violate this right and are in a state of inequality.

Thus, establishing that justice, peace, freedom, good living, and solidarity are prioritized, with judges administering justice based on the Constitution.

This principle comes from principles such as proportionality and reasonableness, thus justifying the variety of treatment, estimating the relationship between the means used and the end to be achieved.

Dr. José García Falconí (2011) explains that:

> In addition, the principle of harm or material unlawfulness, as is generally known and as the doctrine indicates, as stated above, it follows that there must be a relationship of proportionality between the typical conduct and the punitive response, so that the severity of the penalty depends on the gravity of the offense, since the principle of equality. (p. 8)

Criminal dosimetry is a subject that requires an academic study, which is constituted in a legal way to the principle of proportionality of penalties. It is based on objectives, being the character of scientific and normative thinking of the law. The penalty will always depend on the degree that it has either in the judicial or legislative part it will be based and will depend on the degree of intensity with which the violation of the criminal protected legal good was committed (Zambrano, 2019).

In addition, Falconí (2016), in an opinion column published in the newspaper El Universo explains that:

> When we speak of penal dosimetry, we refer to the application of the principle of proportionality to penalties, both by the legislature when imposing a specific sanction for conduct defined as a crime, as well as by judges and courts when deciding specific cases. The imposition of punishment and its magnitude will depend, both legislatively and judicially, on the intensity with which the criminal legal right protected by the criminal type has been violated or endangered. In less technical language, it will depend on the amount of damage that has been caused. (p. 1)

In summary, penal dosimetry is that which is expressed now that the legislator is going to commit a punitive excess that is not prescribed in the law. The dosimetry is based on the principles and the lifestyle or human reality of society, on the principle of proportionality and subsidiarity of the penalty; requiring a profound study of an academic nature that is composed legally. It is up to the judges to ensure that the principles of proportionality and reasonableness are respected and respected.

Dr. José García Falconí (2011) points out that the burden or magnitude of the penalty either in the legislative part or in the judicial part will be given depending on the degree of magnitude with which the act that caused the violation of the criminal protected legal right was carried out.

The principle of lesivity is the typical conduct, giving the punitive response concerning the principle of proportionality; that now of dictating the penalty it will be given depending on the seriousness of the infraction committed.

This is a fundamental principle, which serves a peaceful and harmonious coexistence, alluding precisely to the fact that there will be no criminal offense, process, or penalty, without it

being typified and in force in the law. Which is legally directed by a legislator, guaranteeing the "taxatividad" of the penalty.

It will be published in the official registry. The principle of legality has the function of limiting the abuse of power, seeking that public power is always following the law. In our Constitution of the Republic of Ecuador (2008):

> In all proceedings in which rights and obligations of any kind are determined, the right to due process shall be ensured and shall include the following basic guarantees:
>
> (...)
>
> No one may be tried or punished for an act or omission which, at the time it was committed, was not classified by law as a criminal, administrative, or other offense; nor shall a penalty not provided for by the Constitution or the law be applied to him or her. A person may only be tried before a judge or competent authority and with observance of the proper procedure for each proceeding. (art. 76.3)

1.2. . Family context and intimate partner violence against women

According to Ribero and Sánchez (2005) (cited by Espinoza, Vivanco, and Vargas, 2019) indicate that those women who grew up in a home of violence, where the mother was beaten and abused, suffering aggressions coming from her partner, are those who, at the moment of having a personal relationship, are more prone to live this type of situations, since, due to what they have lived, their vision will be to tolerate this type of behavior in the family environment. At the same time, they

come to believe that the father or the man in the relationship is the one who will have the power to exercise violence to impose his thoughts and authority as the dominant person in the family nucleus.

The World Health Organization (n.d.) indicates that:

> The percentage of ever-partnered women who had experienced physical and/or sexual violence by a partner in their lifetime ranged from 15 to 71 percent, although rates in most settings ranged from 24 to 53 percent. (p. 3)

According to the United Nations, until 1991, only 22 countries in the world granted women the same rights and opportunities as men in matters of family property, marriage, and divorce. Violence against women is caused by the unequal power relations between men and women. The problem continues to develop in the implanted stereotypes that are negative, affecting those networks of support where the woman who lives the type of mistreatment goes so that the due attention and protection are offered to them, but, by the raised stereotypes, they are victimized by those organisms that are supposed to offer them the necessary protection (Ruiz, Blanco, and Carmen, 2004).

