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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

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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.

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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.

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

1. Rol de revisores/as o arbitraje

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

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

2. Conflicto de intereses

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

3. Confidencialidad

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

4. Retroalimentación

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

5. Modalidad de arbitraje

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

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

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

7. Competencia

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

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

Antecedentes / estructura

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

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

Deberes y responsabilidades generales de los editores

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

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

2. Esforzarse para mejorar constantemente su revista;

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

4. Abogar por la libertad de expresión;

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

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

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

Las Mejores Prácticas para los editores incluirían las siguientes acciones:

- *Buscar activamente las opiniones de los autores, lectores, revisores y miembros del Consejo Editorial sobre cómo mejorar los procesos de la revista;*
- *Fomentar y conocer las investigaciones sobre la revisión por pares y publicar y reevaluar los procesos seguidos por la revista a la luz de estos nuevos hallazgos;*
- *Trabajar para persuadir al editor de la publicación para que proporcione los recursos apropiados, así como la orientación de expertos (por ejemplo, diseñadores, abogados);*

- *Apoyar iniciativas diseñadas para reducir las malas conductas en relación con la investigación y la publicación;*

- *Apoyar iniciativas para educar a los investigadores sobre la ética de las publicaciones;*

- *Evaluar los efectos de la política de la revista sobre el comportamiento del autor y del revisor y revisar las políticas, en caso necesario, para fomentar un comportamiento responsable y desalentar la puesta en práctica de malas conductas;*

- *Asegurar que los comunicados de prensa emitidos por la revista reflejan fielmente el mensaje del artículo sobre el que versan y ponerlos en contexto.*

Relaciones con los lectores

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

Las Mejores Prácticas para los editores incluirían las siguientes acciones:

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

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

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

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

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

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

Relaciones con los autores

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

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

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

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

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

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

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

Las Mejores Prácticas para los editores incluirían las siguientes acciones:

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

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

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

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

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

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

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

Relaciones con los revisores

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

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

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

Las Mejores Prácticas para los editores incluirían las siguientes acciones:

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

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

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

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

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

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

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

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

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

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

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

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

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a) The director/editor

b) The editorial coordinators

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

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

1. Role of reviewers or arbitration

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

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

2. Conflict of interest

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

3. Confidentiality

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

4. Feedback

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

5. Arbitration modality

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

6. Responsibilities of the Editorial Committee and the External Evaluators

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

7. Competition

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

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COPE CODE OF CONDUCT AND BEST PRACTICES GUIDELINES FOR JOURNAL EDITORS

Background / structure

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

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

General duties and responsibilities of publishers

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

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

2. Strive to improve the journal continually;

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

4. Advocate for freedom of expression;

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

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

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

Best Practices for publishers would include the following actions:

- Actively seek the opinions of the authors, readers, reviewers and members of the Editorial Board on how to improve the journal processes;
- Promote and learn about research on peer review and publish and re-evaluate the processes followed by the journal in light of these new findings;

- Work to persuade the publisher of the publication to provide appropriate resources as well as expert guidance (e.g., designers, lawyers);
- Support initiatives designed to reduce misconduct in relation to research and publication;
- Support initiatives to educate researchers about the ethics of publications;
- Evaluate the effects of the journal's policy on the behavior of the author and the reviewer and review the policies, if necessary, to encourage responsible behavior and discourage the implementation of misconduct;
- Ensure that the press releases issued by the Journal faithfully reflect the message of the article they are about and put them in context.

Relations with readers

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

Best Practices for publishers would include the following actions:

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

Relations with authors

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

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

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

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

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

6. Editors should publish guidelines for authors on all aspects that are expected of them. This guidance must be regularly updated and must refer to or be linked to this code;
7. Editors should provide guidance on authorship criteria and/or who should be included as a contributor following standards within the relevant field.

Best Practices for publishers would include the following actions:

- Review authors' instructions regularly and provide links to relevant guidelines (eg icmje5, Responsible Research Publication: International Standards for Authors);

- Post relevant conflicting interests in relation to all contributors and post corrections if those interests are revealed after posting;

- Ensuring that appropriate reviewers are selected for the articles submitted (ie, individuals who can value the work and are unable to reject it for competing interests);

- Respect the authors' requests that an evaluator does not review their work, provided they are well reasoned and possible;

- Be guided by COPE flow charts (Http: // publicationethics.org/flowcharts) in cases of suspected misconduct or controversy in authorship;

- Publish detailed information on how suspected misconduct cases are handled (for example, with links to the COPE flow diagram);

- Publish the delivery and acceptance dates of the articles.

Relations with reviewers

- Editors should provide guidance to reviewers on what is expected of them, including the need to handle confidentially submitted material with confidence; this guidance should be regularly updated and should refer to or be linked to this code;

- Editors should require reviewers to disclose any potential conflicting interests before reviewing a paper;

- Editors should have systems in place to ensure the protection of reviewers' identities unless they use an open review system, which both authors and reviewers have been informed of.

Best Practices for publishers would include the following actions:

- Encourage reviewers to comment on ethical issues and possible misconduct actions in relation to the research and publication identified in the papers presented (eg unethical research design, insufficient details on the consent of study patients, or on the protection of research subjects, including animals, inappropriate handling and presentation of data, etc.);

- Encourage reviewers to comment on the originality of papers submitted and to be alert to possible repeat posts and plagiarism;

- Consider providing reviewers with tools to detect related publications (for example, links to cited references and bibliographic searches);

- Send the reviewers' comments to the authors in their entirety unless they are offensive or defamatory;

- Promote recognition of the contribution of the reviewers to the journal;

- Encourage academic institutions to recognize peer review activities as part of the academic process;

- Monitor the work of the evaluators and take measures that ensure a high-quality process;

- Develop and maintain a database of appropriate reviewers and update it based on their performance;

- Stop submitting papers to reviewers who consistently issue uneducated, poor-quality, or late reviews;

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

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

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

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

AVISO LEGAL

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

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

CUOTA DE GÉNERO

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

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EDITORIAL INTERNACIONAL

La Revista Facultad de Jurisprudencia (RFJ) publicada desde el 2017 por la Pontificia Universidad Católica de Ecuador y dirigida por el profesor Rubén Méndez Reátegui, ha sido el resultado del trabajo riguroso de mujeres y hombres de distintos lados del orbe, que se han unido en torno a un proyecto común; lograr una mayor incidencia en la construcción de políticas públicas y normativa jurídica desde las voces del derecho, es decir, el bien común y su impacto en la aldea global. Este producto es, sin lugar a duda, un aporte inconmensurable a las discusiones contemporáneas de la ciencia jurídica, desde el cual se abordan temas de absoluta novedad para el corpus iuris mundial.

La RFJ plantea una variedad temática inter, trans y multidisciplinar como, por ejemplo, la necesidad de entender los efectos de la pobreza multidimensional desde los desafíos de que supone el crecimiento económico y productivo para la construcción de una sociedad internacional centrada en el desarrollo sostenible.

Además, entre las reflexiones que esbozan las contribuciones transversales de esta publicación científica también se identifican contenidos como la crítica al modelo actual de desarrollo de los países, donde se establece de forma asertiva la necesaria transversalidad que existe entre los derechos civiles y políticos, y los derechos económicos sociales y culturales, lo que implica la irrigación del estudio del derecho internacional de los derechos humanos sobre la formulación y ejecución de las políticas públicas en todas las áreas de intervención del Estado.

Por otra parte, desde su existencia, la RFJ ha aportado estudios de alto valor agregado como el análisis necesario a los aportes que ha hecho la Corte Suprema de Estados Unidos al estado actual de los derechos de la mujer y de su participación en las altas cortes. Esto cobra especial relevancia en este momento al retomar las discusiones de la jueza Ruth Bader Ginsburg quien fue un artífice de los derechos de género en el tribunal estadounidense. En ese sentido, la RFJ y su equipo demuestra su abierto análisis sobre la incidencia directa que han tenido las luchas civiles sobre la construcción de las garantías y libertades individuales en Ecuador y América Latina.

Ahora, la RFJ no solo plantea discusiones exógenas del derecho público y privado, sino que muestra la autenticidad del desarrollo constitucional en las naciones latinoamericanas. Muestra de ello, es su preocupación en numerosos de sus artículos sobre el papel que ha desempeñado la Corte Constitucional de Ecuador en la deconstrucción de imposiciones legales que han afectado la libertad de expresión y que han tenido como eje central el control sobre los cuerpos de la mujer, la niñez e incluso el adulto mayor.

Por lo tanto, la RFJ ha sumado al hermano país un producto editorial preocupado por la necesidad de repensar la forma de consolidar nuestros sistemas y ordenamientos jurídicos desde "todas las voces todas", lo que implica darle relevancia a un enfoque editorial que vaya más allá del desarrollo normativo de los derechos de todas y todos, para entender que enfoques como el de género u otros que deben estar presente en las discusiones que tengan repercusión sobre el goce efectivo de los derechos humanos y fundamentales de las personas humanas y nuestra naturaleza.

Tatiana Dangond Aguancha

Abogada de la Universidad del Rosario de Colombia, especialista en Derechos Humanos y Derecho Internacional Humanitario de la Universidad Externado de Colombia. Directora de la **Editorial Tirant Lo Blanch Colombia**

INTERNATIONAL EDITORIAL

The Revista Facultad de Jurisprudencia (RFJ) published in 2017 by the Pontificia Universidad Católica del Ecuador and directed by Professor Rubén Méndez Reátegui, has been the result of the rigorous work of women and men from different sides of the globe, who have united around a common project; to achieve a greater impact on the construction of public policies and legal regulations from the voices of law, that is, the common good and its impact on the global village. This product is, without a doubt, an immeasurable contribution to the contemporary discussions of legal science, from which topics of absolute novelty for the world corpus iuris are addressed.

The RFJ raises a variety of inter, trans, and multidisciplinary topics such as, for example, the need to understand the effects of multidimensional poverty from the challenges posed by economic and productive growth for the construction of an international society focused on sustainable development.

In addition, among the reflections that outline the cross-cutting contributions of this scientific publication are also identified contents such as the criticism of the current model of development of the countries, where the necessary transversality that exists between civil and political rights and economic, social, and cultural rights is assertively established, which implies the irrigation of the study of international human rights law on the formulation and implementation of public policies in all areas of State intervention.

On the other hand, since its existence, the RFJ has contributed studies of high added value, such as the necessary analysis of the contributions made by the Supreme Court of the United States to the current state of women's rights and their participation in the high courts. This takes on special relevance currently by revisiting the discussions of Justice Ruth Bader Ginsburg who was an architect of gender rights in the U.S. court. In this sense, the RFJ and her team demonstrate their open analysis of the direct incidence that civil struggles have had on the construction of guarantees and individual liberties in Ecuador and Latin America.

Now, RFJ not only raises exogenous discussions of public and private law but shows the authenticity of constitutional development in Latin American nations. An example of this is its concern in many of its articles about the role played by the Constitutional Court of Ecuador in the deconstruction of legal impositions that have affected freedom of expression and that have had as a central axis the control over the bodies of women, children and even the elderly.

Therefore, the RFJ has added to the brother country an editorial product concerned about the need to rethink the way to consolidate our systems and legal systems from "all voices all", which implies giving relevance to an editorial approach that goes beyond the normative development of the rights of all, to understand that approaches such as gender or others that must be present in the discussions that have an impact on the effective enjoyment of human and fundamental rights of human beings and our nature.

Tatiana Dangond Aguancha

Lawyer from Universidad del Rosario de Colombia
Human Rights and Humanitarian International Rights specialist from Universidad Externado de Colombia.
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EDITORIAL

La Revista Facultad de Jurisprudencia de la Pontificia Universidad Católica del Ecuador (RFJ), es una publicación científica continua y semestral (Enero-Junio) (Julio-Diciembre) patrocinada 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. Su énfasis es el ámbito de lo jurídico y su relación con otras disciplinas, saberes y ciencias. Puede utilizar el sistema de “especiales temáticos” en cualquiera de sus convocatorias.

Es una publicación 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.

En este tiempo la RFJ ha supuesto un reto profesional y académico que ha permitido aportar a Ecuador y Latinoamérica. Por lo cual, en mí calidad de director considero que, se han alcanzado sus objetivos iniciales y de sostenibilidad. Por este motivo agradezco la oportunidad a las lectoras y lectores, autores y autoras de la RFJ y deseo que nuestra publicación se siga proyectando como un invaluable aporte a la comunidad jurídica internacional y a la sociedad civil mundial preocupada por generar espacios de discusión y diálogo para la construcción de una sociedad abierta, inclusiva y progresista.

Dr. Rubén Carlos Braulio Méndez Reátegui, PhD - DSc

Director

EDITORIAL

The Revista Facultad de Jurisprudencia of the Pontificia Universidad Católica del Ecuador (RFJ) is a continuous and biannual scientific publication (January-June) (July-December) sponsored by the Publications Center and under the auspices of the Research Department of the University. The continuous publication mode closes on June 30 and December 31 of each year. Its emphasis is on the legal field and its relationship with other disciplines, knowledge, and sciences. It can use the system of "thematic specials" in any of its calls.

It is a publication dedicated to the critical analysis of the national and international problems of Law in all its areas. It includes scientific-legal articles, reviews, current analyses, research, book reviews, research notes, review notes, reports, and miscellaneous and original translations. The editorial proposal of the RFJ is within the framework of the mission of the Pontificia Universidad Católica del Ecuador - PUCE and seeks to contribute rigorously and critically, to the protection and development of the rule of law, human dignity, and cultural heritage, through research, teaching and various services offered to local, national, and international communities.

During this time, the RFJ has been a professional and academic challenge that has allowed me to contribute to Ecuador and Latin America. Therefore, in my capacity as a director, we consider that its initial objectives and sustainability have been achieved. For this reason, we thank the readers, authors, and authors of the RFJ for this opportunity and we hope that our publication continues to project itself as an invaluable contribution to the international legal community and to the world civil society concerned with generating spaces for discussion and dialogue for the construction of an open, inclusive, and progressive society.

Dr. Rubén Carlos Braulio Méndez Reátegui, PhD - DSc

Director

A la Pontificia Universidad Católica del Ecuador

AGRADECIMIENTO Y PRESENTACIÓN

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

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

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

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

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

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

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

Revista Facultad de Jurisprudencia

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Evidence in protective action proceedings: an empirical analysis of selected proceedings by the Constitutional Court (2019-2021)

La prueba en los procesos de acción de protección: análisis empírico de los procesos seleccionados por la Corte Constitucional (2019-2021)

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Original article (research)
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ABSTRACT: This research focuses its analysis on the evidence, in the processes of protection action given the absence of research on the subject and the deficient regulation in the Organic Law of Jurisdictional Guarantees and Constitutional Control. The importance of the subject of the study focuses its evaluation on the application of the different means of evidence, with particular emphasis on the evidence collected by commissions. The study aims to establish an argumentative position about the right to defense and its scope in the processes of protective action through the empirical analysis of all the processes of protective action selected by the Constitutional Court between 2019 and 2021. The results of the quantitative analysis show that the evidence by the commission shows: that the most common means of proof used at the time of filing or answering a protection action are in the first instance: documentary 70%, testimonial 13%, expert 7%, judicial inspection and evidence by commission 0%, while, on the other hand, in 10% of cases no means of proof were presented. Of the 91 sentences analyzed, 64 of them were appealed and heard in the second instance, from which it can be concluded that in 61 cases, representing 94% of the sample, no evidence was presented, while documentary evidence, judicial inspection, and evidence by commission represent 2% respectively.

KEYWORDS: Evidence, jurisdictional guarantees, argumentation, protective action, facts.

RESUMEN: Esta investigación centra su análisis en la prueba, en los procesos de acción de amparo dada la ausencia de investigaciones sobre el tema y la deficiente regulación en la Ley Orgánica de Garantías Jurisdiccionales y Control Constitucional. La importancia del tema de estudio centra su valoración en la aplicación de los diferentes medios de prueba, con especial énfasis en las pruebas recogidas por las comisiones. El estudio pretende establecer una posición argumentativa sobre el derecho de defensa y su alcance en los procesos de acción de tutela a través del análisis empírico de todos los procesos de acción de tutela seleccionados por la Corte Constitucional entre 2019 y 2021. Los resultados del análisis cuantitativo muestran que las pruebas por comisión demuestran: que los medios probatorios más utilizados al momento de interponer o contestar una acción de tutela son en primera instancia: la documental 70%, la testimonial 13%, la pericial 7%, la inspección judicial y la prueba por comisión 0%, mientras que, por otro lado, en el 10% de los casos no se presentó ningún medio probatorio.

De las 91 sentencias analizadas, 64 de ellas fueron recurridas y vistas en segunda instancia, de lo que se puede concluir que en 61 casos, que representan el 94% de la muestra, no se presentó ningún medio de prueba, mientras que la prueba documental, la inspección judicial y la prueba por comisión representan el 2% respectivamente.

PALABRAS CLAVE: Prueba, garantías jurisdiccionales, argumentación, acción de amparo, hechos.

JEL CODE: K4, D23.

INTRODUCTION

How is evidence announced, acted upon, and evaluated in jurisdictional guarantees? What are the types of evidence used in these processes? How does the regulation of evidence in constitutional matters differ from that contemplated for ordinary jurisdiction? How do constitutional judges apply the rules of evidence in practice? How do the commissions that gather evidence in jurisdictional guarantees operate? In this article, we offer a systematic examination of these questions.

From the theoretical level, this analytical exercise seems relevant to us insofar as the specialized literature shows a void concerning evidentiary aspects in judicial proceedings, especially notable in the case of jurisdictional guarantees. In part, this is due to the incipient regulation that the Constitution and the LOGJCC establish on the subject, in addition to the still scarce jurisprudential development. To the best of our knowledge, the present study would be the first to study, based on empirical and quantitative analysis, the evidence in protection action proceedings.

In practice, it is commonplace to affirm that the violation of rights is considered proven when the judge considers that he is persuaded that it happened. According to this system of free assessment, the only thing that matters is the judge's intimate conviction. This conviction, by the way, is not always objective and controllable, but highly subjective and sometimes even arbitrary. What is expected of any judicial authority, however, is that it assesses the facts submitted to it objectively. Its decisions -and as far as this article is concerned, those that deal with evidentiary matters- are susceptible to intersubjective control, both by the appellate courts, as well as by the parties to the proceedings and by the public in general. Hence the importance of analyzing the evidentiary regulation necessary to prove the violation of constitutional rights.

To clarify the various evidentiary aspects in the processes of jurisdictional guarantees, particularly those related to the action of protection, we conducted a review of the regulatory framework of the Constitution, the Organic Law of Jurisdictional Guarantees, and Constitutional Control (LOGJCC), and the jurisprudence issued by the CCE. Once we discussed various normative aspects of the test, we evidenced how the relative norms have been applied through the quantitative analysis of 91 protective action processes. Unlike most existing studies, our approach is based on the empirical analysis of all cases of protective action selected by the Constitutional Court of Ecuador (CCE) between February 2019 and June 2021.

The results show that the most common means of evidence used at the time of filing or answering an action for protection are in the first instance: documentary evidence 70%, testimonial evidence 13%, expert evidence 7%, judicial inspection and evidence by commission 0%, while, on the other hand, in 10% of cases no means of evidence were presented.

Of the 91 sentences analyzed, 64 of them were appealed and heard in the second instance, from which it is concluded that in 61 cases, representing 94% of the sample, no evidence was used, while documentary evidence, judicial inspection, and evidence by commission represent 2% respectively. We highlight the functioning of the evidence collected by commissions, which in certain cases could even violate the due process in guaranteeing the right to defense of the procedural parties.

1. THE REGULATION OF EVIDENCE IN JURISDICTIONAL GUARANTEES

1.1. The evidentiary stages

The Constitutional Court of Ecuador (2013) also conceives it as "the certainty or conviction that it provides, being, strictly speaking, a sensible equivalent of the fact to be assessed" (Decision No. 116-13-SEP-CC).

The evidentiary activity includes the following five stages: collection, announcement, admissibility, practice, and evaluation of the evidence (Guerrero, 2020), which we will analyze below.

1.1.1. Compilation

The first of these, the compilation, is a generally extra procedural stage through which the plaintiff, before proposing his claim, investigates and gathers the evidentiary elements necessary to support his claim. Article 10 numeral 8 of the LOGJCC establishes that the claim must contain "the evidentiary elements that demonstrate the existence of an act or omission that results in the violation of constitutional rights, except in those cases in which, by the Constitution and this law, the burden of proof is reversed". Hence, some authors consider that there are no major differences between the collection of evidence in ordinary justice processes and jurisdictional guarantees processes (Guerrero, 2020; Quitana, 2016).

We differ with this criterion, as we find several differences regarding the collection of evidence in ordinary proceedings and jurisdictional guarantees. In the case of jurisdictional guarantees, for example, Article 86 paragraph 3 of the Constitution provides that the judge "at any time during the process may order the gathering of evidence and appoint commissions to collect it". Article 16, the second paragraph of the LOGJCC, on the other hand, states that the judge may appoint commissions to gather evidence during the "qualification of the claim or at the hearing". Both provisions establish that, unlike what happens in ordinary judicial proceedings, in which the collection is an activity carried out by the plaintiff or the defendant, in jurisdictional guarantees, unipersonal or peripersonal commissions, i.e., third parties, may be entrusted with the collection of evidence.

Another difference lies in the fact that, in ordinary proceedings, the collection of evidence is an eminently extra procedural activity, which is generally carried out before the filing of the lawsuit, in the case of the plaintiff, or before the answer to the lawsuit, in the case of the defendant. In the jurisdictional guarantees, on the other hand, the gathering of evidence may be an intraprocedural activity that it occurs "at any time during the process", according to the Constitution. It should be noted that the LOGJCC limits that constitutional judge may appoint commissions, either in the qualification of the claim or in the hearing. This appointment of commissions in charge of gathering evidence should not affect the due process or delay the resolution of the case. We will analyze possible affectations on the due process when we examine the practice of the evidence gathered by the commissions in the second section of the evidentiary means of this article.

From the review of the cases selected by the Constitutional Court, in only 1 of 91 cases, equivalent to 1.09% of them, the commission was used to collect evidence.

1.1.2. Advertisement

The second moment corresponds to the announcement of evidentiary means, which refers to the proposal or presentation of the evidentiary means that will be used in a judicial proceeding. In jurisdictional guarantees, the announcement of evidence may occur either: a) in the claim, in the case of the plaintiff, b) is the answer to the claim, for the defendant, or c) in the hearing, for both parties. This differentiates the jurisdictional guarantees from other ordinary judicial proceedings.[1]

In the complaint, by the provision of Article 10 numeral 8 of the LOGJCC (2009), which establishes:

> The complaint, at least, shall contain: (...) 8. The evidentiary elements that demonstrate the existence of an act or omission that results in the violation of constitutional rights, except for those cases in which, under the Constitution and this law, the burden of proof is reversed.

