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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.

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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.

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

Relaciones con los lectores

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

Las Mejores Prácticas para los editores incluirían las siguientes acciones:

- *Velar por que todos los informes y las revisiones de la investigación publicados hayan sido revisados por personal cualificado (incluyendo revisiones estadísticas cuando sean necesarias);*
- *Garantizar que las secciones no revisadas por pares de la revista están claramente identificadas;*

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

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

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

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

Relaciones con los autores

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

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

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

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

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

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

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

Las Mejores Prácticas para los editores incluirían las siguientes acciones:

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

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

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

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

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

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

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

Relaciones con los revisores

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

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

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

Las Mejores Prácticas para los editores incluirían las siguientes acciones:

- *Alentar a los revisores a realizar comentarios sobre cuestiones éticas y posibles acciones de mala conducta en relación con la investigación y la publicación identificadas en los trabajos presentados (por ejemplo, diseño de investigación poco ético, detalles insuficientes sobre el consentimiento de los pacientes del*

estudio o sobre la protección de los sujetos de la investigación incluidos los animales-, manipulación y presentación inadecuada de los datos, etc.);

- *Animar a los revisores a realizar comentarios sobre la originalidad de los trabajos presentados y a estar alerta de las posibles publicaciones repetidas y del plagio;*
- *Considerar la posibilidad de proporcionar a los revisores herramientas para detectar publicaciones relacionadas (por ejemplo, vínculos a referencias citadas y búsquedas bibliográficas);*
- *Enviar los comentarios de los revisores a los autores en su totalidad a menos que sean ofensivos o difamatorios;*
- *Favorecer el reconocimiento de la contribución de los revisores a la revista ;*
- *Alentar a las instituciones académicas a reconocer las actividades de revisión por pares como parte del proceso académico;*
- *Realizar un seguimiento de la labor desempeñada por los evaluadores y tomar medidas que aseguren un proceso de alta calidad;*
- *Desarrollar y mantener una base de datos de revisores adecuados y actualizarla en función del rendimiento de los mismos;*
- *Dejar de enviar trabajos a revisores que emiten, de forma constante, críticas carentes de educación, de mala calidad o fuera de plazo;*
- *Asegurar que la base de datos de revisores es un reflejo de la comunidad académica para la revista y añadir nuevos revisores si resulta necesario;*
- *Utilizar una amplia gama de fuentes (no solo contactos personales) para identificar nuevos posibles revisores (por ejemplo, sugerencias de los autores, bases de datos bibliográficas);*
- *Seguir el diagrama de* flujo *de COPE en casos de sospecha de mala conducta por parte del revisor.*

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a) The director/editor

b) The editorial coordinators

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

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

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

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

2. Conflict of interest

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

3. Confidentiality

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

4. Feedback

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

5. Arbitration modality

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

6. Responsibilities of the Editorial Committee and the External Evaluators

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

7. Competition

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

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COPE CODE OF CONDUCT AND BEST PRACTICES GUIDELINES FOR JOURNAL EDITORS

Background / structure

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

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

General duties and responsibilities of publishers

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

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

2. Strive to improve the journal continually;

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

4. Advocate for freedom of expression;

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

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

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

Best Practices for publishers would include the following actions:

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

Relations with readers

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

Best Practices for publishers would include the following actions:

- Ensure that all published research reports and reviews have been reviewed by qualified personnel (including statistical reviews when necessary);
- Ensure that the non-peer-reviewed sections of the journal are clearly identified;
- Adopt processes that promote the accuracy, completeness, and clarity of research reports, including technical editing and the use of appropriate guidelines and checklists (e.g., miame, consort);

- Consider developing a transparency policy to encourage maximum disclosure of non-research articles;

- Adopt authorship or contribution systems that promote good practices, that is, that reflect who did the work and discourage the implementation of misconduct (for example, ghostwriters and guest authors); and,

- Inform readers of the measures taken to ensure that proposals submitted by staff members of the Journal or Editorial Board receive an objective and impartial evaluation.

Relations with authors

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

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

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

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

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

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

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

Best Practices for publishers would include the following actions:

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

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

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

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

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

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

- Publish the delivery and acceptance dates of the articles.

Relations with reviewers

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

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

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

Best Practices for publishers would include the following actions:

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

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

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

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

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

- Encourage academic institutions to recognize peer review activities as part of the academic process;
- Monitor the work of the evaluators and take measures that ensure a high-quality process;
- Develop and maintain a database of appropriate reviewers and update it based on their performance;
- Stop submitting papers to reviewers who consistently issue uneducated, poor-quality, or late reviews;
- Ensure that the reviewer database is a reflection of the academic community for the journal and add new reviewers if necessary;
- Use a wide range of sources (not just personal contacts) to identify new potential reviewers (eg, authors' suggestions, bibliographic databases);
- Follow the COPE flow chart in cases of suspected misconduct by the reviewer.

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AVISO LEGAL

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

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

CUOTA DE GÉNERO

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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) publicada por el Centro de Publicaciones y bajo el auspicio de la Dirección de Investigación de la Universidad. La modalidad de publicación continua cierra el 30 de junio y el 31 de diciembre de cada año. Sin embargo, la RFJ se encuentra abierta a recibir artículos a lo largo de todo el año. Su énfasis es el ámbito de lo jurídico y (entendido *prima facie* en un sentido teórico) su relación con otras disciplinas, saberes y ciencias. Puede utilizar el sistema de "especiales temáticos" en cualquiera de sus convocatorias.

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

El Consejo Editorial y de evaluadores externos está integrado por destacados académicos de las ciencias sociales de diferentes Universidades de Latinoamérica, Europa, Estados

Unidos y Oceanía. Estos de forma conjunta al Equipo de Gestión Editorial conforman el Comité Editorial de la RFJ.

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

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

Revista RFJ

A la Pontificia Universidad Católica del Ecuador

AGRADECIMIENTO Y PRESENTACIÓN

La Pontificia Universidad Católica del Ecuador 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, Mariana Lozada Mondragón y Amparo Álvarez Meythaler.

A los revisores que actúan como pares ciegos verificadores de contenido y los lineamientos generales investigativos de la revista y la formulación y acoplamiento técnico de su estructura. A 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.

