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acuarela de Oswaldo Muñoz Mariño.
Cortesía del estudiante fundador Dr. Alfredo Fuentes Roldán.

RFJ

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Pontificia Universidad Católica del Ecuador

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Vicerrectora: Doctora Patricia Carrera Burneo

QUITO, ECUADOR

2022

Centro de Publicaciones de la Pontificia Universidad Católica del Ecuador
Quito, Ecuador
www.edipuce.edu.ec

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

Unidad Coordinadora: Facultad de Jurisprudencia de la Pontificia Universidad Católica del Ecuador

EQUIPO EDITORIAL

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Responsabilidades

El equipo de gestión editorial tiene a su cargo la Dirección/Coordinación Técnica de la RFJ y se encuentra conformado por:

1. El director/a editor/a
2. Las/los coordinadoras/es editoriales

El equipo de gestión editorial/técnica tiene a su cargo las labores de gestión y coordinación administrativa de los procesos editoriales de la Revista RFJ. No participa como evaluadoras/es y/o revisores/as, es decir, del proceso *blind peer review* (sistema de pares a <<doble ciego>>). Este proceso es llevado a cabo de forma exclusiva por los miembros del Consejo Editorial y del Comité Editorial y de Evaluadoras/es Externas/os (quienes son en todos los casos académicas/os y/o profesionales investigadoras/es con filiación externa a la Pontificia Universidad Católica del Ecuador). Su responsabilidad es organizar el proceso de gestión administrativa de los textos remitidos a revista. Por lo tanto, ninguno de sus miembros es responsable de determinar el carácter de publicable de los artículos desde una perspectiva científica. Sin embargo, pueden someter al Consejo Editorial casos de infracción a las reglas de juego que orientan los procesos de la RFJ.

2) CONSEJO EDITORIAL

Miembros

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Dr. Sheraldine Pinto Oliveros, PhD. Profesor de la Universidad Central de Venezuela y profesora asociada de la Universidad Metropolitana (Caracas, Venezuela).

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Dr. Carlos Soriano Cienfuegos, PhD. Profesor investigador de la Universidad Panamericana (México DF, México).

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Responsabilidades

El Consejo Editorial tiene a su cargo supervisar el proceso editorial y la calidad científica de la Revista RFJ. En ese sentido, puede emitir recomendaciones orientadas a perfilar a la RFJ como un producto de excelencia internacional. De manera excepcional, sus miembros pueden participar como evaluadoras/es y/o revisores/as, es decir, del proceso *blind peer review* (sistema de pares a <<doble ciego>>). Sin embargo, su asignación (organizada a través del equipo de gestión editorial) se realiza dentro de lineamientos que apuntan a la total transparencia e imparcialidad. En caso de participar evaluadoras/es y/o revisores/as se inhiben de realizar opiniones o funciones que puedan implicar afectación del código de ética de la revista y/o criterios establecidos por la Pontificia Universidad Católica del Ecuador, el CACES u otras entidades competentes. Son en todos los casos (100%), académicas/os-profesionales con filiación externa a la Pontificia Universidad Católica del Ecuador.

3) COMITÉ EDITORIAL Y DE EVALUADORAS/ES EXTERNAS/0S

Miembros Internacionales

Dra. Juana Inés Acosta López, LLM. Profesora titular y Directora de Investigación de la Facultad de Derecho y Ciencias Políticas de la Universidad de La Sabana (Bogotá, Colombia).

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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.

Gestión ténico-administrativa de la revista

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* Colaboradora principal de diseño y diagramación.

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,* icmje*: Publicación de investigación responsable: Normas internacionales para los autores);*

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

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

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

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

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

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

Relaciones con los revisores

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

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

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

Las Mejores Prácticas para los editores incluirían las siguientes acciones:

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

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

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

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

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

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

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

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

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

- *Asegurar que la base de datos de revisores es un reflejo de la comunidad académica para la revista y añadir nuevos revisores si resulta necesario;*
- *Utilizar una amplia gama de fuentes (no solo contactos personales) para identificar nuevos posibles revisores (por ejemplo, sugerencias de los autores, bases de datos bibliográficas);*
- *Seguir el diagrama de flujo de COPE en casos de sospecha de mala conducta por parte del revisor.*

Coordination Unit: Facultad de Jurisprudencia de la Pontificia Universidad Católica del Ecuador

EDITORIAL COMMITTEE

EDITORIAL MANAGEMENT TEAM

RESPONSIBILITIES

The editorial management team is in charge of the Direction/Technical Coordination of the RFJ and is made up of:

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.

2) Editorial Board

Members

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Dr. Carlos Soriano Cienfuegos, PhD. Profesor investigador de la Universidad Panamericana (México DF, México).

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Responsibilities

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:

International Members

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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

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4. Feedback

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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.

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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

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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.

ARTÍCULOS

JOURNAL SUMMARY

DOI 10.26807/rfj.vi11.367

The irrelevance of informed consent in the medical liability lawsuit. An analysis of the civilian and state experience in Colombia

La irrelevancia del consentimiento informado en los litigios de responsabilidad médica. Un análisis de la experiencia civil y estatal en Colombia

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ABSTRACT: This research provides a general review of medical liability in the Colombian experience, specifically based on the jurisprudence of the Civil Chamber of the Supreme Court of Justice and the Third Section of the Council of State. All the above, intend to raise a critique of the irrelevance of the figure of informed consent in the liability trial, a matter that reconsiders some of the basic assumptions for the emergence of an indemnity obligation in the field of medical liability.

KEYWORDS: Medical liability, Civil Law, Administrative Law, Informed Consent.

RESUMEN: Este artículo ofrece una revisión general de la responsabilidad médica en la experiencia colombiana, específicamente, a partir de la jurisprudencia de la Corte Suprema de Justicia y del Consejo de Estado. Todo lo anterior, para plantear una crítica a la irrelevancia de la figura del consentimiento informado en el juicio de responsabilidad,

cuestión que replantea algunos de los supuestos básicos para el surgimiento de una obligación indemnizatoria en materia de responsabilidad médica.

PALABRAS CLAVE: Responsabilidad Médica, Derecho Civil, Derecho Administrativo, Consentimiento Informado.

JEL CODE: H75, I18.

"There is no light without shadow in the human being".
Carl Gustav Jung

INTRODUCTION

Civil and State liability, with its different developments, regimes, and applications, is one of the broadest areas within the legal world, which is only natural, since determining why and to what extent damage is attributable to a subject requires a judicious and detailed argumentative content, which for each case is accompanied by several particularities (Mazeaud, 1983). In fact, within this area, several sub-areas have been formed, including medical liability (Giraldo, 2018, pp. 37-53).

Medical liability is an issue of great relevance in legal terms, provided that, to date, it has managed to capture the attention of two jurisdictions: the civil and the contentious-administrative. From there, several rulings have been issued that postulate jurisprudential lines in procedural and substantive aspects.

However, the experience of each of the jurisdictions has not been uniform, since there are several nuances in this respect, so much so that the Supreme Court of Justice considers that medical civil liability is contractual in origin, but the Council of State considers that the medical liability

of the State is non-contractual, matters that provide quite different perspectives concerning the lawsuit that gives rise to the indemnification obligation.

However, this is an issue that must be approached with caution and attention, not only because the issues involved are scattered in jurisprudence, laws, decrees, and resolutions, but also because the profession of medicine and its practice is related to the life and physical integrity of all persons who, at any time, have required or will require health care services, be they private or public.

Thus, the purpose of this journal article is to provide the reader with a comparative analysis of the civil and administrative experience in the field of medical liability, considering the most important particularities that each of these offers. Now, given that the complexity of the subject is considerable, we will first deal with the medical-health activity as a case of civil and State liability, and then make some criticisms about the irrelevance of informed consent in the liability trial, a matter that questions some of the fundamental assumptions of medical liability.

Before starting with the object of the journal article, it is important to specify that the present work will start from the assumption that the origin of a compensation obligation comes from the proof of damage, imputation, and basis or attribution factor. Where the first of these refers to the affectation, patrimonial or extramatrimonial, suffered by a subject. The second, imputation, is the relationship of causality, factual or normative, that exists between the conduct of the agent and the damage suffered by the victim. And finally, the basis or attribution factor is the category that allows the evaluation or qualification of the agent's conduct, which can be subjective or objective. The subjective factor consists of

fault, which, in contractual matters, constitutes a breach and, in non-contractual matters, the non-observance of an objective duty of care, diligence, or expertise. Additionally, the objective factor deals with the exercise of dangerous activities, which is concretised by the execution of activities that increase the normal levels of risk.

Having said the above, the present lines will set out the main points that must be considered for an indemnity obligation to arise in terms of medical liability, complemented by a critique that seeks to reconsider some of the assumptions explained, to offer effective protection to the right to self-determination of all persons who seek health care services.

1. MEDICAL-HEALTHCARE ACTIVITY AS A CASE OF CIVIL AND STATE LIABILITY

Within civil and state liability, few factual assumptions have managed to encompass the multiplicity of debates that medical-health activity generates and has generated. This subject is worthy of work and development by the legal academy, not only because of the large number of cases that are brought before judges, magistrates, and councillors, but also because of the significance and usefulness of the medical profession in society. Thus, Liability Law aims to design models of justice that respond adequately to the dynamics of medical services, which, day by day, requires more sophisticated knowledge and arguments to provide solutions to the legal problems generated by the damage caused to pre-patients and patients, who are the object of preventive, diagnostic and treatment measures.

In this section, we will study medical liability as a special area within the law, which aims to correct, via reparation and compensation (Díez-Picazo, 2001, pp. 312-

314), those injustices produced by the activity of doctors and health systems. Thus, for the present, the figure of the patient gains indisputable relevance, since he is constituted, together with his heirs - where applicable - as the direct victim of the medical negligence, so that, in this case, he is the procedural subject through which the trial of liability is triggered, which, will always be the plaintiff. Now, the same does not happen when we refer to the passive party of the litigation, since in the case of Colombia, it may well be a health professional (general practitioner or internist, surgeon, anaesthetist, nurse, etc.), a Health Provider Institute (IPS), a Health Promoting Entity (EPS)[1] or, in the case of State liability, a State Social Entity (ESE) that directly provides the health service.

The main particularity that characterises medical liability is that which is related to the practice of medicine itself, understood as a professional activity that is regulated by the legal system and whose purpose is, in general terms, to improve, alleviate or cure the illnesses of human beings. However, this does not indicate that the laws, decrees, or resolutions of the health sector make it possible to conclude when a doctor, an insurer, or a medical services entity is liable for an injury. The difficulty of the issue lies in the imputation and the grounds or attribution factors of the liability judgment.

Concerning imputation, the problem lies in something quite evident, this has to do with the set of factual situations that give rise to the damage, since in medical liability cases there are always two conditions (Honoré, 2013, pp. 1075-1085) that play the causal role: the illness and the doctor's activity (Perin,

1 Regarding the regulation of health in Colombia, especially the requirements for licensing, authorisation, and obligations of the entities in the sector, it is important to review the regulations: Law 1164 of 2007, the Single Decree 780 of 2018, and the Resolutions of the Ministry of Health and Social Protection.

2020, pp. 221-228). However, it is important to clarify that this is a practical problem so that the doctrine has not created new categories to talk about normative or causal imputation in matters of medical liability, for which the traditional models have been useful.

On the other hand, when it comes to the question of the grounds or, as they are also called, attribution factors, the professional fault is the central point of the problem, insofar as patients, lawyers and judges do not have the necessary knowledge to determine what is considered good or bad behaviour in the medical profession, among other things, because this is one of the most complex sciences within human knowledge and it is developing day by day. As is the case in the legal world, there may be different positions within medicine as to the best treatment for a given pathology, as we all know, medicine is not an exact science.

Now, to determine that a subject has acted with guilt, it is indispensable to have an idea or concept of what is not guilty, for which there are the archetypes of "a good father of a family" or "a good businessman", which provide a standard idea of what is understood by care, diligence, prudence, and expertise. However, guilt in the medical profession is not something that is exhausted by an archetype; the technicality of the profession requires a more sophisticated concept. For this reason, the parameter of non-culpability in medical liability is to be found in the *duty to be* of the professional technique, i.e., the *lex artis*, from which it is possible to deduce the minimum level of care, diligence, expertise, and prudence that any act of prevention, diagnosis, and treatment must-have.

The *lex artis* is characterised by its dynamism, since medical science, for each specific moment and case, may be

different. For this reason, its study requires a retrospective analysis that responds to the conditions of time, manner, and place in which a certain medical service occurred, which prevents the judge from considering a health professional or entity negligent based on the scientific knowledge that arose after the time when the facts occurred. Thus, the *lex artis* that is studied in each case is known as *ad hoc*, which is composed of the set of usages, customs, and practices applicable at a specific time and individualised to the pathological conditions of a given patient (De las Huertas, 2005, p. 22).

However, the professional negligence of the doctor or the health institutions can be evidenced not only in a lack of technical knowledge but also, for example, in the non-performance of medical services or the late performance of the same, the latter cases, unfortunately, being quite frequent in the Colombian experience. In that order, by way of explanation, but not exhaustive, medical fault can occur due to the non-provision of the service, having the obligation to do so, due to the late provision of the same, or due to a defective diagnosis or treatment (De las Huertas, 2005, p. 24). The above, considering that, in most cases, if not almost all, the obligations of doctors are of means and not of result, a matter that will be dealt with later.

Now, within the particularities of fault as a basis or attribution factor, it is important to mention that it can be generic or specific. The former occurs when the agent disregards a generic duty that is mandatory for all persons, and the latter when a particular or specific duty of a certain trade or profession is disregarded (Guido, 2015, pp. 100-105). Well, in the case of medical negligence, the specific fault is quite relevant, if there are many guidelines and precepts applicable

to this profession, including international conventions, laws, decrees, resolutions, guidelines, principles, codes of ethics, etc. In this regard, there is the international Convention on Human Rights and Biomedicine - the Oviedo Convention - which, in its article 4, enshrines the obligations of professionals, indicating that all medical interventions must comply with the applicable standards of conduct and regulations. In turn, Article 2 recognises the human being as a subject of prevailing interest vis-à-vis society and science, and article 3 determines that all persons shall have equal access to the benefits of health care (Council of Europe, 1999).

As far as the Colombian legal system is concerned, it is essential to refer to Article 26 of Law 1164 of 2007, which, in paragraphs 1 and 5, establishes that health professionals must act in a respectful, ethical and competent manner, seeking the greatest benefit for users. In addition, professionals must respect the limits of the Codes of Ethics, which are issued by the Ministry of Health and Social Protection (Trujillo and Patiño, 2019, pp. 21-36; Gómez, 2020)[2] . Additionally, there are

2 At this point it is important to make a caveat, at the time of writing, the world is facing one of the most important problems in public health, the SARS-COV 2 virus that leads to the COVID 19 pathology, which has generated high levels of hospital occupancy, So much so that the National Government, employing Legislative Decree 538 of 2020, granted the territorial authorities the possibility of taking control of the supply and availability of intermediate and intensive care beds in the IPS, intending to maintain an efficient administration of these resources. In addition, the Ministry of Health and Social Protection issued a document on *General recommendations for ethical decision-making in health services during the COVID-19 pandemic*. As we can see, this series of events has had the effect of changing the models of care, as long as health care systems have traditionally focused on patient-by-patient care, but this situation has proposed - in an obligatory manner - a new paradigm where it is essential to change the perspective of individual pathology for epidemiological systems so that it is possible to respond to the health needs of the so-called "new normality". Consequently, the prevalence of the individual over societies, a precept proclaimed by the Oviedo Convention, is a principle that under current conditions is not being comprehensively protected.

also other applicable regulatory bodies, such as Law 23 of 1981, the Single Decree 780 of 2016, and other administrative acts issued by the National Government.

Up to this point, we have already referred to *lex artis* based on the doctrine and applicable rules. Thus, to understand what has been explained in greater depth, we will now refer to case law, to identify how this concept is constructed in the courts.

First, we will review the case-law of the Civil Chamber of the Supreme Court of Justice, which, in a judgment of 12 January 2018 (C. S. J., Civil Chamber, SC 003-2018, 2018), studied a case in which the medical fault of a health service provider was disputed, due to an error of assessment. The facts of the case were that an entity had misdiagnosed the plaintiff since she initially went to the health centre with a headache, which was the result of an anxiety attack, for which the treating physician ordered some painkillers and anxiolytics. The following day, with the same symptoms, the patient went to the same health centre again, claiming that the pain was very severe, and on this second occasion, the diagnosis and treatment given were reiterated. After 8 days, the patient went to another health centre in a state of unconsciousness, where an examination revealed a sub-acute infarction in a cerebral artery, which resulted in a thrombosis that affected the mobility of one arm, the loss of vision in one eye and a neurological disability.

In this case, the judge constructed the *lex artis ad hoc based on* the principles applicable to the social security health system, which are found in article 3 of law 1438 of 2011. In addition, he referred to the Hippocratic oath, from which he deduced the obligation of professional due diligence and the application of the principles that make up medical ethics, concerning technical and ethical aspects. Finally, in the study of

the circumstances of time, manner, and place, the judge found that the first diagnosis should be considered a diligent act, since, according to the management guide for those symptoms, it was not possible to foresee or infer that the plaintiff's ailments would have the consequences.

It is important to make a reservation in this case, as Judge Ariel Salazar saved his vote to clarify that the *lex artis ad hoc* was not correctly delimited in the motivation of the judgement, provided that a more demanding level of diligence should be inferred from the guidelines for the management of the ailment. But not only that, and this is the interesting point of the question, the Magistrate affirmed that the indifference of the doctors to the pain and suffering of the patient disregarded the principle of benevolence that characterises the medical profession, so that the actions of the professionals should be considered negligent, provided that the pain of the patient was an alarm signal, from which the need for a more rigorous examination and diagnosis could be inferred. This is a postulate that, in the opinion of this writer, dignifies the position of the individual concerning health systems, but also incorporates ethical principles that must be respected by doctors, which not only obey the scientific nature of the profession, but also the humanity that it requires.

Concerning the same matter, the Third Section of the Council of State, in a judgment of 10 April 2019 (C. E., Third Section, No. 40916, 2019), studied a case in which the liability of a social entity of the State is analysed. The case consists of an obstetric injury, which occurred when a patient underwent a vaginal hysterectomy, but during the procedure, a perforation was caused in the rectum, which generated an infection that resulted in her death.

For the case, the court determined that the *lex artis* was the set of all the human, scientific and technical means available to doctors, considering the development of medical science at the time of the occurrence of the harmful events. Because of the above, it was concluded that the health institution acted negligently by making a hasty diagnosis that did not consider the necessary means to determine the existence of the infection. Thus, the treatment ordered for the postoperative period was insufficient to meet the patient's needs. Thus, the judge carried out a study of the *lex artis ad hoc* based solely on technical considerations.

In summary, considering all that has been explained, the *lex artis* is made up of two major elements: i) the technique applicable to the exercise of the medical profession, hence the so-called *lex artis ad hoc*, and ii) the rules that regulate the health sector and its professionals, whether these are ethical precepts, international conventions, laws, decrees or resolutions. However, this is a particular institution for cases of medical liability, which, it is worth clarifying, does not prevent a legal or technical vacuum from solving a specific case, since we cannot forget that the traditional legal concepts, such as professional negligence, good faith, the principle of trust, the position of guarantor (Jakobs, 1998) and others, are also applicable and of obligatory observance to determine medical malpractice.

Thus, up to this point, we have developed some particularities that characterise medical liability, this concerning the trial of liability, which applies to any of the possible jurisdictions competent to resolve this type of litigation in Colombia. However, it is important to clarify that these singularities are not sufficient to understand the civil and administrative experience on the matter, which is why, in the following, we will deal with each of these separately.

1.1. Medical liability

The first thing that is indispensable and necessary to point out is that medical civil liability arises on a contract. Nowadays, in the civil jurisdiction, it is not possible to study a case of medical liability under a non-contractual fact, which has a quite simple explanation and has to do with the compulsory application of the health benefit plans (PBS), which are covered by the insurers (EPS) and executed by the health care institutions (IPS), the vast majority of which are private. So, whether it is a contributory or subsidised scheme, it is sufficient for a private entity to provide a service covered by an insurer for a contractual relationship to be established between the doctor, the IPS, and the patient.

On the other hand, it is also possible to assess the liability of insurers, as these entities are responsible for authorising procedures, examinations, transfers, and medicines for patients who are covered by a voluntary or compulsory plan. Thus, a delay in the processing of a certain service may be attributable to contractual liability.

Now, the above does not prevent a person, outside the coverage of their insurer, from deciding to contact a doctor for a service, which is quite frequent in cases of cosmetic surgery (liposuction, rhinoplasty, bichectomy, blepharoplasty, among others) or dental treatment. However, the scenarios are covered by private contracts, which, as far as the resolution of conflicts is concerned, are heard before the civil jurisdiction.

However, one of the most important legal debates in the field of medical civil liability has to do with the type of contract that gives rise to these services (Hinestrosa, 2015, pp.

232-234)[3] , which is not a minor matter, since the negotiating figures allow the obligatory content of the parties to be deduced. Recalling, contracts have essential, natural, and accidental elements, where the first are those without which a certain type of negotiation would not arise, the second are those inherent to each contract and the last are those that the parties, under the negotiation, stipulate. Thus, the nature of the contracts makes it possible to determine the obligations to which each person, creditor or debtor, is bound, without the need to refer to the special provisions that the parties have agreed. In other words, each type of contract, *per se,* has a consubstantial content, which is understood to be agreed with the concretisation of private autonomy.

That said, the doctrine has mainly proposed two types of contracts for the provision of medical services: the mandate and the leasing of immaterial services. This will not be explained exhaustively, but the figure of the mandate was proposed to the extent that, in theory, the patient gives the doctor an assignment. However, if this were the case, the current legislation establishes that the principal has the possibility of issuing instructions to which the mandatary will "strictly adhere", which, to tell the truth, does not correspond to the reality of this service. This is provided that the doctor is the one who determines the treatment plan according to the conditions of the diagnosis; but it is also not true that, by this, the doctor has the possibility of acting "in the way that seems most convenient to him" (Civil Code, 2005, art. 2159), as is also indicated in the regulation of this type of contract (Jaramillo, 2019, pp. 203).

3 The contract, as a type of legal transaction, must be understood as a link arising from the agreement of wills of two or more persons, the purpose of which is the creation of an obligation or the creation, modification, or extinction of a legal relationship.

In addition, another criticism of the mandate contract states that the doctor does not have the possibility of acting on behalf of his client using representation, that is, a faculty that, although it does not belong to the nature of this type of business, is characteristic of it. In that order, the doctrine finds that the contract for the leasing of immaterial services is more appropriate for the provision of medical services, since it does not involve acting on behalf of or representing another, the main obligation of the debtor lies in the performance of a service in favour, solely, of the creditor (Jaramillo, 2019, pp. 204-209)[4] .

However, it has also been said that the leasing of immaterial services is not the right type of contract either, because it requires the intelligence of the service provider to predominate over the labour force, which is not at all suited to the activity of doctors, in which it is possible to use any of these resources for the performance of their work. Thus, it is not possible to affirm that all the rules of this type of contract can cover the entire relationship that exists between the doctor and his patient, which is why it has been proposed that the contractual link of medical services is atypical (Pizarro, 2014, pp. 827-830), a position that has been adopted by the Supreme Court of Justice (C. S. J., Civil Chamber, SC 5507-2001, 2001).

Consequently, the fact that there is no legal regime that makes it possible to design a contract for medical services, either as a mandate or a lease, obliges the doctrine to consider that these must be executed within the framework of an atypical scenario, which implies recognising the complexity of the medical dynamic if this is characterised by its changing *lex artis*

4 It cannot be overlooked that for some exceptional cases, the construction contract has also been proposed for medical services, this in cases of aesthetic surgical procedures.

and the dispersed applicable regulation. Indeed, the obligatory content of the medical contract requires interpretation in the light of the prevailing uses, practices, and knowledge for this profession (C. S. J., Civil Chamber, SC 5507-2001, 2001, p. 830), it is also necessary to bear in mind that, in some cases, consumer relations are configured (C. S. J., Civil Chamber, SC 2804-2019, 2019)[5] where the users of the health system deserve to be protected as weak parties to the contract (Giraldo, 2013, pp. 216-219).

Based on the above, the question then remains: What is the type of obligation that the professional contracts on the medical services contract? Much can be said about this since legal dogmatics has many criteria for classifying obligations (Hinestrosa, 2015)[6] , but about the contractual liability of the doctor, the discussion can be limited to the obligations of means and results.

The liability of a debtor is drastically altered when we speak of obligations of means or results. To explain the above, it is necessary to consider that obligations of means consist of the provision of service using all the standards of expertise, diligence, and prudence necessary for the achievement of an end, the latter understood as the main interest of the obligee. However, even though the latter goes into business with a specific objective, the fact that the obligor is only obliged to the performance of its possible means implies that the obligor cannot allege non-performance just because its interest has not

5 The jurisprudence of the Court has recognised the doctor-patient relationship as a consumer relationship, especially about the suitability of the service provided, without this implying the application of a strict liability regime.

6 Among the most common classifications are natural obligations, obligations to give, to do, not to do, of guarantee, means and results, security, joint, and several, conditional, optional, alternative, etc.

been realised. In this case, then, the obligor's liability is only possible when its actions do not correspond to the expertise, diligence, and prudence required for the provision of certain services (Hinestrosa, 2015, pp. 237-241).

In contrast, obligations of result imply for the obligor the achievement of an end, which must satisfy the interest of the obligee. This is the case, for example, of the obligations to give, where the effective delivery and tradition of an object are indispensable, a matter that in effect cannot be understood as the deployment of a set of judicious and well-intentioned actions that intend, but do not ensure, the achievement of an objective, but rather that it is necessary to achieve the result described in the negotiation agreement (Bonivento, 2017)[7] . Thus, in this type of obligations, the conduct of the obligor is not studied to qualify the non-performance, it is sufficient to establish whether the obligor complied with the promised result of the obligation, so that the expertise, diligence, and care are of no use when it is intended to exempt the obligor from liability (Bonivento, 2017).

Now, in contracts for medical services, professionals are not obliged to achieve a result it would be wrong for the doctor to ensure the cure of pathology when the truth is that this does not only depend on the capacities that he possesses. On the other hand, the regime applicable to the contractual liability of the doctor is determined by the obligations of means, according to which the doctor must use his skills and knowledge to achieve an end, which, in his field, is the prevention, diagnosis, and treatment of diseases.

7 The following contracts with performance obligations can be mentioned: purchase and sale, lease, work contract, mutual agreement, bailment, commodatum, exchange, deposit, etc.

In this order, and as the Supreme Court of Justice has understood, the performance of the doctor within a service contract is satisfied with the execution of his work carefully and diligently, but in addition to this, it is also necessary to take into account the application of the *lex artis*, this being understood, I repeat, as the body of knowledge that medical science has for a given time and case (C. S. J., Civil Chamber, SC 7110-2017, 2017).