1 In ordinary justice, the announcement is made in the acts of the proposition, although some certain exceptions and circumstances enable the announcement of evidence.

If the opportune moment for the announcement of evidence by the plaintiff is the complaint, it is logical to assume that the defendant can do the same in the response to the same, even though the LOGJCC does not expressly contemplate such a possibility. As an exception to the rule of orality that operates for the jurisdictional guarantees, the answer to the claim, according to article 8 paragraph 2 literal c of the LOGJCC, must be reduced to writing. This is without prejudice to the fact that Article 14 of the Law establishes that the answer to the claim must also be given at a hearing.

The announcement of the evidence, according to article 16 of the LOGJCC, is also possible at the public hearing. This is problematic for both procedural parties. In principle, if the evidence is not announced in the lawsuit, but only at the hearing: how is the right to defense and contradiction guaranteed for those who do not know until that procedural moment what evidence will be announced against them?

The General Organic Code of Proceedings (COGEP), as a rule, proscribes surprise evidence, i.e., that practiced without prior and timely announcement. The LOGJCC does not pronounce on the matter. In this regard, we consider that in cases in which the procedural parties announce new evidence at a hearing and the same is admitted, the judge, at the request of the party, must grant a reasonable period to the opposing party for it to fully exercise its right to defense and contradiction. Such a time limit may not be detrimental to the speedy and informal nature of the jurisdictional guarantees.

According to the review of cases carried out, the announcement of evidence is mostly made in the complaint, which relativizes the problem noted above. In 89 of the 89 cases reviewed (equivalent to 98%), out of a total of 91, the plaintiffs announced evidence in their complaint, while in only 2 cases (equivalent to just over 2%) the evidence was announced at the hearing.

1.1.3. Admissibility

The admissibility of evidence comprises the acceptance of a means within a judicial process (Devis Echandía, 1966, p. 85). Unlike ordinary justice, in jurisdictional guarantees, the admissibility of evidence depends only on its constitutionality and relevance. Precisely, article 16 of the LOGJCC provides that "the reception of evidence shall be done only in a hearing and the judge may only deny it when he or she has qualified it as unconstitutional or impertinent". In the ordinary justice system, on the contrary, the judge must judge the admissibility of the evidentiary means according to their relevance, conduciveness, usefulness, necessity, and lawfulness.

The Constitutional Court has held that "the evidence that should not be evaluated in a process of guarantees are those that were obtained against the Constitution, that is irrelevant or that impede the principle of contradiction" (Judgment No. 639-19-JP/20 and accumulated, para. 92). It is worth noting that the Court adds as a principle of admissibility of evidence, the contradiction, a matter that is not expressly established in the law. In Judgment No. 1776-16-EP/21, the Court determined the violation of due process because a public entity was not duly notified and, consequently, could not exercise its right to contradict the evidence. In this regard, the magistrate stated: "although article 24 of the LOGJCC contemplates that the Provincial Court must resolve the appeal "in the merit of the file", this does not prevent the parties in the protection action to defend themselves and add the briefs they consider to present in said procedural phase (...) it is observed that the impossibility that the ISSPOL had of knowing the processing of the protection action due to the lack of notification of the proceedings caused that it was unable to present the evidence and arguments to be considered by the jurisdictional authorities in the appeal".

Now, the first principle of admissibility, the constitutionality of the evidence, depends on whether its production and practice are compatible with the constitutional text. It would be inadmissible, for example, a statement of a party taken under duress, threat, or torture.

The relevance of a means of evidence, on the other hand, refers to the direct or indirect relationship between the means of evidence and the fact in dispute in the proceeding (article 161 COGEP). According to this principle, evidence that tends to demonstrate the good conduct of one of the parties to the proceeding would be irrelevant, when what is being examined in a proceeding is a violation of constitutional rights. The Constitutional Court (2019, in its judgment No. 1208-13-EP/19, has stated that the principle of relevance:

> Provides that the judge has the power to determine when an evidentiary element requested by any of the parties is not related either to the facts on which the case was brought or to the law to be applied, in which case the judge may deny or reject it as an element to form his conviction, in a reasoned manner. (parr. 63)

Both constitutionality and relevance act as guiding principles that limit the abusive evidentiary exercise of the parties and avoid unnecessary delays.

In Ruling No. 687-13-EP/20, the Constitutional Court further established: "questions concerning the admission of evidence (e.g., is this means of evidence valid?) involve a qualitatively different judicial reasoning than questions concerning the evaluation of evidence (e.g., what facts are inferred from this means of evidence?): to answer the first type of questions, one must argue whether or not the production of a means of evidence has observed the rules that regulate such production; while to answer the second type of questions, one must argue about which facts can or cannot be considered proven from legally admissible, i.e., valid, means of evidence".

As Guerrero (2020) points out, it should be noted that:

> In constitutional matters, there is no analysis of the conduciveness of the evidence -that is to say, of the aptitude of the means of proof to lead the judge to the conviction of a certain fact- because there is freedom of means of proof, that is to say, in matters of jurisdictional guarantees there are no lags of assessed evidence.

Although we generally agree with this assessment, we cannot fail to note that recent constitutional jurisprudence has limited the evidentiary freedom of the parties, introducing certain exceptions in which we appreciate the introduction of the principle of conduciveness of evidence, even though this principle is not expressly regulated in the LOGJCC.

We refer, in particular, to Judgment No. 679-18-JP/20. 679-18-JP/20, in which the Court established that the violation of the right to access to medicines requires the demonstration of the following elements: "(i) the disease diagnosed by a health professional of the public sector and of the complementary health network; (ii) the medical prescription of a medicine within a treatment; (iii) the difficulty or impossibility to access medicines; (iv) the information and free and informed consent of the patient to undergo the treatment based on medicines and the purpose of the enjoyment of the highest possible level of health; (v) the quality, safety and efficacy of the medicine by an impartial expert person" (para. 35).

We say that this is a case in which the principle of conduction is introduced and the evidentiary freedom of the parties is limited because each of the elements that make up the violation of the right to access medicines must be proven through specific means of proof. For example, the Court itself provides that the prescription of a medicine must be proven through the epicrisis made by a physician of the Public Intra-governmental Health Network, the informed consent must be proven through the statement of the patient and the testimony of experts, and the proof of the impartiality of the experts' opinion must be made through an affidavit (Judgment No. 679-18-JP/20, para. 237 to 244).

With this caveat, we agree with Guerrero (2020), when he warns that in general, the informality of the jurisdictional guarantees and the evidentiary freedom that should occur in them is far from the systems of standardized evidence, that is, "that in which the legislator predetermines the evaluation that the judge must give to a certain piece of evidence" (Judgment No. 2-14-IN and accumulated parr. 76).

1.1.4. Practice

For Devis Echandía (1966), the practice of evidence refers to "the procedural acts necessary for the various means adduced or requested to be incorporated or executed in the process" (p. 342).

The taking of evidence takes place in a hearing (art. 16 LOGJCC), although as Cevallos (2021) warns, the Law does not establish a specific evidentiary season for this purpose. According to article 14 of the LOGJCC (2009):

> The plaintiff and the affected person will have up to twenty minutes to intervene and ten minutes to reply; likewise, the entities or persons being sued will have the right to the same time. If they are interested third parties, and the judge authorizes it, they will have the right to intervene for ten minutes.

In reality, it happens that judges have made these rules more flexible and while the oral arguments are being made, the evidence supporting the arguments of each party is also presented -usually in a disorderly manner.

If the judge so considers, he may open the case to evidence for a term of 8 days (art. 16 LOGJCC) and, exceptionally, he may also extend the said term in case the complexity of the evidence so warrants. In this regard, the Constitutional Court has stated that "the rules of procedure regarding evidence in jurisdictional guarantees consider the principles of speed and efficiency that characterize these processes. Particularly, the first paragraph of Article 16 of the LOGJCC specifies the procedural moment for the practice of evidence, that is, at the hearing..." (Decision No. 729-14-EP/20, para. 44).

In the same decision, the Court (2020) explained that "in the second paragraph of Article 16 of the LOGJCC, the exceptional possibility of opening an additional term for the taking of evidence is established" (par. 45). Furthermore, the Court (2020) concluded that:

> The mere allegation of the failure to open an additional evidentiary term in addition to the evidence that may be presented at the hearing, without a justification

> explaining its necessity, does not allow for a finding of a violation of a procedural rule or, therefore, of the right to due process in the guarantee to present evidence and contradict that which is presented against him. (par. 47)

In the second instance, the opening of a procedural phase to propose and practice evidence is an ex officio power of the judge. Article 24 of the LOGJCC (2009) itself provides that "the Provincial Court shall take cognizance and decide on the merits of the case file". Likewise, the Constitutional Court has repeatedly emphasized that the fact that the provincial courts of justice, when resolving the appeal filed in processes of jurisdictional guarantees, do not convene a hearing, "does not constitute per se a violation of due process" (Judgment No. 1292-12-EP/19, par. 18).

The practice of evidence varies according to the means of evidence, although it should be noted that the LOGJCC does not regulate the specific way in which evidence is acted in the processes of jurisdictional guarantees. Therefore, it is necessary to apply the final provision of said law, which states: "in all matters not expressly provided for in this Law, the supplementary provisions of its regulations, in the (...) Code of Civil Procedure (...) shall be applicable and compatible with Constitutional Law" and to apply article 159 and following of the COGEP as a supplementary source, as long as they do not distort the simple, fast and efficient nature, provided for in article 86.2.an of the Constitution, for the processing of jurisdictional guarantees.

The Constitutional Court itself has stated that "to determine the proven facts in a process of jurisdictional guarantees, one must start from the rules of evidence provided in Article 16 of the LOGJCC and, as far as it is compatible with the nature of the jurisdictional guarantees, the other procedural principles established in the General Organic Code of Proceedings (COGEP) and the Organic Code of the Judicial Function" (Judgment No. 2936-18-EP/21, para. 42).

It should also be noted, as the constitutional magistracy has pointed out, that "the evidence in the processes of jurisdictional guarantees, unlike the civil, criminal, labor and other processes, is governed by principles and rules that are specific to them and characterize them" (Judgment No. 639-19-JP/20 and accumulated, para. 91). It is added that, in constitutional proceedings, "greater flexibility is allowed in the way of acting the evidentiary means, which are not common in ordinary justice proceedings.

This is because the procedure in which violations of rights are known must be "simple, quick and effective" since such violations are of such magnitude that a reasonably flexible evidentiary activity should be sufficient for their verification". The Court has also stated that "the fact that the evidence has greater flexibility and characteristics that are proper to it, in no case could mean that these actions could be carried out in contravention of rights and principles contained in the Constitution".

These criteria have been reiterated in Judgment No. 2951-17-EP/21, in which the Court held: "evidence in jurisdictional guarantees is governed by the principles and rules that characterize these processes. Therefore, greater flexibility is accepted in the way of acting of the means of evidence, and broader categories and evidentiary institutions are accepted than in ordinary proceedings. This is since the procedure in which violations of rights are known must be "simple, rapid and effective", since such violations are of such magnitude that a reasonably flexible evidentiary activity should be sufficient for their verification" (par. 92).

In the following section, we will point out several specificities that we consider important at the moment of practicing each type of evidentiary means in jurisdictional guarantee processes.

1.1.5. Valuation

The LOGJCC also does not contain specific regulations on the method of evidentiary assessment that must be used by constitutional judges. Therefore, it is again necessary to apply in a supplementary manner article 164 of the COGEP, according to which the evaluation of evidence is carried out by applying the system of sound criticism. In this system of evaluation, according to Barrios (2003), "the judge appreciates the evidential elements according to the rules of logic, experience, and related sciences and arts" (n. p.). Likewise, Coloma and Agüero (2012) argue that sound criticism is composed of the principles that guide logic, the maxims of experience, and scientific knowledge.

This has been ratified by the Constitutional Court in Judgment No. 2936-18-EP/21, in the following terms: "in the absence of an express rule in the LOGJCC, the evaluation of the evidence must be based on the general rules outlined in Article 164 of the COGEP, according to which the evidence must be evaluated as a whole and following the rules of sound criticism..." (para. 43). Additionally, in Judgment No. 2951-17-EP/21, the Court (2021) stated:

> The evaluation of the evidence must be based on the general rules outlined in Article 164 of the COGEP,

> according to which the evidence must be evaluated as a whole and by the rules of sound criticism (...), the evidence admitted to the proceedings must be evaluated as a whole and under the rules of sound criticism. (pars. 87 and 93)

The judge must justify within his sentence the value he has given to each of the evidence, qualifying them as pertinent or impertinent and, to the facts, as truthful or of doubtful consideration, in such a way that from among all the events that occurred and that participated in the process, the judge makes a justified selection (Guamán Ramos, 2018, p. 12).

The need to give reasons for evidentiary decisions in matters of jurisdictional guarantees has also been recognized by the Constitutional Court in the following terms: "once the judge carries out the internal process of evaluating the evidence, he must reflect it in the motivation of the decision. As this Court has pointed out, the guarantee of the motivation requires a sufficient factual basis and this must contain, at least, "a sufficient justification of the facts considered proven in the case" (Judgment No. 2951-17-EP/21, para. 94 and Judgment No. 1158-17-EP/21).

In our opinion, if what is intended is that the decisions regarding the evidentiary assessment of a judicial authority be rational and controllable, it is not enough to establish generically a highly subjective system, such as sound criticism, for the evidentiary assessment. On the contrary, we consider it necessary for the Constitutional Court to gradually introduce through its jurisprudence standards of proof. These standards are usually defined as those minimum thresholds that must be satisfied to consider a statement of fact to be proven. (Clermont & Sherwin, 2002; Ferrer Beltrán, 2021; Gascón Abellán, 2005;

Taruffo, 2003). Some point out that the institutionalization and plurality of evidentiary standards are defining features of mature justice systems and, therefore, capable of identifying the different thresholds of proof applicable to different types of conflicts (Larroucau Torres, 2012; Vásquez, 2013).

It is worth noting that, in Judgment No. 2951-17-EP/21, the Constitutional Court introduced a variant of the *preponderance of evidence* as to the generally applicable evidentiary standard for jurisdictional guarantees. Indeed, the Court (2021) stated:

> The standard of proof required to consider a fact proven is less rigorous than in other areas of law. If it can be concluded from the body of evidence that it is reasonably more probable than not that an event occurred, the standard is satisfied. (par. 93)

The preponderance of the evidence adopted by the Constitutional Court is a de minimis standard according to which the parties must provide sufficient evidence to show that it is more probable that their account of the facts is true than that it is false or that it is more probable than the account alleged by the opposing party (Kaplow, 2012). It is not necessary, for this, for the judge to have elements that guarantee absolute certainty about the truth of the facts, as in the case of the standard beyond *a reasonable doubt*. On the contrary, it is sufficient to show that hypothesis X is more likely to be true than hypothesis Y for the judge to consider hypothesis X proven.

As Lord Denming explains in *Miller v. Minister of Pensions* (1947), "if the evidence is such that the court can say 'we think it more likely than not, then the burden has been met" (n. p.). Unlike other standards of proof, the preponderance of the evidence is based on an inductive and eminently referential probability (Gascón Abellán, 2005).

We consider that the generic application of this standard may undermine the evidentiary nature of the jurisdictional guarantees. In our opinion, the preponderance of the evidence should be applicable only when the reversal of the burden of proof does not operate, that is, in those cases in which the burden of proof falls on the plaintiff. In other cases, for example, when the State must prove that it did not violate constitutional rights, it would be more appropriate to introduce more rigorous evidentiary standards than the preponderance of the evidence. Standards such as the preponderance of evidence and clear and convincing evidence are suited to higher levels of protection of constitutional rights, in those cases where the evidentiary burden falls on public entities.

1.2. Evidence

The LOGJCC does not determine which evidentiary means may be announced and practiced in constitutional proceedings. Under this premise, it is again necessary to resort to the COGEP which, as indicated above, is a supplementary rule to fill the gaps in the LOGJCC. In this regard, the COGEP, in its Book III, Title II, Chapters II, III, IV, and V, regulates the evidentiary means that may be admitted in trials, i.e., testimonial, documentary, expert, and judicial inspection evidence. In the case of jurisdictional guarantees, evidence gathered by commissions appointed by the judges is added.

1.2.1. Testimonial evidence

Testimonial evidence is the statement made by one of the procedural parties, called declarant, or a third party, called witness (Article 174 COGEP). This evidentiary means essentially serves for a person to inform the judge about what he/she knows of certain facts that he/she perceived directly or indirectly through his/her senses. The testimonial evidence must be given at a hearing, either in person or through videoconference, although it is also possible to request an anticipated statement or preparatory diligence (articles 122 numeral 7 and 174 COGEP). In the jurisdictional guarantees, it is not possible to take testimonial evidence through advance statements or preparatory proceedings, since the LOGJCC itself does not provide for this, but it is possible to do so through videoconference. Therefore, in these proceedings, testimonial evidence can only be taken at a hearing.

The practice of the testimonial evidence is carried out through an interrogation, formulated by the person proposing the declarant or witness, and a cross-examination, by the opposing party. According to the COGEP, the judge is limited to ordering the declarant or witness to answer the questions asked by the parties, without the judge being able to ask questions autonomously, but only for clarification purposes (Article 175). In jurisdictional guarantees, on the contrary, we consider that the active role of the judge allows him to formulate questions not asked by the procedural parties, oriented to determine the violation of constitutional rights. Moreover, Article 14 of the LOGJCC provides that “the judge shall ask the questions he or she deems necessary to resolve the case...”.

According to Article 175 of the COGEP, the witness or declarant may refuse to answer questions that could lead to personal criminal liability, to his spouse, common-law spouse, or relatives within the fourth degree of consanguinity. Suggestive, captious, vague, confusing, impertinent, or hypothetical questions may be objected to by his technical defense counsel (art. 176 COGEP). Person's incapable of testifying, persons suffering from a mental illness that deprives them of the capacity to perceive or communicate objectively and persons who at the time of the facts were intoxicated or under the effect of psychotropic substances (art. 189 of the COGEP) may not testify. We consider that these provisions are fully applicable for jurisdictional guarantees since they preserve the standards of constitutionality for the practice of testimonial evidence.

One of the fundamental differences between what occurs between administrative and tax litigation proceedings and jurisdictional guarantees lies in the admissibility of the testimony of public servants. In the first process, Article 310 of the COGEP expressly provides that the testimony of public servants does not constitute evidence and adds that "the reports issued by the defendant authorities (...) shall not be considered part of the testimony". Constitutional jurisprudence has specified that this does not apply to jurisdictional guarantees. In Judgment No. 639-19-JP/20 and accumulated, the Constitutional Court stated that, in resolving an action for protection, "it is admissible (...) declarations of public officials" (par. 91).

With the evidentiary value of the testimonies, the Constitutional Court has held that, in habeas corpus proceedings in which the violation of the right to personal integrity is alleged, "the statement of the victim of sexual aggressions becomes fundamental evidence in this type of aggression". In addition, following the line of the Inter-American Court of Human Rights, the Ecuadorian judiciary expressed: "these statements, when referring to a traumatic moment of the victims, could incur in certain inaccuracies, without this meaning that the statements are false or that the facts related lack veracity" (Judgment No. 365-18-JH/21, para. 192).

In Case No. 2951-17-EP, the Constitutional Court also stated that "to evaluate the testimonial evidence, the context of any statement and its relationship with the other evidence must be considered" (para. 88). In the same decision, it stated: "the judges must always evaluate the statement of the alleged victim, but this statement cannot be taken in isolation, but rather within the body of evidence in the process, taking into account its context and relationship with the other evidence" (par. 93).

After analyzing the 91 sentences selected by the Constitutional Court of Ecuador in the period between 2019 and 2021, it can be concluded that the use of testimonial evidence as a means of proof in the first instance represented 13% of the total study population. On the other hand, 64 sentences were appealed and heard in the second instance, consequently, testimonial evidence was not used, however, in 94% of cases, no evidentiary means were presented.

1.2.2. Documentary evidence

According to Article 193 of the COGEP, documentary evidence is any public or private document that "collects, contains or represents any fact or declares, constitutes or incorporates a right". This includes photographs, videos, and graphics, among other physical and digital documents. Article 194 of the referred procedural law provides that the documents must be submitted in originals or certified copies. Constitutional jurisprudence, however, has established that, in jurisdictional guarantees, "simple copies of public documents, press clippings..." are admissible. This is because in these processes "flexible evidentiary categories and institutions are accepted" (Judgment No. 639-19-JP and accumulated, para. 91). We understand that this rule would be generally applicable to the plaintiffs, but not to the defendant's public authorities, who normally have direct access to administrative records and original documents.

Article 195 of the COGEP establishes several conditions to guarantee the full effectiveness of the documentary evidence, among them: "That they are not defective or diminutive (...) That they are not altered in an essential part (...) That no instance or appeal is pending in the proceedings on the point that, with such documents, it is intended to prove". We consider that these provisions are also applicable in the case of jurisdictional guarantees.

The practice of documentary evidence, regulated in Article 197 of the COGEP, provides that documents are read and exhibited in public in their relevant part, objects are exhibited, and photographs and audiovisual elements are also reproduced in their relevant part. The development of technology has made it possible to speak of digital documents, which are produced electronically through programs, applications, or functional systems that make it possible to prove voluntary acts and facts for a certain event. Article 202 COGEP provides that documents produced electronically with their respective annexes (support), will be considered originals. In the same sense, Article 52 of the Law of Electronic Commerce, Signatures and Data Messages considers as means of evidence "data messages, electronic signatures, electronic documents, and national and foreign electronic certificates", the first characteristic provided by the same law corresponds to the fact that the magnetic support must be attached for its full validity in court. Such evidence remains in the hands of the judge and may be used by the parties during the hearing. In protection action hearings, it is usual for the parties to refer generically to documents included in the file, i.e., without specifying specific extracts.

On the other hand, documentary evidence may be public or private, in the first case, documents authorized with the legal solemnities are considered public, if such document was incorporated into a protocol or public registry it will be called a public deed, in addition, data messages granted by the competent authority duly signed are considered public instruments.

Private documents are those instruments that do not have solemnities or are not registered in protocols or registries; however, they have been created voluntarily by individuals interested in contracting and binding each other, according to the COGEP it is left open the possibility of requesting the recognition of signatures and signatures in the respective hearing, in such a way that if this is not done, it will not lose its evidentiary validity. The documentary evidence in matters of jurisdictional guarantees has greater flexibility and avoids unnecessary formalisms such as the one mentioned in previous lines “recognition of signatures”, due to the inequality of the procedural parties involved in the jurisdictional actions.

Regarding the evaluation of documentary evidence, the Constitutional Court has stated, for example, that “the birth registration certificate and the birth certificate are suitable documentary evidence to claim the right to a nationality” (Judgment No. 2158-19-JP and accumulated/21, para. 91).

When analyzing the 91 sentences selected by the Constitutional Court of Ecuador in the period between 2019 and 2021, it can be concluded that the use of documentary evidence as a means of proof in the first instance represented 70% of the total study population, on the other hand. In this context, in the second instance, documentary evidence was used in 2% of the total analyzed.