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Avoidability of the prohibition error: dichotomy between Spanish jurisprudence and doctrine

Evitabilidad del error de prohibición: dicotomía entre jurisprudencia española y la doctrina

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ABSTRACT: The doctrine approaches the avoidability of the mistake of law or prohibition from markedly antagonistic theories. From there, a broad spectrum of interpretations is obtained by the judges when admitting this figure in a judicial decision. Then, depending on each theory, the effects of the mistake of law or prohibition can be different. It is also to be considered the different criteria that that jurisprudence has formed, especially in countries such as Germany and Spain. These countries regularly apply the figure of the mistake of law or prohibition, primarily in cultural conditioning cases, due to the strong migratory phenomenon they have faced in recent decades. Therefore, various criteria are set out and must be considered for each particular case when defining the person's degree of guilt.

KEY WORDS: Criminal law, legal principle, conduct, law enforcement, administration of justice.

RESUMEN: La evitabilidad o vencibilidad del error de prohibición ha sido abordada por la doctrina desde teorías marcadamente antagónicas; de allí se obtiene un amplio espectro

de interpretaciones que realizan los juzgadores al momento de admitir esta figura en una decisión judicial. Según cada teoría los efectos del error de prohibición en un ser humano pueden ser distintos y a ello se suma también los diferentes criterios que la jurisprudencia ha ido formando, sobre todo en países como en Alemania y España; los cuales aplican con regularidad la figura del error de prohibición, esencialmente en casos de condicionamiento cultural debido al fuerte fenómeno migratorio que afronta en las últimas décadas. En este sentido, se exponen diversos criterios que deben ser considerados para cada caso en particular al momento de definir el grado de culpabilidad en un proceso penal.

PALABRAS CLAVE: Derecho penal, principio jurídico, conducta, aplicación de la ley, administración de justicia.

INTRODUCTION

The theory of error is an essential issue at the dogmatic-criminal level and in the criminal policy of each country. Due to its incredible relevance over the last decades, it has been a subject that has been widely studied by jurists of great intellectual renown worldwide. However, today there are still many questions about the theory of error that the doctrine has not solved. As such, this article proposes to analyze one of the most relevant edges of the prohibition error.

The main topic discussed in the following pages is the expirability of the ban error. The lack of doctrinal development on this specific point constitutes one of the obstacles that limit the application of this figure to a greater extent. If the legal operators had specific elements of analysis when deciding on the degree of expirability of the error, it would undoubtedly greatly facilitate the task of guaranteeing the legal certainty of the persons who are part of a criminal process against them. Likewise, this would also prevent jurisdictional activity from falling into the immense abyss of excessive subjectivity and, therefore, injustice.

1. BETWEEN PSYCHOLOGISM AND NORMATIVIZATION

The neuralgic point of the discussion of the prohibition error lies precisely in the legal effects that derive from its application. The mitigation or elimination of criminal culpability will be addressed in this article, mainly concerning the criteria that the doctrine has developed as mechanisms for determining the degree of expiration of the prohibition error.

The main theses that allow us to form our criteria are set out below and, for this, it is appropriate to point out that the jurisprudence of the Spanish Supreme Court (TS) has not been entirely consistent with the doctrine, because despite reinforcing specific doctrinal criteria of Determination of the avoidability of the error, has also been quite restrictive in the admission of the error, especially of an inevitable nature. Throughout the text, various jurisprudential criteria will be set out in this regard.

A first aspect that is fundamental about avoidability is that its doctrinal development has had two major stages. Psychologicalism ruled first and regulation has gradually taken a wide place.[1]of personal accusation or guilt. This situation must be understood as a political-criminal process. However, this development does not ignore the need for the avoidability judgment to be governed by the search for personal criteria on the ability of an individual to overcome the error.

This means that the study of each case of avoidability always requires the personal analysis of the individual in order to make it compatible with the principle of guilt; For this, the concept of enforceability has been strengthened (Rusconi, 2009). This last concept is the basis on which the different methods that determine the position of the human being are built in the face of the knowledge of the prohibition of their

1 The concepts of psychologism and normativization will be explained at the time that its main ideas are developed.

conduct.

Accepting the postulate that the avoidability judgment must be based on personal criteria, as far as possible by subjective criteria, the expiration must be understood as: "(...) the possibility by the author of having come to the knowledge of unlawfulness" (Olaizola, 2007, p. 155). Therefore, the key is to assimilate said possibility of obtaining knowledge with the potential that the subject has for this purpose (Spanish Supreme Court, STS 835, 2017)[2]. What characterizes potential knowledge is the possibility of reproaching the author for being in that circumstance (Olaizola, 2007).

In such virtue, the expirability of the prohibition error and its legal consequence of attenuation of the sentence are analyzed from the point of view of "capacity" as a determining aspect of the motivation by the norm. Moreover, the perpetrator of a crime has an attenuated level of guilt, even without being aware of the unlawfulness, when he has not made use of his ability to know the illegality of the conduct. Therefore, the analysis of the subjective criteria of the individual tries to illustrate the circumstances in which a subject has that capacity or, on the contrary, if the error is inevitable.

In determining avoidability, there has been a doctrinal struggle regarding the ability to know since it has often been understood as a duty to know the norm. Olaizola (2017) points out that the German jurisprudence and also a part of the Spanish Supreme Court has been favourable to this postulate, pointing out that the error of the expirable prohibition is produced by the injury of a legal duty from which the obligation of citizens to inform themselves about of legal norms.

2 Likewise, Sentence 3981/2015 of the Spanish Supreme Court (2015, p. 23). In the same sense, it establishes that the mechanisms that converge in a specific situation and serve to dispel doubts cannot be omitted in the analysis of the legality carried out by an individual, and such omission would be sufficient to inadmiss an error.

The duty to know, imposed as a legal norm, is questioned by this author by several arguments. The most important is that such a precept violates the individualization mentioned above that the analysis of knowledge capacity must cover (Olaizola, 2007).

But the issue goes further, Rusconi (2009) questions the legitimacy that a State would have to impose a legal duty of such magnitude. This author understands that there is no such legitimacy and that, therefore: "(...) duty of information as a recommendation to the good citizen, in no way can turn its violation into a relevant legal fact either in itself, nor -much less- as a presupposition for the imputation of a non-guilty unlawful act" (p. 478).

In this order of ideas, the idea that the potentiality of knowledge is based on an individual capacity of the human being is fully acceptable - according to the dogmatic construction that is sustained. This means that the verification of said prior condition must be based on the capacity of that individual in their specific situation and not on a requirement of the legal system (Neck, 2002).