This issue of obligations of means in medical service contracts has been so widely accepted that Article 104 of Law 1438 (2011) states that the relationship of "health care generates an obligation of means". So, the problem remains to determine in which events the physician's obligation is one of the results. For this, the solution is quite simple and following the position of the Court (C. S. J., Civil Chamber, SC 7110-2017, 2017), we can affirm that the health professional will be obliged to the achievement of a result when so stipulated in the contract (M'Causland, 2019, p. 583), which can be seen in some cases of aesthetic surgeries.

Additionally, in a recent judgment of 7 December 2020 (C. S. J., Civil Chamber, SC 4786-2020, 2020), citing a judgment of 5 November 2013 (C. S. J., Civil Chamber, SC 2005-00025, 2013), the Court (2013) indicated that the obligations of results could also be configured in those cases in which "the margin of uncertainty of the medical activity is reduced because the variables that can negatively influence recovery are under the control of the professionals" (s. p.). *In* that order, when medical treatment or procedure has the possibility of directly influencing a person's health, with such a level of assertiveness that recovery can be assured, the health professional's obligation will no longer be one of means but one of the results. This is

also the case for damages arising from the omission or delay in the provision of medicine, examination, laboratory analysis, immobilisation of a limb, or fitting of an orthopaedic appliance.

Thus, the general rule is that the obligation contracted by the doctor is one of means, as established by regulation and jurisprudence, in which case diligence and care, based on the *lex artis*, serve to exempt him from liability. Exceptionally, however, the obligations will be of result, in which case the exemption from liability is only found in the effective fulfilment of what was promised or the existence of force majeure.

Having said the above, up to this point, we have evacuated those particularities that characterise the medical civil liability trial in Colombia, which can easily coincide with the experience of other latitudes. Now, after the trial, the most important aspect of liability is the evidentiary regime, after all, it is through this that each of the categories that give rise to the indemnity obligation is fed. Thus, it is important to determine the allocation of the burden of proof, in other words, who, how, and why must prove. This is, in short, a matter of the first order for any judicious jurist.

As far as the evidentiary regime in medical liability is concerned, the most important developments have been in the category of fault, which is hardly consistent with what has been explained up to this point, since the general rule is that the physician's obligation is one of means, which requires qualifying his conduct to determine whether he has incurred non-compliance and, therefore, liability.

To begin with, one of the main theories on the allocation of the burden of proof in these cases is found in Article 1604 of the Civil Code (2005), which recites that "proof of diligence or

care is incumbent on the one who should have used it; proof of an act of God is incumbent on the one who alleges it". By this provision, it is said that the physician, as the party obliged to exercise diligence and care, is the contractual party responsible for proving the absence of fault, which in practice has the effect of a presumption in favour of the patient. Consequently, if the latter proves, within the trial, the existence of an injury and its causal relationship with the health care service, the presumption operates, which results in a condemnatory sentence, when the doctor does not demonstrate that his actions correspond to the *lex artis*.

In the previous position, there are doctrinaires, such as Professor *Fernando Hinestrosa*, who indicate that they agree. However, the way to reach this conclusion is different, since, according to article 1757 of the Civil Code, every creditor must prove the obligation that it intends to enforce and its breach, so it would be understood that the general regime applicable to the obligations of means is one of proven and not presumed fault. But in the case of health care contracts, given the ease with which the doctor has access to the means of conviction, he or she is the one called upon to bear the burden of proof, so it would be worth applying the presumption of fault (Hinestrosa, 2015, p. 586).

On the other hand, and considering the rules of the mandate contract, let us remember that this type has been proposed for medical services, it has been said that under the last paragraph of article 2184 of the Civil Code, the principal will be responsible for proving the agent's fault, which means that the patient must prove that the doctor has been negligent (Tamayo, 2015, p. 1090).

From what has been mentioned so far, it is important to bear in mind that within the legal world it is considered that a presumption of fault is a prerogative that facilitates the plaintiff's action within the process and that the opposite is a neutral or impartial scenario, but the truth is that a proven fault regime is nothing other than a presumption of diligence in favour of the defendant (M'Causland, 2019, pp. 579-652). However, in this writer's opinion, one or the other of the above-mentioned presumptions is a matter of argumentative order that reaches into legal policy. The position adopted by the Court, as far as medical contracts are concerned, is a proven fault regime (C. S. J., Civil Chamber, SC 2804-2019, 2019), which is based on the protection of medical activity as a socially useful profession, a matter that will be discussed in the following sections.

Despite the above, it cannot be left aside that, currently, for any kind of process there is the theory of the dynamic burden of proof, which came about with the implementation of Article 167 of the General Code of Procedure. This rule determines that the judge, at the request of any of the parties or ex officio, may order the reversal of the burden of proof, a matter that only depends on the conditions of the specific case, where it will be analysed who is in the best position to provide the means of conviction. Thus, if the doctor is in a better position to prove, the patient may request a reversal of the burden of proof concerning one or more of the facts that are not established in the litigation. This is a tool that is not only applicable to a fault but to any of the elements of the trial.

In summary, in this section, we address the experience of medical civil liability in Colombia, for which we explain the contractual typology, the type of obligation contracted by the health professional, and the evidentiary regime applicable to

these cases, as the most important points for this matter. We will then go on to explain the medical liability of the State in Administrative Law.

1.2. Medical liability of the State

In comparison with civil liability, the liability of the state brings to the academic and judicial world more demanding debates that deserve a high argumentative content, not only because one of the subjects involved in the litigation is the Colombian state, but also because of the absence of norms in this respect, a matter that does not allow controversies to be avoided with the reasoning of syllogism and interpretation[8] . In effect, the non-contractual liability of the state is based solely on Article 90 of the Political Constitution, a norm that has served for the development of all the categories of the trial.

Thus, the medical liability of the State develops in a different dynamic to that of civil law, so much so that all cases are analysed in the extra-contractual scenario, in addition to the fact that the health care service must be provided by a State Social Enterprise (ESE), which may be a public Health Care Provider Institution (IPS), that is, a hospital or a Health Services Provider Unit (UPSS).

To explain why the medical liability of the State always occurs in the non-contractual sphere, it is necessary to understand that in Colombia health care is part of the State's provision of services, which is a service that must be guaranteed according to the infrastructure and budget possibilities of the public administration. This is following Article 49 of the

8 Exceptionally, within the liability of the State, there are some cases with their own rules, as is the case, in the non-contractual sphere, of liability for judicial error, defective functioning of the administration of justice, and unjustified deprivation of liberty. In turn, in the contractual sphere, all the rules regulate all the types of contracts that the state can and must enter into.

Political Constitution (1991), which states that "Health care and environmental sanitation are public services provided by the State. All persons are guaranteed access to health promotion, protection, and recovery services".

Moreover, when an ESE or UPSS provides a health service to a person, it does not do so by a contractual relationship, but through a regulated activity of a welfare nature guaranteed by the State. Consequently, the patient is understood as a user of the health system, who does not previously have a business relationship with the service provider (C. E., Third Section, No. 36738, 2017). Now, it has long been known that non-contractual liability arises in the context of occasional events, which are characterised by being eventual or contingent, but in these cases, the situation is quite different, since the provision of health services by the State is framed within the scope of public policies, which are governed by the principles of legality and administrative planning.

Now, the trial of non-contractual liability of the State is constituted with the same three presuppositions of civil liability, namely: damage, imputation, and basis or attribution factor. However, it is pertinent to clarify that the legal nomenclatures change. In other words, the essence of State liability has the same logic as civil liability, i.e., the emergence of a compensatory obligation based on the three assumptions: damage, imputation, and grounds, but within these three categories there are different terminologies which, briefly, we will explain below.

There is not much to say about damage, because the differences only lie in the issue of the typologies of non-pecuniary damage, which is not relevant to what we are going to deal with, so I recommend its study in a separate text.

As far as imputation is concerned, the matter is a little more complex. Let us remember that it can be factual or normative, where the former is the causal relationship that exists between the agent's conduct and the damage suffered by the victim, and the latter consists of attributing damage based on legal duty. In civil matters, the normative imputation can occur, for example, in the regime of liability for the acts of others, in these cases the liable party has not deployed any action, but under a legal duty, the damage is attributable to him. The same is true for cases of the act of things, where guardianship can be a criterion of imputation. However, the figures are proper to civil law they are enshrined in the code.

However, the above does not operate in the same way in the administrative jurisdiction, since the advent of normative imputation occurred on the theory of objective imputation in criminal law (C. E., Third Section, No. 21928, 2012). Thus, the legal duties for the attribution of damage no longer rest on criteria such as the actions of others or the protection of things but are developed based on the permitted risk, the principle of trust, the position of the guarantor, the action at one's own risk, the prohibition of return and the purpose of protection of the norm, all these tools with criteria and conditions of jurisprudential construction (Gil, 2015, pp 75-130).

Concerning the bases or attribution factors, there are three in the liability of the State, the failure of service, exceptional risk, and special damage, the first two brought from the general theory of liability and the last one a figure specific to Administrative Law (Rodríguez, 2017, pp. 321-332). Let us see, failure in service is nothing other than the fault, but its connotation responds to the disregard of the legal obligations required by the exercise of the administrative function. Let

us remember that the actions of the authorities are regulated and subject to the principle of legality, so that the failure is not evidenced by the existence of an open archetype, such as the good father of a family, but is seen in the light of the principles and laws that determine how the public administration should act. In that order, the failure can be due to the non-provision of public service, defective provision of the same, or late provision (C. E., Third Section, No. 4910, 1986; C. E., Third Section, No. 53953, 2020).

On the other hand, the exceptional risk is a basis that comes from the objective theory of liability, where the lawful increase of the normal levels of risk allows the attribution of damage without qualifying the conduct of the State so that the applicability of the compensation obligation only depends on the proof of the damage and the factual or normative imputation. Thus, the construction of work or the provision of a service using instruments or activities that place individuals in a situation of exceptional risk is susceptible to liability under an objective regime (C. E., Third Section, No. 4655, 1989; C. E., Third Section, No. 49426, 2020).

As far as special damage is concerned, this is a specific type of state liability and, like the exceptional risk, it occurs in the context of lawful action. Now, in this case, the basis is the principle of equality before public burdens, which aims to maintain the demands of the state equitably among its citizens, so that no one must bear a particular imposition. Consequently, when the state imposes an exceptional burden on a citizen through a lawful act, the latter has the possibility of claiming compensation for the damage suffered. An example of this occurs when a private individual is subjected to a security measure in criminal proceedings and then acquitted, without

the judge or the prosecutor's office has failed to act. In this case, the lawful action of the administration results in special damage that does not correspond to the public burdens that every citizen must tolerate (C. E., Third Section, No. 1482, 1976; C. E., Third Section, No. 55901, 2020).

Having said the above, within administrative law, the general liability regime applicable to health care services is subjective, i.e., through the basis of service failure. In turn, but exceptionally, strict liability is also applicable, based on the exceptional risk factor.

Regarding subjective medical liability, we should mention that, as in the civil jurisdiction, the main debate has arisen around the category of failure of service. However, the discussion is not about what is understood as negligence or not in these events, for which the traditional methodology of the Council of State has not changed, but about the applicable evidentiary regime. The above, is worth noting, with a particularity: let us remember that in civil matters some normative provisions allow us to conclude the allocation of the burden of proof, but in the case of the non-contractual liability of the State this is not the case.

For this reason, at first, the medical liability of the State developed in a regime of proven failure, which assigned the burden of proof to whoever sought to enforce the effect of a rule, so that, if a private individual requested the liability of the State, the latter had to prove the existence of damage, imputation, and failure of service. In contrast, as it was in its interest, the state had to prove the grounds for exclusion of liability (Gil, 2015, p. 636).

After this, the Council of State, through its jurisprudence, determined that the evidentiary regime applicable to medical liability consisted of presumed failure if the administration has to demonstrate that it acted diligently, insofar as its activities are governed by the principle of legality. Thus, it was only necessary for the individual to prove the damage and the imputation, and it was the State's duty to prove the non-existence of failure or any of the grounds for exclusion of liability (C. E, Third Section, No. 5902 1990).

In addition, the presumed failure regime also rested on the idea that the administration, in these cases, as the provider of health care services, is in a better position to prove, since its knowledge of medical science allows it to access the means of conviction in a simpler way (C. E., Third Section, No. 6897, 1992).

However, the position was debated by the Council of State itself, since it was said that the theory of presumed fault assumed that in all cases one of the parties was in a better position to prove, a matter that could not be applied as a rule because it lacked empirical verification. Thus, it was concluded that the most accurate way to determine who was in a better position to prove was through a dynamic theory, which is based on the principle of fairness for the allocation of the burden of proof so that this depends on the study of each case (C. E., Third Section, No. 11878, 2000).

Now, the main criticism that the dynamic theory of evidence received is that advisors and judges did not have the legal power to modify the burden of proof within the process, a point that was avoided with the issuance of the General Code of Procedure and its figure of the dynamic burden of proof, which is applicable in administrative proceedings under article

211 of the Code of Administrative Procedure and Contentious Administrative Proceedings.

On the other hand, regarding objective medical liability, this is a regime that has been developed in an exceptional manner, which only proceeds in certain cases, which are enshrined in case law. Thus, according to the Council of State, the health care service gives rise to the objective regime in the cases of intrahospital or nosocomial infections, application of vaccines, supply of medicines, and when new therapeutic methods with unknown consequences are used (C.E., Third Section, No. 20878, 2011; C. E., Third Section, No. 21515, 2012; C. E., Third Section, No. 22424, 2012). In the following, we will explain each of these scenarios.

1.2.1. Nosocomial infections

Concerning the first scenario, nosocomial infections, it is necessary to explain that these are those acquired during the performance of in-hospital medical treatment, which may occur in the performance of surgery, when a patient is treated in the emergency room or when he/she requires hospitalisation and observation in intermediate or intensive care. However, the particularity of this type of infection is that they do not arise from the pathology for which the user comes to the health care service but is transmitted during the provision of the service. An example of this was a case study by the Third Section of the Council of State, in which a pregnant woman was admitted to a hospital to give birth, however, after the procedure, the patient presented symptoms of an infection acquired during childbirth, which caused a multisystemic organ failure and, therefore, death (C. E., Third Section, No. 26124, 2012).

It is worth saying that there are two positions on this point, the first of which posits that nosocomial infections are a risk inherent to the medical activity of healthcare systems so that informed consent makes it possible to transfer the realisation of the risk to the patient's responsibility. This is the theory held by the Civil Chamber of the Supreme Court (C. S. J., Civil Chamber, SC 2202-2019, 2019). Thus, liability for this type of disease is only possible when it is proven that the IPS or the doctor acted negligently in the implementation of the epidemiological protocols, the latter understood as the technical guidelines aimed at eliminating, controlling, or mitigating the effects of infectious diseases.

In contrast, the Third Section of the Council of State has determined that nosocomial infections imply a risk that must be borne by the state and that informed consent does not allow this to be transferred to the patient. This is if there are reasons for distributive justice and equity through which the public entities providing health services are called upon to assume the damages that occur on an intra-hospital infection. It has also been mentioned that in these cases consent cannot be considered perfect, since it is impossible to inform the user about the totality of the possible infections that he or she may contract and their consequences, which is indispensable when it is intended to transfer the risks of the medical act to the patient (C. E., Third Section, No. 396122, 2017).

Thus, the liability regime applicable to nosocomial infections is objective, which is based on the title of exceptional risk[9], making it impossible for public entities to exempt

9 Despite the above, a question arises based on the context in which these lines are written. Will the damages caused by COVID 19 nosocomial infections be attributable to the state based on the strict liability regime? Concerning this question, we will only make a small comment. Let us recall that in the strict liability regime due diligence and fortuitous event

their liability by proving due diligence in the application of epidemiological protocols, as could be done in a subjective regime - as is the case in the liability regime of the Civil Chamber of the Supreme Court of Justice (C. S. J., Civil Chamber, SC 2202-2019, 2019).

1.2.2. Application of vaccines

Within public health policies, most countries have implemented immunisation programmes for the population against certain infectious diseases, for which vaccination plans have been essential. Today, the vaccination schedule in Colombia is oriented toward all children under 6 years of age, which has around 22 vaccines for 26 types of diseases. It is also important to note that there are plans for adult immunisation, but with lower coverage and only for 7 diseases (Ministry of Health and Social Protection, 2020).

However, even though the objective of vaccination is to immunise people against certain diseases, the application of these medicines can, in some cases, have negative side effects on people's health. For this, the Third Section of the Council of State has determined that the applicable liability regime is objective, this based on the title of exceptional risk, since a lawful act of the State in the implementation of this type of public policy has the effect of an unusual alteration of the risk for certain people, who should not bear the negative effects of health programmes (C. E., Third Section, No. 41390, 2019).

are not exemptions from liability, but force majeure and the act of a third party are. Thus, it will be of vital importance to determine to what extent the conditions of the Colombian Health System may constitute a force majeure scenario, where high levels of care and scarce resources are fundamental to determine whether or not the State could have acted otherwise. At the same time, it should be considered whether informed consent, concerning COVID 19, could be a tool for risk transfer, as patients were aware of the risks and consequences of attending the health system in times of pandemic.

By way of example, we can mention a case in which the responsibility of the State for the application of a polio vaccine was studied. The facts were that a mother took her two-and-a-half-month-old daughter to a health centre for the application of the vaccine, which happened normally, but days later the child presented health complications and, in a new visit to the health service, she was diagnosed with a post-vaccination polio infection, a pathology that caused her permanent quadriplegia (C. E., Third Section, No. 41390, 2019).

The reason for establishing strict liability in these cases is that the State, in its immunisation schemes and plans, implicitly assumes the possible danger and adverse reactions of vaccines in different types of organisms. Thus, due care in the transport, conservation, cold chain, and application of vaccines does not serve to exempt itself from liability as an act of diligence, nor does the fortuitous event, understood as the unpredictability of the effects of these medicines. Thus, the objective regime in these cases will only allow force majeure and the act of a third party to serve as exonerating factors in the liability trial (Cely, 2020).

1.2.3. Supply of medicines

There is no need to comment on this case this case works the same as the one explained in the application of vaccines (C. E., Third Section, No. 40562, 2017). Vaccines are medicines, and this regime is foreseen for cases in which damage can be caused by the supply of analgesics, anxiolytics, antipyretics, anti-inflammatory, anti-gout, anti-allergic, anticonvulsants, antibiotics, antibacterials, anticoagulants, antihypertensives, antirheumatics, antacids, diuretics, disinfectants, among others (World Health Organisation, 2007).

However, it is important to bear in mind that when we talk about the supply of medicines under the strict liability regime, we are only referring to the unforeseeable side effects that these can generate in different organisms. Liability for the failure to supply medicines or a mistake in prescribing them are assumptions that must be studied under the title of failure of service within the subjective regime (C. E., Third Section, No. 35116, 2016; C. E., Third Section, No. 36933, 2016).

1.2.4. New therapeutic methods with unknown consequences

Finally, the strict liability of the state for the application of therapeutic methods with unknown consequences is based on the execution of the medical activity in a risky manner, with the aggravating factor that the possible effects of a certain treatment are not known, which does not allow the patient to give informed consent, as this should consist of an explanation of the procedure to be carried out with its possible benefits and negative effects (C. E., Third Section, No. 17733, 2009). Thus, the basis used in these cases is the exceptional risk, however, it is important to mention that the jurisprudence on this point is quite scarce.

With the above, we conclude the section on state medical liability. In the following, we will make some brief reflections on what has been explained in civil and state medical liability, considering the particularities of each of these regimes.

2. SOME REFLECTIONS ON CIVIL AND STATE MEDICAL LIABILITY: A CRITIQUE OF THE IRRELEVANCE OF INFORMED CONSENT IN THE LIABILITY SUIT

Up to this point we have dealt with many issues, this journal article began by analysing, in a comparative manner,

the civil and administrative experience of medical liability, considering the doctrine and jurisprudence of the Civil Chamber of the Supreme Court of Justice and the Third Section of the Council of State. However, I cannot leave these lines without first making a quite specific criticism of what has to do with medical liability and informed consent.

First, the first thing I should point out is that my criticism consists of the irrelevance of informed consent in the liability trial, given that, in jurisprudence - especially in civil experience - no practical application of this figure can be found. In other words, judges do not attribute any effect to the disregard of informed consent by health professionals, even though academia and jurisprudence consider that this figure acts as a prerogative of self-determination in favour of the patient, which is linked to the fundamental rights of freedom and the free development of personality. At the end of the day, informed consent is the tool that allows the patient not to be a means of medical practice, but an end, which serves to recognise the subjects as free persons capable of deciding on their health and personal integrity.

Thus, the structure of this section will be developed as follows: first, the figure of informed consent and its importance for the practice of medicine will be explained, followed by the experience of the Supreme Court of Justice and the Council of State, and finally, we will explain the error made by the jurisprudence in not granting effects to the lack of informed consent in the trial of liability.

2.1. Informed consent and its relevance to the practice of medicine

Informed consent is the part of the medical act in which the health professional informs the patient about the procedure to be performed so that the patient can give or withhold his or her consent. So, while it is true that the professional is the one who knows the medical science, it is only the patient who can decide about his or her health and personal integrity, this is what is known as self-determination.

Now, to inform the patient about the applicable medical procedure, it is not only required that the professional specifies what it consists of, but it is also necessary to fully, clearly, and sufficiently explain the possible risks and benefits of the therapeutic or surgical treatment that will be carried out, also considering the material or logistical shortcomings of the IPS, when applicable. The problematic nature of this issue is such that it is practically related to all medical acts since if there is no clear communication between the professional and the patient, it can generate a wrong consent or, for example, suppose that the doctor makes a mistake in the diagnosis and informs about a treatment that is not suitable, in this case, the patient will issue an authorisation that does not correspond to the reality of his/her health condition (García, 2018, p. 125).

Indeed, informed consent is a vitally important issue, provided that the patient has a right to be informed and to decide about his or her body and personal integrity. Indeed, the Lisbon Declaration on the Rights of the Patient, adopted by the World Medical Assembly, states in paragraph 3, subparagraph "a" that: "The patient has the right to self-determination and to make decisions freely concerning himself/herself. The physician shall inform the patient of the consequences of his or her decision".

Additionally, paragraph "b" of the same numeral, it mentions that: "The mentally competent adult patient has the right to give or withhold consent to any examination, diagnosis or therapy. The patient has the right to the information necessary to make his or her decisions" (World Medical Assembly, 1981).

In turn, the Oviedo Convention recognises consent as a Human Right, in the following terms: "An intervention in the field of health may only be carried out after the person concerned has given his or her free and informed consent" (Council of Europe, 1999).

As far as the Colombian legal system is concerned, informed consent is not recognised as a right of the patient, but as a duty of the physician, who must request it for any kind of procedure. This is found in Article 15 of Law 23 (1981), which states that:

> The physician shall not expose his or her patient to unjustified risks. He shall seek the patient's consent to medical and surgical treatment that he considers necessary, and which may affect him physically or psychologically, except in cases where this is not possible, and shall explain the consequences of such treatment to the patient or those responsible for him in advance. (art. 15)

However, Article 8 of the law indicates that the patient is free to dispense with the services of the physician. However, it is important to clarify that in cases of urgency, informed consent is dispensable for the practice of a medical act, such as when a person suffers an accident, becomes unconscious, and requires medical attention, in these emergency cases the duty of care allows the physician to act without informing the patient or his relatives.

On this point, in a judgement of 12 September 1994 (C. C., T 401/94, 1994), the Constitutional Court has indicated that informed consent is a fundamental tool for the exercise of the right of every patient to refuse the application of the treatment on his or her body. In addition, it was mentioned that, in the medical relationship, both the patient and the professional have the possibility of withdrawing and, if this is not done, the doctor must inform the patient of all the implications of the treatment. Finally, the Court recalls that there are three cases, for reasons of vital urgency, where consent is not necessary: i) when the patient's mental state is not normal, ii) when the patient is in a state of unconsciousness, and iii) when the patient is a minor.

Despite the above, it is important to point out that all the above-mentioned provisions, both at the international and national level, have not been sufficient to ensure that in all cases health professionals fully respect the right of patients to be informed and, on that basis, to give or withhold consent. At this point, it is essential to mention a very common case, which has to do with the practice of obstetrics and gynaecology, where violent practices by medical personnel are recurrent, including the lack of information to women about the different procedures performed during childbirth, which have negative consequences on sexual and reproductive life (Pozzio, 2016, p. 101-106). Such as an example, the carrying out of unnecessary cessations (DANE, 2018)[10] , repetitive vaginal examinations without justification, frequent use of oxytocin to accelerate labour, and, the most serious of all, the practice of episiotomy

10 The performance of unnecessary caesarean sections is one of the most recurrent violent practices, especially when the health professional has not obtained consent for it. The World Health Organisation has indicated that C-sections should not exceed 15% of births, but in Colombia, this figure is as high as 45%.

without consent, which consists of a vaginal incision to widen the exit canal of the foetus (Barbosa and Modena, 2018, p. 2).

In summary, informed consent is, more than a duty of the physician, a fundamental right of the patient to be informed and to give or withhold consent to the procedure proposed by the physician, which must be explained clearly and considering its risks and benefits, with the aim that the patient's decision is free of force or error.

2.2. Jurisprudence of the Supreme Court of Justice and the Council of State: the irrelevance of informed consent

Having said this, we will mention some of the jurisprudential references that have been made to the issue of informed consent, from the perspective of the Supreme Court of Justice and the Council of State. Thus, we will look at each of these points in separate items.

2.2.1. Civil Chamber of the Supreme Court of Justice

The first case decided on 26 July 2019, arises from the practice of "refractive surgery with laser excision to correct high myopia and reduce dependence on contact lenses and glasses" (C. S. J., Civil Chamber, SC 2804-2019, 2019, s. p.), this procedure was performed on each of the patient's eyes two days apart.

However, the result of the surgery was not the desired one and the patient lost a percentage of her vision, which, according to the defendant's doctor, was an inherent risk of the procedure. Now, one of the main arguments of the plaintiff to prove medical negligence was the lack of information necessary to issue consent. It was proven in the process that the professional had not informed the patient adequately so the patient was not fully aware of all the risks involved in the practice of the procedure.

Despite the above, the judgement states that the lack of informed consent has nothing to do with the act of negligence that must be proven for an obligation to pay compensation to arise. Thus, the defendant's doctor proved in the proceedings that he had carried out all the necessary procedures for the proper performance of the surgery so that in no way could fault be asserted as a basis for the liability judgement. In summary, the court mentioned that the claimed damages were not an unavoidable consequence of the doctor's failure to comply with his duty to inform. Consequently, the doctor was acquitted.

On the other hand, in a ruling of 14 December 2018 (C. S. J., Civil Chamber, SC 5641-2018, 2018), a patient underwent a surgical procedure to have material removed that served her to recover from an "anterior cervical arthrodesis". However, once she came out of the operation, the patient was in severe pain, for which the anesthesiologist ordered an analgesic and then proceeded to evaluate her, finding an oximetry problem, for which reason a transfer for intubation was ordered. Once in intensive care, the doctors noticed sudden oedema in the back of the neck, and an attempt was made to remove the haematoma by performing surgery, but while the procedure was being carried out, the patient died, so the postoperative period for the main surgery lasted no more than 80 minutes.