The National Institute of Women (2006) explains that:

> Partner violence usually begins during the dating relationship, and in most cases continues and is accentuated in married life; in a significant proportion, it continues to manifest itself after the violent relationship has ended, with aggressions towards the woman by the ex-partner. (p. 3)

Sanmartín et al. (2010) indicate that intimate partner violence affects all kinds of people, no matter what social class, educational level, or country they belong to. This is one of the forms of gender violence with the highest rates of development and spread in the world. People consider this type of violence as repulsive and scourge, however, even so, they tend to admit and allow this type of treatment within their relationships, becoming people tolerable to violence. They perceive violence as a normal act, as if it were part of a relationship with their intimate partner, without allowing a third party to intervene, thinking that it should be resolved between the members of the relationship. Considering that it is not other people's business, preventing the help of third parties.

Bronfenbrenner (1979) (cited by Sanmartín et al., 2010) expresses that risk factors can be presented in different ways, whether individually, socially, family, or culturally. In addition, no factor explains why some people are more violent than others or why violence tends to develop in more specific places or other communities; but what is important is how it influences itself and its factors.

1.3. Elements of the Crime according to the Ecuadorian Organic Integral Criminal Code

Human activity has much to do with the human character, referring to humans as an agent and not patients, being susceptible to commit a crime. On the other hand, Typicity is the typical conduct that leads to an act or omission that is established as a crime within a legal body. As for the antijuridicity, it is the typical, antijuridical and guilty voluntary conduct. That is, it is contrary to law and is unlawful, which injures or endangers property or interests protected by law. Finally, culpability is divided in two ways: a) malice or the

intention to harm; b) guilt or the act by negligence or without intention (COIP, 2014).

Guilt is divided into these two ways, the first being with the precise intent to cause pain or harm, while the second is by an act of recklessness leading to guilt.

1.4. Types of violence typified in the Comprehensive Organic Criminal Code of Ecuador

Among the principles of our constitution, it states that it is a constitutional state of rights, justice, and social duty, guaranteeing, in turn, the right to a culture of peace, comprehensive security, and democratic society. In the same prologue, it indicates the constitution of society respecting in all its aspects, the decency and dignity of persons and their collectivities.

It has been established as a right and guarantees sexual and reproductive, moral, physical integrity, non-discrimination in their human and psychological freedom. All of this includes women and all individuals who are part of our nation. Our state has as necessary measures of protection, the prevention, punishment, and elimination of all acts or types of sexual violence, disappearance, prostitution, or forced sterilization; in the Organic Integral Penal Code, they are typified with their respective sanctions as crimes against humanity.

The social reality concerning violence against women was previously a topic that was far removed from the Constitution of the Republic of Ecuador and our punitive code, but today it has been introduced and is part of our Ecuadorian penal system, forming part of the Code of Criminal Procedure (COIP).

Our state through our Organic Integral Penal Code (2014) in articles 155 to article 158 indicates that it is typified and punished in the crimes of violence that occurs against women or members of the family nucleus, which is given these provisions from our constitution. Article 155 states that all mistreatment or any form of violence, whether against women or members of the family nucleus, which is carried out by a member of the family nucleus, is defined as violence, and classified as such. In cases of violence that produce or generate injuries that are given against the woman, or any member of the family nucleus will be sanctioned by Art. 156 maintaining the same penalties that are foreseen in the crimes of injuries, but with a higher degree of one-third.

> Article 155.- Violence against women or members of the nuclear family: Violence is any action consisting of physical, psychological, or sexual mistreatment by a family member against a woman or other members of the nuclear family.
>
> Members of the nuclear family are the spouse, common-law or unmarried partner, cohabitant, ascendants, descendants, sisters, brothers, relatives up to the second degree of affinity, and persons with whom it is determined that the defendant maintains or has maintained family, intimate, affective, conjugal, cohabitation, dating or cohabitation ties.
>
> Article 156.- Physical violence against women or members of the nuclear family: The person who, as a manifestation of violence against women or members of the nuclear family, causes injuries, shall be punished with the same penalties provided for the crime of injury increased by one third.

Article 157.- Psychological violence against women or members of the nuclear family. - –

Any person who, as a manifestation of violence against women or members of the nuclear family, causes damage to mental health through acts of disturbance, threat, manipulation, blackmail, humiliation, isolation, surveillance, harassment or control of beliefs, decisions, or actions, shall be punished as follows:

If minor damage is caused that affects any of the dimensions of the integral functioning of the person, in the cognitive, affective, somatic, behavioral, and relational spheres, without causing impediment in the performance of their daily activities, shall be punished with imprisonment of thirty to sixty days.