However, the discussion goes a little further, as it concerns substantive political and legal criteria. In a democratic state and governed by law, it is unthinkable to establish citizens as a legal obligation to inform themselves about all legal prohibitions (Cobos Gómez, 1987). However, there are certain moments in which a person may be asked to know the legal-criminal norms that regulate a specific activity in which they are immersed, an issue that will be analyzed later. But this does not mean that the sentence should be based on an omission of information attributable without exception to an individual.

Now, following the line of argument based on the democratic State and the Law, it is appropriate to consider that one of the guiding principles is that of equality of human beings. For Nieto Martín (1999), the recognition and application of the

principle of equality supposes a two-way requirement for the principle of guilt. On the one hand, the distinction between imputable and unimputable persons; and, on the other hand, the greatest possible individualization at the time of determining the expirability of the error, taking into account subjective aspects of the person.

The basis for such an equalization is that the lack of motivation in a subject is decisive when there are diseases or disorders that make a person unimpeachable and, consequently, their reproach of guilt suffers repercussions. The same happens with the avoidability judgment, since several criteria must be taken into account, for example, intellectual capacity, social and professional level, possibility of accessing enough information to clear the error and, finally, cultural conditioning.

The use of all these parameters allows individualization to oppose generalizing criteria such as that of the "average man." Although it is necessary to clarify that, in jurisprudence, despite the doctrinal criticisms that proclaim the need for subjective criteria, this criterion is still used, thus the Supreme Court's Ruling 567/2018 (2018) indicates: "The analysis (...) it must be carried out on the specific case, taking into account the conditions of the subject in relation to those of what could be considered an average man, thus combining subjective and objective criteria "[3] (p. 7).

For the dogmatic criterion of avoidability that is proposed, the approaches on individualization in the analysis of the prohibition error are congruent and take into account the capacity of the human being as a support for the different motives that lie in the formation of knowledge. As such, the need for a person to require a reason to consider a scenario of lawfulness or illegality of their conduct is totally admissible. These grounds offer administrators of justice the reasonable limit to determine the avoidability or inevitability of the error.

3 In this sense, it can also be seen that the Supreme Court Judgment 302/2003 (2003), there is exposed in similar words the use of the "average man" as a parameter for measuring error.

The foregoing, according to Olaizola (2007): "(...) supposes that, although there are objective possibilities for the author to recognize the irregularity of his behavior, it will be necessary for the author to have a reason that makes him avail himself of said objective possibilities" (p. 162). However, in the doctrine there is no unanimity of criteria on the various motives. The positions are antagonistic; therefore, it is plausible to succinctly expose their main postulates in order to determine which are the applicable precepts that make the application of the prohibition error feasible in various situations. The dominant positions are represented by psychologism and normativism, although there are several very interesting nuances that are related to a coherent development of avoidability.

The first position has two fundamental postulates, developed by Olaizola. On the one hand, the perpetrator of a crime needs to obtain a reason to think that his conduct may be illegal, in turn, this motive is materialized as a doubt. Therefore, once the person represents a doubt, it serves as a stimulus for him to make whatever efforts are possible to clear his concern and thus exclude the error. On the other hand, it must be taken into account that this effort to put aside the doubt must be valued by the courts, in such a way that, if the subject, despite the effort made with the available means, did not obtain knowledge of the unlawfulness, he would not be guilty of incurring an inevitable error in the subject (Olaizola, 2007).

In this order of ideas, according to this theory, knowledge can only be obtained when the subject, internally, is capable of representing a reason for doing so. This correlation can happen in two ways. First, spontaneously, understood as a coincidence in which a person feels a stimulus, until that moment unknown, which determines it as a sufficient reason to know something (Córdoba, 2012).

The second way is learning, this happens in a subject whose experience allows him to link a stimulus in his daily life to a circumstance about which he has minimal doubt as to its

unlawful nature. Thus, these possible motives are the basis for an action to arise to obtain knowledge (Córdoba, 2012).

1.1. Criticism of psychology

Now, the psychologist position has significantly been discredited by a broad doctrinal sector. The main criticisms are based on the drawbacks of such a radical position; the incompatibility of structural, practical and criminal political order makes it inapplicable today. However, it is essential to clarify that not adopting this position does not mean a contradiction with what was stated above about the particularization of the analysis of guilt and avoidability, since, as Córdoba (2012) points out: "Guilt would be determined, then, certainly according to the individual capacities of the concrete author, but, partially, also according to some established normatively" (p. 57).

One of the strongest criticisms of the psychologist's position is that made by Roxin. This author focuses on the disadvantage of structural order since the application of Horn's postulates would imply leaving aside the theory of guilt and returning to the legal effects of the theory of fraud. This arises because the error of prohibition would be considered inevitable in any case in which a person had no doubts about the unjust nature of the conduct (Roxin, 2008, p. 885).

As such, the reasons for knowing the unlawfulness must not only be limited to the doubt, at least slight, that an individual may have but other independent factors must be examined in a specific situation. . On the other hand, in the practical matter, if any error in which a subject has not had doubts regarding the unjust, is considered as inevitable, Olaizola (2007) highlights "(...) the careless author who does not repair in the circumstances could be privileged that should have led him to question the unlawfulness of his behaviour" (p. 165).

Finally, in the political-criminal issue, the reproach to the psychologist position, whose leading exponent is Horn (n. d.) (cited by Roxin, 2008), has to do with the restriction that it supposes to the avoidable prohibition error, which occurs because a person, having a doubt, would be applicable the postulates of eventual knowledge, which in most cases excludes error. Otherwise, in the opposite circumstance, that is, when there is no doubt, the invincible prohibition error would be the rule (Olaizola, 2007). In conclusion, it should be emphasized that the usefulness and possibility of applying the expiration would be inexcusably restricted. Therefore, the exclusive criterion of doubt as a reason to overcome the expirability of the error is too limiting.

1.2. Distinction of crimes according to the jurisprudence of the Supreme Court

As the next point of analysis, it is essential to study what the doctrine proposes as an intermediate current that, although it is born from the psychologicist postulates, also adds some exciting parameters useful in judicial and procedural activity in cases of avoidable prohibition error. One of the most relevant consists of the recognition of a particular demand for knowledge of the illegality in specific circumstances; furthermore, on this point, it is necessary to analyze the proposals of Nieto Martín.