According to the evidence in the case, it was determined that the doctors had not acted negligently, as what happened was an inherent risk of the surgery. However, when the informed consent was reviewed, it was found that there were several inconsistencies in the information that the doctors provided to the patient before the surgery. But as in the case, the judge did not consider that such omission was susceptible to breach of contract, so the defendant clinic was acquitted (C. S. J., Civil Chamber, SC 5641-2018, 2018).

Finally, in a judgment of 24 May 2017 (C. S. J., Civil Chamber, SC 7110-2017, 2017), a patient required the practice of a "laparoscopic cholecystectomy", that is, a surgery through which the gall bladder is removed. However, in the post-operative period, the patient had abdominal pain that forced the professionals to perform some additional tests, where it was discovered that the first procedure performed had perforated the small intestine, which generated a rather dangerous infection.

In this case, again, the court found that the patient had not been adequately informed about the risks of the procedure. However, following the logic explained above, it was concluded that the lack of consent had no bearing on the medical practice so the risk was inherent to the procedure performed. Furthermore, bordering on rudeness, the ruling mentioned that the defendant's professional was "connoted" so that his capacity allowed him to expertly perform the laparoscopy, which left aside the fact that he had not provided the necessary information for the patient to decide about her health and personal integrity. In other words, according to the Court's reasoning, the more reputable the doctor's reputation, the lesser the duty of information he has towards his patients (C. S. J., Civil Chamber, SC 7110-2017, 2017). Thus, the defendant's liability is not proven.

Despite the above, in a recent judgment of 7 December 2020 (C. S. J., Civil Chamber, SC 4786-2020, 2020), the Court analysed a case in which a woman underwent cosmetic surgery for liposuction. However, after the intervention, the patient suffered abdominal pain, pallor, and other abnormal conditions that caused multi-systemic damage to her health and led to her death. In this case, the plaintiff argued that the victim's death was the result of medical negligence.

Thus, the particularity of this case lies in the fact that the court found the means of proof to ensure that the defendant's doctor had undertaken to perform an obligation to achieve a result. Not only that but in the *obiter dicta of* the judgment, it is stated that a correct disclosure of the risks and the respective consent of the patient to these risks mitigates the doctor's liability, even though the doctor has committed himself to the achievement of a result. In addition, and coming to the most important point, the Court affirmed, for the first time, that in the absence of informed consent, medical personnel must assume the consequences of their omission and diligence cannot exempt them from liability (C. S. J., Civil Chamber, SC 4786-2020, 2020).

Several doubts arise from the above, since in this case the argumentation was not used in the *ratio decidendi* of the ruling, provided that in the specific situation force majeure operated as an exonerating factor for liability. Then, the question remains as to how the absence of informed consent would operate in the liability trial, what are the consequences the medical personnel would bear, is it possible to state that the absence of informed consent is a necessary cause of the damage, and does the absence of informed consent constitute a relative nullity due to error in the medical services contract, and if so, what are the consequences?

As can be seen, although the judgment brings up the issue of informed consent and gives it special relevance, given that no attempt had ever been made to incorporate this concept within the liability trial, on this occasion, it does not make much progress in this respect either, or the matter remains a mere doctrinal reference.

Considering the above, in the jurisprudence of the Supreme Court of Justice it is irrelevant, within the liability trial, whether the doctor provided the necessary information for the patient to issue the respective consent, since, under the logic, this has no direct impact on the practice, i.e., whether the doctor was diligent and, therefore, acted with negligence. However, the last judgment analysed the possibility of liability based on the lack of informed consent but did not specify how this could be done; this reference was only a doctrinal citation (C. S. J., Civil Chamber, SC 4786-2020, 2020).

2.2.2. Third Section of the Council of State

Now, the dynamics of the jurisprudence of the Council of State, as far as the assessment of informed consent is concerned, have developed similarly. To explain this issue, we will look at some cases that will be explained below.

On 3 April 2020 (C. E., Third Section, No. 43034, 2020), the Council of State studied a case in which a minor, accompanied by his parents, went to the health service of a hospital for a congenital cataract, for which the treating ophthalmologist diagnosed that surgical intervention was necessary. Indeed, the ordered procedure was carried out correctly and following the urgency that the patient's situation required. However, days later, the child returned to the hospital with an infection that, traditionally, could have been acquired due to a lack of surgical asepsis and instruments in the post-operative period. At that time, the procedure should have been performed urgently, but a delay on the part of the medical staff resulted in the child's loss of vision. Furthermore, the hospital had the burden of proof to demonstrate the correct application of the procedures established in the protocols that mitigate infectious diseases and timely care.

However, the defendant failed to prove that the protocols had been applied, that the delay of the medical staff had not caused the damage and, additionally, there was no evidence of the informed consent of the child's parents throughout the proceedings. Regarding the latter, the judge considered that this act was reproachable, but did not give it any effect other than considering it a negligent act among the many others committed by the hospital (C. E., Third Section, No. 43034, 2020). Thus, the lack of sterilisation measures and the delay in care were the facts that constituted the evidence of service failure for which the State was condemned.

In a judgment of 11 March 2019 (C. E., Third Section, No. 46283, 2019), a case was decided in which a woman went to the health service of a hospital because she presented a mass in her neck; consequently, the treatment physician diagnosed a "thyroid goitre" and the need for a surgical procedure to reduce the thyroid gland. After the procedure, the patient noticed a loss of vocal ability, and, after consulting other professionals, it was determined that the surgery had resulted in irreversible damage to her vocal cords.

One of the claimant's arguments was that the informed consent had not been given correctly, however, the evidence found that the patient had signed a document stating the risks of the surgery, as well as, in the interrogation, she claimed to have been informed about the surgery.

Thus, the judge, citing a ruling of 3 July 2007 (C. E., Third Section, No. 16098, 2007), indicated that the informed consent acted as evidence that served as an exoneration of liability, since, if the damage was the realisation of one of the risks informed to the patient, the defendant entity should not bear the damage suffered by the plaintiff, since the provision

of information allows the risk of the medical activity to be transferred to the patient. Accordingly, the state absolves the state of liability (C. E., Third Section, No. 16098, 2007).

In a judgment of 26 October 2018 (C. E., Third Section, No. 41144, 2018), the case of a man who went to the health service with symptoms of respiratory distress was studied. After some tests, the medical staff diagnosed gall bladder stones and biliary inflammation, for which, in principle, hospitalisation in intermediate care was ordered and then he was discharged. After a few days, the patient had to return to the health service twice due to gall bladder inflammation. On a final occasion, the patient attended the emergency department where he underwent unnecessary surgery to remove his gall bladder, without his consent, which resulted in harm to his integrity.

In that order, the judge analysed informed consent as a tool to determine whether an exemption from liability was applicable (C. E., Third Section, No. 41144, 2018), however, as mentioned, there was no evidence of consent for the surgery in the file so that the State was condemned for the realisation of a risk that it did not transfer with the patient's authorisation. Apart from this, the absence of informed consent had no other effect.

Thus, in the jurisprudence of the Council of State, informed consent is used to determine whether the defendant has acted diligently, intending to disprove the basis of service failure. Thus, when it becomes evident that the doctors have not provided the information on the procedures to be performed or have done so, but inadequately, this only results in the impossibility of using consent as an exoneration of liability, but not as evidence that can autonomously determine negligence.

3. INFORMED CONSENT AS AN ESSENTIAL ELEMENT IN DEFINING THE APPLICABLE LIABILITY REGIME

Up to this point, after all the analysis carried out on informed consent, it is barely evident that there is a logical contradiction between what is established in international and national provisions on patient autonomy and the recognition that the high courts, in liability proceedings, attribute to this figure. As can be seen in the previous lines, in civil jurisprudence it is irrelevant, within the liability trial, whether the doctor obtained the patient's consent. This is a similar issue in administrative matters, where it only functions as a means of proof to exempt the State from liability.

In my opinion, the irrelevance of informed consent in the liability trial is a matter that violates the fundamental and legal rights of the victims, which should affect the analysis of the arising of the indemnification obligation, whether it is a matter of contractual liability, for the civil case, or non-contractual liability, for the administrative case. Thus, the legal arguments on which this criticism is based will be developed here.

To explain this, I will give the following example:

A pregnant woman presents with symptoms of labour, which is why she decides to go to the medical service of an IPS for treatment. Coincidentally, however, the patient arrives at the emergency department when the obstetrician-gynaecologist in charge, who is quite reputed in his profession and has written several scientific articles on the practice of caesarean section as an acceptable and suitable procedure for childbirth, is about to finish his shift.

However, once the mother is admitted to the emergency department and is ready to be attended to for a

vaginal delivery, which can last between 6 or 10 hours, the doctor orders a caesarean section, a surgical procedure that takes approximately 1 hour. Now, all the above was carried out without informing the patient in a clear, complete, and sufficient manner about the reason for this procedure, its risks, and benefits.

One day after the surgery, due to symptomatology of infection, the medical staff noticed a lesion in the patient's intestines caused by the procedure, which is a risk inherent to this type of surgery, and ignored the doctor's carelessness.

Once the patient has recovered from the surgery and after the days of incapacity caused by the injury, she decides to consult her lawyer about the procedure that was performed, for which he verifies the medical history and finds no evidence of informed consent about the caesarean section, indicating that the treating physician and the IPS violated her right to be informed about the risks and benefits of the procedure. Considering the above, the lawyer recommends filing a liability suit for the damages caused by the uninformed surgical procedure.

Well, in the light of the majority case law of the Supreme Court of Justice, this case would not give rise to an obligation to pay compensation, since the procedure that caused the damage was performed by an expert and in compliance with the *lex artis*, so that it is impossible to prove the doctor's fault, since, as the Court has mentioned, the lack of informed consent is not sufficient to prove a breach. On the other hand, considering the jurisprudence of the Council of State, in this scenario compensation would not be possible either, as the consent would only serve to demonstrate that the doctor was

informed of the risk of injury and that, if this risk materialised, it is not imputable to the State. Thus, it would be necessary to demonstrate some other elements of negligence to prove service failure.

The reasoning explained by each of the courts ignores the two main functions of informed consent. The first has to do with the fundamental right of all patients to decide on their life and personal integrity, so that it is the duty of all doctors, before any treatment, to provide information on the procedure to be carried out, as well as to request the patient's authorisation about any action that is planned to be performed.

On the other hand, and approaching the basis of the critique, another of the functions of informed consent is to make the patient a co-participant in the medical treatment to be performed. That is, whenever the patient is the one who makes decisions about his or her health and personal integrity, the authorisation that he or she gives to health professionals makes him or her responsible for the risks that he or she has been clearly and sufficiently informed of (García, 2018, p. 146).

One of the logical effects of consent, then, is that the negative results of a treatment, whether therapeutic or surgical, are covered in a scenario of self-responsibility of the patient; after all, it is the patient who decides about his body and personal integrity, so it would be wrong for the law to hold the doctor responsible when he is not the one who makes the decision; he only proposes a treatment and carries it out following what has been informed. Based on the above, it is only natural that only obligations of means arise from medical acts, whereby professionals only commit themselves to use all their knowledge and skills to achieve an end, but this does not mean

that they guarantee it. Hence the preponderant jurisprudential position that medical liability must be analysed according to a subjective regime.

However, if a doctor performs a procedure without informed consent, which means violating the patients' right to decide about their health and personal integrity, does the logic of self-responsibility explained in the previous paragraph hold? The answer is no, since it is not possible to hold a subject, in the case of our example, the patient, is responsible for an act that is not attributable to her and that was deliberately performed by the health professional.

Then, when a doctor, having the obligation to do so, does not obtain the patient's informed consent for the performance of a procedure, the latter must assume, in terms of liability, the realisation of the risks produced by the act performed, as would be, in our example, the surgical injury suffered by the patient. This is provided that medical activity, whether we like it or not, in certain cases involves risks and, therefore, is susceptible to being analysed based on a strict liability regime. To conclude otherwise on this point would be to disregard the fact that people have the right to decide about their health and personal integrity. This is one of the reasons why obstetric violence is a recurrent practice in Latin American countries, as there is no incentive for health professionals to obtain the authorisation of patients before performing any procedure.

Now, it is true that in some judgements of the Supreme Court of Justice, medical activity was erroneously qualified as - *per se* - a dangerous activity (C. S. J., Civil Chamber, 14 March 1942 and 14 October 1959), for which I adhere to the criticisms that were made on such a postulate, but not on the same grounds. In debating these decisions, the doctrine

resorted to arguments that the profession of medicine is based on ethical-social, "do-gooder" and altruistic postulates. It was also argued that, historically, strict liability had been designed only for business activities, but not for professions as worthy and desirable as medicine (C. Jaramillo, 2015, 131-142). To tell the truth, these arguments are not valid today; as a rule, medicine responds to market dynamics, but not to the altruistic intentions of some individuals concerned about people's health and well-being. And when this is not the case, it is the State, through its provision of services, that performs this service. Moreover, strict liability does not apply to business activities, it applies to dangerous activities, i.e., conduct that increases the normal levels of risk, whether they are lucrative. Therefore medicine, as a risky activity in certain circumstances, may come under a strict liability regime.

In short, the arguments aimed at dismissing out of hand the objective regime for medical liability are loaded with a condescension that in legal terms is not relevant, so much so that, in other latitudes, it has even been considered, in a judgement, that the "medical profession has much of a priestly nature" (T.S.E., Civil Chamber, STS 453/1991, 1991), a matter that in a secular country has no relevance whatsoever, however small or large it may be, all trades and professions have the same value in social terms, so that these are not arguments to determine the applicable liability regimes.

Thus, according to what has been explained, the patient in our example could request the application of a strict liability regime, since the doctor, having the obligation to do so, did not provide the necessary information to obtain consent. The lack of the patient's authorisation for the surgery implies that the risk of the medical activity was not transferred so the professional

should be liable for the realisation of any risk arising from the procedure performed.

However, it is important to clarify that medical liability for the realisation of a risk that was not informed and, therefore, consented to by the patient, must be conditioned by the fact that the harm suffered by the patient must be a consequence of the medical activity, not a result of the pathology suffered, a matter that in some cases will imply a judicious and demanding evidentiary exercise. In addition, a doctor or an IPS cannot be judged objectively when the information provided, even if erroneous, complies with the *lex artis ad hoc*, which means considering what the doctor could reasonably have inferred at the time of treating a given patient.

CONCLUSIONS

In short, it cannot be said, *per se,* that the *subjective* regime applies to all cases of medical liability, any more than it can be said that, *per se,* the objective regime applies to all cases of medical liability. This will depend on the factual analysis that each case raises.

Thus, taking into account all of the above, the application of the objective regime to cases of medical liability must take into account the following assumptions: (i) the procedure performed by the treating physician must involve an abnormal level of risk, such as that arising from surgery, (ii) the treating physician or the institution providing the health service failed in its duty to provide clear, complete and sufficient information to obtain the patient's consent, and (iii) the damage for which compensation is sought must be the realisation of one of the risks of the treatment applied, and not an effect of the pathology for which the patient sought the health service.

On the other hand, and in anticipation of a possible criticism of the above, let us remember that for the jurisprudence of the Supreme Court of Justice, all medical liability takes place in a contractual sphere, so that the regime of dangerous activities is not applicable, but rather the classification of the obligations of means and results. However, it is not possible to maintain the above reasoning when in medical practice, informed consent is disregarded, as this would be a fundamental requirement for the existence of any contract. If a patient does not authorise the treatment to be provided, there is no contract for lack of the requirement of consent, so the activities carried out by the physician or the IPS cannot be analysed from the perspective of a negotiated agreement. Consequently, when one wants to hold a subject liable for damage that is not the result of a breach of contract, what is the applicable regime? The non-contractual regime, in which liability for the exercise of dangerous activities does exist.

In fact, in the already explained judgement of 7 December 2020 (C. S. J., Civil Chamber, SC 4786-2020, 2020), the Court indicated that the absence of informed consent engaged the liability of doctors but did not mention in what way. Hence, it could be inferred, according to the current jurisprudential line, that the judge believed that the lack of informed consent gave rise to an obligation of result, but this would be an important logical contradiction since it is not possible to predicate the existence of a contract with the deprivation of one of its requirements of existence: consent. Consequently, attributing a role to informed consent in the liability trial would mean recognising the possibility of applying objective extra-contractual liability in the civil jurisdiction, which would be quite a change in the jurisprudential paradigm.

Thus, in effect, as established in article 26 of Law 1164 of 2007, the health care relationship generates an obligation of means, which applies to the contractual and non-contractual sphere, even though obligations of means in non-contractual matters do not exist, but this is how the Council of State has understood it, which for medical practice and the exercise of administrative functions is quite correct. However, as already indicated, and following the assumptions, the violation of informed consent should give rise to the liability regime for dangerous activities or exceptional risk, both in the jurisprudence of the Supreme Court of Justice and in that of the Council of State. This does not mean that the rule is disregarded since the doctor's obligation is one of the means if the medical act is validated by the informed consent or by the legal exceptions that allow the professional to act without it.

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El daño no patrimonial en el derecho contractual comparado

Non-property damage in comparative contract law

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ABSTRACT: The contribution presented in this paper explores the trajectories of constitutionalism in its history, which accompanies the most relevant events of the modern era. The author has set out to highlight the interrelations of social factors, the interests of natural and legal persons, the role of states and of political groups and parties, and ideological anchors, as the main elements that lead to constitutional texts being placed in the leading role in the social fabric where they are today. The most novel expressions of constitutionalism are explored, among which the definition and recognition of the rights of nature constitutes one of the most novel and important forms of its expression.

KEY WORDS: civil law, law, civil liability, non-pecuniary damage, contract.

RESUMEN: La contribución que se presenta en este trabajo explora las trayectorias del constitucionalismo en su historia, que acompaña a los acontecimientos más relevantes de la era moderna. El autor se ha propuesto destacar las interrelaciones de los factores sociales, los intereses de las personas físicas

y jurídicas, el papel de los Estados y de los grupos y partidos políticos, y los anclajes ideológicos, como los principales elementos que llevan a que los textos constitucionales se sitúen en el protagonismo del tejido social en el que se encuentran hoy. Se exploran las expresiones más novedosas del constitucionalismo, entre las que la definición y el reconocimiento de los derechos de la naturaleza constituye una de las formas más novedosas e importantes de su expresión.

PALABRAS CLAVE: derecho civil, derecho, responsabilidad civil, daño no patrimonial, daño moral, contrato.

JEL CODE: D23, B25.

INTRODUCTION

Non-pecuniary damage is one of the figures with the greatest legal development in comparative doctrine and in the jurisdictional headquarters of European and Latin American countries. It is defined as an affection, suffering or distress that affects a person causing pain, grief, or anguish, directly impacting his or her moral assets (as opposed to pecuniary damage, the consequence of which entails an economic decrease). This is why its notion is linked to the theory of non-contractual civil liability in cases where a wrongful act is materialized, however, due to the social and economic changes that have emerged in the community over the years, its conception today is very different from its primitive origins, For example, we currently find that in almost all legal systems reparation is allowed in the form of a monetary sum or that some jurisdictional bodies and even Civil Codes admit compensation within the framework of a convention between two or more persons under certain specific parameters, which until a few years ago was unheard of in the international legal order.

As the years go by and societies adapt to new realities, legislators, judges, and jurists adapt primitive legal concepts to the emerging circumstances, with a view to achieving material justice that guarantees peace among citizens, just as it happened in primitive peoples, the difference lies in the variation of the applicable judicial forms and remedies, which gives us a positive trace in the balance of global legal development. There are various doctrinal discussions on certain theories of law that have been left in the past, today many of them are not even referred to, they simply appear in some sources with the sole objective of enriching the legal study and others are still in force in the current panorama, but the arguments that sustain them have lost their validity in the legal field.

Such is the case of the inadmissibility of the reparation of non-pecuniary damage in the sphere of contractual obligations; if we analyze the origin of this category of damage, we find its roots in Roman law, where the use of the terminology *damnum* was excluded in the cases involving non-pecuniary injuries experienced by a subject, taking special relevance in the sphere of a private tort of iniuria described in D.47.10.1, as a series of actions characterized by the willful conduct of a subject (Cardilli, 2010).

D'Ors et al. (1975) point out about the definition of iniuria that:

> The name "injuria" comes from the fact that it is done unjustly, for everything that is done unjustly is said to be done unjustly. In a more special sense, the offence is called injuria; sometimes we mean by the word injuria the injury done culpably, as we are wont to say in regard to the *Aquilian* Law; at other times, we call injustice injuria, for, when one has given sentence unjustly or

> unjustly, we say that injuria is suffered by the judge; and I think it is said injuria because it is without right or justice, as if we said the opposite of *iuriam*; and the affront or "contumelia" from *contemnere* or *contemnere* or to despise. (p. 640)

The first references to the obligation to repair an injury caused to another can be found in the wording of the second point of Table VIII of the Law of the XII Tables, where it was established that *if membrum rupsit ni cum eo pacit, talio esto, i.e., in the case of a person* causing a fracture of a limb to another person, the Law of Talion should be applied. The legal right that was intended to be protected by this regulation was the physical integrity of the free man, hence the legal assumptions involved injuries such as *membrum ruptum* or *os fractum*.

Subsequently, through the praetor's interpretations, the hypotheses of *iniuria* also began to include those that harmed the moral personality of others. The notion of iniuria was extended through the edicts referring to *convictum* or *ademptata pudicitia*, ending with the publication of a general edict regulating all denigrating acts against another person; this is how the conception of *iniuria* was extended to include in general all injuries to the moral or social personality of the individual (Sánchez, 2012, pp. 338-339).

According to what Ulpianus established in D.47.10.15.15, for the reparation of damages for *iniuria to* proceed, *animus injuriandi was* required, aimed at hurting, hitting, beating, insulting, verbally or in writing the offence to affect the person's honour or reputation; in which case, the legal protection was the *Actio Iniuriarum*, a criminal action that granted the condemned person the taint of infamy. If the facts giving rise to this legal remedy were serious, the penalty was

established by the Praetor. In determining the penalty, the way it was imposed, the context and the personal circumstances were considered. It could be waived with the *dissimulatio* of the aggrieved party (D.47.10.11.1) (Del Valle, 2012).

The purpose of the *actio iniuriarum* action was:

> To obtain a sentence that, in principle, was proposed by the plaintiff himself, who had to evaluate the offence that had been committed against him, although when the insult was very serious, the appraisal was carried out by the praetor; subsequently, the judge carried out the evaluation to impose the sentence, which could not exceed the estimate made. Moreover, in those cases in which the assessment of the offence had been made by the praetor, the judge did not usually reduce the sentence in view of the magistrate's authority. (Guerrero, 2002, pp. 20-21).

Nor does Justinian's doctrine reflect a notable antecedent of the compensation of extra-pecuniary damage as an entity that can be valued in the body of the sentence. It contains the refinement of the concept of *damnum*, on which the bases of tort liability would be based, which according to Cerami (1995), would develop through three ways: *i)* the marginalisation of the penal character of the tort action, with the strengthening of its compensatory function; *ii)* the configuration of the tort action as a general procedural means to obtain the *damni culpa reparatio*; and, *iii)* the configuration of fault as a necessary presupposition of liability for damages.

In the Code of the Seven Partidas (drafted in Castile during the reign of Alfonso X, with the aim of achieving legal uniformity in the kingdom), with deep-rooted influence of the

Justinian doctrine, a broad and outlined notion of compensable damage is established, regulating the damages caused to patrimonial goods of any nature and the acts that degrade the physical integrity of a person.

It follows, then, from the wording of the above provisions, that non-pecuniary damage, since its origins, has been linked to civil liability arising outside the boundaries of the contractual sphere; feasible due to the intrinsic characteristics of this type of injury, since due to its intangibility and unpredictability it is incompatible with the economic and predetermined connotation that an agreement entails.

Although various jurists, for example Gayoso Arias (1918), consider that "no self-respecting man could or should accept money in exchange for moral pain" (p. 234), considering that "fame and honour are in a certain sense unethical of money" (p. 235), the question posed by Chartier (1996) is still relevant today:

> Is it conceivable that today, the highest and noblest feelings of those around us, of our fellow human beings, can be affected without any kind of responsibility being incurred and that, on the other hand, the slightest damage to our heritage can give rise to reparation?

The answer is clearly No, without specifying the origin of the relationship between the persons involved.

Some countries such as France, Italy, the United Kingdom, the United States, among others, have overcome the arguments that for years have prevented the reparation of non-pecuniary damage in the contractual sphere, assessing specific cases that have reached the heart of their courts, in which they have decided in favour of the victim, thus rescuing the role of

the jurist as a cultivator of justice and honoring Celsus' ancient definition of law understood as *l'ars boni et aequi*, professing the knowledge of the good and the equitable, separating the just from the unjust, discerning between the lawful and the unlawful, desiring to do good, not only for fear of being punished, but also with the exhortation of rewards. In this sense, we will now analyse the development of this thesis in recent years in the light of comparative law.

1. NON-PECUNIARY DAMAGE IN COMPARATIVE CONTRACT LAW

The claim for contractual non-pecuniary damage has had several stages in the development of its consolidation in the domestic laws of the countries based on the *common* and *civil law* systems. The first of them unfolds, approximately until the middle of the 20th century, in which there was a forceful and unanimous rejection of this indemnifying condition justified in the natural exclusion based on the patrimonial nature of the contract. The second is circumscribed to the acceptance of this claim in certain conventional categories involving legal weaklings whom the system should protect (workers, consumers, among others), and the third is characterized by the establishment of jurisprudential criteria (source of law), in which mechanisms are created, such as the "cumulative liability", through the concrete analysis of particular cases in which compensation for non-pecuniary damage is approved in favour of the creditor, as a consequence of the non-performance of a contractual performance.

Thus, international organizations, whose aim is the harmonization of private law, have developed certain works containing principles that include precepts applicable to civil law, with a view to the evolution and legal innovation of this

branch. The admissibility of the claim of this category of damage in a convention has not escaped this debate, considering that the legal systems present important differences in their treatment. One of the most significant initiatives in this area is that of the Contract Law Commission, which published the Principles of European Contract Law (PECL), integrated in the *Common Frame of Reference* (CFR) of the *Study Group on a European Civil Code* and the *Acquis Group. European Research Group on Existing EC Private Law*[1] .

Chapter 9 of the PECL on *remedies for non-performance* contemplates, in its section 5 entitled *damages and interest*, Article 9:501 (*right to damages*), which recognizes the possibility of compensating non-pecuniary damage caused by a breach of contract. In this sense, it states: (1) The aggrieved party is entitled to damages for loss caused by the other party's non-performance which is not excused under Article 8:108. (2) The loss for which damages are recoverable includes: (a) non-pecuniary loss; and (b) future loss which is reasonably likely to occur.