1.2.3. Expert evidence

Expert evidence refers to the information provided by a third-party expert called an "expert", who due to his knowledge, academic training, and technical or scientific skills, is qualified to provide specialized information (technical and/or scientific) on a fact of great relevance to the process.

Also, we can identify two central aspects of the expert evidence. The first corresponds to the expert, who has the necessary knowledge to present the information to the judge. The second aspect consists of the expert report that was prepared by the mentioned expert and that is intended to be used to prove the factual premise (Vásquez, 2014, p. 32).

According to Article 222 of the COGEP, the expert witness is the natural or legal person who, in addition to having technical, scientific, artistic, practical, or professional knowledge, must be accredited by the Judiciary Council, so that only those persons who meet the requirements indicated may issue expert reports, intervene, and testify in the process. If there are no accredited persons in a specific matter, the judge will request the Judiciary Council to require a public institution, university, or professional association to send a list of three professionals to be accredited and provide the necessary support in that case, Article 221 of the COGEP and Article 12 of the RSPIFJ.

For the practice of the expert evidence, the expert report must be attached to the claim, except in the event of not having or not having access to the person, object, or thing of the expertise, in which case the judge must be requested to order its practice. For this purpose, the corresponding drawing of lots and designation of an expert will be made. In both cases, the work of the expert must be carried out with objectivity, impartiality, opportunity, responsibility, punctuality, rectitude, and honesty, therefore, the expert shall avoid making value judgments on any of the parties (articles 16 and 21 of the Regulations of the Judicial Function Integral Expert System, hereinafter RSPIFJ).

According to Article 5 of the RSPIFJ, persons who have been convicted of crimes against public administration, harm, crimes against humanity, hatred, sexual or family violence, have been dismissed or sanctioned for administrative, civil, or criminal liability, owe tax obligations and who adulterate or falsify documents at the time of applying for accreditation may not be qualified as experts.

According to article 224 of the COGEP, under article 21 of the RSPIFJ, the expert report must contain the general data of the appointed expert, the indication of the profession, expertise, or art, the number of accreditation before the Council of the Judiciary and a logical exposition of the facts or objects subject to analysis, must be homogeneous among themselves, must be motivated by the methodological activity used and must contain their respective conclusions, in such a way that, it allows the judge and the parties to easily understand the content of the report. For Martorelli (2017) “the report aims to clarify all the technical aspects linked to the case and in that sense to elucidate the disputed facts” (p.133).

The COGEP, to guarantee the right to defense, provides that the expert report must be notified to the procedural parties at least 10 days before the trial or a single hearing is held (article 225 COGEP). This is not regulated in the rule governing constitutional cases. Despite this, in both cases, the expert witness is obliged to attend the corresponding hearing and support his report orally. The procedural parties may question him and challenge the technical or scientific rigor of his conclusions and credibility (articles 222 and 223 ibidem).

In the constitutional sphere, expert opinions have been fundamental evidentiary elements for the resolution of causes related to collective rights. For example, in judgment number 004-14-SCN-CC, the Constitutional Court ruled that in the event of conflicts of competence between the ordinary justice system and the indigenous justice system, anthropological, sociological, and other expert opinions must be available to allow an approach to the ethnocultural worldview of the indigenous peoples, nationalities, and communities.

Similarly, in Case No. 112-14-JH/21, the Court (2021) stated that:

> State and indigenous authorities, to interpret norms and understanding facts and conduct in any jurisdictional process in which rights are involved, must open an intercultural dialogue. The mechanisms to develop this intercultural dialogue are diverse, and priority should always be given to the most direct ones, such as (...) expert opinions with field studies..." (par. 35).

In case No. 273-19-JP/22, referring to action for protection, the Court verified, through an expert report, "environmental, social and cultural damages" that put the Cofán de Sinangoe community at risk. This expert report also highlighted:

> Damage to vegetation cover and deforestation in the area of Las Pizarras, Cofanes River, Chingual River, Aguarico River due to the opening of roads for the entry of backhoes; damage to the banks of the

> Aguarico, Chingual and Cofanes Rivers; damage to water as evidenced by the reduction of fishing; damage to fauna, as it was reduced by poaching and illegal hunting activities of miners who lie in the territory, among others. (Court, 2022, par. 17)

The use of expert evidence as a means of proof in the first instance is 7%. On the other hand, in the second instance, it is not used in the review processes analyzed.

1.2.4. Judicial inspection

Judicial inspection is that evidence that allows the judge to know directly and through his senses the places, things, or documents that are the object of the litigation, in such a way that it is the judge who verifies the existence or not of the facts alleged by the parties. For Garcia (1974), the importance of this evidentiary means consists in that "it puts the judge in personal, immediate and direct contact with the facts that are the subject of the process, thus facilitating the formation of his conviction regarding the extremes that will serve as support for his decision" (p. 322). According to García (1974), the judicial inspection consists of the "personal examination made by the judge of the object of the controversy, to obtain from these examination elements that form his conviction" (n. p.). The judicial inspection is, therefore, a test directly practiced by the judge.

Following Articles 228 and 229 of the COGEP, the judicial inspection may be requested ex officio or at the request of a party utilizing the acts of proposition with the precision of the reasons that support it. This will take place at the place, date, and time indicated for the purpose and, if necessary, will be supported by an expert accredited by the Judiciary Council.

Once the proceedings have been installed, the floor will be given to the requesting party, who will explain the purpose of the inspection, the corresponding judge will conduct the inspection, and finally, the floor will be given to the opposing party, who, in use of his right to defense, will explain what was inspected and will try to refute the allegations of the requesting party, after which, the proceedings will be recorded and the video recording will be attached (Article 230 of the COGEP).

On the other hand, concerning jurisdictional guarantees, the judicial inspection may be requested by the judge or by one of the procedural parties and its objective is the same, i.e., it seeks that the judge acquires knowledge and conviction of the facts through the use of his senses to the place, the thing or the corresponding documents.

Before the analysis of the judgments under study, the evidence by judicial inspection in the first instance was not used, however, in the second instance it represents 2% of applicability, out of the total of 91 review processes analyzed.

1.2.5. Evidence collected by committee

The appointment of commissions to gather evidence in jurisdictional guaranteed proceedings is an ex officio power of the judge. It is the judge who, at the time of qualifying the claim or in the course of the hearing, whenever he considers that the evidence provided by the parties is not sufficient, may appoint a commission to gather new elements, Article 16 of the LOGJCC.

These commissions can be unipersonal or pluripersonal, depending on the information, versions, and evidence required to clarify one or several facts. In this context, the impact of the exploitation and oil spill on a group of inhabitants in a state of voluntary isolation requires the support of a group of people who can gather the necessary information (environmental, economic, social damages, malformations, complex diseases, violent dispossession of ancestral territories, etc.), for which people with a high level of knowledge related to the investigated fact will be required.

The appointment of commissions, according to Article 86 of the Constitution and 16 of the LOGJCC, has three objectives: to visit the place of the facts, to receive testimonies and evidence, and then to prepare a report. This report, according to the LOGJCC, has the value of “practiced evidence”, even if it is not subject to a contradiction in a hearing. The condition of “practiced evidence” that the LOGJCC grants to the evidence by commission mark a new milestone in the protection of rights, because this evidence breaks the procedural rules, to the extent of having it as admitted and practiced. We would be in front of full proof because from the beginning it would be considered duly accredited and practiced and, if this is the case, the judge should value it as such.

The judge’s power to order the formation of commissions violates the principle of immediacy because he becomes one more actor in the process, thus leaving behind the duty of the parties to prove their allegations and contradict the evidence against them, and of course, under this scenario, the parties would no longer be on equal footing.

Ruling No. 175-14-SEP-CC established the leading role that constitutional judges must assume in the substantiation of jurisdictional guarantees so that the respect for the rights recognized in the constitution will only be materialized with a real verification or not of the violation of rights.

On the other hand, the LOGJCC confers to the judge the ex officio power to order the practice of evidence at any time during the process, either in the qualification of the claim or in the hearing, although it is not established in the law, he can also order it in the second instance and the term in which it must be effectively practiced. Notwithstanding the above, it is important to emphasize that the judge should not make up for the evidentiary shortcomings of the corresponding technical defenses and, therefore, before ordering them, he must give reasons for his decisions.

In case 1837-12-EP/20, paragraph 16, the Court developed the basic criteria for a decision to be considered duly motivated, which are: i) enunciation of the legal norms or legal principles; ii) mention of the facts of the specific case and, iii) explanatory statement of relevance for the application in the case.

The importance of the power to order evidence resides in the effect that this generates at the time of resolving the protection action, where there will necessarily be a winning party and another that will have lost the action due to the evidentiary contribution dictated ex officio. For this, it is necessary to clarify that the power deposited in the judge is not unlimited and that it should not be activated in all cases and instances, but, on the contrary, it should be activated when there is not enough evidence to resolve.

From the analysis conducted, it can be concluded that the commission test was not used in the first instance. However, in the second instance, its application represents 2% of the total study population.

The burden of proof responds to a procedural necessity in the effective exercise of a jurisdictional guarantee such as the action for protection, according to article 16 of the LOGJCC, the plaintiff should prove the facts alleged in its claim either in the complaint or at the time of the hearing, except in cases in which the burden of proof is reversed, thus transferring such obligation to the defendant.

According to Cevallos (2021, p. 11) quoting Michelle Taruffo (n. d.) "(...) the legislator resorts to these techniques when he considers it convenient to favor to some extent the position of the weak party or the party that would otherwise find it impossible or excessively difficult to prove a fact". In contrast to what Article 169 of the COGEP promotes, on the burden of proof, this exchange obeys to a great extent the public interests pursued by the state in the protection of constitutional rights.

Article 86, paragraph 3 of the CRE, as well as article 16 of the LOGJCC, determine that the burden of proof falls exclusively on the defendant, in the following cases: i) when the defendant public entity does not prove the contrary or does not provide information and ii) when discrimination or violation of environmental or natural rights is alleged against a private individual, in these two scenarios the facts will be considered true and it will be the defendant's responsibility to prove the contrary.

CONCLUSIONS

The study of evidence in jurisdictional guarantees and specifically in the action of protection shows that in Ecuador there are no clear guiding rules. For this reason, the final provision of the LOGJCC has provided the possibility of using supplementary rules such as the COGEP to fill certain gaps in the process and evidence. In addition, the Constitutional Court, in its role as guarantor of rights, has found it necessary to issue rulings to set minimum standards concerning evidence and its relevance when proving certain factual facts.

The LOGJCC does not establish which means of proof are accepted to demonstrate the violation of constitutional rights. For this reason, the provisions of the COGEP are used and the following are considered valid: testimonial, documentary, expert, and judicial inspection evidence. The Constitution and the LOGJCC grant the judge the power to appoint commissions to gather evidence, which must lead to the conviction of the facts so that a sentence can be issued. The seriousness of this informal power lies in the fact that it would be violating the right to defense in the guarantee of contradiction.

The empirical analysis of the 91 cases selected by the Constitutional Court of Ecuador in the period between February 2019 and June 2021 shows that the most common means of evidence used at the time of filing or answering an action for protection are in the first instance: documentary with 70%, testimonial with 13%, an expert witness with 7%, judicial inspection and evidence by commission 0%, while, for 10% of cases there was no means of evidence.

The results show that although judges are empowered to create commissions to gather evidence at their discretion and at any time during the process, they decide not to resort to the use of this mechanism due to the vacuum that exists in its use and application.

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The principle of comprehensive damage repair and its problems in medical liability

El principio de reparación integral del daño y su problemática en la responsabilidad médica

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ABSTRACT: This paper studies the principle of integral reparation and its problems in medical civil liability. For this purpose, a brief examination is made from the doctrine of the legal figure of the damage, both material and moral, in addition to the liability in the medical field that can be perfected before the non-observance of duties and obligations, as well as its types. Comprehensive reparation is reviewed from its concept and legal regulation in Ecuador provided for in the Constitution of the Republic. Also to link theory and practice, a case study is carried out within the results, which illustrates the application of medical liability and integral reparation in the medical context. All this through the use of a qualitative methodology, based on the application of the documentary bibliographic technique and methods such as inductive, legal exegetic, and synthetic analytical.

KEYWORDS: damages, physician, reparation, and civil liability.

RESUMEN: Este artículo estudia el principio de reparación integral y su problemática en la responsabilidad civil médica.

Para ello, se hace un breve examen desde la doctrina de la figura jurídica del daño, tanto material como moral, además de la responsabilidad en el ámbito médico que se puede perfeccionar ante el incumplimiento de deberes y obligaciones, así como sus tipos. Se revisa la reparación integral desde su concepto y regulación legal en el Ecuador prevista en la Constitución de la República. Asimismo, para vincular la teoría y la práctica, se realiza un estudio de caso dentro de los resultados, que ilustra la aplicación de la responsabilidad médica y la reparación integral en el contexto médico. Todo ello mediante el uso de una metodología cualitativa, basada en la aplicación de la técnica bibliográfica documental y de métodos como el inductivo, el exegético jurídico y el analítico sintético.

PALABRAS CLAVE: daños, médico, reparación y responsabilidad civil.

JEL CODE: D23, B25.

INTRODUCTION

In the medical field, a series of events can take place that triggers damages and lead to full reparation. To review this principle and its problems, it is important to state that the existence and determination of civil liability necessarily involve the production of damage as a fundamental element that distinguishes this type of liability from the others. Therefore, according to López (2016) the occurrence of the damage gives rise to the obligatory analysis of whether there is unlawfulness, causality, and culpability because, without damage, there is no liability whatsoever.

Damage is defined by Alessandri (2017) as that impairment or damage suffered by a person, either to his property or to himself. In the civil context, according to Barros (2013) is the detriment, the affectation that a human being may suffer as a result of an action or omission generated by another, and that affects either his rights or interests. This makes it clear that we are in the presence of this figure when the person is affected by any type of loss, no matter how minimal it may be. This can affect the person, according to Aguiar (2012) both in the present and in the future, and it is perfected, provided that it is susceptible to being repaired by any of the means, and it must also comply with the requirement of being certain.

Furthermore, it is important to say that, among the compensable damages, all those caused by the medical action must necessarily be included, whether material, corporal, including *pecuniary doloris*, i.e. the psychophysical damage that these damages cause the victim to suffer, and moral damages, which are those that affect the immaterial assets of the person, essentially the rights to personality and that do not entail any decrease in assets, of difficult valuation for this reason, but whose compensability is nowadays unanimously accepted.

It should be noted that private damage is directly related to Civil Law, responds to personal interests, and regulates forms of compensation, which makes it different from damage, treated in other areas of law, such as criminal law. For De Cupis, the following elements must be present (2015) elements such as a responsible party; the action or omission that generated the damage; consequences that give rise to the affectation; the presence of victims, and a legal rule that recognizes the obligation to repair. In short, liability for damages requires the existence of a link between the conduct of the liable party and the damage.

The Ecuadorian Civil Code (2005) recognizes in Article Art. 2214 concerning the damage that, whoever has committed a crime or quasi-delict and consequently, has caused damage to another, should compensate; regardless of the criminal sanction imposed. Damage is considered to be the detriment suffered by a person in his patrimony or his non-patrimonial assets. If the damage is to the patrimony, according to Del Bruto (2018), the damage refers to the material damage that can be emergent, which impoverishes and impairs the patrimony or loss of profit, which is directed to any impediment to obtaining profits. There is also moral damage, which affects non-property, immaterial assets, such as honor, morale, etc.

After knowing in a general way, the damage, it is necessary to go into the study of the reparation, to expose some issues associated with the civil liability of the physician, starting from the fact that in Ecuador the Constitution of the Republic, recognizes health as a right that must be guaranteed by the State. In Ecuador, the Constitution of the Republic (2008) recognizes health as a right that must be guaranteed by the State, for this reason, the services of this nature must have quality, effectiveness, and efficiency, among other qualities. Also, under Article 54 of this text, it is provided that any person or organization that provides public services will be liable in the civil, criminal, and administrative order for the deficient provision of this, as well as individuals, will assume their responsibility in case of malpractice in the exercise of their profession and especially that which may place at risk the integrity or life of people.

Along these lines, medical liability is part of professional responsibility, which, as Thompson (2011), argues is governed by the principles of non-maleficence; utility; beneficence;

autonomy, and justice. On the other hand, Calabuig (2005) conceptualizes responsibility as the obligation to respond to the acts that have been committed and that have resulted in harm to persons. Therefore, it means to correct, repair, or compensate for that damage. He also indicates that this type of liability leads to the fulfillment of the duty to correct or compensate the damage caused by the physician in the performance of his professional *practice.*

Furthermore, Calabuig (2005) adds that medical liability should be seen as the obligation of physicians to repair and satisfy the consequences of acts, omissions, and voluntary errors, even involuntary within certain limits, committed in the exercise of their profession. This can be contractual or extra-contractual in nature. The first is when the physician breaches the contract that regulates the relationship with the patient and the provision of the service. The second type occurs when a person maliciously causes damage to another without the existence of a contract and can occur due to inexperience, negligence, and imprudence.

Because of the above, the opinion of Ordoñez (2005) should be taken into account analyzes medical liability as to the obligation that these professionals and health personnel have to assume for the consequence of certain faults that may give rise to civil and criminal actions. In addition, such liability of the physician for his acts or omissions that may be guilty, for reasons of error, imprudence, carelessness, poor execution of operations, or others in which he participates as a physician. In the field of civil liability, it is manifested in the obligation to remedy the damage through compensation, which may be medical or monetary.

It should be noted that, in the practice of medicine, medical liability implies the obligation to cure and to respond before the courts for any damage caused by negligence, linked to a lack of technical knowledge. Also, imprudence saw by Bonnet (2009) as facing a certain risk without having taken precautions to prevent it and proceeding in haste without taking into account the inconveniences that may result from such action. As well as negligence, a matter incompatible with the duty that leads to non-observance of the principles of the profession.

Regarding malpractice, Lascariz (2015) considers malpractice that it is an inadequate treatment, which presents errors or is negligent whose result causes certain damage, unnecessary suffering, or the death of the patient due to ignorance, negligence, lack of skill, or non-compliance with the rules. Currently, according to this author, a medical practice is considered correct if it is medically proven, therefore, it must comply with the requirement of the *lex artis* and the patient must have been informed according to the legislation in force. However, in a professional liability claim, it is not only the result that must be evaluated but also each of the steps taken in medical practice.

In that order, the *lex artis* is for Molina (2008) a standard of normality of the medical professional's conduct in liability, it is, therefore, the criterion for determining the criminal infringement of objectively due care and is a necessary element for assessing tort liability, it also contains the rules and guidelines for the practice of medicine, they are medical and technical standards of mandatory compliance and reflect the physician's conduct. They are guidelines that govern the correct conduct of the physician before the patient, within a certain situation and clinical condition, following the latest advances in medicine.

The foregoing leads to the fact that, when a person or a health professional incurs liability, particularly medical liability, full reparation is required as an elementary principle within civil law. Rousset (2011) considers that reparation constitutes a premise that the obligations of both respect and guarantees will be reestablished to erase or at least mitigate the damage caused and prevent its repetition. Botero (2017) argues that human dignity is the legal basis of liability since the person is the basic element of the right to damages and the latter constitutes a tool to repair the victim through restitutio *in integrum of the* harm suffered.

It should be stated that comprehensive reparation, as its name indicates, is comprehensive because it includes violations of constitutional rights such as the right to health. It seeks to remedy, as far as possible, the actual results caused by the violation of a right. Article 18 of the Constitution (2008) provides that it encompasses damages, both material and immaterial, and its objective is to restore the person to the state before the violation. Reparation includes restitution of the right; compensation, whether pecuniary or economic; rehabilitation as well as satisfaction and guarantees of non-repetition. It also includes the obligation for the fact to be investigated and punished, measures of recognition, apologies in the public sphere, and the provision of public services and health care.

Along these lines, the aforementioned constitutional precept provides that the material damage is repaired through compensation for the loss or impairment of the victims' income, the expenses incurred, and any other pecuniary consequence related to the events that occurred.

On the other hand, the reparation of non-pecuniary damage includes compensation, through the payment of an amount of money or the delivery of quantifiable goods or services due to the suffering and affliction of the affected and their relatives, the affectation of very relevant values for the individuals as well as the alterations, of a non-pecuniary type, that affect the form of existence of the person who suffered the affectation and his family context. The reparation must be made according to the violation, the circumstances that took place in the case, the results of the facts, and the impairment to the life project, this issue is affected, in many cases, because of the performance in the medical field.

For this reason, within the principle of integral reparation, the role of the jurisdictional organs is highlighted, considering that in the judicial disposition issued or in the reparation agreement the obligations to be fulfilled by the person responsible for the damage must be clear and ensure that the decision is executed so that the integral reparation materializes.

According to Domínguez (2010), the principle of integral reparation means that the measure of reparation must be proportional to the damage caused. Therefore, only the damage is subject to compensation as part of the civil liability. To this end, the principle of full reparation includes the evaluation of the damage. The victim must be compensated for what he has suffered.

It should be noted that the principle of full reparation is a good attempt to protect the affected party. However, it is complex in the face of damages suffered by assets that are impossible to value, this can happen because they are suitable for legal treatment and cannot be replaced because they are damages whose nature does not admit an objective evaluation. An example of this is those caused to personal, corporal, and moral goods, which do not have an approximate value and therefore cannot be compensated in their totality, so that the compensation cannot be valued mathematically, therefore, its reparation is far from the intended integrality.

1. METODOLOGÍCAL GUIDELINES AND THOUGHTS

To develop the research, a qualitative study is applied, which according to Hernandez, Fernandez and Baptista (2006) is based on logic and links several fields and specialties such as medical, civil, and constitutional. The research of this approach is characterized by its richness, it is deep and the information that is used is of high quality. It goes from the general to the particular, taking into account that it compiles doctrinal and legal criteria on integral reparation and its problems in the medical context.

The qualitative study allows to understand the dimension of the phenomenon, the interpretation and understanding in the practical order For Croda and Abad (2016) at the legal level, this kind of methodology, consolidates the results because it allows contrasting doctrine, regulations, and jurisprudence. This generates an opinion, interpretation, and perception about study.

On the other hand, the research is descriptive and analytical, because it studies the peculiarities of the phenomenon, specifically issues such as damage, medical liability, and integral reparation from their definitions, to know them and arrive at conclusions that contribute to the legal field. For Hernández, Fernández, and Baptista (2006) the methodology from a descriptive approach specifies definitions and particularities of the subject of study.

The bibliographic-documentary technique is also used in the research, since for the development of the topic, doctrinal foundations found in books, journal articles, research, and essays, among others, were used. These contributed to the theoretical support and deepened the topic of study.