If the person is moderately affected in any of the areas of personal, work, school, family, or social functioning that causes prejudice in the fulfillment of their daily activities and therefore requires specialized mental health treatment, shall be punished with a penalty of six months to one year.

If it causes severe psychological damage that even with specialized intervention has not been reversed, it will be punished with imprisonment of one to three years.

Article 158.- Sexual violence against women or members of the family nucleus: The person who, as a manifestation of violence against women or a member of the family nucleus, imposes on another and forces her to have sexual relations or other similar practices, shall be punished with the penalties provided for in crimes against sexual and reproductive integrity. (COIP, 2014)

2. METHODOLOGICAL ASPECTS

For this article, interviews were conducted with criminal lawyers, judges, and prosecutors in the criminal area specializing in domestic violence, to obtain a more precise point of view that would help to respond to the objectives of the research. In addition, files were elaborated in which the articles that penalize the types of violence against women or members of the family nucleus are observed.

The following table shows the articles referring to the different types of violence in the selected Latin American countries, being those that penalize the different types of violence and aggression by the aggressor.

This table explains physical, psychological, and sexual violence. Physical violence is an action that causes harm to another person, and can be physical or even material, i.e., the use of objects causing even more damage. Its purpose is to cause injuries both externally and internally.

Psychological violence is the one that, although it may seem the "mildest" is the one that affects the most because it reaches the point of generating that the assaulted person sinks into a hole from which it is very complex to get out, accepting and tolerating the aggression by the partner and even thinking that he/she deserves such treatment, blaming him/herself for what happened. Sexual violence is an act that involves threats or force and that occurs without the consent of the victim.

4.1. Laws that criminalize domestic violence in Latin America

Table 1: : List of laws typifying violence in the Ecuadorian Organic Integral Penal Code

País	Cuerpo Normativo	Artículo	Disposición	Sanción
Ecuador	Code Organic Integra Penal	Art.155, Violencia contra la mujer o miembros del núcleo familiar.	Se considera violencia toda acción que consista en maltrato, físico, psicológico o sexual ejecutado por un miembro de la familia en contra de la mujer o demás integrantes del núcleo familiar.	
		Art.156.-Violencia física contra la mujer o miembros del núcleo familiar	La persona que, como manifestación de violencia contra la mujer o miembros del núcleo familiar, cause lesiones	Sanción con la misma pena previstas para el delito de las lesiones aumentadas a un tercio.
		Art.157.-Violencia psicológica contra la mujer o miembros del núcleo familiar.	Comete delito de violencia psicológica la persona que realice contra la mujer o miembros del núcleo familiar amenazas, manipulación, chantaje, humillación, etc.	Pena privativa de libertad de seis meses a un año.
			Si con ocasión de la violencia psicológica se produce en la víctima, enfermedad o trastorno mental.	Tendrá sanción máxima de la pena, aumentada a un tercio
		Art.158.-Violencia sexual contra la mujer o miembros del núcleo familiar.	La persona que, como manifestación de violencia contra la mujer o un miembro del núcleo familiar, se imponga a otra y la obligue a tener relaciones sexuales u otras prácticas análogas.	Pena privativa de libertad son las sanciones de los delitos contra la integridad sexual y reproductiva.

Fuente: COIP (2014)

NOTE: In the following sheet you can see the laws that penalize the types of violence in Ecuador.

Own elaboration

The articles of the Ecuadorian Comprehensive Organic Criminal Code that criminalize the types of domestic, psychological, sexual, and physical violence that an aggressor can commit can be seen in sheet number one. As can be seen in the sheet, the aggressor can receive a penalty of up to one year's imprisonment and the penalty can even be increased depending on the type of violence that the aggressor has committed.

Table 2: List of laws typifying violence in the Nicaraguan Pena Code.

Country	Normative Body	Article	Provision	Sanction
Nicaragua	Comprehensive law against violence against women and reforms to law no. 641, "penal code."	Art. 10. Physical violence.	As a consequence of the physical violence exercised by men in the framework of unequal power relations between men and women, the woman will be caused any of the physical injuries typified in this Law, the following penalty will be applied:	Minor injury: imprisonment from eight months to one year and four months.
				Serious injury: imprisonment from eight months to six years.
				Very serious injury: imprisonment from seven years and six months to thirteen years and four months.
		Art.11 Psychological violence	If dysfunction is caused in any of the areas of personal, work, school, family or social functioning that requires specialized mental health treatment	Penalty of two years and eight months of pressure.