Article 3:701 (*right to damages*) of the CFR sets out this same criterion, with the additional precision of including within non-economic damages, suffering and impairment of quality of life, providing as follows: (1) The creditor is entitled to damages for loss caused by the debtor's nonperformance of an obligation, unless the non-performance is excused. (2) The loss for which damages are recoverable includes future loss which is reasonably likely to occur. (3) "Loss" includes economic and non-economic loss. "Economic loss" includes loss of income or profit, burdens incurred and a reduction in the value of property. "Non-economic loss" includes pain and suffering and impairment of the quality of life.

1 Official website: https://ec.europa.eu/info/departments/justice-and-consumers_en

Likewise, the International Institute for the Unification of Private Law (known by the acronym UNIDROIT, by its French name: *Institut international pour l'unification du droit privé*), in the *paper* referring to the *Principles of International Commercial Contracts*, last published in 2016, expresses in the text of its article 7.4.2 (full compensation) that: (1) The aggrieved party is entitled to full compensation for harm sustained because of the non-performance. Such harm includes both any loss which it suffered and any gain of which it was deprived, considering any gain to the aggrieved party resulting from its avoidance of cost or harm. (2) Such harm may be non-pecuniary and includes, for instance, physical suffering or emotional distress.

Therefore, the first paragraph includes the right of the aggrieved party to full compensation for damage suffered as a consequence of a breach of contract, and the second paragraph includes compensation for non-pecuniary damages, which, according to the comments published in its content, can mean pain and suffering, loss of certain comforts of life, aesthetic prejudice, etc., as well as those arising from attacks on honour or reputation, and compensation can take different forms of reparation, and it is up to the Court to decide which of them ensures adequate compensation.

Contrary to these precepts, the United Nations Convention on Contracts for the International Sale of Goods (signed in Vienna on 11 April 1980), rejects the compensation of any kind of non-pecuniary damage for the non-performance of an obligation prescribed in an agreement; Thus, Article 74 states that "damages for breach of contract incurred by one party shall include the value of the loss suffered and the value of the profit lost by the other party as a result of the breach", so that it only refers to pecuniary damages, without any mention

of the non-pecuniary category. In this case it sounds logical due to the commercial nature of the object of the contract that is regulated in said convention, however if as a consequence of the non-performance of an obligation expressed in a written agreement, it violates a fundamental right, it would matter little the commercial essence of the sale of goods, in any case it would be in the sphere of the contractual non-pecuniary damage that can be compensated, in accordance with the treaties and constitutions mentioned *above*.

In European Community law, in accordance with the jurisprudential criteria that some local courts have been adopting in recent times, several legislative initiatives have been enacted that expressly recognise this thesis, such as, firstly, Council Directive 90/314/EEC of 13 June 1990, refers to the non-performance of package travel contracts (repealed by Directive 2015/2302 of the European Parliament and of the Council of 25 November 2015) and states that compensation for injury must cover non-material damages, in particular for loss of enjoyment of the trip caused by substantial problems in the performance of the services agreed.

Secondly, Directive 2000/78/EC of the European Council (27 November 2000) establishing a general framework for equal treatment in employment, and Directive 2002/73/EC of the European Parliament and of the Council (23 September 2002) on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and on equal opportunities for men and women in the labour market. 2002/73/EC of the European Parliament and of the Council (23 September 2002) on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training

and promotion, and working conditions, provide that Member States shall introduce into their national law such measures as are necessary to ensure real and effective remedies for disadvantages suffered by a person as a result of discrimination (Articles 17 and 6.2 respectively). Similarly, Council Directive 2000/43/EC (29 June 2000) on the principle of equal treatment between persons irrespective of racial or ethnic origin provides for the admissibility of effective redress for discrimination, being effective if the compensation includes the non-material damage caused to the person discriminated against.

Latin America, for its part, has not organised its states with a view to building a community with solid institutions whose legal guidelines have an impact on the domestic law of each country, despite the fact that this mission represented an important goal within the values of the 19th century independence movements identified in projects such as Gran Colombia (1819-1831), the Mexican Empire (1821-1823), the United Provinces of Central America (1823-1824), the Federal Republic of Central America (1824-1839) and the Peruvian-Bolivian Confederation (1836-1839).

Their attempts at integration have been basically limited to the regional economic and political sphere, creating entities such as the Latin American Free Trade Association (LAFTA), the Latin American Integration Association (LAIA) or the Latin American and Caribbean Economic System (SELA), and intergovernmental organisations such as the Andean Community of Nations (CAN) and the Southern Common Market (MERCOSUR), the Bolivarian Alliance for the Peoples of Our America (ALBA), the Union of South American Nations (UNASUR) and the Community of Latin American and Caribbean States (CELAC), most of which aim to impart a legal

regime based on the common economic and social realities of the Latin American territory.

From the point of view of the integration of law, the most transcendental is the Organisation of American States (OAS) created on 30 April 1948, with the aim of achieving in its Member States an order of peace and justice, promoting their solidarity, strengthening their collaboration and defending their sovereignty, territorial integrity and independence (Article 1 of the OAS Charter); However, in contractual matters there is no treaty regulating the reparation of non-pecuniary damage, the closest legal link to this thesis is the obligation that it imparts to the States in the protection of fundamental rights set out in the aforementioned Pact of San José, Costa Rica.

It is important to mention that in recent times, it has been recognised that Latin American law integrates a legal subsystem that has its own unitary elements, whose socio-cultural base has been identified in the Roman-Ibero-Indigenous block, receiving its legal form from Roman law. These common features stand out in the social-democracy based on the real equality between people and the universalism of its law; in fact jurists of great prestige in the internal order of their countries have come together to create various harmonisation projects that qualify the principles of Latin American law, such is the case of the Group for the Harmonisation of Law in Latin America (GADAL) (2021) whose objective is the drafting of a Framework Code of Obligations with the purpose of elaborating a general theory in Latin America, whose purpose is circumscribed to:

> Respond to the demands of renovation, integration and reorganisation of Latin American private law or, in general, to the need for legal security in harmony with the principles and values that guide the Latin

> American legal sub-system, especially the protection of the human person, respect for fundamental rights, equality, justice and good faith. (p. 3).

In the manifesto of this Latin American Harmonisation Group GADAL (2021):

> On a large scale, the legal systems of the Latin countries share: *i)* the tutelage and protection of fundamental rights and human rights (as we have expressed in the preceding pages) through their Constitutions and the signing of international treaties; *ii)* the supremacy of their Constitution protected by ordinary and extraordinary mechanisms with the aim of guaranteeing respect for the Magna Carta; *iii)* the updating of substantive regulations, by doctrine or jurisprudence in response to the resolution of problems specific to the region; *iv)* the enactment of special laws regulating private law matters with legal solutions different from those established in the Civil Code; *v)* the establishment of an equal legal system between persons linked in a relationship in which they are objectively in an unequal situation; *vi)* the local interpretation of legal concepts and rules, taking into account the legal tradition of each Latin country; *vii) the* implementation of comprehensive regional regulatory frameworks with a view to local socio-economic development. (p. 2)

Initiatives such as these have had a forum within the Universities, within a purely academic sphere. In the case of this Group, it can be affirmed that the drafting of the Framework Code of Obligations is the first of them that aims to form an instrument of consultative reference for Latin American doctrine and jurisprudence; however, it is a project that has not

yet been published in its entirety, so that the admissibility of the claim for non-pecuniary damage in the contractual sphere could not be taken as a reference in the thesis.

The common denominator between the legal systems of different nations, either because it is established by legislation or by jurisdictional criteria, is centred on a variety of solutions regarding the recognition of the appropriateness of compensation for non-pecuniary damage as a remedy for the non-performance of an agreement entered into between two or more persons, a determining factor being the qualification of the damage that is admitted and the requirements for its estimation. Undoubtedly, the tendency has been to rule out any claim containing this type of claim, although more and more frequently, the Judges have considered that the economic nature of an agreement does not prevent the compensation of non-pecuniary damages.

1.1. United Kingdom

Initially, the UK case law was very decisive in its criteria, stating that the nature of non-pecuniary injuries was incompatible with the economic nature of the contract. However, over the years, it has become more flexible in its position by carrying out exhaustive analyses in some particular cases and by pointing out some exceptions to the traditional rule.

One of the case law precedents used by the English courts to deny the possibility of compensation for non-pecuniary damage in the contract is established in the *House of Lords* Judgment on the case of *Addis vs Gramophone Co. Ltd.* (1909), in which an employee (*Mr. Addis*) claimed damages for non-pecuniary loss caused by his wrongful dismissal. *Mr. Addis* was the manager of *Gramophone Co. Ltd* in the city of Calcutta.

In October 1905 he was given 6 months' notice of dismissal as required by law and a successor was appointed to his position, and the company took steps to prevent *Mr Addis* from acting as manager during his notice period, which resulted in his return to England 2 months after the notice of termination.

In the judgment, *Lord Loreburn* held that in the case of dismissal without notice, the employer must pay compensation, taking into account that the compensation is reduced to the period of notice omitted and cannot in any way include compensation for hurt feelings, nor for the loss he has faced in being dismissed, which makes it more difficult to obtain a new job.

Lord Shaw of Dunfermline (1909) stated that compensation for intangible damages could not be considered in this case, as it fell within the prohibited grounds of the law, stating the following:

> There remains, however, my Lords, a class of cases in which the injury accompanying the dismissal arises from causes less tangible, but still very real, circumstances involving harshness, oppression, and an accompaniment of obloquy. In these cases, unhappily, the limitations of the legal instrument do appear; these cases would not afford separate grounds of action because they are not cognizable by law. The very instance before your Lordships' House may afford an illustration. Here a successor to the plaintiff in a responsible post in India was appointed in this country, without previous notice given by the defendants; the successor enters the business premises to take, by their authority, out of the hands of the plaintiff those duties with which the defendants have by contract charged him, and he does so

> almost simultaneously with the notice of the defendants bringing the contract to a sudden termination; while, even before this notice reached his hands, the defendants' Indian bankers had been informed of the termination of the plaintiff's connection with and rights as representing their firm. Undeniably all this was a sharp and oppressive proceeding, importing in the commercial community of Calcutta possible obloquy and permanent loss. Yet, apart from the wrongful dismissal, and on the hypothesis that the defendants are to be held liable in the full amount of all the emoluments and allowances which would have been earned by the plaintiff but for the breach of contract, there seems nothing in these circumstances, singly or together, which would be recognized by the law as a separate ground of action. If there should be, it will, on the principle I have referred to, remain; but if there be not, I cannot see why acts otherwise non-actionable should become actionable or relevant as an aggravation of a breach of contract which, ex hypothesi, is already fully compensated. (s. p.)

After using the previous judgement as an argument to deny compensation for contractual non-pecuniary damage, the Courts themselves change their criteria and show that contracts are not always commercial in nature, since not in all cases their content is necessarily linked to economic interests. Thus, another precedent was set in the 50's with the case of *Bailey v. Bullock*, in which a married couple sought damages due to the malpractice of their lawyer, who did not exercise the appropriate procedural actions to recover possession of a home in the possession of a third party, so that they were forced to reside for two years in the home of the wife's family, exposed to an *overcrowded home*. Damages

for inconvenience suffered were awarded, differentiating between *damages for inconvenience* and *damages for distress*, with the judgement emphasising that there is a distinction between the inconvenience or disappointment caused by the debtor's breach of its contractual obligation and the actual physical discomfort and discomfort caused by such breach.

In the same terms, in 1991, the case of *Watts vs Morrow*[2] was decided, concerning a dispute arising from the falsity of the information contained in an expert report ordered by the plaintiffs, which indicated the habitability of a house they intended to purchase in a rural area for holiday purposes. Relying on the provisions of the document in question, they proceeded with the purchase of the property, only to discover later that the report was erroneous and that the house was in urgent need of renovation.

With regard to non-pecuniary damage, it is stated that the breach of a contractual obligation does not generally lead to anguish, frustration, anxiety, disgust, anger, tension or aggravation for the affected party, due to the unforeseeable nature of these reactions, but in cases where the purpose of the contract is to provide pleasure, relaxation or peace of mind, damages may be recognised if the result is different from the one actually obtained, without this involving a financial nature.

Another of the judgments in which the Courts follow this line of argument is the case known as *Farley v. Skinner*, which arose from a dispute arising from the falsity of an expert report on the measurement of the noise produced by planes landing at *Gatwick* airport, in a country house that the claimant

2 In the same vein, other judgments also compensate moral damage resulting from living in unhealthy premises (Patel v. Hooper & Jackson 1999), or from the impossibility of inhabiting a dwelling affected by serious defects (Holder v. Contryside Surveyors, 2003).

intended to buy, which was located close to the airport. Trusting the veracity of the information provided by the expert, he proceeded with the purchase and occupation of the house, when he became aware of the nuisance and inconvenience, especially during the hours of air traffic. The *House of Lords* determined that the risk of the existence of aircraft noise was a determining factor for the peaceful enjoyment of the property, in this sense, the falsity of the information presented by the expert generated damages due to the impossibility of obtaining this enjoyment.

A clearer example of this can be seen in cases of breach of package travel contracts, the purpose of which is to provide the obligee with welfare, rest or pleasure. In *Jarvis v. Swan's Tours*, a dispute arose out of a package travel contract, which included a two-week stay at a hotel during the ski season, as well as a range of activities for hotel guests and ski equipment. When the claimant and his family went there to receive the services of the contracted package, they noticed that they fell far short of what had been promised, for which he requested compensation for pecuniary and non-pecuniary damages for disappointment, distress, displeasure and frustration.

In this regard, the *Lord Justice*, *Edmund Davies* (1972) points out:

> When a man has paid for and properly expects an invigorating and amusing holiday and, through no fault of his, returns home dejected because his expectations have been largely unfulfilled, in my judgment it would be quite wrong to say that his disappointment must find no reflection in the damages to be awarded. And it is right to add that, in the course of his helpful submissions, Mr. Thompson did not go so far as to

> submit anything of the kind. Judge Alan Pugh took that view in Feldman v. Allways Travel Services, noted in 1957 Current Law Year at paragraph 934. The highly experienced senior County Court Judge there held that the correct measure of damages was the difference between the price paid and the value of the holiday in fact furnished, "taking into account the plaintiff's feelings of annoyance and frustration. (s. p.)

For its part, the well-known *Law Commission*, an independent statutory body set up by the Law Commissions Act 1965 to keep under review the law of England and Wales and to recommend reforms where necessary, in its *paper* entitled *Damages for Personal Injury: non-pecuniary loss*, lists as arguments against the recognition of non-pecuniary loss: *(i)* the offensive nature of monetary compensation for this type of damage, *(ii)* the fact that no amount can be adequate to compensate for personal injury, *(iii)* the cost of compensation for non-pecuniary loss, *(iv)* that there is a punitive element in the recognition of non-pecuniary loss; and, *(v)* that these damages constitute a barrier to recovery.

It also points out that if a functional approach is taken to non-pecuniary injuries, they would have to be analysed in terms of the cost of replacing the benefit, so that only economic damages could be compensated; however, the Commission itself eventually recognised the need to assess this category, concluding that the vast majority of victims thought that they should be admitted and opted to recommend that their recognition should be retained in the area of civil liability.

From the above, it can be seen that the general rule in the British legal system is not to admit the claim for non-pecuniary damage for breach of contract, taking into account

that the commercial nature of the contractual relationship means that the psychological suffering produced by the non-performance of an obligation within the framework of this pre-existing relationship is considered part of the risk assumed by the contracting parties, excluding from this rule, by way of case law, the following agreements (with the terms of these exceptions being progressively broadened in recent years): *(i)* contracts whose non-performance causes bodily injury or produces *physical inconveniences* to the obligee (*Hobbs v. L. & S.W. Railway Co.*; *Watts v. Morrow*; *Farley v. Skinner*); *ii)* contracts whose purpose is to provide the obligee with well-being, rest, pleasure, or to avoid certain inconveniences (*Jarvis v. Swan's Tours*), delimited by the doctrine (Mckendrick and Worthington, 2005) in two cases: *i)* when the purpose of the contract is an immaterial benefit and this is not satisfied; and, *ii)* when there is a breach of a consumer contract.

1.2. United States of America

The American *common law* recognises as non-pecuniary damage those damages that arise as a consequence of a wound, injury or observable harm, known as *parasitic damages*, which in turn are divided into two categories *i)* non-pecuniary damage as parasitic damage, originating from a physical wound or injury caused to a person, which includes *pain and suffering*, *emotional distress*, fear, anxiety and other emotions experienced by the victim due to an act that violates a legally recognised interest; and, *ii)* non-pecuniary damage as a basis for an independent action; a precept initially rejected by the Courts, until 1823, when the *United States Circuit Court for the District of Massachusetts*, in *Chamberlain vs. Chandle r* (suit brought against the captain of the ship Pearl for engaging in vulgar and disrespectful conduct towards the plaintiff passengers), allowed a claim for

non-pecuniary damages for mistreatment and injury to a family during a voyage from *Woakoo* Island to Boston (Kircher, 2007).

The common law of North America initially denied protection for certain non-pecuniary damages of a personal nature, on the grounds that these were not considered to constitute a legally protected interest. This premise has been modified over time, and nowadays a recurring criterion in the courts of the United States is the admission of claims for emotional damages when they have been inflicted. This development has arisen after the filing of a series of lawsuits in which the Judges relaxed their previous reasoning, as a result of the obviousness of some circumstances, for example:

i) Edward W. B. Canning v. The Inhabitants of Williamstown (1848) in which the *Massachusetts Supreme Judicial Court* found in favour of the plaintiff, ordering the Town to pay compensation for an emotional injury suffered as a result of a defect in a bridge in the town of *Williamstown*. The plaintiff fell 15 feet onto rocks and stones in the creek after the bridge gave way while he was crossing with his carriage, causing injuries to his cheek, leg and other parts of his body. He applied to the Court for compensation for the great terror and mental suffering he experienced as his life was in grave danger, with the jury to assess the physical and mental damages, taking into account his anguish, as well as the risk and danger involved.

(ii) J. *H. Hill et al. v. H. H. Kimball* (1890) before the *Supreme Court of Texas*, in which a married couple brought an action for damages against their landlord for breaking and entering their rented home. Mrs. Hill was in a remarkably advanced state of pregnancy, so that any undue exaltation could cause irreparable damage to her health. In full knowledge of this, the defendant arrived at the plaintiffs' home and

assaulted, in the presence of the plaintiff, two black people in a boisterous and violent manner, accompanying his attack with profane language, even causing blood to be drawn. As a result, the mother-to-be was frightened, which caused labour pains, leading to a subsequent miscarriage, seriously damaging her health. The Court, despite finding no precedent for such an action, awarded compensation for non-material damages.

(iii) Engle v. Simmons (1906) decided by the *Alabama Supreme Court in a* suit brought by *Damages for Personal Injury from Wrongful Act* against Mr. *Simmons*, who violently entered the home of *Mary P. Engle*, a married and pregnant woman, in the absence of her husband, causing her personal injuries inflicted without physical violence. Despite asking her to leave the house, he expressly refused to do so, proposing to take an inventory of the property, threatening what he would do with it in return for the debt he owed to the plaintiff's husband. This situation caused the woman distress, leading to the premature birth of her unborn child. The Court ordered the defendant to pay compensation to the victim by virtue of her right to the peaceful enjoyment of her residence, so that any invasion of her residence generates an obligation to compensate her.

US law also establishes as a general rule the inadmissibility of non-pecuniary damage in the contractual sphere. The rationale has mainly been the unforeseeability of non-pecuniary damage at the time of the conclusion of the convention. The Courts have pointed out that frustration or displeasure caused by the non-performance of an obligation are common feelings in any contractual relationship and are part of the risk assumed by the parties.

This criterion is accepted by both doctrine and jurisprudence. On 3 April 1980, the *Court of Appeals of*

California, in the case *Allen v. Jones*[3] , established that damages for breach of contract correspond to those arising from the non-performance of an obligation within the framework of a convention or those foreseen by the parties, being necessary, in most agreements, the negotiation of commercial transactions, in which a feeling of distress or frustration, which allows differentiating it from an agitation or annoyance, is not foreseeable for any of the parties involved.

The foreseeability of damage, as an indispensable requirement for its compensation, is regulated in section 351 of the *Restatement (Second) of Contracts*[4] entitled *Unforeseeability and Related Limitations on Damages*, where it is expressly stated that: *(1) Damages are not recoverable for loss that the party in breach did not have reason to foresee as a probable result of the breach when the contract was made. (2) Loss may be foreseeable as a probable result of a breach because it follows from the breach (a) in the ordinary course of events, or (b) as a result of special circumstances, beyond the ordinary course of events, that the party in breach had reason to know. (3) A court may limit damages for foreseeable loss by excluding recovery for loss of profits, by allowing recovery only for loss incurred in reliance, or otherwise if it concludes that in the circumstances justice so requires in order to avoid disproportionate compensation*, i.e. it remains a general rule that damages are not recoverable where the obligor could not foresee them as a result of its breach at the time of the conclusion of the contract.

3 In the present case Carl Allen sues Nicholas Jones for *damages for mental distress* he suffered when he learned that the cremated remains of his brother, which the defendants had promised to ship to Illinois, were lost in transit, the empty box arriving at its final destination, and his whereabouts were unknown.

4 It is a legal treatise in the second series of the *Restatements of the Law*, recognised and frequently cited by American courts and intended to inform judges and lawyers of the general principles of common law of contract. It is considered a non-binding source used in the areas of contracts and commercial transactions.

This precept is not absolute, since section 353 (*Loss Due to Emotional Disturbance*) of the same instrument provides two exceptions: *recovery for emotional disturbance will be excluded unless the breach also caused bodily harm or the contract or the breach is of such a kind that serious emotional disturbance was a particularly likely result*, so that compensation for frustration and emotional disturbance caused by breach of contract is admitted when: *i)* the breach has caused bodily harm or *ii) it* is of such a kind as to cause serious emotional disturbance.

In accordance with this line of argument, the American courts have admitted these two alterations to the rule and have declared the admissibility of non-pecuniary damage within the contractual framework in some particular cases: *i) Stewart v. Rudner* of the *Supreme Court of Michigan,* relating to the result of a badly performed caesarean section, where the admissibility of non-pecuniary damage is concluded, due to the evident mental anguish and suffering experienced by the plaintiff; and, *ii) Hill v. Sereneck* of the *Court of Civil Appeals of Alabama*, concerning the breach of a contract for the construction of a house, concluding that, in cases in which it is demonstrated that the non-performance of the contract causes mental anguish or suffering, resulting in emotional or mental damages, these are compensable.

It is worth noting that case law has also admitted the action for compensation for non-pecuniary damage in contracts for funeral services, construction of housing, medical services or package travel contracts, flight delays leading to the loss of holidays, service contracts subject to an essential term, among others; all have in common that their purpose includes satisfying non-pecuniary interests, whose injury produces the typical frustration, annoyance, discomfort or emotional discomfort to the creditor, which in these cases would be totally foreseeable.

With regard to the applicable regime in the United States of America, we can conclude that despite the existence of a general rule of not recognising the applicability of the action for non-pecuniary damage in the conventions, various exceptions have been granted in jurisdictional venues, as well as in non-binding rules that serve as a guide for judges and jurists, which allow, under specific conditions, the claim for this category of damages, either because they are understood as contractual damages or because they are delimited within the system of *torts*, taking into account that the typology of the contract is fundamental for the judges to decide whether a compensation of this category could be admitted or not.

1.3. France

The French legal system has developed favourable theses, especially at the jurisprudential level, on the admission of compensation for emotional damage in the contractual framework. French jurists have been one of the most prominent, in the comparative law of the nineteenth century, for being pioneers in this matter within the *civil law* system, not only because their code has served as a basis for legislators who are responsible for drafting substantive rules within their countries, but also because their doctrine has influenced the innovation of modern law.

The French *Civil Code* establishes the general principle of performance of obligations in Article 1147, stating that *the debtor is condemned, if necessary, to pay damages and interests either because of the non-fulfilment of the obligation, or because of the delay in fulfilment, whenever the non-fulfilment is not justified by a foreign cause which does not justify the non-fulfilment of the obligation, soit à raison du retard dans l'exécution, toutes les fois qu'il ne justifie pas que l'inexécution provient d'une cause*

étrangère *qui ne peut lui* être *imputée, encore qu'il n'y ait aucune mauvaise foi de sa part*. In the same sense, Article 1150 states: le *débiteur n'est tenu que des dommages et intérêts qui ont* été *prévus ou qu'on a pu prévoir lors du contrat, lorsque ce n'est n'est point par son dol que l'obligation n'est point exécutée*.

The wording of both contemplates the principle of contractual civil liability, according to which the obligor will be condemned to pay damages when it does not fulfil the obligations stipulated in a convention or when the performance is late, unless it can be justified through a non-imputable extraneous cause, limiting the compensation of the damage to the existence of the requirement of foreseeability at the time of the conclusion of the contract, with the exception of cases of bad faith, in which case the provisions of Article 1151 apply, i.e. *dans le cas même où l'inexécution de la convention résulte du dol du débiteur, les dommages et intérêts ne doivent comprendre à l'égard de la perte* éprouvée *par le créancier et du gain dont il a* été *privé, que ce qui est une suite immédiate et directe de l'inexécution de la convention*; therefore, the losses suffered by the creditor will be included, as well as the gains of which he would have been deprived (loss of profit), as a consequence of the immediate and direct non-performance of the agreement.

The position of the doctrine regarding the recognition of contractual non-pecuniary damage has been very firm due to the absence of exhaustive limits established in the substantive rule. The admission of this category is justified by the *principle of integral reparation*, regulated by article 1147 and following articles of the *Code*, so that the damage caused to the victim must be compensated independently of its nature. The non-performance of a performance pre-established in an agreement implies in itself a loss for the creditor, as the debtor is obliged to

repair such damage, regardless of its economic nature or not, it is sufficient that it has occurred.

Planiol and Ripert (1935), in their *Traité pratique de droit civil français*, state that non-material damage must be taken into account in the same way as material damage, whether the civil liability arises from a contract or from the commission of a wrongful act, thus stating:

> *The creditor can only obtain compensation if he proves that the non-execution or the delay in the execution of the obligation caused him a damage. Sans cela de quoi se plaindrait-il? Sans intérêt, pas d'action. C'est pour cette raison que l'art. 1147 dit que "le débiteur est condamné, s'il y a lieu...". Il se peut, en effet, que l'exécution réelle n'eût procuré aucun avantage au créancier. On cites as an example the case of the grocer who omitted to produce in an order, as he had been ordered to do by his client, alors qu'il n'aurait pas obtenu du notaire qui a omis de faire inscrire l'hypothéque de son client el peut* établir *que l'hypothéque non inscrite* était *primée par d'autres qui absorbaient la totalité du Prix de l'immeuble, de sorte que son client, même inscrit, n'eût rien obtenu du tout. Quant au simple retard, il arrive très souvent que le créancier n'en* éprouve *aucun dommage appréciable. If this damage exists, and it depends on the circumstances, reparation is due to the grower. Le dommage moral est à prendre en considération au même titre que le dommage matériel, quelle que soit la nature de la responsabilité.* (p. 158)

One can appreciate the evolution, over time, in the decisions of French judges, which have as their object the resolution of disputes leading to the reparation of damages caused to a person. The openness given to the interpretation

of the *principe de réparation intégrale* provided for in the *Code has been* present in its jurisprudence in a firm and unanimous manner. The first cases arose in the context of so-called accidents at work, from the industrial revolution onwards, but even today the court continues to affirm that *it is a principle that every victim of an injury, whatever its nature, has the right to obtain compensation from the person who caused it* (Motifs de l'arrêt, 2012).