Likewise, the analytical-synthetic method was applied, which as Pastrana (2006) explains allows disintegrating the object of study into its main parts and revising it from the essential to reviewing it integrally. The result is the generation of new knowledge on the subject studied. From this method, the phenomenon is studied exhaustively and complemented with the synthetic activity, in such a way that both actions: analysis, and synthesis determine causes, to find the explanation and arrive at conclusions.

The inductive method is another of those applied in the research, through which integral reparation and its problems in the field of the physician's liability are reviewed, which made it possible to define particularities and legal regulation, reason, and reach conclusions. On the legal level, according to De la Puente (2005), the criteria of the doctrine, the legislator, and the norms are considered, which generates the inductive type of process from the criterion that the legal norm is not independent, it is part of the legal system.

On the other hand, the legal exegetical method was used, through which the norms are exhaustively reviewed utilizing a detailed, literal examination of each article, applicable to the subject among them, the constitutional norm. De Bartolomé

(2014) leads to casuist, which makes it possible to consider the cases that may arise in a certain area of law.

In this line, to link the theory exposed in the introduction with practice, a case study is carried out, which according to Martínez (2016) constitutes a fundamental strategy of scientific research because it places the study in unique situations and which different methods are combined to collect and reason the information in a way that allows describing and verifying the doctrine. This gives objectivity, validity, and effectiveness to the results. To review the research topic, Case 0158-2014 will be reviewed, which resulted in Ruling No. 0103-2015 of Temporary Chamber of Civil and Commercial of the National Court of Justice concerning medical liability and integral reparation.

2. LINKS BETWEEN THE PRINCIPLE OF FULL REPARATION AND MEDICAL LIABILITY

To link the doctrinal review conducted about the principle of full reparation and medical liability, it is essential to study Case 0158-2014, which led to the issuance of Ruling No. 0103-2015 of the Temporary Civil and Commercial Chamber of the National Court of Justice of Ecuador (2015), which brings to light the variables studied.

We must begin by stating the background of the case. The case goes back to an ordinary lawsuit for moral damages against Dr. A in which an appeal was filed to challenge the decision of the Second Civil, Commercial, Tenancy, and Residual Matters Chamber of the Provincial Court of Justice of Guayas, which accepted the appeal and revoked the judgment in the lower court and dismissed the lawsuit.

The facts are supported as stated in the judgment. The plaintiff intends to demonstrate that Doctor A, generated *down* syndrome and the death of her son, and for this reason, the doctor must be held responsible for the moral damage caused by not detecting that the baby, since gestation, suffered from the said syndrome, as well as for hiding the fact that he had a cytomegalovirus infection. This matter is since the treating physician failed to comply with his duty to adequately inform the patient of his illnesses or conditions. The plaintiff's claim is for an indemnity in the amount of one million United States Dollars for moral damages.

The Chamber (2015) analyzed that the legal bond between the physician and the patient must adhere to the regulations to ensure the rights of the parties, under a relationship, in this case, contractual, which obliges the physician to provide his services and in which information and consent must prevail, together with the skill, knowledge, and ability of the physician. Likewise, medical liability is based on the *lex artis,* which entails compliance with the duties and obligations that govern the actions of the physician, among which are: to provide dignified care, without discrimination, under reliability, to comply with the patient's right to information and to make his own decisions.

It is stated in the sentence that the patient must be informed of his diagnosis, treatment, and prognosis. In the event of not communicating his medical situation directly, a person representing him must be informed so that he can give his informed consent to undergo a procedure or treatment, except in the case of emergencies.

On the other hand, it was reasoned by the judge. The judge reasoned that malpractice is manifested when there is deliberate negligence and ignorance, which did not occur in this case, since the death of the child did not occur, nor *down* syndrome or by cytomegalovirus. In addition, the detection of these diseases can be prenatal, however, the tests only reflect probability and not an accurate diagnosis, therefore this situation is not attributable to the physician.

Likewise, the Chamber (2015) analyzed the contractual liability of the physician, which must meet the following requirements: the existence of a valid contract between the parties; that this link leads to an obligation; that the obligated party does not comply with the obligation in a fraudulent or culpable manner; that, in turn, the claimant is not in default with its obligations and that as a result of the breach, real damage has been caused. In this case, the player considers that there is a valid contractual link between doctor and patient that generates between them the obligation to inform and grant freedom to the person being treated to choose the treatment. Therefore, the fact of not informing the patient of her condition perfects a culpable omission.

The damage caused, according to the judgment was caused to the mother, not to the deceased child. The mother suffered emotional damage caused by suffering and moral damage, both caused by the lack of information. The Court (2015) considered it proven that the doctor knew that the fetus suffered from cytomegalovirus. However, he did not inform the patient and mother of the child, therefore, there is a contractual liability, as he breached the duty of information, which prevented the child's mother from obtaining new treatments or preparing for the possible consequences of the disease when her child was born. Moreover, it is stated that "the transgression of the doctor's duty to inform the patient about the disease is the cause of her suffering when she found out about the problem months later when she could no longer do anything about it" (Court, 2015, p. 8).

Also, the Court's judge (2015) affirms that the non-observance of a contract between doctor and patient produces moral damages and that it must be quantified given the affectation of the mother due to the suffered sufferings. He adds that, concerning the relationship between the baby and the doctor, it can be assessed whether there is tort liability, a question that the mother may request, as she is entitled to represent the deceased child. However, this does not proceed, as there is no causal link between the act and the damage produced, since the child does not die from the syndrome, nor the aforementioned virus.

Finally, the fact imputable to the doctor in the court decision (Court, 2015). The fact that he did not inform the pregnant mother that she suffered from cytomegalovirus, a condition that could affect the fetus, and that the fetus had *Down* syndrome. The child died within a short time after birth, not from any of these causes, but pulmonary failure. In summary, the doctor did not harm the child, but there is a medical liability for lack of information to the mother and patient.

It is stated in the sentence concerning the amount of compensation, that the economic capacity of the doctor was not demonstrated and that unrealistic amounts cannot be requested for this concept. Therefore, making use of the judge's power to determine the value of the compensation, under article 2232 of the Civil Code (2005), it is not appropriate to sentence the doctor to pay the sum of one million dollars, requested by the plaintiff, but to an amount that responds to her economic situation. However, the economic situation of the affected party was considered, for whom it is difficult for any economic amount to compensate for her loss. The Chamber (2015) decided to accept the claim and ordered as part of the full reparation that the doctor must pay to the plaintiff, the amount of twenty-five thousand United States dollars as compensation for moral damages.

3. CASE STUDY AND CENTRAL IDEAS

The sentence under study brings to light how medical liability manifests itself, the consequence of which leads to full compensation for damages, whether material or moral. This matter is in line with the analysis of the doctrine made by authors such as Calabuig (2005) and Ordoñez (2005) who coincidentally state that liability entails the obligation to respond for the acts performed, specifically in the case seen above. From the medical point of view, the failure to inform the patient-generated damage, which as such produces the effect of full reparation.

Indisputably, in this case, the figure of the damage is present, which as Alessandri (2017) indicates generates damage to the person, in this case to himself and not to his material goods. In addition, the judges in their decision recognize moral damage, an issue that is theoretically supported according to the criteria of De Cupis (2015) and Barros (2013). Here, an immaterial good of human beings is injured through affliction, suffering, depression; in short, emotionally, causing an affectation to the rights of personality. Consequently, these are compensable, which is the reason why full reparation is appropriate in this case.

On the other hand, the requirements of this figure identified by De Cupis (2015) are present in the harm caused to the victim and which are manifested in the existence of a responsible party, in this case, the physician. As well as the presence of an action or omission, in the case study, the doctor did not duly inform the patient about the health situation, so there is an omission of his duties and obligations, which produced the damage. The plaintiff has also been identified as a victim and legally there is a legal rule that requires the obligation to make reparations, in this case, the Ecuadorian Constitution (2008) in Article 18 and the Civil Code in Article 2214, which supports the application in the case, the integral reparation.

The applies to the medical field as seen in the case study and consequently as analyzed by Thompson (2011), Lascariz (2015), and Molina (2008) referring to the *lex artis* that was breached and caused the damage generated in the medical context. Therefore, the damage caused in the performance of his professional *practice* must be repaired or compensated.

Given the above, the judicial case is an example of the need for compliance in the medical context with the duties and obligations foreseen for this activity in the practice of the profession and the doctor-patient relationship.

Likewise, the case, exposes in the practical order, the requirements that medical liability must meet to be perfected, both in the contractual and extra-contractual order from the doctrinal criteria of Calabuig (2005) and Molina (2008).

The judicial process studied also brings to light the importance of integral reparation, which from the analyses of Rousset (2011) and Botero (2017) is a premise that allows the reestablishment of obligations. In this way, the damage caused is mitigated and, in turn, avoids its repetition. These issues have a direct bearing on the respect for the person as a legal element of liability since it is precisely the human being, in this case, the plaintiff, who is the central element of the right to damages and consequently is the holder of restitutio *in integrum*.

Similarly, the full reparation ordered by the judges in the case is proportional to the breach of the duty to inform that the physician must observe his actions. This operates in line with the doctrinal postulates of Domínguez (2010) based on the fact that the reparation must correspond to the damage caused. The ruling outlined in the judgment under study determined the obligation to be fulfilled by the person responsible for the damage as a way of making full reparation effective.

CONCLUSIONS

The conclusions drawn from the study are that the damage is the essential basis of medical civil liability and produces as consequences the integral reparation that can be manifested through indemnification, restitution of a right, compensation, rehabilitation, as well as satisfaction and guarantees of non-repetition, provision of public services and health care.

The principle of integral reparation is an essential tool within a Constitutional State of Rights such as the Ecuadorian one because it intends to place the person in the state before the violation of a right, a matter that in the medical field is often impossible due to the good that is affected, which is the life, integrity, and health of the person, however, it is a way to satisfy the affected person directly or his relatives.

It was demonstrated through case studies that medical liability is comprehensive and must comply with certain requirements to be perfected, both in the contractual and extra-contractual order. This requires the physician to act by the law to adequately protect the rights to life, personal integrity, and health that may be affected by the non-observance of duties and obligations in the medical context. Likewise, there is concordance between the decision adopted by the jurisdictional body with the doctrine studied, regarding the damage, the civil liability of the physician, and the figure of full reparation.

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Public budget and fiscal impact of convictions against the state

Presupuesto público e impacto fiscal de las condenas contra el estado

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ABSTRACT: The administration of justice has the essential task of ensuring the proper functioning of the State, and its role is fundamental to its maintenance, permanence, and credibility. This has a direct impact on the consolidation of its development, mainly through efficient markets. Furthermore, this article explores some preliminary legal-economic considerations when studying the interactions between the public budget, fiscal impact, and convictions against the State.

KEYWORDS: public budget, fiscal impact, state management, public policy, Law and Economics.

RESUMEN: La administración de justicia tiene la tarea esencial de garantizar el buen funcionamiento del Estado, y su papel es fundamental para su mantenimiento, permanencia y credibilidad. Esto tiene un impacto directo en la consolidación de su desarrollo, principalmente a través de mercados eficientes. Además, este artículo explora algunas consideraciones jurídico-económicas preliminares al estudiar

las interacciones entre el presupuesto público, el impacto fiscal y las condenas contra el Estado.

PALABRAS CLAVE: presupuesto público, impacto fiscal, gestión del Estado, política pública, derecho y economía.

JEL CODE: G31, G38.

INTRODUCTION

It is evident that the administration of justice has the essential task of ensuring the proper functioning of the State, and its role is fundamental in its maintenance, permanence, and credibility, which, of course, has a direct impact on the consolidation of its development, mainly through efficient markets (Yamada, 1997); and precisely for this reason, this activity can and should be studied as a market, within which the plaintiffs or consumers are all those who seek the protection of a right under the legitimacy of the State through the delivery of the dispute to a third party who must be impartial and settle it following the legal provisions in force, and the providers are the judges, who are part of the structure of the State as a basic pillar for its functioning as they are responsible for safeguarding the legal order and protecting the rights of citizens with their binding, executive and enforceable power. Of course, then, it becomes necessary that this market of the administration of justice has a direct and vital impact on the economic organization of a State.

As the failure to protect and guarantee the rights legally and constitutionally enshrined as part of the legal system, as well as the rules themselves, have an economically devastating effect, it is clear that if the judicial system does not work or does so incorrectly, and the judges do not enforce the Constitution, laws, regulations, administrative acts and contracts as required, uncertainty and anarchy will be generated, preventing the State and society from flourishing, Therefore, its role in the attribution of responsibility to all agents and the respect for the allocation of property and markets, as well as in the protection of the most fundamental aspects of people, all as an essential and fundamental part of the economy of a country, is indispensable. It is clear, then, that without the real and efficient protection of human and property rights under the provisions of the legal system, and a sufficiently comprehensive legal framework, no equitable development will be possible. Thus, this introductory article presents some preliminary legal-economic considerations to be considered by social planners, academia, and civil society.

1. JUDGES, JUDICIAL DECISIONS, AND STATE ACTION

In this order of ideas, it becomes evident that within the agents covered by the decision of the judges is the State itself, in all its orders and levels, as a subject responsible for its actions and omissions that must repair the ant juridical damages caused to all persons, natural and legal, in a comprehensive manner, but, above all, timely, and only up to the limit of the damages that have been caused, or at least demonstrated by the victims, since it is so enshrined in Article 90 of our Political Charter; but for this it must be borne in mind that all state action involves the use of monetary resources, so that this issue, for state entities as entities condemned to give, do or not do something, is subsumed in the rules and principles of public spending, whose one of its main pillars is the efficient distribution of resources, which by default are scarce, in order to better meet and prioritize the needs generated by the objectives derived from the constitutional and legal functions of the State, all of them framed in the development of the Social State of Law model, that is, the search for the satisfaction of minimum needs of citizens in conditions of equality, freedom and security, and in favor of the general interest.

2. INTERACTIONS BETWEEN ANTIJURIDICAL DAMAGE AND THE STATE'S BUDGET

The problem underlying this premise comprises two interdependent variants: the first one, that the concept of ant juridical damage, that is, that which the victim is not obliged to bear, implies that not only the tortfeasor, which is the State in this context, is obliged to carry out actions or refrain from conduct, under the classic conception of tort law in which reparation *in natura* must be sought, and in its absence the pecuniary subrogation; and the second, that under the scheme of judicial orders that frame the recognition and protection of rights in specific situations, and which of course also oblige the development of concrete material actions by the State, present and future, a budget for their development and materialization is inevitably required. Thus, between repairing damages caused by the common actions of the State and protecting rights by judicial order, a large part of the public resources, initially destined to materialize the projects that allow the development of the plans and programs of the governments within the framework of the Social State of Law, is not available for the achievement of the coverage of the basic needs of all the associates in conditions of equality, paradoxically because it is required to correct inequalities through the recognition of an individual or minority situations, especially if it is taken into account that under this model of State, material justice and solutions for concrete cases prevail over the importance of legal norms (Constitutional Court, 1992).

In turn, this mechanism has often led state entities to prefer to wait for a court order to give, do or refrain from doing, and based on such coercive mandate to start redirecting the budget for spending, even at the expense of duly planned projects whose execution was requested and authorized through the approval of resources for that purpose.

These situations have generated in our country, to date, a very critical problem in terms of both the delay in the compliance with the sentences condemning the State to material and monetary obligations. Also, as the defunding in general terms of the State expenses destined to investment and operation projected in the plans, programs, and projects devised by the governments to comply with the primary objectives of each one of the entities. It is a vicious circle, and it seems never-ending, because the correct application of the law to a specific case without consideration of the costs and time involved in macro terms and of the general interest, very relevant in the public sphere, constitutes, in the end, and inadequate management of resources that in turn harms development, because the degree of socially optimal certainty that the administration of justice must provide in all areas, including the state, should depend on the exchange between social cost and social value resulting in the best cost-benefit ratio, which means being the most efficient, so that, past a certain point, the marginal gain given by certainty is less than the costs involved in obtaining it, i.e., individual recognition may be irrelevant to the social benefit in terms of income redistribution as an essential objective for the reduction of real inequality.

Thus, we will study in this paper, first, the existing budgetary regulations in the Colombian legal system regarding compliance with court judgments, to determine whether this is sufficient to enforce in the present and avoid the future the delay in its materialization, now to analyze, secondly, the existing disincentives for the compliance of judicial decisions by the State caused in its agents based on the rules of property, responsibility, and inalienability, thirdly, propose based on them some measures optimize this behavior in relief of public finances and, finally, to draw some conclusions and recommendations.

3. CONSIDERATIONS ON CURRENT REGULATIONS

The first thing to remember is that the Code of Administrative Procedure and Administrative Disputes establishes specific rules for the enforcement of court rulings that involve sentences to state entities that are not found in the General Code of Procedure, which leads to a major drawback, since by mandate of Article 105 of the CPACA some matters and state entities are excluded from the scope of the jurisdiction of administrative disputes, and therefore these provisions do not apply to them.

In effect, the first thing that should be noted is that article 192 of the CPACA expressly establishes, for the enforcement of judgments or conciliations (which, it is recalled, require judicial approval) , that "When the judgment imposes a sentence that does not involve the payment or return of a liquid amount of money, the authority responsible for its execution within a term of thirty (30) days from its communication, shall adopt the necessary measures for its compliance", that "The sentences imposed on public entities consisting in the payment or return of a sum of money shall be complied with within a maximum term of ten (10) months, counted from the date of execution of the sentence", that "The liquid amounts recognized in orders imposing or settling a sentence or approving a conciliation shall accrue moratory interest as from the date of execution of the respective sentence or order", that "Three (3) months after the execution of the order imposing or settling a sentence or approving a conciliation, without the beneficiaries having gone to the responsible entity to enforce it, In labor matters, when the reinstatement is ordered, if within three (3) months following the execution of the ruling so ordering, the reinstatement cannot be carried out due to causes attributable to the interested party, from then on the accrual of all kinds of emoluments shall cease".

Thus, the rules set forth herein establish a difference between the enforcement of monetary and non-monetary obligations, but it must be remembered that the latter may also involve expenses, although the creditor will not receive a monetary amount.

CONCLUSIONS

Whenever a society chooses an initial allocation of rights, it must also determine whether to protect them by rules of ownership, liability, or inalienability. In our context, much of what we commonly call private property can be seen as a right that is protected by a property rule. No one can appropriate a private property right unless the owner voluntarily sells it at the price at which he values that property. However, a *nuisance* activity, from which sufficient public utility is derived so as not to be prohibited, involves, in practice, the power to take property with due compensation. Under such a circumstance, the property right is only protected by what we call the liability rule: an external and objective parameter of value is used to facilitate the transfer of the right from its holder to those who carry out the nuisance activity. Finally, in some instances we will not allow the sale of the property at all, i.e., sometimes we will make the right inalienable.

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Come si potrebbe migliorare la procedura di approvvigionamento dei farmaci per garantire farmaci di buona qualità, al momento giusto, nelle quantità richieste e ad un costo vantaggioso? Il caso ecuadoriano

¿Cómo podría mejorarse el procedimiento de adquisición de medicamentos para garantizar medicamentos de buena calidad, en el momento adecuado, en las cantidades requeridas ya un costo ventajoso? El caso ecuatoriano

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ABSTRACT: Il processo di approvvigionamento pubblico è utilizzato dai Paesi, soprattutto da quelli in via di sviluppo, per ottenere farmaci di buona qualità, in tempo, a un prezzo accessibile e nelle quantità necessarie a beneficio della popolazione. In questo modo, gli Stati salvaguardano il diritto alla salute delle loro popolazioni. Sfortunatamente, gli appalti pubblici sono soggetti a cattiva gestione e corruzione, che portano all'inflazione dei prezzi, alla distribuzione di farmaci di scarsa qualità, alla carenza e allo spreco, con conseguenze finali sui poveri e sui vulnerabili. Per questo motivo, il presente documento analizzerà come trasformare un sistema di approvvigionamento pubblico inefficiente in uno che risponda efficacemente alle esigenze della popolazione e non violi il diritto alla salute dei cittadini. L'analisi si baserà sul caso ecuadoriano, caratterizzato da gravi difetti. A tal fine, il presente documento esaminerà la letteratura esistente sui fattori che influenzano l'efficienza degli appalti pubblici e le caratteristiche di un sistema di appalti pubblici efficiente per stabilire come i nostri sistemi di appalti pubblici possano essere migliorati per garantire un accesso tempestivo e conveniente ai farmaci in modo efficiente.

PAROLE CHIAVE: farmaci, salute, acquisizioni, costi.

RESUMEN: El proceso de negociación pública es utilizado por los países, especialmente los países en desarrollo, para obtener medicamentos de buena calidad, rápidamente, a precios razonables y en las cantidades requeridas para el beneficio de la población. De esta manera, los estados salvaguardan el derecho a la salud de la población. Desafortunadamente, la negociación pública está sujeta a la mala gestión y la corrupción, lo que conduce al aumento de los precios, la distribución de medicamentos de mala calidad, la escasez y la desesperación, que en última instancia afectan a los pobres y vulnerables. Por ello, el presente trabajo analiza cómo un sistema de negociación pública ineficiente puede convertirse en uno que satisfaga efectivamente las necesidades de la población y no vulnere el derecho a la salud de las personas. El análisis se basa en el caso ecuatoriano, caracterizado por graves defectos. Por esta razón, este documento examina la literatura existente sobre los factores que afectan la negociación pública eficiente y las características de un sistema de negociación pública eficiente para determinar cómo mejorar nuestros sistemas de negociación pública para garantizar el acceso inmediato y asequible a los medicamentos.

PALABRAS CLAVE: medicamentos, salud, adquisiciones, costo.

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INTRODUZIONE

Nelle regioni dell'Africa, dell'Europa e del Pacifico, le amministrazioni hanno pagato in media tra il 34% e il 44% in più del necessario per i farmaci destinati alle loro popolazioni (Cameron et al., 2009). Ciò è dovuto al fatto che gli acquisti pubblici di farmaci sono soggetti a cattiva gestione e corruzione e hanno contribuito all'esaurimento delle scorte, agli sprechi, alla scarsa qualità e all'inflazione dei prezzi, causando iniquità nella fornitura di farmaci essenziali, aumenti dei prezzi, pagamenti "non ufficiali" e pagamenti out-of-pocket, che escludono la popolazione povera e vulnerabile. Queste carenze devono essere considerate un notevole fallimento del sistema sanitario pubblico e una chiara violazione del diritto alla salute della popolazione.

Fortunatamente, ottenere risparmi significativi introducendo migliori strumenti per gli appalti pubblici è possibile e particolarmente rilevante nel settore sanitario. Può migliorare in modo sostanziale l'accessibilità e la convenienza dei prodotti sanitari, con un sistema di erogazione dell'assistenza sanitaria efficace dal punto di vista dei costi. Purtroppo, secondo la Banca Mondiale, questo settore è uno dei più corrotti al mondo, quindi, come si vedrà, l'attuazione di una misura efficace dipende principalmente dalla volontà politica di un governo.