		If a mental illness is caused that, even with specialized intervention, the person cannot permanently recover their mental health.	Sentence from seven years and six months to thirteen years and four months in prison.

Note: In the following sheet you can see the laws that criminalize the types of violence in Nicaragua

Own elaboration

In card number two, you can see the articles of the Integral Law Against Violence against Women and of the reforms to the law no. 641, the "penal code" of Nicaragua that penalizes physical violence in art.-10 and psychological violence in art.-11.

Table 3: List of laws typifying violence in the Guatemalan Penal Code

Country	Normative Body	Article	Provision	Sanction
Guatemala	Law against Femicide and other forms of Violence Against Women.	Article 7. Violence against women,	Having attempted in a repeated or continuous manner, unsuccessfully,	The person responsible for the crime of psychological violence against women will be punished with imprisonment of five to eight years, according to the seriousness of the crime.
			Maintaining at the time of the perpetration of the act, or having maintained family, conjugal, cohabitation, intimacy or courtship relationships, friendship, companionship, or relationship with the victim against the work, educational or religious relationship.	
			As a result of group rituals using or not using weapons of any kind.	
			In disregard of the victim's body for the satisfaction of sexual instincts or committing acts of genital mutilation. e. For misogyny.	

Note: In the following sheet you can see the laws that criminalize the types of violence in Guatemala.

Own elaboration

In tab number three, we can see the Law against Femicide and Other Forms of Violence against Women, Article 7 of which criminalizes violence against women in Guatemala. The aggressor in this country can receive a sentence of up to eight years depending on the seriousness of the crime committed.

Unlike Guatemala and Nicaragua where an aggressor receives eight to seven years in prison for committing some type of violence, in Ecuador these laws are very docile when sentencing a person who has committed an act of this kind, putting only one year of pressure when in this case the penalties should be more severe.

4.2. Violence against women throughout the life cycle

Table 4: Violence Women Receive During the Life Cycle

Violence against Women through the Life Cycle	
Phase	Type of violence
Childhood	Female infanticide; physical, psychological, and sexual abuse.
Childhood	Female genital mutilation; incest; child marriage. pornography; prostitution; physical, sexual, and psychological abuse.
Adolescence and adult life	Forced sex for economic reasons; incest; dating violence; sexual harassment; prostitution and pornography; forced pregnancies; spousal homicide; women's traffic; sexual abuse in the workplace; abuse of disabled women.
Old age	Economic widow homicide, physical abuse, Psychological and sexual old age; forced suicide.

Note: In this table we can see the different types of violence and abuse that woman experience throughout their life cycle, separated by stages

Elaborado: *Autora de la tesis.*

Table 4 shows the different acts of violence that a woman suffers in her life cycle, which causes any type of harm and is generated by the simple condition of being a woman. It presents an endless number of acts in the different aspects that go from discrimination to violence that can be physical, psychological, and sexual.

Interviews with judges and lawyers in Guayas:

Table 5: First block of the interview

Interviewee	**1. Measures for the protection of victims of domestic violence**	**2. Protective measures applied to victims of domestic violence**	**3. Procedural steps to be followed in a case of domestic violence**
Nel Eduardo Alaba Mieles / Abg. Free exercise and legal advisor of the Transit Commission of Guayaquil.	Society from its foundations has allowed the backwardness of women in all its forms, where machismo has been tolerated as something normal, discriminating the work of women to an inferior role, often allowed, and accepted by the same woman, who, on many occasions has accepted it because she has considered it as something normal.	The departure from the offender's home, the obligatory distancing, not to approach the victim at meters.	The victim of psychological abuse must file a complaint with the authority of violence against women and members of the family group, who must grant protection measures, and immediately, inhibit to know, providing that a competent prosecutor for the investigation of the crime is drawn.
Michael Angelo Santillan Cadena /Free Exercise Abg.	They are positive tools that serve to contribute to the protection of the rights of women and the members of a nuclear family to eradicate or eliminate situations of violence that may affect them.	The most applied are those set out in article 558, paragraphs 1, 2, 3, 4, 5, and 6 of the Comprehensive Organic Criminal Code. The latter is when the victim and the aggressor or defendant share a common dwelling.	The procedure for this type of criminal offense of domestic violence against women or members of the family is set out in Article 643 et seq. of the Comprehensive Organic Criminal Code (COIP).