The broad interpretation of the full reparation of damage does not entail the unlimited opening of the compensation of non-pecuniary damage in a contract, since its uncontrolled application can give rise to jurisprudential precedents far removed from justice, even opening the possibility of generating abuses, especially because the majority of the legal world agrees with the purpose of the monetisation of such a subjective damage as moral damage (indirect compensation), since its intrinsic value cannot be questioned for any reason. This is where the judge's criterion plays an important role. The wording of the *Code*, as shown *above*, is a generalised text, and it is therefore the responsibility of the courts to determine whether this category of damages is appropriate in each specific case, for example, whenever the breach of an obligation relates to an object that has moral value, or when it violates the religious feelings of an individual, or when the breach of the contractual relationship affects the reputation of one of the parties, or when it results in indirect dismissal, among others.

For its part, as in the United Kingdom and the United States of America, French case law has considered that non-pecuniary damages are inherent to the breach of contract that prevents the enjoyment of the holiday, in the same way as in the United Kingdom and the United States of America, in

agreements for the purpose of contracting package holidays or holidays. One of the most important rulings on the matter was issued by the *Cour de Cassation* on 4 November 1992, where this criterion was established, despite the fact that the *Arrêté du 14 juin 1982 relatif aux conditions générales de vente régissant les rapports entre les agences de voyages et leur clientèle* indicates in its article 9 that only material damages are applicable.

1.4. Italy

The compensation of non-pecuniary damage in Italy is regulated for the first time in the text of the *Civil Code* of 1942, in which, according to Article 2059, *non-pecuniary damage must be compensated only in the cases determined by law*. This provision represented, at the time, the updating of Italian civil law, in line with what was already being developed in comparative law. Italian society was not the same as in 1865 (date of promulgation of the previous *Codice Civile*), the reality went beyond the legal structure in force at the time, it was necessary to guarantee a broad protection of the non-economic interests of the citizens, however there was a notable distrust of the legislator, which resulted in the normative restriction of the reparation of this category of damage (Salvadori, 1979, p. 258).

Once the *Codice* was published, and with the presentation of some controversies before the local courts, two contradictory interpretative currents arose in case law and doctrine. The first one related to the identification of non-pecuniary damages only under the concept of "subjective moral damage" (or *pretium doloris*, understood as the transitory psychic suffering produced as a consequence of an injury suffered, with special exclusion of injuries to the integrity and health of a person considered as material damages) (Franzoni, 1995; Thiane, 2002), leaving out the protection of other types

of harm to the person, and the second corresponding to the interpretation of the clause "*casi determinati dalla legge*" and the feasibility of extending its application to other areas that are not limited to offences punished by criminal law (Scognamiglio, 1957), as indicated in Article 185 (*restituzioni e risarcimento del danno*) of the *Codice Penale*, according to which *ogni reato, che abbia cagionato un danno patrimoniale o non patrimoniale, obbliga al risarcimento il colpevole e le persone che, a norma delle leggi civili, debbono rispondere per il fatto di lui.*

With the restricted interpretation of the current body of law, an important category of interests that were emerging in society were excluded, which did not correspond to the criminal nature of the preceding provisions, nor could they be framed within the content of article 2043 of the *Codice Civile* (*qualunque fatto doloso o colposo che cagiona ad altri un danno ingiusto, obbliga colui che ha commesso il fatto a risarcire il danno*), but which necessarily needed to be protected in the Italian legal system.

Thus, in favour of the prevalence of the values of the person and of the thesis that the traditional imposition of the inappropriateness of the inappropriateness of the compensability of injuries to fundamental rights is inadequate, the doctrine and the courts began to consider the insertion of factual assumptions that the legislator, through various bodies of law, recognises as feasible for the claim of non-pecuniary damage, which in some cases could even be interpreted in an analogical manner (Astone, 2012).

This tendency began to gain strength after the historic sentence of the *Corte Costituzionale No. 184 of 14 July 1986*, which affirmed the compensability of biological damage, without taking into account the negative economic effects. For

the judge, the aforementioned article 2043 must be clarified in accordance with the provisions of article 2 of the *Constitution*, in the light of the extensive interpretation based on the evolution of the right to compensate not only pecuniary damages in the strict sense, but also all those that hinder the activity of the human person and therefore, in an autonomous manner, and without any limits, biological damage. From this point onwards, emotional damage is no longer limited exclusively to moral damage, as it includes biological damage, understood as the injury to the psychophysical integrity of the individual as such, considered acceptable on a medico-legal level, which can be defined as the damage caused to non-economic interests of social relevance, among which are the fundamental rights of the subjects.

In the chapter entitled "*Considered in law*", the Court (1976) analyses the change in the terminology of "moral damage" with that of "non-pecuniary damage", revealing that *such reasons are unequivocally clarified by the same ministerial report to the definitive draft of the criminal code of 1930, where reference is made, above all, alla scelta operata in sede di risarcimento di danni morali ("Il carattere generale di tale principio, incompatibile con una enunciazione di casi tassativi di applicabilità, mi ha indotto a non limitare la risarcibilità del danno morale a casi particolari, come taluno aveva suggerito") e si offre, successivamente, la ragione della nuova locuzione usata per indicare il danno morale subiettivo: "Quanto alla designazione del concetto, ho creduto che la locuzione "danno non patrimoniale" sia preferibile a quella di "danno morale", tenuto conto che spesso nella terminologia corrente la locuzione di "danno morale" ha un valore equivoco e non riesce a differenziare il danno morale puro da quei danni che, sebbene abbiano radice in offese alla personalità morale, direttamente o indirettamente menomano il patrimonio*".

Another important aspect is the definition of biological damage and its difference with subjective non-pecuniary damage. Thus, it is indicated that *biological damage constitutes the event of the injurious health event, while subjective moral damage (and pecuniary damage) belong to the category of damage - consequence in the narrow sense.... The subjective moral damage, which is sustained in the psychological disturbance of the offended party, is damage - consequence, in its own sense, of the illicit act injurious to health and constitutes, when it exists, a condition for the liability of the victim; the biological damage is, instead, the event, internal to the health-damaging fact, which must necessarily occur and be proved, and we cannot expect to find out about the possible consequences external to the event itself (moral or patrimonial) without the complete realisation of the latter, including, obviously, the event of the deterioration of the psycho-physical integrity of the offended party. Biological (or physiological) damage is specific damage, it is a type of damage, identified with a type of event. Subjective moral damage is, instead, a type of damage - consequence, which can derive from a numerous series of types of event; just as a type of damage - consequence, an objective condition of liability, is patrimonial damage, which, in turn, can derive from different typical events.*

Italian jurisprudence has given rise to various decisions that have regulated the various aspects of the subject of *non-patrimonial damage* and which are a central guide in the legal development of this concept, among which are the following:

i) Ruling No. 233 of the *Corte Costituzionale (*2003), where it is held that the *traditional assertion that the non-patrimonial damage protected by art. 2059 cod. civ. si identificicherebbe con il cosiddetto danno morale soggettivo*, as long as *in the framework of a bipolar system of patrimonial and non-patrimonial damage*,

a costituzionalmente orientata interpretazione dell'art. 2059 cod. civ, tesa a ricomprendere nell'astratta previsione della norma ogni danno di natura non patrimoniale derivante da lesione di valori inerenti alla persona: e dunque sia il danno morale soggettivo, inteso come transeunte turbamento dello stato d'animo della vittima; sia il danno biologico in senso stretto, inteso come lesione dell'interesse, costituzionalmente garantito, all'integrità psichica e fisica della persona, conseguente ad un accertamento medico (art. 32 Cost.); or finally the damage (often defined in doctrine and in jurisprudence as systemic) deriving from the injury of (other) interests of constitutional rank inerent to the person.

ii) Judgments Nos. 8827 and 8828 of the *Corte di Cassazione Civile* (2003), in which non-pecuniary damage was admitted for the loss of the parental relationship produced by a *plurioffensive event*, in the first case for the *damages related to the tetrapresi spastica ed alla atrofia cerebrale da asfissia neonatale da cui era affetto, assumendo che l'infermità era stata determinata da errori diagnostici e/o da comportamenti omissivi del personale sanitario dell'ospedale dove il bambino era nato il 15/4/1982 a seguito di parto cesareo* e il secondo per *tutti i danni, patrimoniali e non patrimoniali, da essi subiti, sia iure proprio che iure hereditatis*.

The Court of Cassation, in both judgments, determined the division and independence between article 2059 of the *Codice Civile* and article 185 of the *Codice Penale*. It states that *non-patrimonial damage must be considered as a broad category, comprising any hypothesis in which there is a value inherent to the person* other than the *objective moral damage*, finding support, on the one hand, *in the progressive evolution verified in the discipline of this sector, contrasted by the new legislation and jurisprudence in relation to the protection of non-patrimonial damage, la sua*

accezione più ampia di danno determinato dalla lesione di interessi inerenti alla persona non connotati da rilevanza economica and on the other hand, in the jurisprudential evolution *sollecitata dalla sempre più avvertita esigenza di garantire l'integrale riparazione del danno ingiustamente subito, non solo nel patrimonio inteso in senso strettamente economico, ma anche nei valori proprii della persona (art. 2 Cost.).*

A *bipolar system* of compensatory protection of the interests of the individual can therefore be configured, in which *patrimonial* and *non-patrimonial damage* coexist, made up in turn of *biological damage in the narrow sense*, *objective moral damage* and the *various and subsequent pre-judgements* as a consequence of an injury to a protected constitutional interest, taking into account that *tutte le volte che si verifichi la lesione di un tale tipo di interesse, il pregiudizio consequenziale integrante il danno morale soggettivo (patema d'animo) è risarcibile anche se il fatto non sa configurabile come reato. And it should be noted that in the equitable settlement of subsequent judgements, the judge cannot disregard what has already been recognised for the recovery of the objective moral damage, in relation to the aforementioned unitary function of the recovery of the damage to the person.*

iii) Le Sezione Unite Nros. 26972, 26973, 26974 and 26975 of the *Corte di Cassazione civile* (2008), in which the judges sought to limit the expansion of a new conception of damage, known as *systemic damage,* defined *as any damage of a nature that is not merely emotive and internal, but objectively acceptable, provoked on the habitual behaviour of the subject, which alters his or her life and relational assets that were his or her own, inducing him or her to make different life choices in terms of the expression and realisation of his or her personality in the external world.*

The compensation of this type of damage does not result from a settlement derived from an autonomous classification of the damage, because, according to the Court, it *does not emerge, within the general category of "non-patrimonial damage",* as a *subcategory*, but as a *mere descriptive synthesis*, where *the different denominations (moral damage, biological damage, damage due to loss of parental relationship) adopted by the twin judgments of 2003, and received by the judgment, N. 233/2003 of the Constitutional Court,* are understood. *233/2003 della Corte Costituzionale*.

The Supreme Court censured the conduct of the so-called *giustizia di prossimità* in which ample protection is granted to injuries that do not entail the need for compensation, because they consist of *disagi, fastidi, disappunti, ansie ed in ogni altro tipo di insoddisfazione concernente gli aspetti più disparati della vita quotidiana che ciascuno conduce nel contesto sociale*. In this sense, the so-called imaginary rights *such as the right to the quality of life, to the state of well-being, to serenity: in short, the right to be happy,* do not fall within the catalogue of *essential damage, so* that beyond the cases determined in ordinary law, only the detriment of an inviolable right inherent to the individual person is a source of non-pecuniary liability for compensation.

The possibility of extending the list of cases prescribed for the compensation of non-pecuniary damage is admitted. However, as regards the payment of mental damages in the contractual framework, the dominant doctrine in Italy, as in most countries, initially refused to admit this possibility, arguing that fault in a contract plays an important role in determining the scope of the non-performance of a performance, which has a pecuniary connotation, so that in this context there cannot

be room for a claim of a moral nature, since its essence does not represent the object of an obligation in the proper sense (Scognamiglio, 1957).

There was a limit caused by the restrictive interpretation of Article 2059 of the *Codice Civile*, which limited its applicability only to cases of liability for an unlawful act, in particular those arising from the commission of a criminal offence, and in no way alluded to cases of obligations established in a prior agreement. Hence, the thesis of negation was seen on two important grounds, *i)* the topographical location of Article 2059 within the *Codice Civile* (*Titolo IX dei fatti illeciti*), exclusively referred to the non-contractual field; and *ii)* the patrimonial nature of the contractual legal bond.

Another part of the doctrine (De Cupis, 1979; Russo, 1950; Asquini, 1952; Barassi, 1964), based on the jurisprudential tendency to use an "*interpretazione costituzionalmente orientata*" of the laws, has expressed itself in favour of a broad perception of the aforementioned provision, applying an analogical extension with respect to the wrongs of contractual liability, since it is the only rule of the *Codice Civile* that regulates the compensation of non-pecuniary damage. There is no express legal prohibition within the body of law that excludes the claim for non-pecuniary damage in a convention, which is why the content of this article must be analysed as a general solution that allows for the elimination of all uncertainties and discussions on the matter (De Cupis, 1979).

A contract that has been studied from this perspective in the European Union, and which is worth mentioning at this point, is undoubtedly that which has as its object the enjoyment of package tours, regulated by the above-mentioned European directive CEE 314/1990, adopted by Italy and accepted by the

local legislator with Legislative Decree No. 111/1995. 111/1995, which established, in its article 15 entitled '*responsabilita' per danni alla persona'*, that *the damage deriving to the person due to the inadequacy or unsatisfactory execution of the services that form the object of the tourist package is punishable within the limits of the international conventions that regulate the matter, of which Italy or the European Union are a part....* The only legal case in which compensation for non-pecuniary damages is allowed as a consequence of the non-fulfilment of a contractual obligation is the one and only legal case in which compensation for non-pecuniary damages is allowed.

In case law, as stated above, the decisions of the *Corte Costituzionale* and the *Corte di Cassazione Civile* of 2003 and 2008, opened the way for the inclusion of non-pecuniary damage in the contractual relationship, as the interpretation of Article 2059 aimed at taking into account the constitutional precepts, allows the reparation of the injuries caused to a person in the sphere of his fundamental rights protected in article 2 of the Magna Carta of the Italian peninsula, according to which *the Republic recognises and guarantees the inviolable rights of man, both as an individual and in the social formations where his personality develops, and requires the fulfilment of the non-derogable rights of political, economic and social solidarity.*

In the text of Judgments Nos. 26972-26975 of the *Corte di Cassazione Civile,* non-pecuniary damage is expressly mentioned with respect to contractual liability in the following terms:

i) The non-patrimonial damage resulting from the failure to fulfil obligations, according to the prevailing opinion in doctrine and jurisprudence, was not considered risarcibile. The obstacle was due to the lack, in the discipline of contractual liability, of a rule analogous to art. 2059 c.c., which is detailed in matters of wrongful

acts. In order to aggirare l'ostacolo, in the case in which, in addition to inadequacy, a violation of the principle of neminem laedere would be configurable, the jurisprudence had elaborated the theory of cumulo delle azioni, contractual and extra-contractual. Apart from its dubious dogmatic foundation, the thesis does not resolve the question of the recovery of non-patrimonial damage in the broad sense, because it brings it, in relation to the non-contractual action, within the strict limits of art. 2059 c.c. in collegamento with art. 185 c.p., sicché il risarcimento era 114 condizionato alla qualificazione del fatto illecito come reato ed era comunque ristretto al solo danno morale soggettivo.

ii) The constitutionally oriented interpretation of art. 2059 c.c. now allows us to affirm that also in the area of contractual liability, the recovery of non-pecuniary damages is a given. From the principle of the necessary recognition, for the inviolable rights of the person, of the minimum protection constituted by the compensation, it follows that the injury of the inviolable rights of the person that has determined a non-pecuniary damage entails the obligation to compensate such damage, whatever the source of the liability, contractual or extra-contractual. If the non-fulfilment of the obligation determines, in addition to the violation of the obligations of economic recovery assumed with the contract, also the injury of an inviolable right of the person of the creditor, the protection of the non-pecuniary damage may be based on the action of contractual liability, without having to go back to the background of the accumulation of actions.

iii) What interests of a non-pecuniary nature can be considered important in the area of contractual obligations, is confirmed by the provision of art. 1174 c.c., according to which the performance that forms the object of the obligation must be susceptible of economic valuation and must correspond to an interest, also non-pecuniary, of the creditor. The identification,

in relation to the specific contractual hypothesis, of the interests included in the area of the contract which, in addition to those with patrimonial content, present a non-patrimonial character, is aimed at establishing the concrete cause of the negotiation, to be understood as a synthesis of the real interests that the contract itself is directly aimed at realising, beyond the model, also typical, adopted; synthesis, and therefore concrete reason, of the contractual dynamics.

iv) In the area of contractual liability, compensation will be regulated by the rules set out in the matter, to be read in a constitutionally oriented sense. L'art. 1218 c.c., in the part in which it provides that the debtor who does not fulfil the due performance is liable for the compensation of the damage, cannot therefore be referred only to the patrimonial damage, but must be considered comprehensive of the non-patrimonial damage, as long as the failure to fulfil has determined damage to the inviolable rights of the person. The same wider content is found in art. 1223 c.c., secondo cui il risarcimento del danno per l'inadempimento o per il ritardo deve comprendere così la perdita subita dal credore come il mancato guadagno, in quanto ne siano conseguenza immediata e diretta, riconducendo tra le perdite e le mancate utilità anche i pregiudizi non patrimoniali determinati dalla lesione dei menzionati diritti. D'altra parte, la tutela risarcitoria dei diritti inviolabili, lesi dall'inadempimento di obbligazioni, sarà soggetta al limite di cui all'art. 1225 c.c. (non operante in materia di responsabilità da fatto illecito, in difetto di richiamo nell'art. 2056 c.c.), restando, al di fuori dei casi di dolo, limitato il risarcimento al danno che poteva prevedersi nel tempo in cui l'obbligazione è sorta.

Thus, Italy has recognised both in its rules and in its courts that non-pecuniary damage must be compensated within the framework of the recognition of the fundamental rights

inherent to a person, on the basis of a *constitutionally oriented interpretation of* Article 2059 of the *Codice Civile*, significantly broadening the concept of non-pecuniary damage, extending its notion beyond subjective non-pecuniary damage.

1.5 Venezuela

In the Venezuelan legal system, non-pecuniary damage finds its legal basis in Article 1196 of the Civil Code (1982), which provides that:

> The obligation of reparation extends to any material or moral damage caused by the unlawful act. The judge may, in particular, award compensation to the victim in case of bodily injury, violation of his or her honour, reputation or that of his or her family, or personal liberty, as well as in case of violation of his or her home or of a secret concerning the injured party. The judge may also grant compensation to relatives, relatives of the victim, or spouse, as reparation for the pain suffered in the event of the victim's death. (art. 1196).

With the drafting of the Civil Code that came into force in 1942 (repealed in 1982), the recognition that the courts of first instance and even the former Federal Court and Court of Cassation had been giving to emotional injuries materialised, incorporating in its provisions (still in force to date) the admission of the claim for non-pecuniary damages caused by the commission of an unlawful act. Previously, in the absence of legislation on the matter, judges had begun to admit, in cases of tort liability, that a person could suffer injuries to both their financial and moral assets.

The Venezuelan substantive civil legislation has its foundation in the French-Italian project of obligations and

contracts of 1927 (in fact Article 1196 of the Civil Code is a copy of its provision No. 85), elaborated by a commission of eminent European jurists of French and Italian origin with the purpose of unifying the rules of both countries, using as reference the Italian Civil Code of 1865 and the French one of 1804 in force at the time, and incorporating the advances of the legal science in the last years. As was mentioned in previous apices, the development of non-pecuniary damage in these countries was propitiated at the jurisprudential level, not in positive law, which was replicated in each of the nations that over the years have incorporated into their legal order the European tendencies, product of the inheritance of the *civil law* legal system.

Of all the categories of damages contained in the Venezuelan legal system, moral damages is the one that has had the greatest jurisprudential relevance, firstly because questions have always arisen within the doctrine that do not find answers in the interpretation of the normative text, but in sentences derived from judges who in their capacity as operators of the law have had to dictate, and secondly because of Article 1196 itself, which leaves it to the discretion of the courts to estimate an injury that by its very nature has been considered inestimable.

The terminology used to identify a pecuniary injury suffered by a person in Venezuela is that of "moral damage", mainly because that is what the Civil Code itself calls it, although the doctrine tends to distinguish two classifications of this: *(i)* those damages linked to material damage, which affect the social part of the moral heritage of an individual, such as their reputation or that which falls on their physical appearance, called aesthetic damage, important for those who live off their image; and, (*ii)* those that disturb the affective or sentimental

part of a subject, such as the pain experienced by someone who suffers the death of a relative/friend or that which originates from a state of anxiety or worry (Domínguez, 2017, p. 244); what characterises the difference between one concept and the other is the possibility of the quantification of the harm.

While some countries establish scales in their legislation to justify the determination of the *quantum* of non-pecuniary damages, Venezuelan law leaves the estimation of the quantification to the discretion of the judge, which is why the Venezuelan courts are obliged to follow the jurisdictional criterion issued almost 20 years ago by the Social Cassation Chamber of the Supreme Court of Justice, in its judgment No. 144 of 7 March 2002 (Case: Hilados Flexilón C.A. vs José Francisco Tesorero Yáñez. vs José Francisco Tesorero Yáñez), where it established that any judge hearing an action for non-pecuniary damages must examine the specific case by analysing the following aspects: *i)* the entity (importance) of the damage, both physical and psychological (the so-called scale of moral suffering); *ii)* the degree of culpability of the defendant or his participation in the accident or unlawful act that caused the damage (depending on whether it is objective or subjective liability); *iii)* the conduct of the victim; *iv) the* degree of education and culture of the claimant; *v) the* social and economic position of the claimant; vi) the economic capacity of the claimant; *vi)* economic capacity of the defendant; *vii)* possible mitigating factors in favour of the liable party; *viii)* the type of satisfactory compensation that the victim would need to occupy a situation similar to that prior to the accident or illness; and, finally, *ix)* pecuniary references estimated by the Judge to assess the compensation that he considers equitable and fair for the specific case. In this way the objectivity of the amount is ensured, the Judge must indicate in the grounds for

his decision, the prior analysis of all these points, thus justifying the reasons that led him to quantify the claimant's claim in the amount specified.

Regarding the admissibility of the claim for this classification of damage as a consequence of the breach of a pre-established obligation by the parties to an agreement, the doctrine and jurisprudence have been pronouncing on the matter for some years. There are contradictions in the positions expressed on the matter, both jurists and judges have not been unanimous in identifying a unison criterion in this regard, on the one hand it is established that in Venezuela contractual and non-contractual civil liability coexist, being able to generate in the former the reparation of moral and material damages (Domínguez, 2017, p. 252), since they are not mutually exclusive and find the object of their claims in the cases in which the so-called "cumulative liability" is verified. In the opinion of Domínguez (2017), the expression cumulo de responsabilidad is not appropriate, since this figure:

> It does not imply that the subject can accumulate two indemnities for the same act, which would be absurd because they are two different regimes, notwithstanding the unity of civil liability. Rather, it is a matter of 'choice'. In effect, it is a question of deciding whether, faced with the same event, the subject can take the path of contractual civil liability or, on the contrary, that of non-contractual liability. (p. 287).

On the other hand, moral damage is not a consequence of the non-fulfilment of a contractual obligation, in addition to the fact that it is only contemplated in our legislation in the liability for a wrongful act (Maduro, 2003, p. 897).

In Judgment No. 176 of the Civil Cassation Chamber of the Supreme Court of Justice of 20 May 2010 warns "of the new criterion widely developed by prominent Argentine, Chilean, Brazilian, Spanish and other authors, in relation to the viability of moral damages derived from contractual breaches, as well as judgments of the Chamber itself (...) which are in clear contradiction with the statement offered by the appellant according to which ....in matters of contractual liability there is no compensation for moral damages..." and points out that "the impossibility of requesting moral damages as a consequence of breach of contract is an outdated thesis, as the current trend is the compensability of moral damages in matters of obligation, provided that certain circumstances and conditions are verified, which will have to be established in each specific case"; however, to the contrary, in decision no. 644 of 22 October 2014 of the same chamber states that "moral damages are only contemplated in our legislation in liability for wrongful acts..., as enshrined in article 1.196 of the Civil Code".

In any event, in Venezuela both the majority of the decisions of the Supreme Court and the doctrine have been in favour of the admissibility of the admissibility of moral damages in the contractual framework, finding the solution to justify this thesis, in accordance with the Venezuelan legal system, in the finding of the applicability of the aforementioned "cumulo de responsabilidad", which leads to the coexistence of contractual and non-contractual liability, whenever a wrongful act arises on the occasion of or in relation to a contract, the non-performance of which gives rise to material and non-material damages.

Mélich-Orsini argues that there is a doctrinal current that is inclined to accept cumulative liability under certain circumstances, i.e. in order to allow the rules applicable to tort

liability to be applied, it would be necessary that a different harmful fault be joined to that which consists of the mere violation of the contractual obligation. This would presuppose two conditions: *i)* that the act implies the "violation of a legal duty independent of the contract", and *ii)* that the damage caused by that act consists of the "deprivation of a pecuniary or moral good other than the benefit itself assured by the contract". The first one excludes any idea of a contest of actions when the defendant has not violated any duty other than his contractual duties, even if such violated duties are not expressly agreed but those that are considered implicit according to the text of positive law; and the second one excludes any application of the provisions regulating tort liability when the damage suffered by the victim is limited to the loss of advantages derived from the contract (Melich, 2006).

1.6. Latin America

Latin Americans followed the trend developed by the countries of the European Union on this issue. Some decided to reform their Civil Codes in order to incorporate non-pecuniary damage within the doctrine of contractual civil liability, overcoming the arguments previously put forward in their own legal systems, and others have supported this thesis on the basis of binding case law pronouncements by Supreme Courts or Tribunals, applicable in the seats of their jurisdictional bodies.

By way of summary, the following table shows the regulations in force in various countries in the Americas, which over time have increasingly accepted this theory, unless such an assumption is expressly prohibited by law.