Per capire come migliorare i sistemi di appalti pubblici, questo saggio si baserà sul caso dell'Ecuador, viste le carenze del suo attuale sistema sanitario e di appalti pubblici. Per farlo, definirà la relazione tra il diritto alla salute e gli appalti pubblici e la loro rilevanza. Analizzerà poi quali fattori dovrebbero essere presi in considerazione per evitare sprechi, esaurimento, scarsa qualità e inflazione dei prezzi. Infine, in base alla letteratura corrente, descriverà le caratteristiche critiche di un sistema di appalti pubblici efficiente per offrire raccomandazioni generali ai sistemi di appalti pubblici, soprattutto a quelli danneggiati dalla corruzione e dalla mancanza di volontà politica.

1. DIRITTO ALLA SALUTE E APPALTI PUBBLICI

Il diritto alla salute è emerso come diritto sociale nella Costituzione dell'Organizzazione Mondiale della Sanità (OMS) nel 1946. Poi, nel 1948, la Dichiarazione universale dei diritti dell'uomo (1948) ha stabilito che "ogni individuo ha diritto a un tenore di vita adeguato alla salute e al benessere proprio e della sua famiglia, che comprenda l'alimentazione, il vestiario, l'abitazione, le cure mediche e i servizi sociali necessari" (n. p.). Nel 1966, il Patto internazionale sui diritti economici, sociali e culturali (CESCR) (2000), vincolante, ha dettagliato la progressiva realizzazione del diritto alla salute attraverso quattro fasi concrete, tra cui l'accesso a strutture, beni e servizi sanitari. Nel 2000, l'autorevole Commento Generale 14 applica l'accessibilità, la disponibilità, l'appropriatezza e la qualità garantita a beni e servizi, compresi i farmaci essenziali. A partire dall'Obiettivo strategico 11 del Piano strategico a medio termine dell'OMS per il periodo 2008-2013 (2008), l'accesso ai prodotti sanitari essenziali è diventato un indicatore del rispetto del diritto alla salute:

> Un fattore di successo cruciale per l'applicazione legale dell'accesso ai farmaci essenziali è l'incorporazione dei principi del diritto alla salute nelle costituzioni nazionali. In uno studio, in 11 dei 12 Paesi a medio reddito in cui si sono svolte con successo cause giudiziarie a sostegno dell'accesso, esisteva un linguaggio costituzionale di supporto e, nel dodicesimo Paese, i trattati internazionali ratificati dallo Stato acquisiscono lo status di legge

> nazionale. Il riconoscimento costituzionale del diritto di accesso ai prodotti e alle tecnologie mediche è diventato un indicatore di progresso nazionale nel Piano strategico a medio termine dell'OMS per il 2008-2013. (n. p.)

Il riconoscimento costituzionale del diritto di accesso ai farmaci essenziali è un segnale essenziale dei valori e dell'impegno nazionale. Questo dà luogo allo sviluppo e all'attuazione di una regolamentazione più mirata. Ad esempio, gli Stati potrebbero creare imprese solide e competitive attraverso le leggi sulla concorrenza per promuovere la tecnologia e l'innovazione nel settore farmaceutico (i); sviluppare e far rispettare i quadri normativi volti a garantire la sicurezza, l'efficacia e la qualità dei farmaci (ii); promuovere regole e processi trasparenti e competitivi per rendere i farmaci più accessibili e convenienti (iii); stabilire una regolamentazione dei tetti di prezzo (iv); introdurre sistemi efficaci di appalti pubblici (v); e così via, tra molte altre strategie. Pertanto, se sviluppate e implementate correttamente, le normative sono uno strumento potente che può essere utilizzato per garantire l'accesso ai farmaci.

Per quanto riguarda l'approvvigionamento pubblico, si riferisce al "processo di acquisto di forniture direttamente da fornitori pubblici o privati nazionali o multinazionali; acquisto attraverso agenzie e meccanismi di approvvigionamento globali o sistemi di approvvigionamento regionali; o acquisto da agenti di approvvigionamento internazionali" (Management Science for Health Inc., 2012, n. p.). Lo scopo principale dei sistemi di approvvigionamento dei farmaci è ottenere prodotti sanitari di buona qualità (i), al momento giusto (ii), nelle quantità richieste (iii) e a un costo favorevole (iv). Per questo motivo, si dice che il sistema di approvvigionamento sia un determinante significativo della disponibilità di farmaci e dei costi totali.

Attraverso gli acquisti pubblici, i Paesi soddisfano i bisogni di salute della popolazione, soprattutto i Paesi in via di sviluppo, la cui capacità di produzione locale di tecnologie mediche è bassa o nulla (OMS et al., 2013). Ad esempio, gli acquisti rappresentano circa il 50% della spesa totale dei governi nei Paesi a basso e medio reddito (Banca Mondiale, et al.), mentre nei Paesi ad alto reddito la percentuale si avvicina al 30% (OCSE, 2016). Per avere una prospettiva più ampia, è essenziale considerare che

> Il 23% della spesa sanitaria pubblica globale è destinato ai farmaci, il che suggerisce una spesa di circa 1.66 trilioni di dollari, con i Paesi a basso e medio reddito che spendono una percentuale più significativa dei loro bilanci rispetto alle controparti ad alto reddito (Belmonte e Gavilanes, 2008, n. p.).

Purtroppo:

> Una ricerca dell'Organizzazione Mondiale della Sanità (OMS) suggerisce che il settore sanitario spende trilioni di dollari ogni anno per ottenere *scarsi benefici*. In un'importante revisione del finanziamento dell'assistenza sanitaria, l'OMS ha rilevato che "*secondo una stima prudente, il 20-40% della spesa totale viene consumato in modi che non migliorano la salute delle persone*". L'OMS indica dieci cause principali di inefficienza, e cinque sono, in tutto o in parte, problemi di approvvigionamento. Queste includono il pagamento di prezzi più alti del necessario per i farmaci (i), l'uso di farmaci inferiori agli standard e contraffatti (ii), l'uso eccessivo o la fornitura di attrezzature che possono essere indotte dai fornitori (iii), l'inadeguatezza delle infrastrutture dei servizi sanitari (iv), la corruzione e

gli sprechi (v). (Belmonte e Gavilanes, 2008, n. p.)

Quanto detto porta alla luce l'esistenza di significative fonti di inefficienza nei sistemi sanitari mondiali e che un approvvigionamento efficace è la chiave di volta per fornire un'assistenza sanitaria efficace. Quali sono i fattori da tenere in considerazione per creare un sistema di approvvigionamento pubblico efficiente, che garantisca l'accesso a farmaci di qualità ragionevole e a prezzi accessibili nei tempi previsti?

2. FATTORI DA CONSIDERARE PER EVITARE SPRECHI, ESAURIMENTO, SCARSA QUALITÀ E INFLAZIONE DEI PREZZI DEI FARMACI

Per garantire farmaci di buona qualità, a costi favorevoli, nei tempi e nelle quantità richieste, il sistema di approvvigionamento pubblico deve eseguire un'analisi meticolosa dei costi delle procedure farmaceutiche - che comprendono diverse componenti - costi evidenti e altri che non lo sono (Management Science for Health Inc., 2012). Questi costi devono essere presi in considerazione per evitare di aumentare le pratiche di acquisto che, in ultima analisi, influiscono sui prezzi dei farmaci. In questo senso, il sistema degli acquisti pubblici ha bisogno di personale competente che, allo stesso tempo, si concentri sulla salvaguardia del diritto alla salute della popolazione.

2.1. Costi evidenti e nascosti

In primo luogo, il fattore principale da considerare è il costo totale di approvvigionamento, che ha quattro componenti: i prezzi di acquisizione dei farmaci, i costi di mantenimento delle scorte, i costi delle operazioni di acquisto e i costi di carenza (Management Science for Health Inc., 2012). Alcuni di questi costi sono facilmente visibili ai manager, come la spesa totale per l'acquisizione dei farmaci o gli stipendi del personale addetto all'approvvigionamento. Tuttavia, i costi associati alle carenze e alle scarse prestazioni dei fornitori non sono evidenti (Management Science for Health Inc., 2012). Ad esempio, i costi di gestione del sistema di acquisto e i costi aggiuntivi sostenuti in caso di carenza di scorte - i costi di carenza - possono aumentare il costo totale di acquisto del 50% o più dei costi di acquisizione (Management Science for Health Inc., 2012).

A questo proposito, le stime dei volumi di approvvigionamento sono necessarie per evitare l'esaurimento di alcuni farmaci e l'eccesso di scorte di altri nel caso di contratti a quantità garantita. Infatti, "i fornitori sono più propensi a competere per un contratto di fornitura a quantità stimata se credono che le quantità specificate siano ragionevolmente accurate... purtroppo, in molti Paesi, i dati sul consumo passato sono incompleti o non riflettono il reale fabbisogno" (Transparency International UK, 2017, n. p.). In Ecuador, ad esempio, i giornali hanno pubblicato numerose notizie sulle conseguenze di stime imprecise dei volumi di approvvigionamento:

- "I difensori civici ottengono misure cautelari a favore di 80 pazienti oncologici che non hanno ricevuto tempestivamente i loro farmaci" (Ombudsman ecuadoriano, 2018).

- "Una donna di 55 anni ha avuto un trapianto di midollo osseo con successo, ma le medicine che riceveva dall'Istituto di previdenza sociale ecuadoriano non erano state raccomandate dai suoi medici (Teleamazonas, 2018).

- "Carenza di farmaci negli ospedali dell'Istituto di

Sicurezza Sociale ecuadoriano -IESS-", dopo il trapianto di rene, una paziente deve assumere 14 pillole al giorno, ma poiché non riceve i dosses in tempo dalla Sicurezza Sociale, ha scelto di chiedere "prestiti" ad altri pazienti trapiantati, per non interrompere il trattamento (El Comercio, 2019).

- "Un paziente denuncia l'uso di materiale medico scaduto all'ospedale Teodoro Maldonado" (Teleamazonas, 2019).
- "Carenza di farmaci all'ospedale di Manta", la newsletter riferiva che l'ospedale era in attesa di una spedizione di dispositivi medici acquistati per 175.000 dollari e che i farmaci e le forniture mancanti erano già stati messi in gara per un importo di 318.000 dollari per i farmaci e 882.000 per le forniture. "Gli ordini di esami clinici dovevano essere pagati in laboratori privati", ha detto la madre (...) "Stiamo facendo una colletta per finanziare le spese mediche", ha aggiunto (El Diario, 2016).

Questa è la conseguenza delle scarse prestazioni del Servizio Nazionale per gli Appalti Pubblici -SERCOP-, responsabile di determinare il volume e i tempi degli appalti necessari.

In secondo luogo, i produttori e i distributori hanno molte considerazioni da fare sui prezzi dei farmaci e molti fattori fanno variare i prezzi da Paese a Paese. Uno di questi è il numero di prodotti farmaceutici diversi e di versioni generiche dello stesso prodotto presenti sul mercato (Management Science for Health Inc., 2012). In genere, i prezzi competitivi più bassi sono disponibili quando sono disponibili cinque o più alternative generiche per un determinato prodotto o quando, in una gara d'appalto, ci sono almeno cinque offerte per articolo - la "regola del cinque" nel settore farmaceutico - (OMS, 1999).

Ad esempio, l'Africa subsahariana deve affrontare sfide per aumentare l'accesso a farmaci di alta qualità e a prezzi accessibili per il trattamento delle persone affette da HIV/AIDS. Anche quando il trattamento antiretrovirale è disponibile, la sua efficacia è compromessa dalla mancanza di accesso a una fornitura costante e ininterrotta di farmaci antiretrovirali. Una possibile soluzione a questo problema sarebbe quella di aumentare la trasparenza sulla domanda futura; nell'approvvigionamento, suddividere gli ordini tra più fornitori in modo che gli attuali produttori di alta qualità rimangano sul mercato; pagare tempestivamente i farmaci quando vengono consegnati (o addirittura anticipare il pagamento) e alleggerire gli ostacoli normativi (OMS, 2014). I dati dimostrano che "*riformare la fornitura di questi beni ai governi potrebbe garantire che il 20%-40% della spesa sprecata, tra 1,4 e 2,8 trilioni di dollari, sia utilizzata in modo più produttivo*" (Transparency International UK, 2017).

2.2. Personale competente

L'impatto delle attività di approvvigionamento sul funzionamento e sull'efficacia dei servizi sanitari è un altro fattore da contemplare e che rappresenta, allo stesso tempo, dei costi nascosti al processo di approvvigionamento "Queste attività devono essere svolte da personale competente che utilizza procedure valide, che lavora in buoni uffici con buone comunicazioni e che ha accesso a informazioni affidabili sull'inventario e sui consumi. Una buona gestione degli acquisti richiede anche competenze mediche, farmaceutiche, manageriali, finanziarie e spesso politiche" (Management Science for Health Inc., 2012, n. p.). Alcuni esempi di costi associati a prestazioni scadenti da parte del fornitore o dell'ufficio acquisti sono:

- Aumento dei costi di acquisizione dovuti ad acquisti di emergenza, ad esempio quando un farmaco vitale viene ordinato troppo tardi, o l'utilizzo supera le stime, o il fornitore non riesce a consegnarlo in tempo.
- Costi di sostituzione quando la merce viene persa o deve essere scartata a causa di un imballaggio insufficiente, di condizioni di spedizione inadeguate, di un rapido deterioramento o di una breve durata di conservazione.
- Costi di sostituzione per spedizioni brevi, concentrazione errata di preparati liquidi, forme di dosaggio sbagliate e altro.
- Stoccaggio, spese portuali e amministrative dovute a procedure di sdoganamento inefficienti o alla mancanza di fondi o di documentazione adeguata.
- I costi sanitari ed economici delle scorte derivanti da ritardi o inadempienze nelle consegne. (Management Science for Health Inc., 2012, n. p.).

Il caso ecuadoriano mostra come le scarse prestazioni delle attività di approvvigionamento incidano sul funzionamento e sull'efficacia dei servizi sanitari. Dall'analisi delle informazioni riportate dal Servizio Nazionale di Approvvigionamento Pubblico dell'Ecuador -SERCOP-, è emerso che tra il 2009 e il 2016, oltre il 70% dei processi di acquisizione di dispositivi medici, forniture mediche, prodotti odontoiatrici, reagenti biochimici e per la diagnostica, sarebbe stato effettuato con fornitori che non disponevano della corrispondente autorizzazione operativa e dei certificati di buone pratiche di stoccaggio, distribuzione e trasporto (Ministero della Salute, 2018). Lo stesso è avvenuto con i produttori farmaceutici che, in assenza di controlli, hanno fornito farmaci di scarsa qualità. Diverse newsletter in Ecuador hanno pubblicato una serie di casi in cui pazienti e medici si lamentano della scarsa qualità dei farmaci. Un paziente che soffre di ipertensione polmonare ha dichiarato: “Il ministro è indolente”, affermando che l’acquisto e la somministrazione di farmaci a basso costo e di scarsa qualità “la stanno uccidendo lentamente” (Expreso, 2019, n. p.).

Le circostanze hanno costretto le associazioni mediche a unirsi contro il Ministro della Salute (Expreso, 2019). La rivista digitale di informazione sanitaria “Redacción médica” ha pubblicato l’articolo “I medici mettono in guardia dai farmaci di scarsa qualità”. L’articolo sottolinea che “almeno il 70% dei farmaci generici prescritti in Ecuador ha ottenuto la licenza commerciale senza studi di bioequivalenza”, ha commentato Santiago Carrasco, presidente del Consiglio d’onore dell’Associazione medica di Pichincha. Questa denuncia è stata presentata dal 2009 alle autorità sanitarie, che acquistano i farmaci senza questo tipo di studi. Tuttavia, i suggerimenti non sono stati ascoltati fino ad ora. Questo è un grave difetto.

Se è possibile ottenere prezzi più bassi e forniture ininterrotte grazie a un’analisi meticolosa dei costi evidenti e non evidenti, in collaborazione con personale competente, sono necessarie una buona governance e l’integrità negli appalti. Tuttavia, come si può ottenere questo risultato?

3. LE CARATTERISTICHE CRITICHE DI UN APPALTO PUBBLICO EFFICIENTE

Secondo una ricerca della Banca Mondiale, gli appalti pubblici sono tra i più corrotti al mondo a causa degli stretti legami con il governo e dei processi non standard, tra gli altri fattori (Kenny, 2007).

> La corruzione o la scarsa pianificazione negli appalti per le strutture sanitarie creano un'infrastruttura che non soddisfa le specifiche delle gare d'appalto, non è adatta allo scopo o non è accompagnata da finanziamenti per il personale e le attrezzature [...] Le vulnerabilità della corruzione negli appalti di farmaci, dispositivi medici e infrastrutture possono portare all'acquisto di articoli non necessari, inefficaci o costosi. (Transparency International UK, 2017, n. p.)

Per esempio, in Ecuador, finora durante la pandemia:

> Si stima che lo Stato abbia perso almeno 17 milioni di dollari a causa della gestione corrotta del settore sanitario. Tutto ciò è in accordo con il lavoro di Transparency International, che ha rilevato che il livello di corruzione dell'Ecuador è aumentato sostanzialmente negli ultimi sette anni, salendo di ventuno posizioni nella classifica internazionale dei Paesi più corrotti. L'Ecuador è ora al 93° posto su 198 Paesi nell'Indice di percezione della corruzione di Transparency International. Nel 2019, l'Ecuador ha ottenuto solo 38 punti su 100 (0 è il più corrotto e 100 il meno corrotto). L'Ecuador è diventato uno dei Paesi più corrotti dell'America Latina. Lo slogan del Presidente dell'Ecuador Moreno, "lotta alla corruzione", ha fallito clamorosamente. (Etica e affari internazionali, 2020, n. p.)

Sulla base di quanto detto sopra, il Modello di Legge UNCITRAL sugli appalti pubblici contiene procedure e principi volti a conseguire un buon rapporto qualità-prezzo e a evitare abusi nel processo di appalto, promuovendo l'obiettività, l'equità, la partecipazione e la concorrenza, nonché l'integrità verso questi obiettivi[1] . Il Modello considera che.

> La natura degli appalti comporta un processo decisionale discrezionale da parte del governo a tutti i livelli; la spesa per gli appalti può rappresentare il 10-20% del PIL e fino al 50% o anche più della spesa pubblica totale. La natura degli appalti comporta necessariamente un rischio di abuso. Le dimensioni del mercato dimostrano che le perdite potenziali potrebbero essere significative, ma gli appalti riguardano progetti importanti (sanità, istruzione, infrastrutture), che hanno un impatto significativo sui risultati economici e sullo sviluppo. Di conseguenza, il raggiungimento del rapporto qualità-prezzo negli appalti è fondamentale. In risposta a questi fattori critici, la Legge Modello consente allo Stato che la emana di sviluppare un sistema di appalti che consenta di ottenere un buon rapporto qualità-prezzo e di evitare abusi. (Legge modello UNCITRAL sugli appalti pubblici, 2011, n. p.)

In effetti, la Legge Modello considera la trasparenza un principio fondamentale. Quando i governi rendono accessibili le informazioni sugli appalti, gli stakeholder, il governo e l'intera popolazione ne traggono beneficio. La comprensione dei processi di approvvigionamento da parte degli stakeholder può essere migliorata e, grazie a ciò, aumentare l'integrità, l'equità e l'efficienza degli appalti pubblici (Transparency International UK, 2017), in altre parole, le imprese possono competere in modo leale per aggiudicarsi i contratti; il

1 La Legge Modello prende in considerazione anche quei Paesi che soffrono di una carenza di fondi pubblici per gli appalti, stabilendo che è quindi fondamentale che gli appalti vengano effettuati nel modo più vantaggioso possibile.

governo può migliorare la comprensione dei propri processi di approvvigionamento, correggere i mercati attraverso modifiche normative e punire gli attori corrotti attraverso l'applicazione della legge; e, soprattutto, la società civile può monitorare il processo per identificare le irregolarità e indagare sulla corruzione (Transparency International UK, 2017).

Sulla stessa linea di pensiero, l'Accordo plurilaterale sugli appalti pubblici dell'OMC -ACP-[2] fornisce un quadro internazionale di regole per promuovere l'efficienza e il buon governo negli appalti pubblici e richiede ai firmatari di creare un sistema di appalti pubblici trasparente e apertamente competitivo, con procedure e criteri di aggiudicazione chiari (WTO GPA, 1994).

> Pertanto, le agenzie di approvvigionamento sono tenute a pubblicare i bandi di gara in modo ragionevole e accessibile, affinché tutte le parti potenzialmente interessate possano conoscere e fare offerte. Essi devono indicare le specifiche tecniche, le procedure di qualificazione tecnica, le procedure di apertura delle offerte e i termini e le condizioni di aggiudicazione dei contratti. Devono inoltre indicare se la procedura di gara o il processo di ricorso successivo all'aggiudicazione sono eccezionali. Devono tenere un registro delle procedure, divulgare qualsiasi altra informazione che possa essere dovuta alle parti interessate e rendere pubblica l'aggiudicazione della gara d'appalto, compresi il nome e l'indirizzo dell'aggiudicatario e il valore

2 L'AAP è un accordo plurilaterale nell'ambito dell'OMC, il che significa che non tutti i membri dell'OMC sono parti dell'accordo. Attualmente, l'Accordo conta 20 parti che comprendono 48 membri dell'OMC. Altri 34 membri/osservatori dell'OMC partecipano al Comitato dell'AAP in qualità di osservatori. Di questi, nove membri sono in procinto di aderire all'Accordo. L'Ecuador partecipa al Comitato GPA in qualità di osservatore.

> dell'offerta vincente. Di conseguenza, l'AAP dell'OMC mira ad aprire gli appalti pubblici "alla concorrenza internazionale in condizioni di parità commerciale e senza preferenze nazionali". (Mosoti, 2004, n. p.)

Il suggerimento sulla trasparenza è sostenuto anche dalla Cooperazione e Sviluppo Economico (OCSE) nel 2013, un'organizzazione internazionale che lavora per costruire politiche migliori che favoriscano la prosperità, l'uguaglianza, le opportunità e il benessere. Insieme ai governi, ai responsabili politici e ai cittadini, stabilisce standard internazionali basati su dati concreti e trova soluzioni a una serie di sfide sociali, economiche e ambientali. Nel 2013, l'OCSE ha dimostrato che in Guatemala è stato possibile risparmiare il 43% del costo di acquisto dei farmaci grazie all'introduzione di procedure di appalto più trasparenti e competitive e all'eliminazione di qualsiasi capitolato d'appalto che favorisse una particolare gara (OCSE, 2017). In Nicaragua, una riduzione sostanziale del budget per la spesa farmaceutica è stata dovuta all'istituzione di un'agenzia di approvvigionamento trasparente accompagnata dall'effettiva implementazione di una lista di farmaci essenziali (OCSE, 2017).