Fuente: Santillán y Alaba (2020)

Nota: En este cuadro podemos observar los diferentes tipos de violencia y abusos que la mujer presenta a lo largo de su ciclo de vida, separadas por etapas.

Own elaboration

The first step is to make the relevant complaint so that protection measures can be issued. These protection measures are the judicial way that helps to avoid new infractions, being tools of a positive nature, protecting the rights of women, aiming to eliminate violence. The most applied protection measures in Ecuador are the injunction and the order to leave the home of the person being prosecuted. These measures are those that are taken at the time of cohabitation between the victim of violence and the aggressor.

Table 6: Second block of the interview.

Interviewee	**4. Under what type of criteria are protection measures issued?**	**5. Protection measures for victims of domestic violence are effective.**	**6. How to improve the effectiveness of these protection measures**
Nel Eduardo Alaba Mieles/ Abg. Free exercise and legal advisor of the Transit Commission of Guayaquil.	Generally, the judicial criterion for issuing measures, knowledge of the complaint is sufficient to merit for judges to issue protective measures.	I consider these victim protection measures to be effective.	t is much more common in popular areas this type of violence, for this reason, I believe that as a state, should be improved communication or points of reception of violence.
Michael Angelo Santillan Cadena/ Free Exercise Abg.	These protective measures are issued as a preventive measure and as a mechanism for safeguarding the physical, psychological, or sexual integrity of both the woman and the members of the nuclear family.	I do not consider them effective, just look at the high rate of femicides and domestic violence against women and family members, during the same in which increased considerably, which reveals the fact that these do not have the effectiveness or prevention as a positive tool to contribute to the protection of this vulnerable group of the law determines.	I believe that the state should assume a real leading role and not just limit itself to the development of punitive laws, instead of implementing training programs for judicial officials.

Fuente: Santillán y Alaba (2020)

Own elaboration

Protective measures are issued in times of need and protection, but they are also to prevent acts of violence. The judges who issue these measures are there to protect the psychological, physical, and emotional integrity of the victim. The protection measures help to reduce the rate of violence, because the aggressor, knowing that he has been notified, knows that it is not appropriate to approach her because he would pay with jail. The state judicially has many laws that protect women and the family, it is not that the state does not have the necessary measures, but rather it is something social because in our society the feminine is devalued by the supremacy of the masculine.

CONCLUSIONS

From this article, it can be concluded that violence against women and members of the family nucleus is based on all members of the family, but even more so in women, since it is the one that is directly affected, proliferating, or hugely reproducing itself, such as the situation in our country that in the Judicial Units it has gotten out of control.

In the same way at the international level, it has been possible to verify the statistics of the worldwide commotion that is lived, by the cases of so aberrant crimes that have arisen against women.

With violence against women and members of the nuclear family, the principles, and constitutional rights such as the right to life, physical integrity, good physical and mental health and to stay in a healthy place, the violation of these principles is observed.

These treatments and episodes of violence towards women are received within the family nucleus as well as outside; they are presented within these two circumstances since, once the conjugal relationship is over, the victimizer does not accept this separation, believing that the woman is his property, continuing and creating more violent actions. This is how crimes occur in our country.

The changes in our Penal Norms, based on the dosimetry of the judges, mainly now of punishing based on the principles of proportionality for both the offenders and the victims.

For this reason, the following is recommended:

a. To regulate and at the same time structure psychological treatment programs for victims of domestic violence and aggressors in the same way, especially in those cases where there are minors involved or those who are in a state of vulnerability or emotional dependence.

b. That those authorities of the Judicial Units demand regulations where there is a good functioning of shelters, to deal specifically with this issue and this problem such as violence.

c. To campaign for the creation of a culture of peace and harmony, promoting equal rights for all in schools and colleges, and to raise the issue of domestic violence in a more upright and professional manner.

d. That Ecuador's judicial system should monitor compliance with psychological therapies with greater importance.

e. Reform the articles on the different types of violence against women or members of the nuclear family in the

Comprehensive Organic Criminal Code, which are found in articles 155 to 155.

158 (COIP)

f. Respect the different rights of both the victim and the aggressor, being judged impartially and under the management of the law

g. Correctly follow the procedures as set out in the law, respecting the rights of citizens

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