	Propriety Contractual Non-material Damages	Regulations
Argentina	-) Acceptance of the Civil Code.	-) Article 522 of the Civil Code, drafted by *Dalmacio Vélez Sársfield* and in force from 1871 until 2015, established that "in cases of compensation for contractual liability, the judge may sentence the liable party to compensation for the moral damage caused, in accordance with the nature of the event giving rise to the liability and the circumstances of the case". -) Jurisprudence: Chamber K of the National Chamber of Civil Appeals, 15 August 1994. Case: Emilio Cornejo v. Ricardo Maiztegui, agreed on the compensation of moral damages in favour of the plaintiff caused by the lack of restitution of a property in the framework of a lease contract (Hernández et al., n. d.). -) The very new Argentine Civil and Commercial Code (approved by law 26.994 Enacted according to decree 1795/2014) unifies the standing regime in the contractual and non-contractual sphere without making reference to whether the damage arises from the non-performance of an agreement or from the duty not to harm another.

Bolivia	-) Denial of the Civil Code.	-) Article 994 of the Bolivian Civil Code: "I. The injured party may request, when possible, compensation for the damage in kind. Otherwise, compensation must be assessed by evaluating both the loss suffered by the victim and the lack of profit insofar as they are a direct consequence of the harmful event. II. Moral damage must be compensated only in the cases provided for by law. III. The judge may equitably reduce the amount of compensation when fixing it, considering the financial situation of the liable party who has not acted maliciously".
Chile	-) Silence of the Civil Code. -) Jurisprudential acceptance through the interpretation of Article 1556 of the Civil Code.	-Article 1556 of the Chilean Civil Code: "Compensation for damages includes consequential damages and loss of profits, whether they arise from the obligation not having been fulfilled, or having been fulfilled imperfectly, or from the delay in its fulfilment. With the exception of those cases in which the law expressly limits it to consequential damages". -) The Supreme Court ruled for the first time in favour of the applicability of compensation for non-pecuniary damages for breach of contract in 1994, becoming a binding criterion in 2001 (Domínguez, 2017).

Colombia	-) Silence of the Civil Code. -) Denial of the jurisprudence of the Supreme Court of Justice. -) Acceptance in the text of the Commercial Code in contracts of carriage.	Article 1006 of the Colombian Code of Commerce: 'the heirs of the passenger as a result of an accident occurring during the performance of the contract of carriage, may not exercise cumulatively the contractual action transmitted by the deceased and the non-contractual action derived from the damage that his death has personally caused them; but they may try it separately or successively. In either case, if it is proved, there shall be compensation for the damage in default".
Ecuador	-) Denial of the Civil Code. (-) Denial of Jurisprudence	Article 1572 of the Ecuadorian Civil Code: "Compensation for damages includes consequential damages and loss of profits, whether they arise from the non-fulfilment of the obligation, or from its imperfect fulfilment, or from the delay in its fulfilment. Except in those cases where the law limits it to consequential damage. Also exempt are the damages for non-pecuniary damage determined in Title XXXIII of Book IV of this Code".
Peru	-) Acceptance of the Civil Code.	-Article 1322 of the Peruvian Civil Code: "Moral damage, when it has been incurred, is also susceptible to compensation".

Mexico	-) Acceptance of the Civil Code.	-Article 1916 of the Federal Civil Code: Moral damage is understood as the affectation that a person suffers in his or her feelings, affections, beliefs, decorum, honour, reputation, private life, physical configuration and appearance, or in the consideration that others have of him or herself. Moral damage shall be presumed to have occurred when the freedom or physical or psychological integrity of persons is unlawfully violated or impaired. When an unlawful act or omission causes non-pecuniary damage, the person responsible for it is obliged to compensate it by means of monetary damages, regardless of whether material damage has been caused, both in contractual and non-contractual liability. The same obligation to repair moral damage shall be incumbent on those who incur in strict liability in accordance with Articles 1913, as well as on the State and its public servants, in accordance with Articles 1927 and 1928, all of the present Code...".

Table 1: Moral damages in Latin American countries

Own elaboration

It is evident from the foregoing that in Latin American comparative law, in most countries, the thesis that denies compensation for non-pecuniary damage for breach of a contractual obligation has been overcome; however, the jurists and judges of some countries still hinder the opening of this thesis. Thus, three fixed positions can be identified: *i)*

the express recognition in the Civil Codes or in special local laws; *ii)* the taxing civil regulation that delimits assumptions in which an action for compensation for non-pecuniary damage is applicable in certain contracts; *iii)* the admission and development of jurisprudential criteria by virtue of the absence of legislation on the matter; and, *iv)* the express prohibition in the legal bodies.

CONCLUSIONS

The discussions generated around the category of non-pecuniary damage have notably developed a body of innovative jurisprudence and doctrine in the light of the study of modern law. Today we can not only affirm that suffering has a price without triggering a moral dispute, but also that the contractual relationship between the person who suffers it and the one who causes it is not a limit to rule out its immediate reparation.

To annul the idea of compensation for this classification as being contrary to the economic function of the contract, or to assert that the requirement of foreseeability of the contractual damage prevents its possible regulation within a convention, as it is indeterminable for the effects of the obligor (by ignoring the scope of non-performance), are arguments which, in the foundations of a current legal order, do not enjoy any validity. This is why judges, in their role as interpreters, have had to rethink their criteria and create new equitable parameters in which, on the one hand, the aggrieved party's need to compensate for the moral injury suffered and, on the other hand, the debtor's certainty of knowing the consequences of non-fulfilment of an obligation coexist.

The doctrine has also understood the need to overcome the fundamentals that oppose the moral prejudice to the

contract. There are more and more jurists who agree to the possibility of its compensation, developing editorial lines, for academic purposes, where they establish conjectures appropriate to contemporary times or creating organisations with the aim of harmonising the law, highlighting the urgency of updating the substantive rules, many of them in force since the last century, due to the disuse and ineffectiveness of their content.

The materialisation of the incorporation of these new currents in the local legal instruments is a fact that has been manifesting itself in the codification of the civil rules for some years now. The discussion on the applicability of this proposition has been left in the past in the legislations of some Latin American countries, today their Codes adopt a new category of damage in the contractual sphere, writing one more chapter in the legal history of civil liability, which will serve as a basis for the members of the legislative power of other nations to replicate their example and formalise what is happening in the seat of their courts, taking into account the essence and function that has kept this institution in force to date.

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Informe Legal - Grupo para la Armonización del Derecho en América Latina (GADAL): Quito 2022

Equipe de pesquisa GADAL
Grupo de especialistas latinoamericanos em Direito Civil

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DESDE: Equipe de pesquisa GADAL
TÓPICO: Articulado sobre o pagamento
DATA: Quito, 10 de maio de 2022

ABSTRACT: O objetivo deste documento é apresentar uma seção dos instrumentos normativos específicos denominada "Código Quadro para a Harmonização e Modernização do Direito das Obrigações". Ela leva em consideração a tradição do direito civil e as particularidades da região (sem perder de vista os desenvolvimentos nesta área no direito comparado, especialmente em outras experiências de harmonização do direito privado) e que constituem modelos jurídicos mais justos e eficazes.

PALAVRAS-CHAVE: tradição, obrigações civis, legislação.

ABSTRACT: This report amis to present a section of the specific normative instruments called "Framework Code for the Harmonization and Modernization of the Law of Obligation". It takes into consideration the civil law tradition and the particularities of the region (without losing sight of the developments of this matter in comparative law, especially in

other experiences of harmonization of private law) and that constitute fairer and more effective legal models.

KEYWORDS: tradition, civil obligations, legislation.

RESUMEN: Este documento tiene como objetivo presentar una sección del instrumento normativo concreto denominado "Código Marco de Armonización y Modernización del Derecho de las Obligaciones". Tiene en consideración a la tradición romanista y las particularidades de la región (sin perder de vista los desarrollos de esta materia en el derecho comparado, en especial en otras experiencias de armonización del derecho privado) y que constituyan modelos jurídicos más justos y eficaces.

PALABRAS CLAVE: tradición, obligaciones civiles, legislación.

CÓDIGO JEL: N10, K41.

1. TÍTULO: DO ADIMPLEMENTO[1] E OUTROS MODOS DE EXTINGUIR AS OBRIGAÇÕES

2. CAPÍTULO I: DO ADIMPLEMENTO

Seção I

Disposições gerais

Artigo 1. **Definição**. O adimplemento é a realização da prestação devida.

Artigo 2. **Legitimação para atos de disposição**. Quando o adimplemento configurar ato dispositivo de direitos, a legitimação das partes para a prática de tais atos é pressuposta de sua eficácia.

1 Termo votado e aprovado em 21/04/2021, como tradução ao português, com sentido idêntico ao de cumprimento. A delegação brasileira julga oportuno que se verifique se em alguma situação houve inconsciente uso de pagamento em sentido estrito em alguma regra com sentido mais amplo, equivalente a adimplemento/cumplimiento.

Artigo 3. **Da eficácia do adimplemento em bens.** Nas obrigações de dar (arts. 16, 17 e 18 deste Código) o adimplemento que implique transferência de propriedade ou constituição de direitos reais, somente será eficáz se efetuado pelo proprietário do bem ou quem o represente, observado, ainda, o disposto no artigo 17 deste Código.

3.1. Dado em adimplemento bem fungível pelo não dono, não é admissível exigir restituição do credor que, de boa-fé, o recebeu e consumiu.

Seção II

Do objeto do adimplemento

Artigo 4. **Requisitos do adimplemento quanto ao objeto.** O adimplemento deve reunir os requisitos de identidade, integralidade, pontualidade, localização e conformidade com a prestação devida nos termos dos artigos 14 e seguintes deste Código.

Artigo 5**. Identidade.** O adimplemento deve guardar identidade com a prestação devida, de modo que o devedor não é obrigado a cumprir, nem o credor a receber prestação diversa, sem prejuízo das exceções previstas neste Código.

Artigo 6**. Integralidade.** O adimplemento deve compreender o principal, atualizado monetariamente quando for o caso, bem como eventuais juros e frutos devidos, ainda que a obrigação tenha por objeto prestação divisível. O credor não é obrigado a receber adimplemento parcial, nem o devedor a efetuá-lo, exceto disposição convencional, norma imperativa ou norma deste Código em sentido contrário.

6.1. Se a obrigação for em parte líquida e em parte ilíquida, o devedor pode adimplir a parte líquida.

6.2. É admitida a convenção de aumento ou diminuição progressiva das prestações sucessivas, sem prejuízo de sua revisão, nos casos que transgridam as regras ou os princípios deste código.

Artigo 7. **Benefício de competência.** Será outorgado o benefício de competência a certos devedores em razão de suas circunstâncias pessoais, conferindo-lhes o direito de adimplir apenas aquilo que lhes for possível sem prejuízo do mínimo vital, até a melhora de suas condições. Neste caso, o credor deve conceder o benefício:

7.1. Aos seus ascendentes, descendentes ou colaterais até segundo grau, e ao seu cônjuge ou companheiro, desde que não sejam culpados por ofensa grave ao credor, tais como aquelas indicadas como causas de deserdação ou indignidade.

7.2. Ao doador, relativamente ao cumprimento da doação.

Seção III

sujeitos legitimados a adimplir e efeitos do adimplemento por terceiro

Artigo 8. **Sujeitos legitimados a adimplir**. O devedor tem o dever e o direito de adimplir. O adimplemento também poderá ser realizado por terceiros. O terceiro, interessado ou não, pode adimplir, mesmo sem o conhecimento, sem autorização ou contra a vontade do devedor, ressalvadas as seguintes exceções:

8.1. Quando se tratar de uma obrigação personalíssima, requer-se a anuência do credor para que um terceiro possa adimplir;

8.2. Quando o devedor e o credor se opuserem conjuntamente ao adimplemento, salvo que o terceiro seja portador de interesse digno de tutela;

8.3. Quando exista um legítimo interesse do devedor em opor-se ao adimplemento.

Artigo 9**. Efeitos do adimplemento realizado por terceiro legitimado.**

9.1. O terceiro que realiza o adimplemento da obrigação, nos termos do artigo antecedente, com o consentimento do devedor, sub-roga-se nos direitos do credor.

9.2. Também se sub-roga nos direitos do credor o terceiro interessado que realiza o adimplemento da obrigação, ainda que sem o consentimento ou contra a vontade do devedor.

9.3. O terceiro não interessado que realiza o adimplemento da obrigação não se sub-roga nos direitos do credor, mas terá direito ao reembolso, salvo no caso de oposição expressa do devedor ou existência de causa legítima para ilidir o pagamento.

9.4. Realizado o adimplemento pelo terceiro antes do vencimento, o reembolso só poderá ser pretendido após a dívida tornar-se exigível.

Seção IV

sujeitos a quem se deve adimplir

Artigo 10**. Sujeitos a que se deve adimplir.** O adimplemento deve ser feito ao credor, ou ao seu representante ou à pessoa autorizada pelo credor ou pelo juiz.

10.1. Considera-se autorizado a receber o adimplemento o portador do título e/ou do recibo, salvo se as circunstâncias contrariarem a presunção daí resultante.

10.2. A falta de autorização do credor pode ser posteriormente suprida mediante ratificação expressa ou tácita.

10.3. O adimplemento de boa-fé ao credor aparente é eficaz, ainda que posteriormente se prove que ele não era o credor.

Seção V

Do lugar do adimplemento

Artigo 11. **Lugar do adimplemento.** O local do adimplemento será aquele convencionado pelas partes. Não havendo convenção sobre o lugar, e não sendo possível determiná-lo pelos usos, pela natureza da prestação, por outras circunstâncias, em conformidade com o princípio da boa-fé, o adimplemento deverá ser efetuado no domicílio do devedor ao tempo do surgimento da obrigação.

11.1. Havendo motivo grave para que o adimplemento não seja feito no lugar convencionado, faculta-se ao devedor fazê-lo em outro lugar, sem prejuízo ao credor, mediante comunicação a este.

11.2. Se o devedor mudar de domicílio, poderá adimplir no novo, desde que sem prejuízo ao credor. A mesma opção corresponde ao credor, quando o lugar do adimplemento for o seu domicílio, desde que não haja prejuízos ao devedor.

11.3. Em se tratando de prestação de dar coisa certa, o lugar do adimplemento será aquele em que esta se encontrava ao tempo do surgimento da obrigação.

11.4. Se o adimplemento consistir na entrega de bem imóvel ou em prestações relativas a bem imóvel, será feito no lugar em que ele se situa.

11.5. O adimplemento reiteradamente feito em outro local implica renúncia do credor relativamente ao previsto na obrigação, em consonância com o princípio da boa-fé.

Seção VI

Do tempo do adimplemento

Artigo 12. **Tempo do adimplemento.** A obrigação é exigível no momento do vencimento do prazo ou do implemento da condição suspensiva, conforme definido na fonte da obrigação.

12.1. Não havendo termo, sendo a obrigação pura e simples, o credor poderá exigir o seu cumprimento de imediato, mediante interpelação ao devedor. Se a natureza ou circunstâncias da obrigação assim o impuserem, o credor só poderá exigir o seu cumprimento após o decurso de prazo razoável;

(este artigo tem continuidade, ainda não discutida pelo GADAL)

CONCLUSÕES

O Grupo para a Harmonização do Direito na América Latina (GADAL) foi formado em 2013, na cidade de Lima-Peru, por juristas de vários países latino-americanos (Argentina, Brasil, Colômbia, Chile, México, Peru e Venezuela) com o objetivo de propor iniciativas para a harmonização do direito na América Latina, refletindo a especificidade e riqueza do subsistema jurídico latino-americano como um desenvolvimento do sistema jurídico romano. Este produto científico cumpriu o objetivo de desenvolver uma extensa discussão (articulada) do "Código Quadro para a Harmonização e Modernização do Direito das Obrigações" e de socializá-lo com a academia latino-americana e internacional.

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Women, decisions, and martinis

Las mujeres, sus decisiones y los martinis

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ABSTRACT: Hollywood believes that single women lose their will and even strength. Series such as "One hundred days to fall in love", "Suits" or "Sex and the City", portray us in inappropriate ways if we consider everything, we have achieved by ourselves and everything we are capable of. Not only have we won Olympic medals, but also (every single day) we woke up to be mothers, businesswomen, teachers, and, of course, writers. Therefore, this miscellaneous article seeks to share a preliminary discussion regarding the role of jurist women in Ecuador.

KEYWORDS: law, women, cinema, social and economic rights, genre studies.

RESUMEN: El cine cree que las mujeres que carecen de una relación heterosexual se tornan carentes de decisión, voluntad y fuerza inclusive. Series conocidas como "Cien días para enamorarnos", "Suits" o "Sex and the City", nos retratan de formas inadecuadas si consideramos todo lo que hemos alcanzado por nosotras mismas y todo lo que somos capaces de hacer. No sólo ganamos medallas olímpicas sino que todos los días nos levantamos a ser madres, empresarias, profesoras

y en este caso escritoras. En ese orden de ideas, este artículo, presenta una reflexión sobre el rol de las mujeres juristas en Ecuador.

PALABRAS CLAVE: derecho, mujeres, cine, derechos económicos y sociales, estudios de género.

JEL CODE: F16, J01.

INTRODUCTION

These days we've been wondering what a woman looks like. We check literature, Instagram, and Facebook and we turn to those who monopolize much of the world's attention: cinema.

In our classes, law professors and others use films to exemplify realities to facilitate the understanding of the students; and, on this occasion, there is no exception because only in this way, we can explain to the reader what a woman is like in the world (Schultz, 2020; Yang and Li, 2009).

The truth is that the movies look at women as indecisive, perverse, calculating, clumsy for business, capricious, and dependent on a male relationship to assume themselves as complete if you do not believe us, please refer to the following:

a) *Undecided:* The Netflix series called "100 Days to Fall in Love" told the story of two Mexican women facing divorce with children. The plot revealed that they needed to be in a relationship to take life seriously; being single or divorced automatically turned them into a worthless entities that harmed their hard-earned businesses and their children's mental health.
b) *Perverse:* We can also be so if you think of the poor good husband who is devastated when his wife irrationally

asks him for a divorce. Indeed, Scarlett Johanson was the bad guy in "About a Marriage", because she goes so far as to ask for a divorce from her "loving, caring and supportive husband" without any betrayal, heartbreak, or mistreatment. The film highlights the characteristics of the "split" man, shows how devastated he was, how sorry he was, and of course how wrong his wife was to ask him for a divorce, but he never understands that she was dissatisfied because marriage is not only based on the social standards, we have about the husband but on the satisfaction of all kinds that he can provide to his partner.

c) *Calculators:* In "the law of the bold" or "suits" when Jessica takes control; somehow, she becomes this cold calculating character, that we all come to hate, although we know that if the same decisions were made by a man we would qualify him as an entrepreneur, brilliant, a great businessman.

d) *Clumsy for business or career:* of course, we are not businesswomen, because when we reach fifty far from being at the peak of our lives or professions; we are content with the partner we chose to survive, and the Martini we can drink with our girlfriends, as happens in the new season of "Sex and the City".

e) No one achieved an economic advantage and rather they relaxed on a professional level leaving their happiness to depend on their day-to-day life and the bland husband.

1. THE TRUTH ABOUT WOMEN IN FILM

We think even "Wonder Women" puts us in a situation where the woman becomes capricious because the object of her desires almost ends up destroying the world.

We could cite several examples containing these and other negative references to women, but we would exceed the scope of this review and take up too much of the reader's time.

The truth is that the cinema sees us this way because the world does too, and the truth is that we are more, much more.

We women are strong, intelligent, leaders; and, yes, why not, scientists, here is an example. As a matter of trust and evidence, we can refer to the job of three great women academics who wrote with genius during the pandemic when tempers were running high because of the tragedy:

a) Dr. Patricia Alvear (2022) wrote a chapter entitled: "Abuse of dominant position in a situation of economic dependence and public aid in the Ecuadorian system", which details how Ecuadorian law confused the abuse of economic dependence with that of market power, leaving unpunished the acts committed by operators without a dominant position.
b) Professor Francesca Benatti (2022) of the Università degli Studi di Padova, in a chapter entitled "Women in the United States Federal Supreme Court: a journey" details the legal work of women in high legal spheres in the USA since 1600 with the hostile and patriarchal environment characteristic of each era.

c) The researcher María Belén Vivero (2022), wrote another chapter "Sustainability: Unorthodox objective of competition law", and with it, she clarified that sustainability is not circumscribed purely to an economic or environmental concept, but could be applied transversally in competition law with a special regulation to comply with the 2030 objectives.

2. WOMEN RESEARCHERS

If a series were really to be made that obeyed how we women are, it would have to be taken into consideration that we are scientists. Then, we investigate, we doubt, we are curious.

We can also have nerves of steel in the most extreme circumstances, like Isabel Robalino who was not only the first to graduate in law at the Central University and fight for the rights of workers but who lived over a hundred years providing Ecuador with the best legal material because she was brilliant.

We are strong. It is not only because we won an Olympic medal in weightlifting with Neisi Dajomes. And the silver medal with Tamara Salazar (CTV, 2021). But because every day we get up to fulfill our dreams. Despite we live in a world that often closes its doors to us owing to misperception of what a woman can be.

We are smart, like Carolina Serrano who for her extensive work in innovation was placed on the list of innovators under 35 years old in Latin America by the MIT Technology Review.

CONCLUSIONS

In short, women are more than the expression of popular culture about us, we are what we want to be or what, in a vulgar sense of the expression, we want to be and not an inch less.

The entertainment world considers women without any kind of heterosexual relationship to be weak and have uncontrolled lives (Siegel and Meunier, 2019). Shows like "100 Days to Fall in Love", "Diaries of a Passion"; "Love Rosie" and even "Game of Thrones" diminish the leading role of women when it comes to their love interests.

Even though women have shown strength, they seek to perpetuate the belief of submission and dependence on the male sex (Siegel and Meunier, 2019).

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¿Riqueza nacional y pobreza privada a través del derecho civil?

Una discusión del libro "The Code of Capital" de Katharina Pistor[1]

National wealth and private poverty through civil law?

A discussion of Katharina Pistor's book "The Code of Capital"

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Recension de Pistor, Katharina, The Code of Capital: The Code of Capital: How the Law Creates Wealth and Inequality, Princeton, 2019, 320 pp., ISBN 0691189439.

Review of Pistor, Katharina, The Code of Capital: The Code of Capital: How the Law Creates Wealth and Inequality, Princeton, 2019, 320 pp., ISBN 0691189439.

1 Este artículo se basa en una publicación de la autora, Katharina Pistor, en alemán: *Nationalreichtum und private Armut durch Zivilrecht? Rabels Zeitschrift, 85 Oktober 2021*. En el mismo número se encuentra su respuesta: *Recht und* Ökonomie *im Spannungsfeld verschiedener Schulen, Eine Replik auf Hans-Bernd Schäfers Buchbesprechung*.

2 *Agradezco a Claus Ott, Peter Behrens y a Thilo Kuntz por aportarme importante información. Todos los errores son del lastre del autor.

3 Autor corresponsal.

PALABRAS CLAVE: riqueza, capital, derecho civil, propiedad privada, pobreza, codificación.

KEY WORDS: wealth, capital, civil law, private property, poverty, codification.

INTRODUCCIÓN[4]

Katharina Pistor (2019; 2020), quien terminó sus estudios de derecho y de doctorado en Alemania, es profesora de derecho comparado en la Universidad de Columbia, Nueva York. Es una científica reconocida internacionalmente, la cual se sirve de métodos económicos, de las ciencias sociales y empíricos para adelantar sus investigaciones en derecho y en derecho comparado. Como tesis central de su libro, afirma que, junto con su creciente globalización, el derecho privado favorece los intereses de los más ricos; y que hace posible la "dominación a través del derecho" (Pistor, 2019, p. 205) en vez posibilitar el imperio del derecho.

Ella afirma que las reglas del derecho de los contratos, del derecho empresarial, del de insolvencia, del de propiedad y del derecho internacional privado cobran una especial relevancia en este sentido. A través de dichas reglas, según la autora, se determina, o "codifica," la posesión tanto de los recursos como del capital, de tal forma que se generan tanto creciente riqueza, como desigualdad. Además de formular propuestas de política jurídica, el libro intenta entender, desde una perspectiva jurídica, algunos desarrollos económicos inquietantes como la crisis de Lehamn; la creciente desigualdad; y el rezago de los salarios detrás de los desarrollos económicos en los EEUU y en otros países industriales.

4 Nota del traductor: En el texto original, se utilizan los términos en alemán "Kodierung," "Neukodierung" y "Umkodierung." Se ha decidido traducir estos términos como "codificación," recodificación" y transcodificación" respectivamente.

La edición que fue publicada en inglés en 2019 ha sido discutida ampliamente y ha recibido generalmente reseñas positivas (Häring, 2019; Jafri, 2019; Vatiero, 2020). En particular, este escrito es crítico del libro. No pone en duda reflexiones importantes del mismo. Sin embargo, pone en cuestionamiento varias de las hipótesis y afirmaciones presentadas en él.

1. Los abogados al servicio de clientes con grandes riquezas como motor del desarrollo del derecho

Predominantemente en Estados del *common law,* como EEUU y Gran Bretaña, mas no exclusivamente en estos, se presenta la situación en la que ciertos abogados, que se encuentran al servicio de codificar los intereses de sus clientes con grandes riquezas, desarrollan nuevas figuras jurídicas, dejan que sean confirmadas por los jueces, para después reclamar su recodificación a través del monopolio estatal de la fuerza. El significado extraordinario de los abogados al servicio de clientes con grandes riquezas para el desarrollo del derecho tiene, como lo muestra Pistor, una larga tradición. Esto amerita ser elaborado claramente.

La cita hecha por Pistor (2019), de un discurso de Lord Campbell en la Cámara de los Lores en 1851, puede ser el lema de la obra completa. "*There is an estate in the realm more powerful than either your Lordship or the other House of Parliament and that* [is] *the country solicitors*" (p. 158). Como lo muestra la autora, los abogados fueron los que siempre resultaron aumentando la riqueza de la aristocracia rural al, en los términos de Pistor, recodificando los derechos de propiedad; y teniendo éxito frente a las cortes. Esta percepción contradice la opinion general, según la cual el derecho constituye un marco normativo para los actores económicos; que dicho marco normativo describe las reglas del juego; y que en Alemania se

sostiene en alta estima por parte de los representantes de la Escuela de Friburgo (Stoetzer, 2001, pp. 208–214).

Según afirma Pistor (2020), son de hecho los mismos intereses de los actores con grandes riquezas los que determinan y continuanemente modifican en su favor las reglas del juego con ayuda de inventivos abogados. Esto contradice la teoría de la elección pública, la cual destaca la influencia de poderosos grupos de interés en el proceso legistivo parlamenario; que de manera correspondiente se mantiene escéptico frente a la ley estaturaria; y que ve representada la racionalidad económica en la jurisprudencia.

Pistor demuestra el caracter incompleto de esta teoría y no comparte la hipótesis fundamental de Richard Posner de la superioridad de la tesis de maximizar el bienestar económico por medio del derecho privado de los jueces, siendo comparable con el derecho parlamentario o legislativo (Posner, 1979, pp. 485–508, 2014; Rubin, 1977, p. 51, 1982, pp. 205–244). Las cortes independientes se encuentran en una situación difícil cuando las familias con grandes riquezas, o las empresas, financian a ciertos abogados, que a su vez son maestros de la recodificación, que impugnan cada caso relevante a través de varias instancias y que pueden monopolizar la discusión jurídica.