As a first aspect, this author proposes to distinguish two criteria. On the one hand, nuclear and artificial or secondary crimes are different subjective avoidability criterion for laypeople and professionals (Nieto Martín, 1999). The division has an exciting political criminal purpose. This qualification bases its argument on recognising a criterion of avoidability based on the knowledge that a person must have when they belong to a field regulated by law. However, it is not a determining question either, since for there to be potential knowledge, the motive must be formed by belonging to the legally regulated sector and by a doubt about the unlawfulness of their conduct.

The Spanish High Court has ruled on the distinction that exists between crimes. If it is a "notorious wrongfulness" crime, it will be tough for a citizen to make an invincible error. For example, in crimes of a sexual nature in which a 13-year-old person participates, the knowledge could have been obtained by the actor of the crime since:

(...) The notorious illegality of sexual conduct with minors in our cultural sphere [has been] widely disseminated by the media, with extraordinary incidence regarding the reform introduced in 2015, precisely due to the lack of consensus over the age limit, being, consequently, easily knowable by the generality of citizens. (Spanish Supreme Court, STS 633, 2019, p. 4)

However, despite the nuclear nature of certain crimes, other personal factors are also considered. Among them, the nationality of the perpetrator of the crime, his age, and general knowledge, being these factors that would allow access to knowledge (Spanish Supreme Court, STS 633, 2019). For this reason, a prohibition error that falls into a crime of this nature will not always be avoidable, as there are exceptions that address very particular circumstances that can make it inevitable.

This is the analysis carried out by the Supreme Court in the case of two Ecuadorian citizens residing in Spain who had a dating relationship and also of a sexual nature. The man was 29 years old and the woman 15 when they began to have sexual relations in May 2015. Coinciding with the time of penal reforms in which the chronological threshold for the provision of consent of minors was changed from 14 to 16 years. Therefore, at the beginning of the relationship, there was no illicit conduct[4].

The reasoning of the Spanish Supreme Court focuses on the fact that, despite being a "natural or material" crime, the discussion must go further, since the central problem is to define the possibility that the subject had of knowing the unlawfulness of his conduct, which was the product of a legislative reform

4 Lawfulness comes from the free and voluntary nature of sexual relations.

in the months after the beginning of the relationship. In view of this circumstance, any duty to inform that may have been attributed to the author is set aside, as that would mean an obligation:

(...) Of periodic consultation of the official gazettes in which the legislative reforms are published, in order to rule out that a change in criminal policy has turned him into a sex offender. [And the TS exposes its criteria]. It is a non-enforceable conduct that, therefore, exceeds the limits of the beatable error of prohibition and generates, due to its invincibility, the full exclusion of guilt. (Spanish Supreme Court, STS 782, 2016, pp. 7-8)

In such virtue, the social context of the individual is also taken into account, considering in the particular case, that the subject develops his activities in a group composed only of Ecuadorian citizens; Therefore, it dispenses with legal knowledge that would allow it to effectively know the imperative of the criminal law to which it would have had to resort by consulting the Official Gazette of the Spanish State BOE. Thus, this ruling allows exceptions to the legal consequences of the error according to the class of crimes in which it is admitted.

1.3. Relevance of internal aspects of the human being

But the issue does not end there, as this current gives broad importance to the legal right that corresponds to the conduct, because: "(...) the correct treatment of the expirability of the error in this area cannot be carried out without taking into account the different levels of commitment that, in relation to the legal right correspond to each of these authors" (Nieto, 1999, p. 185). Consequently, for the laypersons of the specifically regulated activity who do not exercise, but by chance, the conduct could only be reprehensible when there is full knowledge of the unlawfulness and not merely potential.

Thus, the justification lies in the fact that the protection of the legal right does not justify equal treatment for lay people and professionals. Well, the level of demand could never be compared to that of a professional who is constantly developing in a specific field and that the legal norm will be more apprehensible to him.

The political-criminal justification to which Nieto Martín (1999) above is that the aforementioned distinction allows the rational application of the principle of equality or social solidarity, thus facilitating that avoidability responds to a criterion of proportionality of the sentence. Additionally, the undesirable damage that may be caused to the lay person who for any circumstance becomes doubtful is remedied, in front of the carefree professional who makes no effort to verify the legality of his conduct. This was one of the main criticisms of psychologism, therefore, with the qualification set out, said legal consequence is corrected.

It is appropriate to highlight that the different level of demand that must govern between lay people and professionals who are developing an activity in a field regulated by law should not set aside an internal distinction parameter. Well, it is not fair that all lay people and all professionals are measured with the same parameter. Precisely the avoidability tries to individually verify the possibility of knowledge and the actions carried out by each individual to clear the error. The internal difference between laymen who act differently, whether scrupulously or carelessly, also implies a different assessment by the administration of justice, which could even be decided by an invincible error.

At this point, we return to the fundamental premise on avoidability, certainly the differences between the same sector of society must be analyzed to determine the criminal sanction. Those differences should guide the assessment of individualizing internal aspects of the human being. To this end, other circumstances that are useful for measuring expiry are set forth below.

Once the psychologist position is overcome, it is time to review the contributions of normativism, in order to determine its possible harmonization with the present investigation. Its main exponent is Jakobs, who poses a vision antagonistic to Horn's.

For normativism it is essential that guilt has a function with respect to the end of the sentence. That is, guilt to the extent that it may be attributable to the avoidability of a prohibition error will have as a further purpose the reaffirmation of confidence in the criminal law. Therefore, ignorance is a stage that must be standardized according to explicit criteria that empower the administration of justice to decide whether to tolerate it or not, in such a way that avoidability arises when the author may be responsible for it. (Olaizola, 2007)

The avoidability of the error does not constitute, in this current, a psychological problem but a normative one (Jakobs, 1997), a situation that makes it possible to dispense with the individual and his individual analysis and thus form the criterion of attributing to people the task of knowing the rules in virtue of being accredited as a true citizen of the Law. (Córdoba, 2012)

The measure of the judgment of reproach in this current implies an assignment of a role to the members of society. By virtue of this role: "(...) the task of procuring for himself reasons is imposed on the individual so that it is preferable for him to know and follow the rules" (Córdoba, 2012, p. 80). This task is precisely fidelity to the legal system. Therefore, for Jakobs (1992), avoidability: "(...) is determined individually, that is, depending on whether the specific author would have been able to perform the behavior corresponding to the standard of his role if he had made enough effort". (p. 1067)

In this vein, it is clear that the concept of avoidability would be immersed in guilt, thus the prevention objective pursued by guilt makes the motive for finding out about the

illegality of a conduct falls on the individual according to the imposed role.