Come si può notare, la trasparenza favorisce acquisti più economici, equi e diretti che, in ultima analisi, migliorano i risultati sanitari. Come raggiungere questo obiettivo? La trasparenza si può concretizzare garantendo il libero accesso alle informazioni relative ai processi di approvvigionamento. Ad esempio, consentendo alle parti interessate di accedere a tutte le norme e ai testi legislativi relativi agli appalti pubblici, nonché alla registrazione dei procedimenti in qualsiasi commissione, consiglio o agenzia per gli appalti; annunciando pubblicamente le aggiudicazioni di contratti pubblici e fornendo agli offerenti non selezionati la possibilità di contestare o richiedere un riesame della procedura e dell'esito dell'aggiudicazione di una gara d'appalto; e molte altre cose (Transparency International UK, 2017). Tuttavia, è indispensabile considerare che

> La divulgazione delle informazioni è significativa solo quando consente al settore privato di competere per gli affari e dà alla società civile la possibilità di monitorare e indagare. La trasparenza nell'open contracting si discosta sia da un approccio basato sui diritti, come la libertà di informazione, sia da un modello top-down di divulgazione proattiva dei dati, come i programmi di pubblicazione dei dati aperti. Nell'open contracting, la domanda degli utenti di dati è un principio di progettazione che organizza l'offerta di informazioni da parte del governo. L'identificazione e la consultazione degli stakeholder che desiderano accedere ai dati sugli appalti garantisce la loro partecipazione ed è il primo e più cruciale passo nel processo di open contracting. (Transparency International UK, 2017, n. p.)

Un esempio rilevante di come la partecipazione e la società civile possano cambiare le carte in tavola è il caso dell'Ucraina:

> Nel 2014, il governo ucraino ha speso oltre il 90% del suo budget sanitario per il trattamento di cancro, sindrome da immunodeficienza acquisita (AIDS) e tubercolosi (TBC). Il cancro è la seconda causa di morte in Ucraina. Meno di un terzo delle 220.000 persone affette da virus dell'immunodeficienza umana (HIV) riceve la terapia antiretrovirale (ART) e ogni anno si registrano circa 30.000 nuovi casi di tubercolosi, di cui uno su sei è fatale. Un numero crescente di pazienti affetti da HIV, più di uno su tre, contrae anche la

TBC, che spesso porta alla morte. Fino a poco tempo fa, l'acquisto dei farmaci per il trattamento di queste malattie era ostacolato da una corruzione endemica. I revisori governativi stimano che nel 2013 il Ministero della Salute abbia pagato in media il 40% in eccesso per i farmaci a causa di collusioni di cartello, monopoli, fissazione dei prezzi e altre strategie (...)

Nel 2014, le manifestazioni di massa, oggi note come Rivoluzione della dignità, hanno costretto il presidente corrotto dell'Ucraina a lasciare il Paese e hanno portato alla formazione di un nuovo governo. Tra la rabbia dell'opinione pubblica e gli sconvolgimenti politici, un gruppo di volontari ha intravisto l'opportunità di riformare il sistema degli appalti pubblici. Una serie di attori della società civile e delle imprese ha collaborato per progettare un sistema di appalti elettronici chiamato ProZorro. Ripristinando la fiducia del settore privato nei contratti pubblici, ProZorro ha aiutato più di 2.000 organizzazioni sanitarie a partecipare a gare d'appalto attraverso una competizione aperta ed equa, risparmiando il 15% dei loro bilanci. Si è poi sviluppata un'alleanza tra i volontari e i riformatori governativi di alto livello, che alla fine ha portato all'istituzione di ProZorro come sistema di approvvigionamento governativo obbligatorio nel 2016.

Un intervento dall'alto verso il basso ha integrato la riforma dal basso verso l'alto condotta da ProZorro presso il Ministero della Salute (MoH). Il nuovo governo, consapevole che l'amministrazione del MoH era sistematicamente corrotta, ha esternalizzato l'approvvigionamento farmaceutico a tre organizzazioni

> internazionali. Questa tranche di acquisti fa parte di un piano triennale del governo per eliminare la corruzione dal settore sanitario. Le organizzazioni internazionali hanno ottenuto risparmi tra il 10 e il 38% sugli acquisti consolidati di farmaci contro il cancro, l'HIV e la tubercolosi. (Transparency International, 2017, n. p.)

Il caso ucraino mostra come la partecipazione dei cittadini possa incentivare la volontà politica, essenziale per implementare un sistema di appalti pubblici efficiente. Con queste premesse, passiamo alle raccomandazioni generali che i governi, le organizzazioni civili, gli stakeholder e la stessa popolazione dovrebbero tenere in considerazione per capire cosa sta succedendo nei loro Paesi e cosa dovrebbero chiedere ai loro governi:

4. RACCOMANDAZIONI PER UN SISTEMA EFFICIENTE DI APPROVVIGIONAMENTO DEI FARMACI

La scelta della procedura di gara è il primo passo fondamentale nella lotta alla collusione e alla corruzione negli appalti pubblici. Una questione politica fondamentale è se utilizzare una procedura di gara aperta, più suscettibile di collusione in quanto crea opportunità di comunicazione tra gli offerenti, o una procedura a busta chiusa, più suscettibile di collusione. Essa crea opportunità di comunicazione tra gli offerenti, oppure una procedura a busta chiusa, che è più suscettibile di corruzione nella misura in cui c'è una mancanza di trasparenza nel processo. La procedura di appalto più appropriata dipende, in gran parte, dalle condizioni di mercato.

> Esistono numerose forme di gara che possono essere adottate nel contesto degli appalti, ma non tutti i modelli di gara sono all'altezza della concorrenza. Quando

> il mercato degli appalti ha un numero di imprese sufficiente a sostenere una ragionevole concorrenza, di solito si possono ottenere risultati efficienti attraverso una semplice procedura di gara (offerta sigillata o aperta). Quando non ci sono abbastanza imprese per sostenere la concorrenza, possono essere necessari accordi più sofisticati per ottenere un risultato efficiente. La scelta del modello di gara più adatto alle circostanze dell'appalto è, quindi, il punto di partenza di qualsiasi tentativo di prevenire la collusione negli appalti pubblici. (OCSE, 2011, n. p.)

Per comprendere meglio questo aspetto, torniamo al caso ecuadoriano. In Ecuador, le aste inverse aziendali e istituzionali devono essere effettuate per l'acquisto di farmaci (Regolamento della Legge Organica del Lavoro, 1943, art. 77).

> Un'asta inversa è un tipo di asta in cui i venditori fanno offerte per i prezzi che sono disposti a vendere i loro beni e servizi. In un'asta normale, il venditore mette in vendita un bene e gli acquirenti fanno offerte fino alla chiusura dell'asta, momento in cui il bene va al miglior offerente. In un'asta inversa, l'acquirente presenta una richiesta per un bene o un servizio richiesto. I venditori fanno quindi offerte per l'importo che sono disposti a pagare per il bene o il servizio e, alla fine dell'asta, il venditore con l'importo più basso vince. (Investopedia, 2021, n. p.)

Tuttavia, questo approccio è stato raramente utilizzato per gli acquisti farmaceutici - con la massima esperienza in America Latina - (Management Science for Health Inc., 2012), soprattutto perché i requisiti di garanzia della qualità farmaceutica e i fattori correlati possono limitare seriamente l'uso di questo modello.

> Potrebbe esserci una tendenza a concentrarsi sulle offerte più basse da parte dei venditori, con minore attenzione alla qualità dei beni o dei servizi. L'adagio "economico per un motivo" può essere applicato in questi casi in cui un acquirente soffre per la qualità non ottimale dell'insieme di beni o servizi al prezzo più basso acquistati tramite un'asta inversa. Infine, l'acquirente deve essere scrupoloso nel comunicare tutte le specifiche ai partecipanti all'asta, altrimenti potrebbe ritrovarsi con un'offerta vincente che non coglie tutti gli attributi ricercati. (Investopedia, 2021, n. p.)

Riguardo all'attuale processo di asta inversa dei farmaci, Santiago Carrasco (n. d.) (citato da Investopedia, 2021), presidente del Consiglio d'onore dell'Associazione Medica di Pichincha, ha indicato che, a suo parere, le offerte fatte non corrispondono alla realtà del mercato. "Ad esempio, non possiamo credere che un antipertensivo costi un centesimo o meno di un centesimo. Il buon senso ci avverte che questi farmaci non sono sicuri" (n. p.). Inoltre, il medico ha assicurato che l'Associazione Medica di Pichincha ha diversi rapporti di medici sull'efficacia di alcuni farmaci prescritti negli ospedali. "Le aree che hanno presentato maggiori problemi sono la Chirurgia e la Traumatologia. Tuttavia, i medici hanno paura di lamentarsi. Spesso a causa di possibili ritorsioni" (Carrasco, n. d.) (citato da Investopedia, 2021, n. p.), ha concluso. Quando il prezzo è l'unico criterio, come possono la qualità, la fiducia e i servizi a valore aggiunto far parte dell'equazione?

4.1. La trasparenza

Uno dei problemi principali degli appalti è la mancanza di trasparenza, che rende il processo soggetto a pratiche di corruzione. La trasparenza può essere raggiunta attraverso l'attuazione dei Patti di integrità, che rappresentano un impegno reciproco tra le parti contraenti pubbliche e commerciali ad astenersi dalla corruzione e a garantire la trasparenza durante una transazione di appalto (IPs). A svilupparlo è stata Transparency International -IT-, un'organizzazione non governativa tedesca fondata nel 1993 con sede a Berlino con lo scopo di agire per combattere la corruzione globale con misure anticorruzione della società civile e di prevenire le attività criminali derivanti dalla corruzione. TI promuove l'implementazione di questo modello insieme ad altre iniziative di open contracting e ad altri meccanismi di responsabilità sociale. Una terza parte indipendente potrebbe essere un monitor della società civile, a cui sarà concesso l'accesso ai documenti e alle procedure del processo di appalto per garantire che le parti rispettino i termini dell'IP (Transparency International, 2017). La metodologia più comune e di successo per il monitoraggio degli appalti da parte di terzi è l'approccio Red Flags. Il monitoraggio Red Flags utilizza algoritmi per analizzare i dati e misurare la trasparenza e altre variabili del processo di appalto, come il numero di offerenti, rispetto a una serie di norme. Quando la pratica viola una norma, il sistema genera una notifica di Red Flag, che segnala un rischio di corruzione. Le parti interessate, come le CSO o i giornalisti, utilizzano queste informazioni per condurre ulteriori indagini. L'OCP e Development Gateway, uno sviluppatore della piattaforma Red Flags, hanno pubblicato una guida sull'implementazione dei sistemi Red Flags (2021).

Questa struttura permette di rispettare le corrette procedure di appalto in ogni fase, riducendo il rischio di corruzione. Inoltre, a questo scopo può essere utilizzato un manuale di implementazione. Questo manuale enfatizza quattro componenti dei PI di successo:

i. la volontà politica di impiegarli,
ii. completa trasparenza in ogni fase,
iii. un monitoraggio indipendente dotato di risorse adeguate e
iv. stretta collaborazione e coinvolgimento della società civile. (Transparency International, 2014, n. p.)

Messico, Slovacchia e Honduras sono tra i Paesi in cui le PI sono state utilizzate con successo nel settore sanitario (Transparency International).

4.2. Implementazione dello standard per i dati della contrattazione aperta

L'Open Contracting Data Standard -OCDS- consente la divulgazione di dati e documenti in tutte le fasi del processo di contrattazione definendo un modello di dati standard. È stato creato per supportare le organizzazioni ad aumentare la trasparenza degli appalti e consentire un'analisi più approfondita dei dati sugli appalti da parte di un'ampia gamma di utenti (OCDS, 2019). L'OCDS[3] fornisce un punto di riferimento per la trasparenza durante l'intero ciclo dell'appalto e identifica i documenti e i dati che dovrebbero essere divulgati in cinque

3 Non tutti i processi di contrattazione prevedono tutte le fasi. Ad esempio, l'appalto diretto può iniziare con l'aggiudicazione di un contratto. Tuttavia, anche in questo caso ci saranno informazioni da divulgare su budget, specifiche e processo di selezione. I singoli sono incoraggiati a pubblicare i dati OCDS quasi in tempo reale: rilasciando i dati man mano che si svolge ogni fase di un processo di appalto. Ciò potrebbe comportare la generazione di output da una serie di sistemi diversi. I dati pubblicati da sistemi diversi possono essere collegati tra loro grazie all'uso di un ID Open Contracting standard.

fasi dell'appalto: pianificazione, gara, aggiudicazione, contratto e attuazione.

Otto governi stanno attualmente pubblicando queste procedure di divulgazione, tra cui Colombia, Messico, Paraguay, Moldavia, Ucraina, Regno Unito, Canada e Taiwan.

> In Canada, Paraguay e Ucraina, questi schemi di pubblicazione dell'OCDS includono la copertura del settore sanitario (...) L'entusiasmo dei governi per l'OCDS sta crescendo rapidamente in tutto il mondo. Più di dieci Paesi stanno attualmente implementando l'OCDS, mentre altri venticinque si sono impegnati in tal senso. (Transparency International UK, 2017, n. p.)

4.3. Qualificazione e monitoraggio formale dei fornitori

Tutti i fornitori devono essere qualificati attraverso un processo che tenga conto della qualità del prodotto, dell'affidabilità del servizio e dei tempi di consegna, nonché della solidità finanziaria.

> Il processo di valutazione dei nuovi fornitori può comprendere la registrazione formale, il controllo delle referenze presso i clienti precedenti e le agenzie internazionali, l'acquisto di prova di piccole quantità e la raccolta informale di informazioni a livello locale. Inoltre, i prodotti devono essere registrati da un'autorità di regolamentazione rigorosa o approvati dal sistema di prequalificazione dell'OMS.
>
> Indipendentemente dal modello di qualificazione dei fornitori utilizzato dal sistema sanitario, l'ufficio acquisti deve impegnarsi a fondo per garantire che gli acquisti provengano solo da fornitori noti per fornire

> prodotti di qualità. (Transparency International UK, 2017, n. p.)

4.4. Ordinare quantità basate su una stima affidabile del fabbisogno effettivo

Sono necessarie stime accurate dei volumi di approvvigionamento per evitare l'esaurimento di alcuni farmaci e l'eccesso di scorte di altri nel caso di contratti a quantità garantita. La lista dei farmaci può essere ridotta riducendo le duplicazioni terapeutiche (Transparency International UK, 2017).

> Il modo più affidabile per quantificare la domanda farmaceutica futura è partire da dati accurati sul consumo passato di tutte le unità fornite, supponendo che la pipeline di fornitura sia stata costantemente completa. Questi dati dovrebbero essere mitigati dai cambiamenti noti o attesi nei modelli di morbilità, nei fattori stagionali, nei livelli di servizio, nei cambiamenti del formulario o nei modelli di prescrizione e nella frequenza dei pazienti. Purtroppo, in molti Paesi i dati sul consumo passato sono incompleti o riflettono il reale fabbisogno perché la pipeline di approvvigionamento non è mai stata completa. In questi casi, per stimare la domanda di approvvigionamento possono essere necessarie le tecniche basate sulla morbilità e sul consumo aggiustato discusse nel Capitolo 20. (Transparency International, 2017, n. p.)

4.5. Appalti elettronici

La trasparenza degli appalti elettronici è fondamentale per la sua focalizzazione sul lato dell'offerta, poiché i governi non sempre pubblicano informazioni interessanti o accessibili agli stakeholder (Transparency International, 2014). Questo è il caso dell'Ecuador. Pertanto, tutte le informazioni relative all'acquisto di prodotti medici dovrebbero essere pubblicate su un sito web dedicato agli appalti pubblici, in modo che gli stakeholder possano accedere a tutte le informazioni relative al processo e al controllo degli appalti pubblici.

4.6. Appalti competitivi

La concorrenza tra i fornitori è fondamentale per ottenere prezzi favorevoli. Se i prodotti necessari hanno più fornitori, i programmi del settore pubblico dovrebbero ricorrere alle gare d'appalto per tutti gli acquisti, tranne che per quelli molto piccoli o di emergenza. Questo non sarebbe necessario quando si acquista attraverso un meccanismo di approvvigionamento comune regionale o globale, perché l'approvvigionamento globale o regionale gestirà la concorrenza (Transparency International, 2017).

> Uno studio del 2011, pubblicato dal National Bureau of Economic Research negli Stati Uniti (Danzon et al., 2011), ha esaminato le determinanti dei prezzi dei farmaci originator e generici in un numero significativo di Paesi. Lo studio si è concentrato principalmente sui farmaci per il trattamento dell'HIV/AIDS, della tubercolosi e della malaria nei Paesi a basso reddito. Lo studio ha analizzato l'effetto sui prezzi dei farmaci nei casi in cui i farmaci sono stati venduti attraverso il canale delle farmacie al dettaglio invece che nei casi in cui i farmaci sono stati acquistati con gare d'appalto come quelle (...9 Lo studio mostra che le gare d'appalto attraggono i fornitori di farmaci generici e riducono significativamente i prezzi degli originator e dei generici rispetto ai prezzi applicati nelle farmacie al dettaglio. In

> particolare, lo studio rileva che: "I dati relativi ai farmaci per l'HIV/AIDS, la tubercolosi e la malaria dimostrano che i meccanismi di approvvigionamento riducono i prezzi degli originator e dei generici rispettivamente del 42% e del 28% rispetto ai prezzi delle farmacie al dettaglio". (OMS et al., 2013, n. p.)

In questo senso, le autorità ecuadoriane dovrebbero prendere in considerazione altri metodi di approvvigionamento, come le gare d'appalto aperte, per i vantaggi illustrati in precedenza.

4.7. Partecipazione della società civile

Ricordiamo il caso ucraino: dopo che la Rivoluzione della Dignità ha costretto il corrotto Presidente ucraino a fuggire dal Paese, una serie di attori della società civile e delle imprese ha collaborato per progettare un sistema di appalti elettronici chiamato ProZorro. ProZorro ha aiutato più di 2.000 organizzazioni sanitarie a partecipare a gare d'appalto attraverso una competizione aperta ed equa, risparmiando il 15% dei loro bilanci. Le organizzazioni hanno ottenuto risparmi tra il 10 e il 38% sugli acquisti consolidati di farmaci contro il cancro, l'HIV e la tubercolosi (Transparency International, 2017).

4.8. Audit annuale con pubblicazione dei risultati

Come modo per controllare le prestazioni dello Stato.

4.9. Organizzazione e gestione delle funzioni di approvvigionamento e distribuzione

Per evitare spese dovute alla mancanza di conoscenza o esperienza del personale amministrativo coinvolto nel processo di approvvigionamento.

4.10. Pagamenti affidabili e gestione finanziaria adeguata

Un pagamento tempestivo e affidabile dei fornitori ha l'influenza più significativa sulla riduzione dei prezzi dei farmaci e sul loro mantenimento al livello più basso possibile, ma questo settore riceve spesso un'attenzione inadeguata. La possibilità di ordinare i farmaci quando necessario e di pagarli in tempo riduce sia i prezzi che le scorte (Transparency International UK, 2017).

CONCLUSIONI

Attraverso gli acquisti pubblici, i Paesi soddisfano i bisogni sanitari della popolazione, soprattutto quelli in via di sviluppo. Pertanto, gli acquisti pubblici devono garantire il diritto alla salute, devono assicurare l'accesso a farmaci di buona qualità, al momento giusto, nelle quantità richieste e a un costo favorevole. Purtroppo, gli acquisti pubblici di farmaci sono soggetti a cattiva gestione e corruzione, che contribuiscono all'esaurimento delle scorte, agli sprechi, alla scarsa qualità e all'inflazione dei prezzi, con conseguenti iniquità nella fornitura di farmaci essenziali, aumenti dei prezzi, pagamenti "non ufficiali" e pagamenti out-of-pocket, che escludono la popolazione povera e vulnerabile.

I governi devono garantire pratiche di approvvigionamento efficienti che riducano i prezzi e attuare interventi sul lato della domanda e dell'offerta per evitare queste gravi conseguenze. A questo proposito, i costi evidenti e non evidenti devono essere attentamente esaminati da personale competente. Inoltre, deve essere garantita la divulgazione delle informazioni sull'intero processo di approvvigionamento per consentire al settore privato di competere per gli affari e dare alla società civile la possibilità di monitorare e indagare sulla corruzione o sulle azioni inefficaci. Questa è la base degli appalti trasparenti, quella prescritta dagli standard internazionali, e ha dimostrato di ridurre significativamente gli appalti e i prodotti.

I governi hanno diverse opzioni per includere gli standard internazionali nei loro sistemi di approvvigionamento e garantire il diritto alla salute. Tuttavia, tutto dipende dalla loro volontà politica. Cosa fare in queste circostanze? Il caso ucraino dimostra il potere delle organizzazioni civili. Se il governo ecuadoriano continua a ignorare le richieste di pazienti e medici, gli ecuadoriani possono organizzarsi e cambiare le regole del gioco a loro vantaggio.

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Martens Clause: application in the context of Cyberwar

Cláusula de Martens: aplicación en el contexto de la Ciberguerra

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ABSTRACT: Certainly, with the codification of International humanitarian law or commonly known as the law of war or the law of armed conflict, the humanitarian problems derived from the armed conflicts were solved. However, against situations didn't consider the traditional law is given the possibility of appeal to other sources inside International law like General principles of law, the international custom, or the doctrine. The Martens Clause is shown as a mechanism of interpretation against problems or situations that couldn't be contemplated by the conventional law of IHL[1]. This article pretends to analyze the application of the Martens Clause in the context of cyberwar. It will be examined in the context of armed conflict, and it will be checked the normative development that could be applied to an armed conflict cataloged as cyberwar. It will be shown the important role that performs the Martens Clause against the empty normative of cyberwar that it will be presented as a new threat inside of the *jus in bello*.

KEYWORDS: Martens Clause, International Humanitarian Law, Information Society, Cyberwar, Cyberspace.

1 Understood as International Humanitarian Law.

RESUMEN: Con la codificación del Derecho Internacional Humanitario o mejor conocido como "las leyes y usos de la guerra", se ha logrado solucionar los problemas humanitarios generados por la barbarie de la guerra. ha sido capaz de resolver los problemas humanitarios generados por la barbarie de la guerra. Sin embargo, en situaciones no contempladas por las normas tradicionales, se deja paso a la posibilidad de acudir a otras fuentes, como los Principios del Derecho Internacional, la costumbre o la doctrina. La Cláusula Martens se presenta como un mecanismo de interpretación ante problemas o situaciones que no pueden ser cubiertas por las normas convencionales del DIH[2]. Este artículo tiene como objetivo analizar la aplicación de la Cláusula Martens en el contexto de la ciberguerra. En este sentido, se examinará su interpretación en el contexto de los conflictos armados y se identificarán las normas del DIH aplicables a la ciberguerra como conflicto armado, además, se revisará el desarrollo normativo vigente aplicable a un conflicto armado catalogado como ciberguerra. De esta forma, se demostrará el importante papel que juega la Cláusula Martens en el vacío normativo de la ciberguerra, que se presenta como una nueva amenaza latente dentro del *jus in bello.*

PALABRAS CLAVES: Cláusula Martens, Derecho Internacional Humanitario, Sociedad del conocimiento, Ciberguerra, Ciberespacio.