La hipótesis de Pistor es interesante y es un impulso intelectual. Sin embargo, se encuentra tan solo parcialmente fundamentada. Para la recodificación de normas jurídicas, las cuales resultan en modificaciones de capacidades sobre ciertos recursos, no son suficientes los abogados. Sus sugerencias deben ser confirmadas como normas jurídicas por cortes independientes, porque, de lo contrario, se deja de un lado su protección por medio del monopolio estatal de la violencia.

Pistor señala en este contexto la internacionalización del derecho, la cual viene acompañada de una pérdida de significado de las cortes y de los legisladores nacionales. Los codificadores del capital deberían buscar para sí algún país, en la cual las cortes aceptaran sus recodificaciones sin reserva alguna, para así poder aplicarlas en otros estados (Pistor, 2019). Las normas del derecho internacional privado ciertamente han llegado a ser más amigables frente a la aceptación del derecho extranjero. Como consecuencia de ello, éste juega un rol cada vez más grande en la realidad jurídica interna. Sin embargo, esto tan solo puede explicar una parte de las deficiencias señaladas por Pistor.

En primer lugar, la competencia entre normas jurídicas resultantes es usualmente beneficiosa, porque puede llegar a evaporar normas nacionales fallidas, ineficientes o aquellas normas que favorecen intereses parciales. Aclara Pistor, en segundo lugar, por qué los tribunales supremos pueden doblegar las propuestas de los abogados codificadores, que solo representan los intereses parcializados de sus clientes. Aquí no se trata precisamente de Estados que son a su vez dictaduras corruptas, sino de aquellos altamente desarrollados con cortes independientes.

En tercer lugar, juega el derecho nacional (o el derecho de la Unión Europea) asimismo un papel importante. Pistor debería aclarar por qué las cortes independientes en realidad siguen a los codificadores, cuando sus propuestas son capaces de generar riqueza en favor de sus clientes, siendo asumidos los costos de ello por terceros. Finalmente faltan también aquí diferenciaciones analíticas. Un ejemplo de ello es la sentencia dictada en La Haya, en la que el consorcio petrolero Shell fue obligado a indemnizar a unos agricultores nigerianos, cuyas tie-

rras de labranza fueron contaminadas debido a una fuga en un oleoducto, lo cual fue a su vez posible por un ejercicio de *forum shopping*. En Nigeria los agricultores no habrían tenido oportunidad alguna de haber conseguido esta indemnización. El *forum shopping* no es solo un arma para los poderosos, sino que también lo es para los débiles (*Shell Nigeria Liable for Oil Spills in Nigeria*, 2021).[5]

Pistor (2019) señala en algunas partes, que crecientemente se implementa el uso de tribunales de arbitramento para la resolución de conflictos, que a su vez se establecen *ad hoc* por las partes y que no son independientes. Estas decisiones se encuentran sometidas al orden público a través de la revisión de las cortes estatales, con lo cual tan solo se puede impedir el desarrollo de errores generales. Pero incluso cuando el derecho extranjero pueda sobreponerse al derecho nacional, lo cual no es el caso, permanece vacía la tesis del poder de los maestros codificadores sin una teoría de decisión judicial que la fundamente. El lector tiene la impresión, de que el derecho privado sería hecho por las personas con grandes riquezas en los países capitalistas, que incrementa al mismo tiempo sus riquezas y la desigualdad dentro esos países.

Pistor habría tenido que presentar su tesis de una manera más fuerte, porque esta es contraria a la teoría ampliamente difundida, según la cual el derecho de los jueces es superior al derecho del parlamento, por tener aquel en consideración en menor medida ciertos intereses parciales. Muchos autores en los EEUU exaltan la independencia y estructura descentralizada las cortes estatales. Pistor escribe, por ejemplo, que los maestros codificadores crean para sus clientes el nuevo derecho (*They often make new law,* 2019, p. 160). Cuestiones como por qué las

5 Desde 2015 se declaró competente la Corte de los Países Bajos.

cortes estatales, contrario a cómo sucede con el parlamento, se ven fuertemente influenciadas por grupos de interés, al punto de llegar a considerarse agentes vicarios de los abogados, y que aquellas incorporan a través de sus decisiones judiciales los intereses de los ricos y poderosos, deberían haber sido trabajadas más fuertemente por parte de la autora.

Ciertos planteamientos de la literatura así lo enfocan. Así, en un tratado sobre el aumento del Estado regulador desde el final del S. XIX (*The Rise of the Regulatory State*), Glaeser y Shleifer afirman y defienden tesis similares, a partir de las cuales el derecho civil se ha desprendido del interés general con el aumento del "*Big Business*" desde el final de la Guerra Civil en los EEU, porque en una disputa de derecho civil no habría más una "igualdad de armas" entre las partes. Solo el compromiso político y civil de las partes, de asociaciones y de sindicatos, del Estado democrático, del derecho regulatorio y del derecho parlamentario de orden público han funcionado como una especie de poder compensatorio en favor de la corrección de desarrollos indeseables en relaciones laborales, en la protección al consumidor y en la del medio ambiente (Glaeser y Shleifer, 2003).[6]

Una línea adicional de la literatura desarrolla la posición, según la cual la probabilidad de salir victorioso de un proceso judicial depende del esfuerzo que una de las partes pueda ejercer en relación con la otra u otras. Si acaso se tratara acá de un desequilibrio, podrían los tribunales supremos conver-

6 En relación a este se suele citar mucho la decisión de la Corte Suprema de los EEUU conocida como Lochner v. New York: 198 U.S. 45 (1905). En esta se declaró inconstitucional una ley de protección laboral, porque intervenía en la autonomía privada; y porque le otorgaba un estatus que no podía deducirse desde una perspectiva jurídico-política consecuente y coherente. También porque se basaba en principios libertarios no consecuentes y de hecho implicó la participación de la Corte Suprema en favor de intereses económicos.

tirse en la "pelota de juego" de aquella parte que experimenta un gran incentivo de gastar relativamente muchos recursos en el proceso y de involucrar a los mejores abogados por el relativamente mayor número de horas posibles (Cooter y Rubinfeld, 1989)[7].

Por parte de Pistor este aspecto es impreciso. Lo que se necesitaría serían los abogados adecuados. Las razones por las cuales los tribunales supremos independientes se convertirían en agentes vicarios y concederían fuerza jurídica a las recodificaciones jurídicas de los abogados no son claras. ¿Se trata acaso de una justicia de clases? ¿Hay acaso una dinámica que opera a las espaldas de los jueces involucrados, los cuales solo pueden conocer los presupuestos de argumentación de los abogados de las grandes empresas, no pudiendo considerar suficientemente a la otra parte?

A esto se contrapone, que no solo los representantes de intereses que son remunerados se encuentran en la capacidad de influir en la jurisprudencia, sino que también ciertos científicos independientes darían forma al discurso jurídico. El desarrollo del derecho civil es el objeto de confrontación jurídica en la que participan, además de los abogados, científicos del derecho y de otras disciplinas; así como también las cortes a través de su jurisprudencia y los jueces a través de sus propias publicaciones en revistas académicas, comentarios y antologías. Éstas discusiones no son determinadas únicamente por parte de los abogados de grandes empresas y sus mandantes, sino que

7 La hipótesis consiste en que la probabilidad de ganar un proceso depende del esfuerzo que se asigna por parte del demandante y del demandado. En caso de que existan muchos casos similares respecto de una de las partes del proceso, experimenta ésta un incentivo de esforzarse más que la otra parte, porque la ganancia potencial del proceso solo compromete una fracción de su ganancia total. Gastará más y así podrá elevar la probabilidad de ganancia relativa a la de su contraparte, la cual no tendría incentivo alguno para asignar tanto esfuerzo a ello.

abarcan un espectro de presupuestos de argumentación diferentes y controversiales con diferentes intereses.

2. La codificación de la propiedad

En la presentación de su tesis principal, Pistor hace uso de ejemplos históricos, como el desarrollo de la propiedad de bienes raíces en Inglaterra y en los EEUU. Durante la Edad Media, en Inglaterra grandes porciones de la tierra agrícola eran, o bien tierra libre, o bien tierra común de los aldeanos. Con el transcurso del tiempo, los miembros de la aristocracia cercaron la tierra, con los infames "*Enclosures*," los utilizaron exclusivamente para ellos, similar a como lo harían propietarios privados (Pistor, 2019, p. 31 y ss.). Esto fue un acto de violencia brutal descrito muchas veces en la literatura.

Como lo expone Pistor (2019), aquello fue acompañado de la recodificación de los derechos de propiedad sobre la tierra por parte de los abogados, en favor de la aristocracia, como derecho absoluto de propiedad, paso a paso y por medio de decisiones judiciales. Los tradicionales derechos de uso de los agricultores que fueron excluidos de sus tierras fueron arrebatados en favor de aristocracia rural, a través de un largo proceso y sin indemnización alguna. Más tarde se siguió desarrollando la propiedad sobre la tierra en favor de la aristocracia rural con la ayuda de "*Trusts*" en beneficio de las familias nobles, protegiéndose en contra de los acreedores. A través de esto se lograron proteger las posesiones familiares en contra de posibles ovejas negras en la familia.

Sin embargo, Pistor está menos interesada en los efectos económicos de este desarrollo, a diferencia de, por ejemplo, Karl Marx, quien en el tomo I de *Das Kapital*, dedica casi la totalidad del capítulo 24 sobre la acumulación original a los *Enclo-*

sures, por medio de un análisis más complejo. Marx critica los cercamientos incisivamente como actos de violencia sangrientos, pero destaca que habrían sido un paso hacia la formación del capitalismo y que en Inglaterra habrían hecho posible una acumulación originaria, que a su vez desembocó en la industrialización. Este desarrollo, según Marx, trajo consigo tanto riqueza nacional, como pobreza popular (Marx, 1867, p. 741 ss.).

Otros autores como North y Thomas en su obra "*The Rise of the Western World*" destacan, que este desarrollo impulsó la productividad a través de la multiplicación de los cultivos agrícolas, lo cual hizo posible, por primera vez, la generación de un superávit sobre el consumo personal, con el cual se pudo alimentar a la rápidamente creciente población de las ciudades. Estos autores señalan a aquellos Estados que fueron relativamente empobrecidos y atrasados, como por ejemplo España, donde la corona era dependiente de los impuestos de degüello de ganado, que protegía los derechos tradicionales e inapropiados para la agricultura, y que incluso prohibió la re-dedicación de tierras de pastoreo a campos abiertos (North y Thomas, 1973). El historiador económico Bairoch (1988) habla incluso de una revolución agraria, la cual hizo posible la urbanización de Inglaterra.[8] La eficiencia, la riqueza de la nación o el desarrollo de las fuerzas productivas, categorías centrales del análisis económico, no solo en Marx, sino que también en la ciencia economía, juegan para Pistor un rol bastante subordinado.

Esto merece ser criticado, ya que el análisis de la desigualdad a través de las recodificaciones jurídicas del capital no puede separarse de los efectos sobre la productividad de tales recodificaciones sin correr el riesgo de convertirse en un análi-

8 Según Bairoch los *Enclosures* jugaron un papel decisivo en la modernización de la agricultura y en el ascenso de la producción agrícola en Inglaterra.

sis vacío. La recodificación jurídica puede causar grandes ventajas para todos, como suprimir la pobreza mientras aumenta fuertemente la desigualdad como actualmente sucede en China. La recodificación jurídica puede aumentar la riqueza nacional y dejar atrás daños no compensados como en el caso de los *Enclosures*. También puede provocar destructivamente una redistribución en favor de los más ricos a costa del público en general, conduciendo a su vez a un atraso en la productividad, como en el caso de los fideicomisos (*Fideikommiss*).

Quien no considere la desigualdad no está en la capacidad de distinguir estos casos, porque todos ellos permiten que aumente un indicador estadístico de desigualdad como el coeficiente de Gini. Pistor (2019, p. 222) de hecho destaca, que no hay nada reprochable con las transcodificaciones que incrementan la eficiencia, cuando aquellas no resultan en efectos desventajosos para terceros. No obstante, ella no aplica este discernimiento a sus ilustraciones. Estos procesos no son infrecuentes y pueden igualmente aumentar fuertemente la desigualdad. Esta constelación se logró en China, donde en el sector moderno los préstamos aumentaron a la par del ingreso popular y la pobreza absoluta se encuentra casi que desaparecida. Al mismo tiempo, la desigualdad en el ingreso ha disminuido drásticamente desde los tiempos de Mao Zedong.[9]

Mientras los *Enclosures* desarrollaron las fuerzas productivas de Inglaterra, la protección jurídica descrita por Pistor de las familias nobles frente a sus acreedores a través de fideicomisos y *Trusts* fue un paso hacia atrás en términos de economía institucional, porque esa protección excluyó la utilización de la tierra como prenda de los créditos, convirtió la tierra en capital muerto y llevó a la subcapitalización de los bienes de los no-

9 Así aumentó el coeficiente de Gini de un valor por debajo de 0.3 a uno que sobrepasaba 0.45 en la primera década del S. XXI. Ver Whyte (2012).

bles en toda Europa. Los fisiócratas Jacques Turgot y François Quesnay analizaron esto de forma clarividente en el S. XVIII, atribuyéndole a ello el atraso de la agricultura francesa (Schäfer, 2013, Chapter 4). Estas diferenciaciones esenciales no se ofrecen en el trabajo de Pistor, porque ella solo se pregunta por los efectos negativos sobre terceros de las transcodificaciones jurídicas y por los impactos sobre la desigualdad en el ingreso. Pistor (2019, p. 93) trae a la discusión el ejemplo de los bancos hipotecarios de Silesia (*Schlesischen Landschaften*). Después de la Guerra de los Siete Años, el rey de Prusia, Federico II, permitió a los nobles silesios que dieran en prenda sus bienes, para así titularizar las deudas a nombre de sus acreedores, lo cual resultó en una rápida reconstrucción de las provincias destruidas por la guerra.

La presión comercial en favor de la transcodificación jurídica no iba usualmente en dirección a un escudo de activos o *Asset Shield*, sino en una dirección contraria. A saber, no hacia la protección del deudor frente al acreedor, lo cual pueden resultar en efectos económicos destructivos, sino hacia la codificación de activos como prenda crediticia para así movilizar préstamos a empresas. Esto aplica, por ejemplo, a la garantía mobiliaria, la cual supone la separación de las funciones de la propiedad en funciones de garantía; y en funciones de uso con un vínculo fiduciario con el tenedor de la garantía mobiliaria. La discusión acerca de la admisibilidad de la reserva de dominio para pasar por alto el derecho prendario o pignoraticio fue decidida positivamente por el Tribunal del Imperio (*Reichsgericht*) en 1899. Desde las discusiones al interior del Asociación de Juristas (*Juristentag*) de 1908 y 1914 no se pone en tela de juicio esta solución económicamente productiva (Reich, 1969).

Casi ningún problema del derecho civil ha sido discutido en tal grado de profundidad como este, en lo que respecta a su clasificación de dogmática jurídica. Finalmente, ciertas consideraciones económicas han conducido a una consolidación de la clasificación jurídica de compra bajo reserva de dominio y a una ampliación de los casos a los que se puede aplicar (reserva de propiedad ampliada, reserva de cuenta corriente, reserva de consorcio, reserva de propiedad intermedia, reserva de propiedad trasmitida). De este modo, después de la II Guerra Mundial fue movilizada la totalidad del capital circulante de las empresas hasta la última acreencia con el objetivo de ofrecer garantías crediticias. Esto no solo ha aumentado las ganancias, sino que también ha contribuido a la reconstrucción. También el denominado saneamiento por cesión en procedimientos concursales es el fruto de la actividad del ejercicio de los abogados criticada por Pistor. Aquella figura elevó la eficiencia del antiguo ordenamiento concursal fallido respecto de la relación jurídica y logró mejores posibilidades para evitar que empresas viables fueran aplastadas.

En la presentación de sus varios ejemplos de historia del derecho, Pistor comete un error al concluir que es suficiente para una crítica de política jurídica tomar en consideración el hecho de que los abogados codificadores solo toman en cuenta los intereses de sus clientes orientados por las ganancias. Esto se remonta a conocimientos esenciales de la ciencia política y la economía, desde Nicolás Maquiavelo,[10] pasando por Adam Smith hasta Karl Marx y la actual ciencia económica. Particularmente, Marx sostenía, que el desarrollo de las fuerzas productivas y el avance económico se encuentran ligados a la implementación de los intereses de una clase, lo cual podría ser o no contra

10 Maquiavelo instó a los príncipes Medici a unificar Italia "por la gloria propia y el bienestar de todo el pueblo italiano." (Machiavelli, 1512, p. 106).

producente bajo determinadas condiciones. Cuando Pistor escribe sobre riqueza a través de la recodificación de normas jurídicas, no diferencia con suficiente claridad entre (i) riqueza clientelista, la cual solo es posible por medio de redistribución, en la cual la sociedad en general se estanca o se empobrece más; (ii) riqueza que permite que un país avance económicamente, pero que a la vez puede generar altos daños para muchos que no se compensan; y (iii) riqueza que genera ventajas económicas para muchos o para todos y que casi no genera daños para alguien, pero que de igual manera aumenta la desigualdad.

En su descripción de la apropiación de tierra en América del Norte por medio de colonos blancos, también se puede identificar un desinterés en el trabajo de Pistor por los efectos del derecho en la distribución de recursos. Allá casi que no hubo ninguna consideración de las formas tradicionales de propiedad de la población indígena. La tierra fue convertida en propiedad privada de aquellos colonos blancos a través de una cruda violencia y a través de una transcodificación mediante el ejercicio de los abogados y las cortes –y a través de la misma estrategia, la población indígena fue despojada de la posesión. ¿Qué habría sucedido si el ordenamiento jurídico, como lo reclama Pistor (2019, p. 34) hubiera protegido los derechos de propiedad (*Property Rights*) de las tribus indígenas por medio del principio de antigüedad? Antes de la colonización de América del Norte por parte de los blancos, este territorio alimentó y resguardó aproximadamente a 3,8 millones de nativos sobre una superficie de casi 20 millones de kilómetros cuadrados con el estado de las fuerzas productivas de los indígenas de aquel entonces, lo que correspondería a 50 veces el tamaño de Alemania, según una investigación de Denevan (1992).

Pistor describe vívidamente como los derechos tradicionales fueron violados y, sin embargo, no presenta aquellas alternativas a la brutal subyugación, que hubiesen sido compatibles con la inmigración y la colonización; y que considerarían lo difícil que es transferir, a través de negocios jurídicos, derechos de propiedad sobre la tierra fuertemente tradicionales e imprecisamente definidos, con varias diversas posiciones de veto por parte de jefes tribales, de familias y de clanes.

El desinterés por las propiedades productivas de las normas del derecho civil también se reconoce en el análisis que hace Pistor de la codificación de las personas jurídicas, la cual fue impulsada desde la Edad Media por parte de los abogados. Éstos tan solo tenían la meta de poner a disposición de sus clientes un *Asset Shield* (Pistor, 2019, p. 57). El interés egoísta de esta codificación fue el de proteger los activos, que los comerciantes comprometían en una empresa y así retirar del alcance de sus deudores la existencia misma de aquella, para más adelante permitir que en la sociedad de responsabilidad limitada (*Limited Company*) hubiera una separación entre el capital de la firma y el privado. Acá Pistor pasa por alto el hecho de que, respecto de esta codificación, la recodificación generalmente no está relacionada con efectos negativos sobre terceros, contrario a la inobservancia de los derechos de propiedad de los indígenas en América del Norte; o a la exclusión del campesinado de la tierra comunal en Inglaterra.

Un prestamista, no pudiendo acceder más a los activos empresariales de su deudor, sino a las acciones de la compañía, reaccionará con un margen de tasa de interés más alto para cubrir el incumplimiento del crédito con el precio, o incluso no otorgando el crédito. Lo mismo aplica al principio de la responsabilidad limitada. Los créditos se otorgan a las

compañías, bien sea encarecidos o soportados con una garantía. Sin contar a los acreedores forzosos (en especial a las víctimas de accidentes), no se producen en lo más mínimo efectos negativos sobre terceros.[11] Adicional a esto, es sugerido, más no desarrollado, por Pistor, que el desarrollo gradual de la persona jurídica es una de las innovaciones jurídicas más productivas de la historia jurídica europea, lo cual promovió el ascenso de Europa Occidental a potencia económica en el S. XIII –como lo ha afirmado Timor Kuran (2011, p. 60 y ss.).

Solo aquella figura hizo posible que empresas con largos periodos de vida pudieran asegurar su capital de manera independiente de las inversiones de sus accionistas; y que sus acciones pudieran ser titularizadas y negociadas en bolsa. La figura hizo posible convertir activos vinculados a largo plazo en activos líquidos y también reunir capital de varios inversionistas. De esta forma pudieron formarse grandes empresas generadoras de economías de escala. Esta nueva forma jurídica no trajo consigo perdedor alguno –salvo con algunas excepciones.

No obstante, ella generó enormes riquezas dondequiera que fue utilizada por primera vez, lo cual obviamente aumentó la desigualdad. Esto no se puede equiparar con aquella desigualdad, que en una economía clientelista genera riqueza privada al costo de toda la población y a la par resulta en una disminución de la riqueza nacional. Se puede estar de acuerdo con Pistor (2019, p. 222) cuando ella escribe que la codificación del capital es la llave para la distribución de la riqueza en una sociedad. Sin embargo, hay que diferenciar si acaso la codificación de la riqueza hace posible la riqueza de los ricos a través de redistribución y a costa de terceros, o por medio de un aumento de la productividad.

11 Visión general encontrada en Schäfer y Ott (2020, Cap. 25).

Que las normas jurídicas puedan tener un papel sobresaliente en el desarrollo económico, tanto en un sentido positivo como en uno negativo, es hoy en día conocimiento común (Hall & Jones, 1999; Rodrick, 2006; Rodrik et al., 2004).[12]

3. ¿La codificación del capital y una tendencia hacia una mayor desigualdad?

La codificación del capital sigue la lógica del poder y del dinero –según Pistor. Esto es indiscutible. Pero llegar de este enunciado a la afirmación de que aquello llevaría a desigualdad e incluso a empobrecimiento, es un paso muy grande, que demanda un análisis cuidadoso como en el caso de este libro. Generalmente, el comportamiento que busca maximizar ganancias no es en sí mismo algo reprochable. No se encuentra en una clara relación con las exigencias de la ética social. Lo mismo aplica para el comportamiento altruista, el cual puede degenerar en paternalismo.

12 Los autores mencionados destacan, que, sin la ejecución de contratos, sin la protección de la propiedad y de las inversiones no es posible desarrollo económico alguno. Hall y Jones (1999, p. 86) resumen el resultado de un amplio estudio empírico de la siguiente manera: "*Countries with corrupt government officials, severe impediments to trade, poor contract enforcement, and government interference in production will be unable to achieve levels of output per worker anywhere near the norms of Western Europe, Northern America, and Eastern Asia*". En Rodrick et al. (2004, p. 976) se destaca, que este resultado no está condicionado necesariamente por el imperio de la ley en un sentido Occidental, sino que también puede darse a partir de instituciones sustitutas (*Substitute Institutions*), como agremiaciones de comerciantes, o poderosos solucionadores de conflictos de un Estado, o un partido político. "*The cross-national literature has been unable to establish a strong causal link between any particular design feature of institutions and economic growth. We know that growth happens when investors feel secure, but we have no idea what specific institutional blueprints will make them feel more secure in a given context. The literature gives us no hint as to what the right levers are. Institutional function does not uniquely determine institutional form.*" Esta opinión es compartida preponderantemente en la literatura actualmente. Sin embargo, no existen ningún país rico, que no cuente con un imperio de la ley materializado –con la excepción de ciertos países pequeños y ricos en materias primas. Ver Cooter y Schäfer (2012).

Para una crítica desde la ética social hacia el comportamiento egoísta deben satisfacerse y desarrollarse ciertas características especiales. Las crisis financieras actuales, el aumento mundial de la desigualdad y el estancamiento observable los salarios reales en el EEUU desde los años ochenta son ciertamente razones de mucha preocupación. Sin embargo, Pistor describe un sistema económico y jurídico, que se desarrolló a lo largo de siglos, que se implementó a la vuelta del S. IX en los países Occidentales; y que conllevó un aumento masivo de prosperidad y de bienestar generales, incluyendo una mejoría en salud, educación escolar y una mayor expectativa de vida sin precedentes.

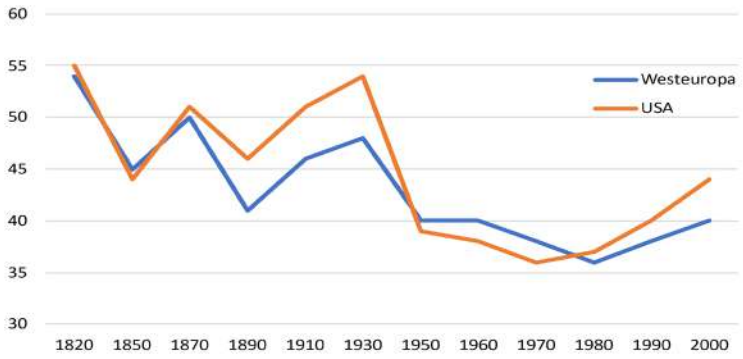
Ningún otro sistema económico concurrente ha alcanzado jamás algo siquiera parcialmente parecido. Un estudio comprensivo de historia económica de Jan Luiten van Zanden y otros (2014) demuestra esto. Entre los años de 1820 y 2000 se multiplicaron por 13 los salarios reales promedio de los trabajadores de la construcción en Europa Occidental; y el ingreso real per cápita lo hizo por 16 (De Zwart et al., 2014). Los EEUU, Canadá, Australia y Nueva Zelanda suelen resumirse en series de tiempo de historia económica como *western offshoots*.[13] En este grupo de países se multiplicó por 21 el ingreso real per cápita desde 1820 a 2000 (Bolt et al., 2014). Las estimaciones de los salarios reales de los trabajadores de la construcción solo están disponibles para el período de 1860 en adelante. Para el año 2000, estos se habían multiplicado por 3,8 desde 1860. En los EEUU el ingreso real per cápita se multiplicó por 21 entre 1820 y 2000. Durante este período, los salarios reales de los trabajadores de la construcción se han multiplicado por 2,9.[14]

13 Angus Maddisson (2006) introdujo esto en su innovador estudio empírico sobre series de tiempo en historia económica.

14 Todas las cifras en cálculos propios sobre la base de datos en los estudios de Jan Luiten van Zanden et al. (ver notas al pie 19, 20 y 22). Ver especialmente las Tablas 3.2 en p. 65, Tabla 3.4 en p. 67, Tabla 4.4 en p. 80 y Tabla 4.6 en p. 81.