Due to the dogmatic construction, it is not convenient to apply such a radical position to avoidability, since the political-criminal considerations that will take place in the application of the prohibition error reduce its possibility of application, at least in a general way. Although there are also certain nuances[5], perhaps a little more marked when compared with psychology, and that outline considerations to make the avoidable prohibition error viable. The most important position that arises at this point is that proposed by authors such as Rudolphi, Roxin, among others; that, although it is still normative, it has several aspects in which it disagrees, without placing itself at the extreme of psychologism.

The criterion that the vencibility of the error is the result of an interrelation between psychic aspects and normative provisions is correct. Therefore, the level of avoidability must be based on the doubt, understood as a reason, in the subject who may know the unlawfulness.

Now, this doubt allows to configure the potentiality and generate an expectation of knowledge in a person, here a normative aspect that establishes this requirement already intervenes. Cobos Gómez de Linares (1987) exposed several decades ago some criteria that were developed by Rudolphi at the time and have been useful to establish the winnability of a prohibition error. The first of these is the possibility for a person to obtain reliable information to determine their behavior. The second criterion is that it may be required to take advantage of this possibility of obtaining knowledge. Finally, it proposes that the author have the opportunity to represent the doubts, in order to be able to clarify them with the two previous means.

5 As in psychologism, intermediate doctrinal positions have also developed that systematically distance themselves from radical criteria.

1.4. Reasons for knowing the unlawfulness

The criteria presented above show an interesting connection between the two theories previously exposed, the first two normative criteria are the most important and are also collected, with some variations in Roxin's thesis. This author begins by stating that, in order to overcome the defeatability of an error, an extreme effort is not required on the part of the subject to know the unlawfulness, since such demand considerably reduces the elimination of guilt in practice. Well, so that the administration of justice cannot impose this requirement, three requirements are proposed that are concatenated among themselves, forming a single structure of expirability.

The first is the need for a reason that allows a subject to reflect; This criterion can be seen in various circumstances. For example, if there is already a reason, the subject must not have made a sufficient effort to clear his doubt; or if the subject makes an effort, but not enough to know the illegality of his conduct (Roxin, 2008). In this context, the close relationship between Roxin and Rudolphi can be appreciated, a matter on which the Spanish Supreme Court (2019) has also ruled:

> It is often reasoned that a doubt, even a slight one, about the lawfulness of the conduct is sufficient to integrate the first aspect. Moreover, this standard is mitigated with normative criteria: it is enough to be aware of circumstances that would advise verifying the legality of the conduct. With this qualification we want to avoid giving priority to those who, due to their attitude of indifference towards the Law, do not even consider whether their conduct is lawful or not (the subject does not doubt anything because the law is indifferent to him). (STS 261, p. 15)

The reason for knowing the unlawfulness must arise on the initiative of the individual himself. This is basically the psychologist thesis, which has also been accepted in this

current. Then, if the subject must carry out activities in a field that has specific criminal regulations, said knowledge becomes a normative expectation whose purpose is for the person to make efforts to know the criminal regulations. For example: "Whoever opens a bank or a grocery store, who intends to operate a hotel business or drive a truck on the road knows that there are legal precepts for the exercise of these activities" (Roxin, 2008, p. 886).

In this sense, Spanish jurisprudence has also tended to recognize these differences. Thus, the Spanish Supreme Court (2001) has indicated that: "(...) a person normally educated to do business is practically impossible to ignore the illegality of obtaining undue money by deception" (p. 7). In this statement we can see the importance of rejecting the error, both the preparation of the subject, and the area in which they develop their work activities. Regarding the specific regulations for a work activity, the jurisprudence stands out, in Sentence 318/2019 of the Spanish Supreme Court (2019) regarding a case of sexual crimes with a minor who:

> (...) The accused appears as a volunteer to train minors, which requires him to have an exquisite diligence in dealing with minors, which at least must materialize in informing himself before starting his activity; either individually or by the person in charge of the Sports Center that hires him; of certain regulations regarding the relationship of adults with minors. (p. 6)

The second criterion allows establishing a limit to the effort that a subject must make to obtain knowledge. This effort can only be triggered by those who, as a precondition, have obtained a reason in the terms already indicated. Here the preventability of an error can be overcome in several cases. One of the most common examples is the consultation that a citizen makes to a person versed in Law. The fact that a legal consultation has been carried out already implies a high level of interest in knowing the legality of the conduct. Therefore, this limit would

have to be sufficient without, normatively, being able to require other kinds of verifications to a lay person in law.

The radical normative thesis of Jakobs (1996) disagrees with this criterion, since it states: "If the determining source is not reliable for reasons for which the author is responsible - the lawyer is obviously distracted or recommends circumventing the law through gross machinations - (...) the author is not exonerated" (p. 680). Following this line, the error produced by the incorrect information provided by a lawyer, would remain the responsibility of the author of the fact. For his obligation was to overcome the lack of knowledge to a greater degree.

Such normative consideration is inapplicable for a person who does not know the Law, since it is not possible to demand to be in the appropriate conditions to refute or contradict a legal criterion without being able to understand that there are contradictory positions on a subject. In addition, this person most likely will not be able to understand technical-legal aspects that support a position contrary to the criteria of his lawyer.

In this sense, Roxin (2008) rightly points out: "It would be going too far by demanding that those seeking advice must verify the general ability or specific technical knowledge of a lawyer" (p. 888). This criterion is based on a principle of trust, which is generated in a lay citizen regarding the response of a lawyer. Thus, it is pertinent to constitute a limit to the information requirement. Therefore, when there is a reason for doubt and the person does not make the effort to consult an expert in Law, the error will be beatable and therefore guilty, although to a lesser degree.

However, if the subject tries to overcome ignorance through such consultation, the error is transferred to the field of invincibility and therefore there is no guilt. The intention of a person to overcome ignorance by consulting a legal professional has been accepted by jurisprudence as

an important criterion in determining expirability; clearly, provided that real possibilities to do so have converged (Spanish Supreme Court, STS 302, 2018).

However, exceptional circumstances may arise in which an individual, despite the information received from his lawyer, continues to have doubts, either because he knows of the existence of discrepant criteria at the doctrinal or jurisprudential level, the correct thing would be to make an additional effort to meet your requirement for certainty. However, these cases will hardly happen in a subject who does not have legal training, but the scenario is more likely when the same lawyer or official body that issues the information also highlights the existence of discrepant criteria at the judicial or scientific level. Such a situation entails an expectation towards the subject to obtain a second opinion that allows him to decide with greater argument for one or another behavior.