JEL CODE: F02, L86.

2 Entendido como Derecho Internacional Humanitario

INTRODUCTION

In the colossal world in which we live, armed conflicts have undergone great transformations. The history of humanity is marked by wars and massacres; however, States have also struggled to achieve peace through concrete actions that allow full coexistence. In the field of armed conflicts, the law has been presented to protect people who do not participate directly or those who can no longer participate in the conflict. Moreover, it is thanks to the development of International Humanitarian Law that it has also been possible to limit the methods and means used in warfare. However, the world is evolving and so is everything concerning armed conflicts, the means, and methods, and even the people involved in a conflict. Today, humanity is surrounded by a growing technology that has revolutionized and expanded the scenario of war. The terrestrial is set aside to analyze the imminent dangers that can be unleashed in cyberspace[3] . Indeed, the broad technological development has resulted in an information society[4] that poses new realities and in which, multiple changes can be observed within the branch of law. In this way, we can confirm what was stated by Bericat (1996) when referring to the existence of "a growing concern and sensitivity that surrounds scholars and theorists regarding the presence of a new society" (p.112).

3 The U.S. Department of Defense defines it as a global domain within the information environment consisting of the interdependent network of information technology infrastructures and resident data, including the Internet, telecommunications networks, computer systems, and embedded processors and controllers.

4 The "Information Society" better known as "Infocommunication Society" is defined as a society that uses, both intensively and extensively, computers and telematic networks, the combination <<Computer-Network>>, the social technostructure of <<Computers in Networks>> technologically defines the information society. (Bericat, 1996).

The existing concern has been generated because there is uncertainty about how to cope with the growth of new technologies since every day more and more human activities are added to the dependence on a computer which in turn is connected and interacts structurally through a network[5] . In addition, with the emergence of information and communication technologies[6] , it is now easy to obtain information and establish communications. Consequently, the ITU[7] emphasizes that "networks now play a key role in the critical infrastructures of many countries, such as electronic commerce, voice and data communications, facilities, finance, health, transport, and defense" (Unión Internacional de Telecomunicaciones, 2008, p. 6).

In the field of law, reference has already been made to the role played by the States in the face of the progressive technological development, considering what has been pointed out by Drezner (2007) (cited by Radu, 2002, p. 8) that the power of the State increased in the digital era due to tactics employed by them, where the emphasis is placed on the work done by the great powers to safeguard their interests. This is how a prominent inequality can be evidenced, since at the interstate level some States may be better equipped for the management and development of technology. Therefore, the idea that networks transform spaces, in which territoriality prescribes and is extinguished, is present. (Drezner, 2007, p. 92).

5 For the purposes of this article, the network will be understood as the interactive infrastructure on which the Infocommunication Society is based (Bericat, 1996).

6 ICT is defined as Computer-based technologies and computer-mediated communications used to acquire, store, manipulate and transmit information to people and business units both internal and external to an organization (Benjamin and Blunt, 1992).

7 The International Telecommunication Union (ITU) is the specialized agency of the United Nations in the field of telecommunications and information and communication technologies.

Furthermore, it can be evidenced that networks have also come to modify the scenarios of war, since unlike traditional scenarios such as air, sea, land, or space; the new war scenario cataloged as cyberspace represents multiple uncertainties for the States. Cyberspace has established itself as "an environment with its means and rules, with the particularity of not having a specific physical location, which would imply a questioning of the usefulness of the traditional categories with which we approach real warfare" (Eissa et al., 2012, p. 2).

The approach to the development of an eventual war within this new environment has already been considered by international security and defense organizations, and for this reason, security is approached as the process whose purpose is to protect systems, applications, resources, and networks (Unión Internacional de Telecomunicaciones, 2008, p. 6). As services are permanently connected to a network, they are vulnerable to possible attacks or problems that may arise in cyberspace. Therefore, the concept of security has also been transformed to deal with the problems that may arise in this changing scenario, for which international law must be prepared.

States must be aware of the new changes represented by the inclusion of cyberspace as a "field or territory" of warfare. Considering that, while this may be a novel space for human interaction, on the other hand, it also takes shape as a space in which cybercrimes or cyber espionage are carried out. This site is the one that should generate more concern as the results that are triggered within this realm "can produce modifications in the physical world" (Eissa et al., 2012, p. 3).

However, "cyber warfare can have far-reaching consequences" (Kittichaisaree, 2017, p. 1). For this reason, States must safeguard certain rights of individuals, since many of these rights may be infringed in the context of an armed conflict generated in cyberspace. What has happened is a transition regarding how societies can initiate an armed conflict and the new role played by the armed forces within this new scenario. In the defense field, cyberspace would come to be configured as a new military domain.

This gives way to cybersecurity[8] which would configure a cyber defense for the protection of the so-called *critical information infrastructures*[9] defined as organizational structures and facilities with a high degree of importance for a State. It should be noted, "that their failure or degradation would result in sustained supply shortages, significant disruption to public safety, or other dramatic consequences." (García Zaballos, 2016, p. 35). For this reason, what must be considered are the possible consequences of an attack on critical infrastructures in the event of a cyberwar.

The purpose of this paper is to analyze the application of the Martens Clause in the context of cyberwarfare. Moreover, it will start by examining the interpretation of the Martens Clause in the context of armed conflicts. It will then move on to identify the rules of international humanitarian law applicable to cyberwar as an armed conflict. This part will study cyberwar and its relationship with IHL, the framework

8 ITU defines it as the set of tools, policies, security concepts, security safeguards, guidelines, risk management methods, actions, training, best practices, insurance, and technologies that can be used to protect organizational and user assets in the cyber environment (Recommendation ITU-T X.1205, 2008).

9 The Commission of the European Communities states that: Critical infrastructures consist of those physical and information technology facilities, networks, services, and assets that, if disrupted or destroyed, would have a serious impact on the health, safety, or economic well-being of citizens or the effective functioning of governments in the Member States (European Commission, 2004).

that regulates cyberwar will be discussed: *jus ad bellum* and *jus in bello*, in addition, the development of the rules that have been established for its application will be indicated. The final part of the paper will evaluate the role played by the Martens Clause in the normative vacuum that regulates cyberwarfare. This part will analyze the role of States in the regulatory development of cyber warfare and the vulnerability of critical infrastructures to the development of cyberwarfare. In this way, the aim is to answer two questions that guide the writing of this paper:

What protection would the Martens Clause provide in the face of the lack of regulatory development in cyberwarfare as a regulatory conflict?

How does international humanitarian law intervene in the face of an armed conflict categorized as cyberwar?

1. ORIGIN OF THE MARTENS CLAUSE

1.1. Fyodor Fyodor Firovich Martens as a jurist and diplomat

F.F Martens (1845-1909) entered the Faculty of Law of the University of St. Petersburg in 1863, where he obtained the title of professor of international law. He stood out as a brilliant student and gained the support and admiration of great professors of the time from Western Europe. His way of seeing the world allowed him to develop an independent and innovative way of thinking for his time. Martens was always critical of the state of international law as a science, and his ideas called for the creation of a contemporary international law with functions that would meet the needs of States and at the same time express the moral values of mankind. (Pustogarov, 1996, p.326).

Martens was an opponent of thinking that implied that law is based on force, he pointed out that:

> In such cases, even leading experts confused law enforcement mechanisms with the law itself, because the fact that force exists to safeguard the law does not mean that force should be the basis of law. According to Martens, the inviolability of human life, honor, and dignity are recognized rights of every person, not because they are protected by criminal law, but because every person has an inalienable right to life, honor, and dignity. (Pustogarov, 1996, p. 327)

For Martens, the idea of protecting the rights and interests of the human being was paramount in international relations, in his opinion, what determined the degree of civilization of the States and the field of international relations lay in the respect for human rights. In the diplomatic sphere, Martens did not share the idea that law would be the mechanism to abolish war completely; for him, what had to be done with the help of humanitarian objectives was to limit the barbarity of war using norms that were accepted by the states (Pustogarov, 1996, p. 328).

It is within his diplomatic position as a delegate of Russia that in the Preamble to the Second Hague Convention of 1899, by a declaration, the Martens Clause begins to become part of the law of disputes (Ticehurst, 1997, p. 131). The transcript states that:

> Pending the promulgation of a more complete Code of the laws of war, the High Contracting Parties deem it expedient to record that, in cases not covered by the regulations adopted by them, the peoples and

> belligerents remain under the safeguard and the rule of the principles of the law of nations, such as result from the usages established among civilized nations, from the laws of humanity, and the requirements of public conscience. (Convención II de La Haya relativa a las leyes y usos de la guerra terrestre y reglamento anexo, 1899, preámbulo)

1.2. Interpretation of the Martens Clause

Although the Clause has been enunciated, it does not have an official interpretation that allows knowing exactly its field of application. Given this, different interpretations have been established and analyzed from the doctrine, jurisprudence, and custom, conceived strictly or broadly (Ticehurst, 1997, p. 132). The broad interpretation establishes that considering that there is a low number of international treaties relating to the law of armed conflict, "the Clause stipulates that what is not explicitly prohibited by a treaty is not permitted *ipso facto*" (Ticehurst, 1997, p. 132).

This interpretation could be considered the most functional since it provides comprehensive protection per se to the parties involved in the development of an armed conflict by delimiting a barrier to the methods and means used in war, however, the future problem of this conception is its difficult acceptance because States will not commit themselves to diminish their power of defense and attack as a response in the scenario of an armed conflict. States will always look after their interests and will try to find ways of not being bound by a norm whatever its origin.

On the other hand, according to Tocino (2018) "the Martens Clause is general, avoids possible normative gaps, and reaches all parties to International Humanitarian Law" (p. 179). This idea can be understood in the light of the fact that "conduct in armed conflicts is not only judged based on treaties and custom but also on the principles of international law to which the Clause refers" (Ticehurst, 1997, p. 132).

This interpretation that enunciates features of generality could finally help to understand what the Clause mentions and its field of application for a close normative development, it is the opinion of Judge Shahabuddeen within the Nauru case that could contain the answer by stating that:

> The principles of international law referred to in the Clause derive from one or more of three distinct sources: the established customs among civilized nations (referred to as "established usages" in Art. 1.2 of Additional Protocol I), the laws of humanity (referred to as "principles of humanity" in Art. 1.2) and the requirements of public conscience (referred to as "dictates of public conscience" in Art. 1.2). (Ticehurst, 1997, p. 135)

The Martens Clause, in mentioning customary norms, stresses the importance of their application concerning armed conflicts. In the same way, the reference to the laws of humanity will be interpreted in the sense of prohibiting any method or means of warfare not necessary for the attainment of a military advantage. Finally, for the dictates of the public conscience, it refers to declarations, resolutions, and communications made by qualified persons and institutions that evaluate the laws of war (Ticehurst, 1997, pp. 135-136).

1.3. Evolution of the Martens Clause

The Martens Clause was drafted in both the 1949 Geneva Conventions and their Additional Protocols. It had one important change; in the case of the Geneva Conventions, it was removed from the Preamble to the body of the treaty. In the case of the I Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 1949, it was established in Article 68; the II Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 1949, it was established in Article 62, the Third Geneva Convention relative to the Treatment of Prisoners of War of 1949 provided for it in Article 142 and the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 1949 provided for it in Article 158.

The Clause was stipulated for a different purpose; thus, it was framed in the articles concerning the denunciation of the Convention by the High Contracting Parties (Meron, 2000, p. 80). The articles have the same content, which is as follows:

> The denunciation shall be valid only to the denouncing Power. It shall not affect the obligations which the Parties to the conflict are bound to fulfill under the principles of the law of nations, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of public conscience. (Geneva Convention relative to the Protection of Civilian Persons in Time of War, 1949, art. 158).

On the other hand, in the I Additional Protocols the Martens Clause was moved to Article 1 (2) and worded as follows:

> In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and rule of the principles of the law of nations derived from established custom, the principles of humanity, and the dictates of public conscience (Protocol Additional to the Geneva Conventions and Relating to the Protection of Victims of International Armed Conflicts, 1949, art. 1).

According to Meron (2000) "in Protocol II, a changed version of the clause was included in the Preamble, which omits references to both custom and international law" (p. 81). It is worth considering that another of the changes that the clause has undergone are the words used for its drafting since they have caused it to lack coherence and even the meaning of the clause to be misunderstood or have different interpretations (Ticehurst, 1997).

About the principles of humanity, it is stated that the Martens Clause incorporates three elementary considerations of humanity: a) the right of the parties to choose the means and methods of warfare is not unlimited; b) the duty to distinguish between civilians and those engaged in military operations; c) prohibition of targeting the civilian population. (Meron, 2000, p. 83). In this case, the International Committee of the Red Cross (ICRC) pointed out that the clause has a dynamic factor, thus proclaiming "the applicability of the above principles irrespective of subsequent developments in types of situations or technology". (CICR, 1977, p.39) Furthermore, within the Commentaries to the Additional Protocols to the Geneva Convention it was concluded that the Martens Clause: a) applies independently of the treaties containing it; b) provides that the principles of international law apply in all armed conflicts (CICR, 1977, p. 39).

The interpretation given by the Jurisprudence has allowed for a clearer notion of the scope of the rule, which is why the International Court of Justice has made it clear that the Martens Clause is "an effective means to cope with the rapid evolution of military technology" (Meron, 2000, p. 87) This opens the way to the possibility of a wide application of the clause to eventual situations that may arise in the new scenarios of war. For this reason, the importance of the clause is stressed as a mechanism that limits certain means and methods of warfare that have been evolving and have not been contemplated by the rules of IHL. Thus, it fulfills its purpose of legally covering situations arising from hostilities and everything that is not contemplated by the conventional norms (Salmon, 2012, p. 36).

2. ARMED CONFLICT AND CYBERWARFARE

2.1. Definition of Armed Conflict

Custom is the source of IHL, at first, IHL applied exclusively to international armed conflicts, however, humanity witnessed conflicts without a purely international character, and due to this, rules have been adopted to protect the victims against the development of these hostilities. Therefore, an armed conflict may be of an international or non-international character.

As he points out. Salmon (2012) "neither the four Geneva Conventions of August 12, 1949, nor their Additional Protocols of June 8, 1977, contain a definition in the proper sense of this". (p. 29) However, the Jurisprudence has been providing elements to define and specify the concept of armed conflict. In this case, the Criminal Tribunal for the former Yugoslavia defined it as "a resort to armed force between states" (Kittichaisaree, 2017, p. 204)

Reference has also been made to the existence of other elements which are: a) of a temporary nature, since the conflict will be prolonged in time; b) of organization, referring mainly to a level of organization that the group participating in the conflict must have; c) inclusion of the notion of groups, since the conflict may be generated between States or between an armed group and the State authority; d) inclusion of the notion of groups, since the conflict may be generated between States or between an armed group and the State authority (Salmon, 2012, p. 30).

On the other hand, the ICRC has pointed out that IHL applies to cyber warfare, but it does not neglect the progressive development of IHL that must be carried out concerning new technologies. The update of the Commentary to the First Geneva Act of 1959 emphasizes the issue of progressive development, thus the ICRC states:

> The updated Commentary to the I Convention offers a more comprehensive look that takes into consideration the issues and challenges observed in contemporary armed conflicts, developments in technology, international law, and national legislations. (Cameron et al., 2015, p. 7)

The same commentary discusses the issue of "dealing with operations cyber as an armed force equitable to armed conflict" (Cameron et al., 2015, p. 15). What should be kept in mind is that IHL will be triggered "by cyber operations if they are conducted by one State against another and in support of more classical military operations." (Kittichaisaree, 2017, p. 204) Even the ICRC states that if the effects of cyber operations are like those of classic military operations, they would be equivalent to an armed conflict, with the main attention if they have the consequence of causing the death of civilian or military persons, or in turn, destroying both military and civilian assets" (Kittichaisaree, 2017, p. 204).

2.2. Cyberspace as a new theater of warfare and cyber attacks

The impact of the technological development that the human being has given to different matters has generated that there is a frenetic change of the known everything. This has been done to give way to technological innovations, however, this growing technology has come to encompass spheres of Law that merit important attention for its full development. Cyberspace is "an artificially created domain of information and economic exchange" (Kiggins, 2002, p. 163). This domain has no central authority, it is seen as an anarchic domain, in such a sense Deibert & Rohozinski (2010) (cited by Kiggins, 2002, p. 163) point out that cyberspace is subject to rules concerning physics and codes.

The formation of cyberspace is established through the interconnection of computers resulting in a globalized network, which can be seriously affected by possible vulnerabilities of the network or attacks to control and obtain its information. The exchange of information is carried out through cyberspace, which crosses the control of the State in the geographical aspect since they are networks that cross borders without any limit. Faced with this eventuality, States have formulated norms that allow information to be exchanged securely (Kiggins, 2002, p. 174).

The definition of attack contemplated in Protocol I related to the Geneva Conventions enunciates certain characteristics that allow classifying a cyberattack as an armed conflict. For this, the cyberattack should be understood as "that offensive or defensive cyber operation which is expected to cause loss of life, injury to persons and damage or destruction of property" (Reguera Sánchez, 2015, p. 15). If understood in this way it will be regulated by IHL. By nature, a cyber-attack aims to prevent access to a network, either by disconnecting it or by accessing computer networks to steal information and manipulate it. In addition, it is important to consider the advantages that come from the use of cyber-attacks in an armed conflict, firstly, its organization in cyberspace provides speed; as a second point, for a cyber-attack no target is remote; finally, cyber-attacks have more tools and targets of attack that are coupled with limited costs (Kittichaisaree, 2017, p. 158).

The means of warfare used to carry out a cyber-attack encompass "any device, material, instrument, instrument, mechanism, equipment or software" (Kittichaisaree, 2017, p. 158). The lack of security in cyberspace directly affects Information Technologies, for this reason, it is the role of the State to guarantee the fulfillment of individual freedoms within this environment known as cyberspace (Carlini, 2016, p. 11).

The concept of cybersecurity has been established due to the latent threats in the use of cyberspace, one of these threats is cyberwar understood as "Sanchez (2015) the conflict between technologically advanced states, which is carried out through cyberattacks in isolation, or as part of a conventional war" (cited by Polloni, 2018, p. 131). It is because of this threat that cyberspace has been categorized as a new battlefield. Regarding the law of armed conflict, States will have to respect the *ius ad bellum* and *ius in bello in the* event of a cyberwar, until international law develops regulations applicable exclusively to these conflicts (Reguera Sánchez, 2015, p. 5).

On the other hand, it should also be considered that the functioning of society currently lies in the performance of tangible and intangible elements that form a critical infrastructure, and it is this infrastructure composed of services, goods, and mechanisms dependent on a technology that make a State vulnerable (Luke, 2012, p. 409). For this reason, the protection of this infrastructure that can be attacked in the context of cyberwarfare in the face of the growing development of computer weapons is emphasized. (Polloni Contardo, 2018, p. 21).

A case in point is the attack on the computer network to disable air defense systems during NATO military operations in Kosovo in 1999 or the massive blackout in Ukraine due to a cyberattack that stopped and shut down the systems of six energy suppliers of the electricity network (Kittichaisaree, 2017, p. 156).

2.3. Regulatory framework for cyberwarfare

In the framework of the *ius ad bellum* a cyberattack can be categorized as an act of war by a) a universal manifestation through a United Nations declaration of the cyberattack as an act of war; b) the definition that a group of States gathered in an organization gives to the cyberattack, identifying its illegality; c) the unilateral declaration of a State establishing the cyberattack as an imminent act of war (Polloni Contardo, 2018, p. 136). However, in any of these scenarios, there are doubts as to how the action of the affected State should be conceived and what would be the responsibility of the responsible State.

Within the framework of *ius in bello,* International Humanitarian Law will regulate cyber warfare only if the cyberattack takes place within the context of an armed conflict.

Therefore, it is required that the cyberattack is previously classified as an armed conflict, in addition, cyberwarfare refers to the means and methods of warfare using technologies that can cause consequences outside the network system and reach to develop palpable effects in the real world (Droege, 2011). Among these consequences, it is noted that:

> The materialization of potentially catastrophic scenarios such as the collision of aircraft, the emission of toxic substances from chemical plants, or the disruption of vital infrastructure and services such as electricity or water supply networks cannot be ruled out. The main victims of such operations would most likely be civilians. (Polloni Contardo, 2018, p. 137)

Thus, the *ius in bello* will determine that "if the means and methods of cyberwarfare were to come to produce the same real-world effects as conventional weapons (destruction, disorder, damage, injury or death), they are governed by the same rules as conventional weapons" (Polloni Contardo, 2018).

2.4. Regulatory development

With the cyber realm, state practice and judicial decisions in Europe and the USA "are the most developed of all the regions of the world due to their dominant advancement in cyber technology" (Kittichaisaree, 2017, p. 52). Added to this problem is the regulatory vacuum in cyberspace and the unwillingness of states to develop it. In 2002, during the Prague Conference, NATO launched the global program for the coordination of cyber defense to strengthen alliances between states and combat cyber-attacks. In 2010, the Lisbon Summit was held to define a strategic concept on cyber defense policy. As a result, NATO approved a new cyber defense policy on June

1, 2010. In the case of the United Nations, initiatives for the regulation of cyberspace have been minimal and those that have been made only cover specific aspects, there is still no consensus among all states. However, in the face of disagreements between States, global agreements have been established, with basic principles relating to the subject (Reguera Sánchez, 2015). The main resolutions are:

- General Assembly Resolutions 55/63 (2000) and 56/121 (2001) invites the Member States to take steps to develop national laws and policies to combat the criminal misuse of information technology.

- General Assembly Resolutions 57/239 (2002) for the creation of a global culture of cybersecurity.

- General Assembly Resolution 58/199 (2004) for the protection of information infrastructures.

- On December 5, 2018, the General Assembly adopted resolution 73/27 on developments in the field of information and telecommunications in the context of international security.

- On 22 December 2018, the General Assembly adopted resolution 73/266 on promoting responsible behavior by states in cyberspace in the context of international security.

The United Nations Counter-Terrorism Office on its official website mentions documents on cybersecurity submitted to a principal or subsidiary organ of the United Nations, these are:

- Sixth Review of the United Nations Global Counter-Terrorism Strategy A/RES/72/284

- UN Security Council Resolution 2341 (2017).
- UN Security Council Resolution 2370 (2017).
- Security Council text S/2015/939 (Madrid Guiding Principles).