En todos los estratos sociales desde entonces se han incrementado tanto la expectativa de vida como el nivel de educación de manera dramática. Cifras similares aplican a los EEUU, Canadá o Australia, pero de lejos no lo hacen para aquellos países, que fueron menos capitalistas que los mencionados. Aquellos hallazgos son incompatibles con la descripción de un sistema jurídico, que hace a los ricos cada vez más ricos y a los pobres cada vez más pobres. Ante ello, que en los sistemas capitalistas de economía de mercado aumente sistemáticamente la desigualdad no está demostrado. La siguiente tabla contiene series temporales del Coeficiente de Gini para Europa Occidental y los EEUU. El Coeficiente de Gini, un número entre 0 y 1, (o expresado en porcentajes entro 0 y 100) es la medida estadística de mayor uso para explicar la desigualdad en el ingreso y riqueza. Un Coeficiente de Gini de cero indica que todos los receptores de ingreso cuentan con los mismos ingresos; uno de 1 implica, que la totalidad del ingreso popular es percibido por un solo individuo.

Figura 1: Desigualdad en el ingreso en Europa Occidental y los EEUU, 1820-2000, Coeficiente de Gini (en porcentajes)

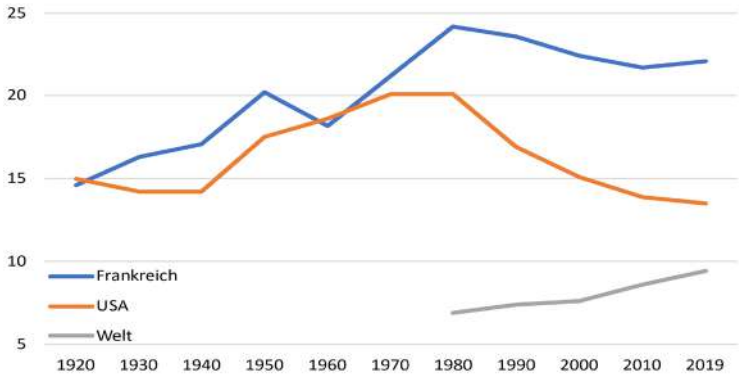


Fuente: Moatsos et al. (2014, pp. 206, 210)

La investigación de Moatsos et al. (2014) muestra, que la desigualdad en el ingreso en economías Occidentales de mercado, expresado mediante el Coeficiente de Gini desde 1980, ha aumentado; y en EEUU la tan valorada desigualdad fue en 9 de las 12 series temporales mayor a la de Europa Occidental. Sin embargo, la misma investigación no ofrece indicios para afirmar que las economías de mercado constituyen una tendencia para la intensificación de la desigualdad.

Este hallazgo es fortalecido por medio de series temporales adicionales de *World inequality Database*, la cual expresa la suma de los ingresos de la mitad de los receptores de ingresos con los ingresos más bajos como porcentaje de todos los ingresos; y, a diferencia del estudio de van Zanden, contiene datos hasta 2019. Series temporales prolongadas, que van hasta el año de 1920, existen en este estudio solo para los EEUU y Francia y se incluyen en la siguiente tabla.

Figura 2: Participación del 50% de los ingresos más bajos de todos los ingresos en Francia y EEUU entre 1920-2019.



Fuente: World Inequality Database (2021, s. p.)

Las series temporales de Francia y EEUU presentadas respecto de este indicador de desigualdad, asimismo, no constatan aumento de la desigualdad alguno. Para Francia la línea de tendencia en general indica antes una disminución de largo plazo de la desigualdad. En EEUU disminuyó la desigualdad hasta 1980 de manera regular. No obstante, después aumentó –como también sucedió en Francia- más fuertemente que en Francia y que la mayoría de países Occidentales.

Del mismo estudio se concluye, que la desigualdad en ingresos definida en la Tabla 2 disminuyó generalmente de manera suave entre 2010 y 2019 en los Estados industrializados Occidentales; y que la tendencia sostenida desde 1980 de una mayor desigualdad no avanzó en la segunda década del S. XXI. No existe ninguna evidencia de una tendencia duradera en aumento de la desigualdad en los países capitalistas Occidentales. A esto no se contrapone, que más de 3 décadas de un aumento de la desigualdad de ingresos después del 1980 y un estancamiento de los salarios reales en los EEUU hayan derribado el optimismo detrás de la noción de que la economía de mercado siempre resulta en un aumento del bienestar de todos.

La desigualdad en el ingreso (y aún más fuerte, la desigualdad en la riqueza) en los sistemas capitalistas fue esencialmente mayor a la de los sistemas socialistas, para los cuales se determinaron coeficientes de Gini de más de 20. Éstos aumentaron en los antiguos Estados del COMECON hasta el final de la Unión Soviética desde alrededor de 20 a 30 (Milanovic, 1999); en China incluso aumentó hasta 45 (Statista, 2021). Sin embargo, la desigualdad es parcialmente un epifenómeno de la libertad económica. Aquella surgiría de igual manera, cuando su uso no pudiera causar efectos negativos a terceros.

En caso de prestar atención únicamente a la desigualdad como consecuencia del comportamiento que busca maximizar ganancias, no puede diferenciarse más entre un innovador como Guglielmo Marconi, quien inventó y también comercializó exitosamente el telégrafo inalámbrico y el teléfono; los aristócratas ingleses, que despojaron a los agricultores de sus tierras, desarrollando la agricultura; y una oligarquía mafiosa, la cual con ayuda de las normas jurídicas llevan a la sociedad al subdesarrollo, haciéndose ella misma rica.

Los tres casos presionan al alza el coeficiente de Gini. Es impensable, que Katharina Pistor no sea consciente de esta diferencia. Su libro se compone de una serie de ejemplos históricos, de los cuales cada uno de ellos recae dentro de alguna de estas categorías: desde la ocupación de tierras por parte de colonos blancos en América del Norte, pasando por el *Asset Shield* destructor de prosperidad de familias nobles a través de fideicomisos; hasta el *Asset Shield* de la persona jurídica, una de las extraordinarias y económicamente poderosas innovaciones en la historia del derecho. Comprender todo esto en una sola categoría es un error analítico.

Es también claro e indiscutible, que la desigualdad de ingreso ha crecido fuertemente en los Estados de Occidente con economías de mercado desde 1980 hasta la segunda década del S. XXI. En los EEUU se relacionó esto incluso con un estancamiento de los salarios reales. Habría tenido más sentido enfocar el análisis en esta serie temporal y describir los factores que produjeron esto. La autora no habría llegado a la idea de que todo esto se les atribuye a los laboriosos maestros codificadores. Desde una monografía dirigida a un amplio público no se puede esperar conscientemente que se filtre la información de estos factores y la fuerza de su influencia por medio de métodos métricos estadísticos.

Sin embargo, sí habría tenido que ser discutido el señalamiento de ciertos factores determinantes para el aumento de la desigualdad desde 1980 (Alvaredo et al., 2018). A aquellos pertenecen la educación escolar precaria y un acceso más difícil a las instituciones de educación superior. También pertenecen a aquellos factores la supresión de la producción industrial en muchos Estados Occidentales, después de que la mayoría de los países en vía de desarrollo pusieran fin a su política nacionalista (sustitución de importaciones) en la década de 1980 y comenzaran a producir para el mercado mundial, lo cual disminuyó la oportunidad de ingresos de la fuerza productiva con menor nivel de formación en los países ricos. Y también a aquello se suma el ascenso de la tecnología de la información, lo que trajo consigo una muy buena remuneración a las fuerzas productivas con buen nivel de formación y prescindió de las demás.

Finalmente juega también un papel el bajo grado de inversión estatal en bienes públicos. Como un factor importante también puede incluirse la internacionalización del derecho. El derecho internacional privado, que contiene los puntos fundamentales para el grado de internacionalización del derecho, fue hace algunas décadas aún materia de especialistas del derecho de divorcios. Entretanto, se ha transformado en una materia jurídica que es central y que da forma a nuestras vidas. Haber hecho hincapié en este punto en el trabajo de Pistor es ciertamente meritorio.

4. Propiedad sobre los datos personales

A partir de los desarrollos históricos, Pistor (2019, p. 126 y ss.) hace referencia a los gigantes del Internet, quienes consiguen sus fabulosas ganancias con el procesamiento de datos personales. Aquellos no cuentan en lo más mínimo con derechos de autor sobre los datos personales brutos que recogen

de los usuarios y sin embargo se encuentran protegidos por el secreto comercial. Mediante el uso de efectivas tecnologías de encriptación, estas empresas tienen la propiedad exclusiva, no *de jure* sino *de facto*, de esos datos personales en bruto. Esta situación arroja de hecho una serie de preguntas de política jurídica importantes, que están relacionadas con la protección de la protección industrial, del derecho de la competencia y de la protección de la propiedad sobre los datos personales. Las empresas de Internet posicionan sus propios productos para la venta en lugares privilegiados. Ellas generan nuevos conjuntos de datos con ayuda de unos algoritmos, que tienen un valor de mercado distinto al de los datos personales brutos. Sin embargo, aquellas empresas no están en la obligación de compartir esos con sus competidores, las cuales, de igual manera, generan nuevos conjuntos de datos desde los mismos datos personales brutos, que también venden en el mercado. Los científicos no tienen ningún acceso asegurado a esto. La protección de los datos brutos como secreto comercial impide que aquellos trabajadores que optan por ser independientes o que llegan a trabajar a otras empresas puedan llevar tales datos consigo, lo que entorpece la competencia y lo cual es acertadamente criticado por Pistor.

Que los datos personales se encuentren de hecho dentro de la propiedad de las empresas de Internet; y que la correspondiente codificación del inventario de datos personales brutos se implemente dócilmente en los EEUU y en otros países por medio de las cortes, es algo que Pistor (2019) compara con la apropiación violenta de tierras por parte de los señores feudales ingleses a través de los *Enclosures*. "*We are now in danger of losing access to our own data*" y llama a esto "*the second Enclosure*" (p. 131). Esto es por consiguiente inadmisible, porque a través del reconocimiento del secreto comercial y la conformación de

una propiedad de facto sobre datos personales en bruto por parte de los gigantes del Internet, no solo no ha ocasionado la muerte de ningún ser humano, ni ha exterminado ningún tipo de existencia, sino que se trata de una contraprestación como consecuencia del uso gratuito de las redes sociales.

Un derecho de propiedad desde el derecho civil comprensivo, cuyo objeto sea la información propia de la persona, no puede derivar en sí mismo a partir de la noción de la protección personal ni de la de protección de la dignidad humana; ni tampoco puede inferirse como un derecho natural („*our own Data*"). La Corte Constitucional de la República Federal de Alemania ya rechazó la noción de un derecho natural a los datos personales y trazó una convincente línea divisoria de política jurídica entre la protección de la propiedad y la de la privacidad. "*El individuo no tiene un derecho sobre sus datos en el sentido de tener un dominio absoluto e ilimitado*" (Bull, 2018; *BVerfGE 65, 1 - Volkszählung*, n.d., p. 43 y ss.).[15]

¿Quién soy yo, dónde y cómo vivo? Las respuestas a estas preguntas constituyen secretos que vale la pena proteger, los cuales a su vez son protegidos en todos los Estados de Derecho. Derechos adicionales que se relacionarían con aquel uso de datos personales, más aún cuando estos datos permanecen anónimos en conjuntos de datos, no se justifican por medio de la protección de privacidad y deben someterse a una prueba de conveniencia social o económica.

Aquí surgen rápidamente problemas de justificación. Un problema central, que es a su vez difícilmente solucionable, es la explicación del término. La propiedad respecto de los datos personales, que va más allá de la protección de la

15 Texto original traducido del alemán al español: "*Der Einzelne hat nicht ein Recht im Sinne einer absoluten, uneinschränkbaren Herrschaft über ‚seine Daten*. "

privacidad, es difícil de definir y de implementar. Los derechos absolutos no deben redactarse de manera idiosincrática, distinto a los derechos relativos, como por ejemplo aquellos derechos contractuales bilaterales, porque son protegidos en contra de las acciones de cualquiera e imponen deberes a todo el mundo. Deben ser reconocidos fácilmente, para que puedan ser observados (Smith, 2011). Esto ya establece límites a la expansión de los derechos asimilables a la propiedad sobre los datos más allá del derecho a la privacidad, que solo no existen en pequeñas sociedades tribales, donde de hecho los derechos completos y absolutos se encuentran generalizados. Porque, en el sentido de los derechos absolutos, existe una relación inversa entre la complejidad de una sociedad y la de los derechos de propiedad. La propiedad en sociedades globalizadas otorga derechos a un inmenso número de personas y les impone así mismo deberes. Por lo tanto, un derecho absoluto debe ser fácilmente reconocible y, de ser posible, ser protegido a través de una sencilla regla *hands off*.

Cuando cada individuo tiene un derecho absoluto sobre „sus“ datos, puede aquel vender sus datos personales a intermediadores de la información. Esto conlleva altos costos de transacción. En cada perfeccionamiento del contrato debe lograrse un acuerdo adicional con él sobre los costos de los datos transferidos. Surge entonces la pregunta de si puede en todo caso surgir un mercado así, con millones de oferentes de datos; o si, por lo tanto, tal propiedad sobre los datos es o no conveniente. A esto se suma que los derechos de propiedad fragmentados sobre los datos hacen posible el comportamiento estratégico; entorpecen el intercambio de datos, planteando así un problema de los anti-comunes, el cual resultaría en una infrautilización de tales datos (Acquisti et al., 2016; Duch-Brown et al., 2017, p. 29).

Incluso cuando no se esté de acuerdo con Pistor en este punto, ella resalta un gran problema jurídico, cuya actual solución termina beneficiendo las posiciones monopolísticas de las empresas de Internet. Se genera una brecha digital entre aquellos que cuentan con acceso al *big data* y aquellos que no. Los usuarios científicos pueden ser excluidos del acceso a datos a voluntad. Para evitar una nueva separación entre *Insider* y *Outsider,* deberia el Derecho facilitar el acceso a estos datos. De esto no tienen interés alguno aquellos que recodificaron legalmente los grandes conjuntos de datos según los intereses de sus mandantes.

Las declaraciones de Pistor son acertadas en cuanto al derecho de patentes y sobre derechos de autor, cuyos niveles de protección y duración los considera tanto excesivos como a veces contraproducentes, y que más que fomentar, obstaculizan el surgimiento de nuevo conocimiento como resultado de múltiples posiciones de veto (Pistor, 2019, p. 118 y ss.) –y está afirmación es consistente con el naciente consenso de la investigación del análisis económico del derecho. Estos derechos siguen siendo aún ampliados y no restringidos, lo que hace posible que se genere riqueza por parte de algunos pocos a costa de la riqueza nacional.

5. La codificación de los créditos

Las titularizaciones de créditos, la creación de dinero, el dinero fiduciario y los contratos de opción ocupan un amplio espacio, cuyos inventores son asimilados por Pistor con los alquimistas. Con razón, Pistor rechaza la consideración del capital en términos de unidades físicas. Sin embargo, también respecto de productos financieros complejos, permanece la relación con los bienes de la economía real, cuyos productividad y valor son influenciados por la codificación jurídica de los

productos financieros. Tampoco es cierto, como lo sugiere Pistor, que únicamente los bienes reales se conviertan en capital por medio de la codificación jurídica. En docenas de Estados impera hoy en día la anarquía. La propiedad existe en estos lugares en forma de dominio fáctico sobre objetos físicos o en conocimiento privado, el cual se puede defender en contra de un Estado corrupto y cleptocrático, o bandas de ladrones.

De todas maneras, estos bienes son utilizados para producir y consumir, aunque a bajo nivel y con baja productividad. Si bien la codificación jurídica aumenta la productividad de bienes físicos y de información privada, no genera ninguna de estas. La comparación con la alquimia es problemática. En la economía institucional se ha desarrollado la expresión "bien efectivo" (*effective commodity*) a partir de la combinación de las cosas con derechos de propiedad (*Property Rights*). Esto aplica también a la titularización de contratos de crédito entre acreedores y deudores y a través de papeles al portador como letras de cambio o bonos. Esto no produce nuevo capital, pero sí hace que aumente el valor real de los créditos subyacentes para los deudores.

Los préstamos hipotecarios son inicialmente intransferibles o muy difíciles de transferir. En la medida en que pueden ser transcodificados en activos líquidos y fungibles, pueden aquellos ser negociados a nivel mundial; y los bienes de capital se encuentran en capacidad de movilizarse a nivel mundial para la producción de bienes inmuebles útiles. La capacidad de transferencia y liquidez generada a través de las normas jurídicas aumenta el valor de las deudas para los acreedores, sin que pierda algo el deudor; y moviliza el capital. Pero al final se encuentra solo el contrato de crédito originario son sus riesgos, el cual hace posible la adquisición de una cosa.

La presentación por Pistor (2019, p. 48) de la crisis de Lehman, con sus repercusiones mundiales a través de una "autopsia institucional" del consorcio Lehman tiene errores, en la medida de que identifica como la causa de la crisis: la codificación más compleja de los créditos hipotecarios a través de redes de consorcios y cadenas de titulación y codificación cada vez más largas y confusas. La compleja titularización de créditos hipotecarios fue de hecho una condición *sine qua non* para la crisis de Lehman, sin embargo, apenas contribuye a su comprensión. Un análisis que se concentra en este punto no proporciona claridad del por qué muchos bancos, especialmente en Europa, se empaparon de estos productos financieros, hasta el punto en el que debieron ser rescatados por el Estado.

Puede descartarse que los bancos estaban desinformados al encontrarse al final de la cadena financiera solo préstamos *sub prime;* o que fueron llevados al error por parte de maestros codificadores. También lo puede ser que confiaron ciegamente en la calificación de triple A de las agencias calificadoras. Esta crisis no se explica mediante una analogía con la protección del consumidor con asimetría de la información entre compañías de titulación y los bancos. Al comienzo de sus causas no se encontraba tampoco ningún tipo de meta explotadora, sino la aspiración socio-política de la administración Clinton, que consistía en que a cada ciudadano americano con un pequeño bolsillo le fuera posible comprar una casa o un apartamento propio por medio de crédito hipotecario.[16]

La *Housing and Community Development Act* expedida durante la administración Clinton en 1992 debería haber ayudado a grupos menos favorecidos y a minorías a convertirse en propietarios de vivienda. El presidente Bush continuó con esta

16 Me gustaría agradecer al profesor Thilo Kuntz, de *Bucerius Law School* de Hamburgo, por señalar esto.

política. El crédito debería cubrir el precio de venta completo del inmueble, no requerir fondos propios del comprador y, además, en caso de incumplimiento, limitar el cobro de la deuda al valor del inmueble. Los bancos hipotecarios fueron detenidos en el mercadeo agresivo de estos *Sub Prime Loans* (*reverse redlining*). Detrás de esto se encontraba una estrategia de política social en un país, cuyo parlamento adelantaba con dificultad labores para institucionalizar un Estado de bienestar financiado con impuestos y gravámenes progresivos a la renta. Esto lo sabía cada banco que gastó miles de millones.

¿Por qué entonces fueron tantas deudas de este tipo compradas en forma de titularización y sustitutos de dinero por parte de bancos que se encontraban por fuera de los EEUU, incluso por parte de lo que coloquialmente se conoce como *stupid German Money*? El banco central de los EEUU apoyó una expansión del crédito hipotecario a través de una política de dinero fácil, la cual ocasionó una inflación de los precios de los inmuebles, de tal manera que los bancos hipotecarios, los cuales habían financiado el 100 por ciento del precio de venta de los inmuebles, estuvieran después de pocos años en el lado seguro, cuando el deudor no pagara y el inmueble valorizado fuera vendido para el pago del crédito. El plan consistió en que esta inflación en los activos llegara a su fin aterrizando suavemente con ayuda de una política monetaria del banco central. Después estas titularizaciones habrían terminado al final con una enorme constelación gana-gana, en la cual (casi) todo ciudadano de los EEUU habría terminado siendo propietario de una casa; y los bancos alrededor del mundo junto con sus depositantes a plazo fijo habrían obtenido bienvenidas ganancias adicionales. Muchos creyeron en esta apuesta y también las instituciones financieras relevantes para todo el sistema se esperanzaron en un rescate en el peor caso posible. A ello se pueden incluir

también a los *Landesbanken* alemanes, que se encuentran bajo influencia política.

De otra manera aquellos papeles tóxicos no habrían encontrado tomadores en cientos de bancos a nivel mundial. Sucedió de otra manera y mientras los precios de los terrenos se hundían fuertemente la crisis había llegado. De identificarse en la codificación jurídica de los créditos *subprime* una causa relevante de la crisis, no se llega a un entendimiento comprensivo de ellos. La titularización de créditos hipotecarios riesgosos y la mezcla con créditos de menor riesgo en el marco de la titularización fueron condiciones necesarias, mas no suficientes, para la catástrofe incipiente. Hay que recordar a Katharina Pistor que las crisis en Grecia y del Euro, que surgieron como consecuencia de la crisis de Lehman, tuvieron causas similares.

Unos bancos con muy poco capital de riesgo experimentaron el incentivo de incurrir en mayores riesgos y compraron bonos del Estado griego, a pesar de que se trataba de los sencillos "bonos vainilla" de codificación básica. El portador del premio Nobel Kenneth Arrow presentó seguidamente una evaluación totalmente diferente de las crisis financieras en la última década. Si uno ve en la codificación jurídica de los créditos *subprime* una razón relevante de la crisis, no llega uno a un entendimiento comprensivo de ella.

Como todo jurista lo sabe, el conocimiento de las condiciones necesarias para el entendimiento y para la clasificación de la política jurídica suele ser más obstaculizador que conducente. Lo decisivo no fue la titularización, ni la mezcla de créditos hipotecarios de diferentes calidades, sino la creencia en una inflación de activos de largo plazo junto con la subcapitalización de instituciones financieras en los Estados

Occidentales. Martin Hellwig y Anat Admati (2013) llegaron a una evaluación similar y, por lo tanto, a la exigencia de mayores índices de capital propio para las instituciones financieras.

CONCLUSIONES

En lo relacionado con sus recomendaciones de política jurídica, la autora se limita a instrumentos del derecho civil. Es obvio que muchos de los efectos negativos de la recodificación del derecho civil descritos en el libro de Pistor pueden eliminarse por medio de normas propias de un Estado de bienestar y pagos de transferencia a los desfavorecidos; y por medio de la legislación tributaria, cuando estas medidas aumentan la riqueza nacional. El derecho regulatorio puede evitar aquellos efectos, cuando solo producen una redistribución en favor de los más ricos mientras la riqueza nacional cae. Esto se excluye en gran medida en un libro enfocado en derecho civil como lo es éste. Aquello habría complementado el panorama general.

Pistor (2019, p. 224) va mucho más allá del objetivo cuando reclama que las recodificaciones generales del capital del derecho civil, a través de abogados y cortes que vayan más allá de los módulos básicos, sean abolidas. Muchas de las recodificaciones descritas por Pistor causan simultáneamente riqueza nacional y desventajas para terceros. Si bien usualmente no causan aquellos daños a terceros, sí aumentan la desigualdad en el ingreso. Un sistema jurídico diferenciado, en el cual el derecho civil impulsara eficientemente la riqueza nacional y que brindara soluciones justas del derecho social, podría contrarrestar esto. Esta fue la fórmula de éxito previo al Estado-nación para la domesticación de una economía de mercado sin fronteras desde la legislación social de Bismarck. Es, por demás, una fórmula impartida por la mayoría de los economistas.

En la reclamación de Pistor de que no puede haber más innovaciones en el derecho civil más allá de la "codificación básica" hace que se pierda la comprensión de que las metas de la justicia social, generalmente a través de pagos de transferencia y la legislación tributaria en una economía de mercado, se alcancen de mejor manera y con menores pérdidas macroeconómicas, que simplemente prohibiendo la formación de formas jurídicas novedosas y más productivas. Esta comprensión, sin embargo, no se ha implementado en todo el mundo, sino en la mayoría de los Estados Occidentales y en Europa.

Después de la introducción del Marco alemán y de que la reunificación expusiera abruptamente a Alemania Oriental a los efectos de la globalización, fluyeron en 30 años 2 billones de Euros en pagos por transferencias hacia los nuevos estados federales, mayoritariamente por transferencias con fines sociales (Burda, 2020, p. 390 y ss). Esto no es precisamente evidencia de la incapacidad de actuar por parte de los Estados de bienestar nacionales de economía de mercado. Al entrar Portugal y España en la UE fue claro que se quebrarían sus industrias altamente protegidas. En compensación, recibieron estos países pagos provenientes del Fondo Estructural Europeo, el cual se había desarrollado en un importante elemento de la política de la UE hasta ese momento (Becker, 2020). Durante la crisis del Coronavirus han fluido pagos por transferencia de la UE a los Estados Miembros, cuyos montos fueron vertiginosos.

El resto fueron créditos baratos. En el marco del Instrumento SURE, la UE gasta hasta 100 mil millones de Euros para asegurar puestos de trabajo e impedir despidos. Los Estados Miembros de la UE han podido tomar prestados otros 240 mil millones de euros del Mecanismo Europeo de Estabilidad (MEDE) en el sistema de salud, para gastos relacionados el

tratamiento de la crisis del Coronavirus (*Eurogruppe Macht Corona-Hilfen Über Rettungsfonds ESM Klar | Aktuell Europa | DW | 08.05.2020*, 2020).

Sin embargo, se puede estar de acuerdo con Pistor (2019, p. 224 y ss) en torno a otras propuestas. Parcialmente, la globalización del Derecho por medio del *fórum shopping* y la expansión del Derecho extraterritorial los critica acertadamente. Ella pasa por alto el hecho de que esto también puede ser un arma de los débiles en países sin Estado de Derecho. Pistor critica con razón el reemplazo progresivo de cortes estatales independientes por tribunales de arbitraje politizados controlados por las partes, especialmente en lo que a la protección de las inversiones internacionales se refiere. También es bienvenida la propuesta de la extensión de la responsabilidad civil para los desfavorecidos por las recodificaciones en conjunto con un mayor uso de las acciones colectivas; y también su petición de un proceder en el largo plazo e incremental.

El libro contiene imprecisiones empíricas y debilidades analíticas, sus recomendaciones de política jurídica están relacionadas con el Derecho civil de una manera demasiado angosta. Sin embargo, demuestra una tesis central importante. Un Derecho privado "codificado" por parte de abogados al servicio de grandes empresas y aceptado por las cortes, dada la concurrencia internacional de normas jurídicas en un mundo globalizados, no necesariamente conduce a una economía de mercado con bienestar para todos, cuandoquiera que no sean movilizadas también fuerzas contrarias. El libro también muestra, que para estos actores el derecho civil no es un marco regulatorio, sino un instrumento; y que se desarrolla e implementa constantemente en interés propio, en lo cual las

cortes deben estar de acuerdo, para que las recodificaciones se puedan implementar con el monopolio estatal de la fuerza. Finalmente, el libro rechaza la tesis de una superioridad jurídica y política fundamental del *private ordering* sobre la teoría de la decisión racional. Estas son ganancias importantes del trabajo por las que se puede agradecer al autor.

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