Finally, the third criterion is a necessary consequence of the above, when the subject makes efforts to ensure the legality of his conduct, but these are inefficient, the following alternative is proposed. If an individual tries to form a legal criterion self-taught and its result is the same as what a lawyer would have told him, the error would also have exceeded the criteria of expiration and therefore the subject would not be guilty (Roxin, 2008).

At this point, it is necessary to be inclined to accept Roxin's thesis for the central theme. This is due to the great practicality and political-criminal convenience, since it allows an analysis of the avoidability of the error that considers the normal activities of the human being, maintaining the normal channels of daily life. Without leaving aside, of course certain expectations that are legally formed so that criminal law is not overwhelmed and overloaded in its judicial stage.

1.5. External factors

But the issue of avoidability does not end in determining the existence of motives to seek knowledge of unlawfulness and not in the limits for such search. Rather, there are several external factors that are very useful to support a judgment of avoidability. Some of them - those that acquire more influence - will be studied below. For example, the weather, the person's state of mind, the social conditions in which he operates, and cultural conditioning.

In the daily life of a person diverse external factors converge that can condition or, at least, influence, the possibility of knowing a criminal norm. Until now, the analysis of internal and subjective issues has been deepened; but one should not forget the aspects that are independent and are outside the reach or control of the members of a society. Likewise, the jurisprudence highlights that there are no general parameters that allow determining avoidability, but that:

> (...) It will be necessary to appeal to the circumstances of each case and of each subject, (...). What is involved, as it is accepted, is to assess whether the subject, in the specific context of his behavior, had indicators that warned him of the eventuality of the criminal nature of his conduct. For this reason, it is not possible to objectify behaviors in terms of the requirement of the duty to examine one's duty under the Law, and to the contrary it is not acceptable to carry out a maximum subjectivization that makes the injustice of the crime depend on the "perception of the author". conduct. (Spanish Supreme Court, STS 684, 2018, p. 28)

In order to determine whether the possibility or potential knowledge of criminal unlawfulness existed, time must be taken into account. This is a determining factor for a subject, because the performance of some action may depend on it to determine the adequacy of the conduct to the legal-criminal order. The

importance of the time factor in the study of avoidability must be considered from two different points of view.

First, the time in which a subject has been able to have knowledge of a certain criminal norm must be appreciated. For example, faced with the migratory phenomenon, it is an essential factor that should be assessed, since depending on the time that a subject has been in a territory with a new legal system, the possibility that he had to access knowledge could be determined. However, the analysis of avoidability should not be satisfied with the time factor but consider other criteria together.

As another point of view, the time must be considered at the time of commission of a crime, that is, taking into account the lapse between the moment that an individual may consider the need to know about the illegality of his action and the moment in which it is carried out. Córdoba (2012) proposes the following example: "(...) in situations of legitimate defense or state of necessity, but also in situations of vehicular traffic that cannot be stopped (...). These are, as can be seen, situations in which the need to act is imposed" (p. 97). In extreme situations, a person does not have the possibility of knowing the illegality of their conduct or, at least, this possibility may be conditioned by circumstances dependent on factors, both internal and external.

Such situations are impossible to consider in crimes that involve prior preparation, in which, at the very least, it is possible to think about their unlawfulness. This issue has also been warned by jurisprudence when it indicates in a crime of distribution of narcotic substances, that: "(...) there was no urgency to decide and act. It was a decision by its own nature that could be postponed" (Spanish Supreme Court, STS 3981, 2015, p. 23), referring to the possibility of overcoming the ignorance of the unlawfulness because the commission of the crime required advance preparation and does not imply -as happens in extreme situations- the lack of time to take the pertinent actions.

Another aspect that must be taken into account to determine the avoidability of the error is the social integration of the person. This includes multiple edges[6], for example, age, language, education, etc. From the assessment made by the administrators of justice regarding these circumstances, the real potential for access to knowledge of the illegality can be determined with greater accuracy. For example, a person who works, who speaks the same language as the country to which the legal norm is applicable, who has access to the Internet, etc .; will be very prone to access the knowledge of a criminal law. It could not be compared to the situation of a subject that in his concrete reality the mentioned circumstances are unfavorable to him, because in that case, it is most likely that his ignorance is inevitable.

CONCLUSIONS

The error of prohibition is a figure that cannot be limited to certain types of crimes. That is, it cannot be applied in some criminal types and not in others. A specific doctrinal sector has proposed that distinction based on categorising "common" or "notorious wrongdoing" crimes and those that are very specific and little known by the majority of the population. Assuming this classification as correct is quite risky since it allows arbitrariness in jurisprudence.

The prohibition error is a figure that goes far beyond the crime committed. Its legal nature does not focus on the violated norm or protected legal right but criminally prosecuted. The guilt or personal imputation is the ideal place within the dogmatic construction of the crime. In previous pages, two cases that substantiate this position were analyzed, both related to sexual crimes; in one of them, the prohibition error is admitted and in the other not. This shows that it depends on the individual's circumstances and the context in which the unlawful act occurs, not of the criminal type committed.

6 In this sense, Sentence 318/2019 of the Spanish Supreme Court (2009) can be seen. It takes as relevant aspects of expirability the age of the subject, as well as their academic training and nationality.

The parameters that must be analyzed to determine the avoidability or inevitability of the error are a) The person's academic preparation depends on whether they have a professional degree. It is also incumbent on what type of profession it is since the knowledge of unlawfulness is not the same as that of a layperson in law as that of a jurist; b) The intention to obtain information that a subject has either self-study or through consultation with a legal professional; c) The work activity carried out in a specific field and whether it is permanent or temporary. With these parameters, it can be determined whether a person could have known the legal norms that regulate his activity or, on the contrary, if such knowledge was not required; d) The time in the two scenarios presented in the investigation is decisive. The administration of justice must take into account this parameter in which specific circumstances of the criminal act and complex aspects such as the migratory phenomenon converge; e) Social integration is an aspect that jurisprudence considers in all its decisions, within this, there are several aspects such as the social circle of the individual, their work activity and the possibility of accessing information by electronic means.