The Council of Europe was the first international organization to adopt a treaty for the fight against Internet crime, thus the Budapest Convention entered into force on July 1, 2004. This is a treaty that addresses both cybercrime and Internet crime, through international cooperation and the adoption and development of national regulations on cyber security. (Reguera Sánchez, 2015, p. 12). As the Estonian Minister of Foreign Affairs points out in the 2020 Cybersecurity Report Risks, Progress and the Way Forward in Latin America and the Caribbean:

> From the national and international perspective, the Budapest Convention provides a comprehensive and reliable international legal framework for combating cybercrime, and during almost two decades of its existence, it has become a global reference instrument. Therefore, the Budapest Convention has become a preferred model for many countries in terms of promoting their national legislation, building international cooperation, and exchanging electronic evidence. (BID & OEA, 2020, p. 36)

In May 2010, the European Commission presented one of the seven pillars of the Europe 2020 Strategy, which aims to set targets that will enable the European Union to grow and exploit the potential of ICTs (Reguera Sánchez, 2015, p. 12). As for recent actions they have taken, it is noted that:

- The European Commission signed with the European Cyber Security Organization (ECSO) a public-private partnership to structure and coordinate industrial resources for digital security in Europe. (BID & OEA, 2020, p. 36)

Furthermore, the European Union is aligned with the position that international law, and in particular the UN Charter, applies to cyberspace. Moreover, the EU gives high priority to establishing a strategic framework for conflict prevention and stability in cyberspace, including the special protection it gives to fundamental rights and freedoms in the face of possible limitations under the pretext of cybersecurity. Although the strengthening of European cybersecurity is essential, the aim is to provide safe and secure cyberspace for all. Similarly, the Organization of American States (OAS) has played an important role in certain actions that have helped States to become aware of cyber threats and the mechanisms to deal with them (BID & OEA, 2020, pp. 27-34).

To continue developing applicable regulations, the Tallin Manual created by Michael N. Schmitt is positioned as a tool for jurists, since it allows interpreting the existing rules to the assistants, in the same way, it is a tool for jurists who analyze the eventual conflicts that can be generated in cyberspace (Reguera Sánchez, 2015, p. 15). To understand cyber-attacks comprehensively, it is necessary to consider what has been analyzed and drafted by the Group of Experts of the Tallinn Manual. This non-binding body of norms is of great help and serves as a tool for understanding cyberspace attacks. The Tallinn Manual has established:

> Eight factors - previously proposed by Michael N. Schmitt in 1999 - are essential to determine whether

> a cyber operation can be classified as a "use of force". These factors consist of invasiveness, severity, military character, immediacy, state involvement, quantification of effects, presumed legality, and directness. According to a group of experts, a cyber operation counts as a "use of force" when it produces the same level of physical damage to objects and people. (Carlini, 2016, p. 9)

In addition, the Manual identifies the means of cyberwarfare, defines the subjects of cyber-attacks to the category of persons within IHL, determines when the cyber-attack will constitute an armed conflict, etc.

3. THE ROLE OF STATES IN THE REGULATORY DEVELOPMENT OF CYBERWARFARE

3.1. Global governance

Global governance is a concept that should focus on the role and effectiveness of the state in an era in which the globalization of information and economic exchange is characteristic. Cyberspace presents itself as a new scenario that surpasses the concept of sovereignty agreed upon by states. For this reason, what is required is that through continuous cooperation on the part of states, a fusion of transnational information exchange policies is achieved (Kiggins, 2002, p. 175).

States have formed organizations that have emerged from transnational cooperation, such as the case of NATO created to promote regional security. However, the inaction of states to coordinate global governance focused on cybersecurity is evident. It should be noted that transnational norms focused on cybersecurity issues would be considered of vital importance for the formation of support structures within global governance. The role of leading this global governance is based on a) driving the constitutive rules that will shape the regulatory rules in a global regime (Kiggins, 2002, p. 175).

In addition, it should be noted that cooperation on cybersecurity issues should focus on a) non-proliferation of cyberweapons. This would have the effect of limiting the number of cyber threats for which the State will have to develop countermeasures; b) increased cooperation in cybersecurity could pool resources and capabilities to overcome the problem of resource allocation. This would overcome the technical obstacles arising from the lack of resources for cybersecurity development; c) develop a consensus on a standard or set of standards governing the exchange of information, arrest, and prosecution for the commission of crimes in cyberspace; d) develop a consensus on a standard or set of standards governing the exchange of information, arrest, and prosecution for the commission of crimes in cyberspace (Kiggins, 2002, p. 175).

Hence, as pointed out in the Cybersecurity 2020 report:

> As cyber threats are becoming increasingly sophisticated, it is the responsibility of states to ensure that the activities of perpetrators do not go unnoticed. Therefore, policy and legislative initiatives, along with capacity-building measures, are some of the key elements in combating threats arising from cyberspace, including the conduct of criminals. Therefore, the implementation of relevant legislation and the adoption of strategic approaches will support the effectiveness of national criminal justice efforts and international cooperation. (BID & OEA, 2020, p. 42)

3.2 Importance of critical infrastructures

Today, modern society depends on many services provided by critical infrastructures. If these services were to be affected or interrupted for a prolonged period, they could generate serious economic impacts and could even affect people's physical integrity. Problems related to critical infrastructures can arise from a variety of sources, problems related to system downtime, natural disasters, acts of terrorism, or even war (Lopez et al., 2012, pp. 1-2).

The Critical Infrastructure Protection Act of 2001 issued by the United States defined critical infrastructure as:

> Systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems and assets would have a debilitating impact on the national security, national economic security, national health or national public safety, of any combination of those matters. (Harašta, 2018, p. 2)

On the other hand, the European Commission 2004 in a communiqué stressed the increasing dependence of society on high-tech infrastructures and emphasized with much more importance of the growing interconnection between these infrastructures. In 2005 the European Community adopts the European Programme for Critical Infrastructure Protection (EPCIP), who's main "the objective is to improve the protection of critical infrastructures (CIP)[10] of the European Union (EU)" (Programa Europeo Para La Protección de Infraestructuras Críticas, 2006).

10 PIC stands for Critical Infrastructure Protection or CIP for Critical Infrastructure Protection.

The EPCIP established a more delimited definition of critical infrastructures, intending to expressly cover cyber and physical networks:

> Therefore, the definition was expanded outside of physical facilities (railroads, pipelines, and power plants) to procedures: complex networks of socially and culturally determined values preceding and helping to operate heavy physical facilities. These social and cultural procedures may be technologically connected, but the diffusion of these values will be mediated to a large extent by the technological means present in the information society. (Harašta, 2018, p. 3)

The EU has identified the sectors that comprise critical infrastructure, these are: a) energy; b) nuclear energy; c) information and communication technologies; d) water; e) food; f) health; g) finance; h) transportation; i) chemical industry; j) space; (García Zaballos, 2016, p. 39).

Regarding the vulnerability to which IICs are subject[11], Nickolov (2005) has determined that:

> Critical Information Infrastructure (CII) has become particularly vulnerable to fun-seeking hackers, criminals, and even state actors and terrorists. The main tools used to attack critical systems are malware (computer viruses, worms, logic bombs, Trojans) that modify and destroy the information or crash computer systems. Tools to spy on the exchange of information on computer networks, as well as tools to modify the normal operation of the computer network and block access to its services, are also widely used for destructive purposes. (p. 107)

11 CII stands for Critical Information Infrastructures.

The measures that can be taken to provide protection should be focused on preventing cyber-attacks on IICs and reducing the recovery time from cyber-attacks. These measures can be taken at the company level with a focus on a) physical protection of key elements of the IIC; b) technical security; c) social, regarding training and control of personnel; d) security policy including security issues, control, data availability, as well as data recovery and contingency plans; and e) public-private cooperation between companies and the government. (Nickolov, 2005, p. 112). While each State at the national level, what must be done to protect the IICs is:

> Improving secondary legislation related to CIP; monitoring the implementation of relevant legislation by the parties involved; auditing security plans of critical infrastructure operators; advising critical infrastructure operators, sharing information, disseminating alerts on security threats, and supporting CIP and resilience efforts; and organizing joint exercises to test procedures and strengthen relationships and habits of cooperation. (García Zaballos, 2016, p. 52)

Indeed, the effective management of cybersecurity measures is a highly complex task that requires a variety of resources and mechanisms. The prioritization of critical infrastructure protection implies commitments that states must be willing to make to protect their citizens and provide security. As stated in the 2008 Report on Critical Infrastructure Protection in Latin America and the Caribbean, CIPs require tools and regulatory frameworks to protect virtual information structures and physical infrastructures, which should be considered a high priority for the States:

Effective critical infrastructure protection must rely on public-private partnerships. Governments, critical infrastructure owners and operators, and ICT providers must partner across sectors and borders to better manage risk. The benefits of collective action in cybersecurity are clear. Information sharing is one example of the potential value of a collective response to cyber threats. When information about attackers and attack methods is shared, organizations are better prepared to thwart them. Therefore, governments should consider implementing frameworks and incentives that would encourage critical infrastructure organizations to engage in this activity. (OAS - Microsoft, 2018, p.52)

CONCLUSIONS

It is evident the little normative development contemplated for scenarios such as cyberwarfare. The world is changing, and states are safeguarding everything that is their property, while at the same time developing new technologies for new war scenarios. Although States have witnessed the effects of conventional weapons and methods of warfare, there is still no clear perception of the damage that new technologies can cause in terms of means and methods of warfare. The role of the States in giving rise to this law in the current technological era is of fundamental importance, however, everything lies in the unwavering will of the States to give way to the development of the Law. Its effectiveness lies in the "normative" force that has been given to it. Although it was initially established to determine whether civilians carrying weapons against an occupying force should be considered snipers and be punished with execution or should be considered legitimate combatants, it is its interpretation in the face of technological progress that opens the possibility of its application until the International Community develops the law of war completely.

The interpretation of the Martens Clause could be taken by IHL as a mechanism that provides broad protection to the victims of cyberwar as an armed conflict since it would limit the means and methods of combat that could be used and would even provide protection to IICs as they are considered services that are linked to indispensable goods for survival within a State. In this way, the international community could use the interpretation of the clause in the event of events occurring in cyberspace.

The current foolishness on the part of some States to identify or include the Martens Clause as a source of international law is perceived and is a reality. However, this does not detract from the value and weight of those who advocate in favor of considering it as a tool to limit action in the face of evolving armed conflicts. The interpretation of the Martens Clause as part of the law of armed conflict allows the parties to a conflict to be protected by the rules of international humanitarian law in the face of the evident normative vacuum. Finally, cyberspace plays an important role, being configured as another scenario of confrontation, which is why States must adopt provisions that further restrict the use of means and methods of cybernetic nature in the development of regulations applicable to cyber warfare. Since there is no international regulation that specifically regulates cyber-attacks within an armed conflict, each of the States must give way to its development.

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Report No. 1 - 2022 - Illegal Drugs Micro-trafficking Gans

Report No. 1 - 2022 - Micro-trafficking Gangs

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TO: Editorial Board

ABOUT: Illegal Drugs Micro-trafficking Gans - Criminal strongholds of a business that operates with children and adolescents

DATE: June 21st, 2021

ABSTRACT: This transdisciplinary legal report represents the problem of micro-trafficking (Giommoni et al., 2021), its relationship with criminal gangs (Densley et al., 2020), and its implications (taking Colombia as a case study) in a context where the weakness of the institutional framework and potential violations of the rights of children and adolescents prevail. Furthermore, a descriptive and communicational approach is adopted through which the information is presented in a versatile way, without resorting to complex conceptual frameworks typical of legal dogmatics and emphasizing the main points to be settled in future discussions on how, why, and for what purpose to formulate public policies and practical legal management tools to address this and other underlying social problems.

KEYWORDS: micro-trafficking, criminal law, public policies, social control, media reports.

RESUMEN: En este informe jurídico transdiciplinario se comparte una representación del problema del microtráfico, su relación con las bandas criminales y sus implicancias (tomando como caso de estudio a Colombia) frente a un contexto donde prevalece la debilidad del marco institucional y potenciales vulneraciones de derechos de niños, niñas y adolescentes. En ese sentido, se adopta un enfoque descriptivo y comunicacional a través del cual la información es presentada de forma versátil, sin recurrir a marcos conceptuales complejos propios de la dogmática jurídica y haciendo énfasis en los principales puntos a dirimir en futuras discusiones sobre cómo, por qué y para qué formular políticas públicas y herramientas de gestión jurídica efectivas para afrontar esta y otras problemáticas sociales subyacentes.

PALABRAS CLAVES: microtráfico, derecho penal, políticas públicas, control social, bandas criminales.

1. BACKGROUND

This transdisciplinary report presents a description of the problem of micro-trafficking and its implications, taking the city of Colombia as a case study. It is a cross-cutting phenomenon in the country. According to data from the Attorney General's Office, between 2015 and November 2021, 441 structures dedicated to micro-trafficking were dismantled, of which 254 involved minors. The most affected departments are Antioquia, Valle del Cauca, Caldas, Quindío, and Santander.

In this regard, it should be noted that, despite being a problem that affects the whole of Colombia, complaints do not usually come from the civilian population but through early warnings from the Ombudsman's Office, as stated by the Attorney General's Office.

For Universidad del Valle professor Leonardo Raffo López (2021), an expert in criminal economies, understanding the silence of the citizenry involves recognizing that in those areas where criminal gangs partially or dominate - parks, streets, neighborhoods, blocks - they not only control the illegal market but also security and social relations, through groups prepared to defend gang members, which involves intimidating the population and negotiating with local control agents.

For López (2021), the power that gangs consolidate in urban scenarios produces fear and, paradoxically, admiration among minors who see in these criminal groups the possibility of economic advancement, under the imaginary of success, recognition, and easy money. In addition, it can be argued that they assume roles related to the collection of information and the transport of small quantities of illegal substances, as a way of forging a criminal career within these groups, as explained by the Attorney General's Office (2021).

Daniela Suárez (2021), an expert in criminal dynamics and current executive director of Fundación Ideas Disruptivas, reports that during a research process she interviewed 10 jíbaros, adults between the ages of 21 and 35, in a prison. One of them told her that he had entered the business at the age of 11 as a bell ringer: he would stand on a corner and tell the other members of the gang if any authorities were coming. His rise in the organization allowed him to dominate an entire sector for the sale of heroin.

In addition to forging heirs of criminal structures and showing the world of drugs as a thriving business, the use of minors in micro-trafficking is part of a strategy to acquire cheap labor and have people who face fewer legal implications in case they are apprehended, explains Claudia Sanchez (2021), a social worker and technical director of World Vision International.

2. FIGHT AGAINST DRUGS AND CORRUPTION

Suarez (2021) assures that the most difficult thing in the fight against drugs is to fight corruption. This is so because the issue is that the authorities carry out illegal operations to reach the goals they are asked to achieve. We have heard reports of police officers who say that they were asked to meet goals (quotas of detainees) and that they asked for this number or else they would be punished and not given permission to go see their families. They even paid 20,000 Colombian pesos to a street inhabitant and gave them more than 20 grams of marijuana and they ended up in jail for one night to meet the goal. False operations and results with which the image of effective institutions that control crime is built according to the denunciations that have been made in a journalistic way and that this report collects.[1]

Through the documentary review and in line with the opinion of Suarez (2021), it has been identified that in Colombia there are officials who operate in favor of the State but who also do so benefiting large drug trafficking groups or micro-trafficking gangs. Moreover, the complaints collected claim that these officials pass information to have control on one side and continue to operate with impunity, and upwards so that there is an illusion of legal operation that does not exist. This perverse and historical modus operandi has allowed, among other factors, the persistence and almost uncontrolled growth of micro-trafficking structures.

3. ON APPREHENDED MINORS

Figures delivered by the National Police (2021) to the de Investigación Periodística of the Politécnico Grancolombiano reveal that between 2015 and 2021, 29,756 minors were apprehended in the country for trafficking, manufacturing, and carrying drugs. The last of the three crimes are the most common cause due to its close relationship with commercialization in small quantities, the visible link in the complex ecosystem of micro-trafficking. For Raffo (2021), this is the tip of the iceberg, because behind this distribution surface there are very complex hierarchical structures and, therefore, difficult to identify.

1 The ideas presented here are shared with a reflective purpose and adapted from a journalistic investigation carried out between 2021 and 2022 by the Unidad de Investigación Periodística of the Institución Universitaria Politécnico Grancolombiano: https://bandasmicrotrafico.poligran.edu.co/texto.html. In addition, it is proposed as an academic contribution for discussion and research. Without political and/or ideological alignment, it aims to make visible a social problem, that is, to serve as a reflective input for potential actions in terms of public policies and legal management in the face of real scenarios such as micro trafficking and criminal gangs in Colombia.

In addition, testimonies have been collected from young people and older people who entered the business when they were under 18 years old, in which they state that they do not usually know the top leader of the organization and that their contract is with the person who provides them with merchandise or to whom they account for the money. Thus, in the event of being apprehended or subjected to criminal proceedings for adolescents, there is very little information they can provide.

When minors are apprehended in Colombia, the Colombian Institute of Family Welfare (ICBF) assures that in 2021 the restoration of rights will be the priority. But if they are older than 14 and younger than 18, they enter the System of Criminal Responsibility for Adolescents (SRPA), which seeks a pedagogical, specific, and differentiated criminal process concerning the adult system, guaranteeing restorative justice, truth, and reparation of the damage done by the adolescent.

This may include, in some cases, deprivation of liberty in Specialized Care Centers. According to the ICBF, between January 2015 and November 2021, 179 adolescents and young people were admitted to these Centers for cases linked to the trafficking, manufacture, and commercialization of narcotics.

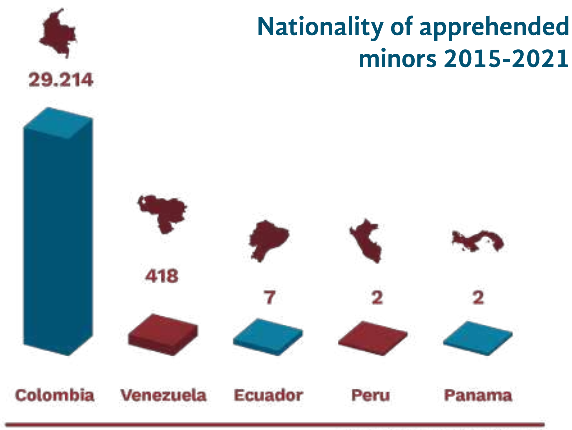
4. ON MIGRANTS TARGETED BY MICRO-TRAFFICKING GANGS

The other issue of concern is that it is not only national minors who are involved in illegal structures dedicated to micro-trafficking. The data analyzed on apprehensions also includes Venezuelans, Ecuadorians, Peruvians, and Central Americans.

From the list of countries, it is noteworthy that in the last six years, 418 children and adolescents of Venezuelan nationality have been apprehended, with significant annual increases from 2 cases in 2015 to 132 in 2021. In the period under study, there is only a decrease between 2019 and 2020, from 132 to 100 apprehensions, respectively.

There is little information on the matter. However, the interest of drug trafficking groups is to identify vulnerable populations. For Claudia Sanchez (2021), technical director of World Vision, the migration of Venezuelan people in extreme poverty is exploited because it represents cheap labor. In this context, migrants find in criminal dynamics an opportunity, but there are also cases in which they act under threats and other forms of violence.

Figure 1: Nationality of apprehended minors 2015-2021



Source: Policia Nacional (2021, n. p.)

Juan Manuel Núñez (2021), the advisor to the Directorate of Drug Policy and Related Activities of the Ministry of Justice, assures that the more isolated the migrant population is left from institutional services or the Colombian community, the more at the mercy of criminals who do act quickly and offer protection and employment.

However, it goes beyond the migrant and returnee population. Sanchez (2021) draws attention at this point to the border areas of Colombia as spaces lacking state presence and, therefore, with criminal structures. This expert (2021) explains that:

> One example is Buenaventura (Valle del Cauca). It is a port, and there are many interests and the control that the different groups have, and the danger they represent for many children and adolescents, mainly because they are on one side or the other, and if they are not, they go and kill them, and that is a reality. (n. p.)

The murder of minors by gangs dedicated to micro-trafficking is a topic that is rarely talked about in the country. Only in 2018, after a demonstration in the locality of Ciudad Bolivar in Bogota for the murder of 22 young people in strange and diverse circumstances, did the media deal with the issue for a few days. Among the articles published was one in the newspaper El Tiempo, in which neighborhood leader Luceris Segura said that micro-trafficking gangs had a lot to do with the events. But the issue did not gain relevance in the political and media agendas.

5. INSTITUTIONAL WEAKNESS AND PUBLIC POLICIES

Although the phenomenon has been growing in all Colombian cities for years, it was only in 2015 that the National Narcotics Council began to design and implement research to understand the criminal network from which micro-trafficking is built Núñez (2021). Also, Núñez (2021), advisor to the Directorate of Drug Policy and Related Activities of the Ministry of Justice has stated that:

> From there we realized that we had to intervene with security issues, block criminal organizations, and, on the other hand, recover territories and disengage the population from crime through social policy. We evolved that and in 2018 we created a guide so that in the territories they can formulate projects that address micro-trafficking. (n. p.)

Both the governments of Juan Manuel Santos and Iván Duque have included these lines of action in their development plans, which can be summarized, according to Núñez (2021), as an intervention in areas of fear and micro-trafficking from a security and social inclusion perspective.

Likewise, the Presidential Council for Human Rights and International Affairs, which serves as the technical secretariat of the Intersectoral Commission for the Prevention of Recruitment, Use and Sexual Violence of Children and Adolescents by Armed Groups Outside the Law and Organized Criminal Groups (CIPRUNNA), has taken these recommendations to integrate them into its policies (2021): "The technical strengthening of the governors' and mayors' offices is being promoted for the implementation of routes that allow the identification of risks and the development of institutional offerings for the activation of ways to prevent the recruitment and use of minors."

6. RECOMMENDATIONS AND FINAL CONSIDERATIONS

Súmate por Mí and *Ruta Futuro* are two of the projects being developed in the country to try to prevent and stop the recruitment, use, and instrumentalization of minors by criminal structures linked to drug trafficking. In practice, the action tools derived from these guidelines are integrated into the security and citizen coexistence policies of each department or municipality so that, according to their conditions, they can be applied. But development is not optimal due to the lack of technological, human, financial, and academic capacity. According to Núñez (2021):

> All policies must include a line that has to do with strengthening capacities in all aspects because if I tell them what to do and how to do it, but I don't give them the means to do it, it's serious. (n. p.)

In other words, the State has clear and, from the discourse, possibly effective policies, but there are no resources to implement them efficiently. Meanwhile, the problem continues to expand in streets, schools, parks, street corners, city squares, even in social networks; and, in rural areas where the phenomenon is beginning to spread. In these scenarios, criminal groups offer minors gifts, motorcycles, money, weapons, and power; a solution to the most vulnerable lives, with few expectations for the present and future, and the State is directly responsible for this.

For stopping the growth of gangs is also to reduce the possibility that many children, adolescents, and young people build their life projects from criminal economies. Therefore, it is urgent the attention and efforts that the national and local governments put on this phenomenon that has been hidden, in the back room of discussions and policies on drug use.

Therefore, the issue that worries families and educational institutions is addiction, which is not a minor issue, but placing the prevention of joining micro-trafficking gangs at the center of the discussion can also save lives.

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