The individualization of the avoidability analysis is transcendental so that the prohibition error is admitted and guarantees that the criminal sanction is proportional and fair to the degree of guilt of the individual. Then, the individualization of guilt results from the analysis carried out by the justice administrator regarding various issues. The jurisprudential analysis provides a broad perspective on certain essential aspects that must be taken into account for the resolution of each case.

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Bankruptcy of creditors for breach of obligations

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ABSTRACT: This article analyzes the state of insolvency or bankruptcy that may be incurred by those who default or fear default on their obligations. This breach is the source of a new legal situation and an economic and patrimonial state of the debtor, which is declared judicially to organize its creditors legally and preserve the insolvent debtor's assets and later liquidate and distribute them.

Once this situation has been analyzed (which may be fortuitous, guilty or fraudulent), the five types of bankruptcy procedures that Ecuadorian legislation provides are reviewed and differentiated: preventive, preventive for commercial companies, exceptional preventive, voluntary and necessary, highlighting the effects and consequences that each one of them generates for or against the debtor.

Finally, the authors' conclusions regarding this legal institution and its application in the Ecuadorian judicial system will be reviewed.

KEYWORDS: Contract law, civil liability, legal procedure, credit, debts.

RESUMEN: El presente artículo analiza la situación de insolvencia o quiebra en la que pueden incurrir aquellas personas que incumplen o temen incumplir con sus obligaciones de dar, hacer o no hacer. Esta falta o incumplimiento da lugar a una situación jurídica y estado económico y patrimonial del deudor, el cual se declara judicialmente con el fin de organizar legalmente a sus acreedores y así depurar y conservar el patrimonio del deudor insolvente, para posteriormente liquidarlo y repartírselo.

Una vez analizada esta situación (la cual puede ser fortuita, culpable o fraudulenta), por medio de un enfoque descriptivo y del método sistemático, se revisarán y diferenciarán los cinco tipos de procedimientos concursales que nuestra legislación contempla: preventivo, preventivo para sociedades mercantiles, preventivo excepcional, voluntario y el necesario, destacando los efectos y consecuencias que cada uno de ellos genera a favor o en contra del deudor vencido. Este estudio se realizará en base a la doctrina ecuatoriana, peruana y española que sobre el concordato, se ha pronunciado.

Finalmente se revisarán las conclusiones de los autores respecto a esta institución jurídica y su aplicación en nuestro sistema judicial.

PALABRAS CLAVES: Derecho de los contratos, responsabilidad civil, procedimiento legal, crédito, deuda.

INTRODUCTION

The Civil Code (2005) in its article 1561 states that every contract legally entered into is a law for the contracting parties and, therefore, cannot be invalidated except by mutual consent of the parties or for causes established in the law. This provision makes up the basic rule of contractual relationships between people.

However, the contracts that are contracted are not always fulfilled in how they were agreed. In these cases, the law empowers those debtors who foresee an eventual breach to avail them, preventively or voluntarily, of legal mechanisms that facilitate their compliance either through the extension of deadlines (withdraw or wait) or the remission of interest or capital.

Finally, the most common scenario is that it is the creditor who demands the fulfilment of an overdue obligation. In this case, the bankruptcy procedure is necessary and seeks to declare the expired debtor's insolvency or bankruptcy. It is the last resort of the creditor to force his debtor to satisfy the debit or credit.

However, our legislation is not clear when identifying each of the existing bankruptcy procedures, which generates confusion among justice operators. Through this article, we intend to analyze and describe each of the five procedures currently applied in Ecuador, both in their notions and their procedures, which are scattered throughout the legal system, so that the study of this institution in this systematic investigation.

1. OBLIGATIONS TO GIVE, DO OR NOT DO

In the first place, it is essential to remember that an obligation is a "link, tie, link, terms close to each other, when not synonymous, which, when applied to the law, imply a legal relationship" (Hinestrosa, 2007). Then, it is how it can be defined to the obligation as a legal bond between a specific party called the debtor (taxpayer of the relationship) and a specific party called the creditor (active subject of the relationship). Furthermore, the debtor party needs to execute a Determined provision of giving, doing or not doing something in favor of the creditor to be released from the existing legal bond.

Indeed, our legislation establishes that the specific benefits of the obligations can be: 1) Positive: a) Give that

entails the transfer of entire or dismembered property of goods, whether of gender or kind, b) Do as the benefit of service and those whose purpose is the delivery of a thing, as long as such delivery does not imply the mutation of the property and, 2) Refusals or NOT to do that are aimed at abstention from the debtor. (Ospina, 2008, p. 25). Furthermore, these are "generally intuitu personae. This is because the structure of said obligation consists, precisely, in the non-action of a specific subject, reaching said obligation exclusively to that subject " (Castillo, 2014). In this regard, the General Organic Code of Processes (2015) (from now on COGEP or procedural code) states:

> **Art. 366.- Obligations to give a certain kind or body**. In the case of an obligation to give a certain kind or body and the object is in the power of the debtor or third parties, the judge shall issue an order of execution ordering that the debtor deliver it within five days. Unless grounded opposition from the third party, the judge will order that the delivery be made with the intervention of an agent of the National Police, and may even unlock the premises where it is located.
>
> If the true species or body cannot be delivered to the creditor due to legal or material impossibility, the judge, at the request of the creditor, will order that the debtor consign the value of the same at replacement price, as of the date this order is issued.
>
> If the thing is in judicial deposit, the judge will order that the depositary deliver it to the creditor, a provision that will be carried out immediately under the personal responsibility of the depositary.
>
> If the claim has dealt with the material delivery of a real estate, the judge will order that the debtor vacate and make the property available to the creditor, under prevention that if not, the public force will deliver the either to the or the creditor, coercively if necessary, and may even unlock the property. If there are things

in it that are not subject to execution, the release will be carried out, at the risk of the debtor.

Art. 367.- Obligations to give money or goods of gender. In the case of an obligation to give money, the procedure will be in accordance with the provisions of this chapter.

In the case of debt of a specific kind, the judge will issue an order of execution ordering that the defendant, consign the amount of generic goods or deposit the amount of said goods at their current market price on the date it was issued. , under preventions of proceeding to seize sufficient assets in the manner provided by this Code.

The execution proposed for the payment of periodic pensions, for the fulfillment of obligations that had to be satisfied in two or more installments, may include the pensions and obligations that had expired in subsequent periods or terms, even when the judgment had been contracted upon payment of a single pension, or to the one that should have been given or made in one of the terms.

Art. 368.- Obligations to do. In the obligation to do if the creditor requests that it be complied with and this is possible, the judge will indicate the term within which the debtor must do so, under the prevention that if they do not comply with such order, the obligation will be fulfilled at through one or a third party designated by the creditor, at the expense of the executed person, if they have so requested.

If for any reason the fact is not carried out, the execution judge will determine in a hearing convened for that purpose and on the basis of the evidence provided by the parties, the amount of compensation that the debtor must pay. for the breach and will order the respective

collection following the procedure provided for the execution of an obligation to give money.

The execution order will contain the order for the debtor to pay the amounts corresponding to the compensation for damages to which he or she has been sentenced. The order of execution will indicate the sum of money that the debtor must pay, when he has refused to comply with the obligation that is ordered to be fulfilled by a third party, to compensate the latter for what has been done.

If after the term granted by the judge to comply with the obligation, the debtor does not do so, the judge will seize their assets in the manner provided in this Code, in a sufficient value to cover the cost the fulfillment of the obligation by the third party designated by the creditor.

If the fact consists of the granting and signing of an instrument, it will be done by the judge on behalf of the one who must carry it out, this act will be recorded in the process.

Art. 369.- Obligations not to do. If the execution refers to not doing something and if it has already been carried out, the judge will order the reinstatement to the previous state and that the debtor undo what was done, granting a term for the effect, under prevention that, if not done , the creditor will be authorized to undo what has been done at the expense of the debtor and will indicate the amount of money that the debtor must pay for such concept.

In addition, the judge will order the debtor to pay the amounts corresponding to the compensation for damages to which they have been sentenced. If it is not possible to undo what has been done, the defendant will be ordered to consign the amount corresponding

> to the amount of compensation, which will be set at a hearing, in accordance with the procedure provided in the previous article. (art. 366-369)

When the judicial execution of these kinds of obligations is sought, the rules established in Book V of the General Organic Code of Processes must be observed. In this sense, the judge who knows the application for execution, will issue his order of execution which must contain, as established by the procedural norm: 1) The precise identification of the executed person who must comply with the obligation, 2) The determination of the obligation The fulfillment of which is intended, attaching a copy of the liquidation, if applicable and, 3) The order to the executed to pay or fulfill the obligation within a period of five days, under the prevention that failure to do so, will proceed to forced execution .

If the obligations to give a certain kind or body, or gender goods, or to do or not to do, are transformed into monetary obligations, in the cases provided for in Arts. 366 to 369 of the procedural code, and the executed person does not pay or does not resign assets within the term of five days or if the resigned assets are disputed, are not in the possession of the debtor, are located outside the Republic or are insufficient for payment, the insolvency or bankruptcy of the debtor will be presumed and, as a consequence of it, the bankruptcy of creditors will be declared. (COGEP, 2015, art. 416)

> Insolvency presupposes a state or a patrimonial situation of a special nature in which the debtor finds himself, by virtue of which he cannot satisfy his creditors at the moment in which they can demand the fulfillment of his obligations. (Broseta, 1977)

According to Broseta (1977), it is understood that insolvency "presupposes a state or a patrimonial situation of a special nature in which the debtor finds himself, by virtue of which he cannot satisfy his creditors at the moment in which they can demand the fulfillment of his obligations."

In this sense, insolvency (in the case of natural persons) or bankruptcy (in natural persons, merchants or legal persons) is called the exceptional economic and patrimonial status of a person, produced by the lack or impossibility of complying with their obligations, which It is declared judicially in order to legally organize its creditors and thus purify and preserve the assets of the insolvent debtor, to later liquidate and distribute it.

However, for Cuberos (2005) the concept of insolvency has evolved over time, which means that:

> Insolvency has ceased to signify an economic or patrimonial state, to become a whole procedure, that is, that it has undergone a transition, from originally being a patrimonial state, to later become a budget for certain situations and now, more recently , to signify a genre: that of bankruptcy proceedings.

The United Nations Legislative Guide recommends: "Insolvency situations should be addressed and resolved in an orderly, swift and efficient manner with a view to avoiding undue disruption to the debtor's business activities and to minimize the cost of the procedure." (Cited by Méjan, 2010, p. 18)

In accordance with article 417 of the Procedural Code (2015), insolvency or bankruptcy may be: a) Fortuitous when said situation comes from unforeseeable circumstances or force majeure,[1] **b) Guilty**, the one caused by reckless or dissipated behavior of the debtor and; c) Fraudulent that in which malicious acts of the bankrupt occur, to harm creditors. These acts are those described in articles 205 to 208 of the Comprehensive Organic Criminal Code (2014).

Regarding the types of fault, article 29 of the Civil Code (2005) provides:

1 Article 30 of the Civil Code (2005) indicates that force majeure or fortuitous event is called, the unforeseen event that is not possible to resist, such as a shipwreck, an earthquake, the arrest of enemies, the acts of authority exercised by a public official, etc.

> Art. 29.- The law distinguishes three types of fault or neglect:
>
> Serious guilt, gross negligence, canned guilt, is that which consists of not handling the business of others with that care that even negligent and unwise people often use in their own businesses. This guilt, in civil matters, is equivalent to fraud.
>
> Slight guilt, slight carelessness, slight carelessness, is the lack of that diligence and care which men ordinarily employ in their own affairs. Guilt or carelessness, without any other qualification, means slight fault or carelessness. This kind of guilt is opposed to ordinary or medium diligence or care.
>
> The one who must run a business like a good parent is responsible for this kind of guilt.
>
> Guilt or negligible carelessness is the lack of that careful diligence that a wise man employs in the administration of his important business. This kind of guilt is opposed to the utmost diligence or care.
>
> The fraud consists of the positive intention to injure the person or property of another.

Víctor Hugo Castillo (2017) points out that currently the institutions of bankruptcy law are almost uniform in most countries and that, in addition, bankruptcy procedures respond to characteristic notes of the heritage of the French Revolution, whose ideology we have been adopting, hence, liberal law is based on a liberal-capitalist tendency and on an absence or divorce from our own reality. (p. 21).

> The assets included in the bankruptcy proceedings encompass all assets, rights and obligations of the debtor, with the exception of unattachable assets and those expressly excluded by special laws. (Carbonell, 2014)

Now, with respect to bankruptcy, our current legislation contemplates the possibility of initiating 5 kinds of bankruptcy procedures: preventive (which in turn can be for individuals, for commercial companies and exceptional), voluntary and necessary. We will analyze each of them below.

2. PREVENTIVE CONTEST

Professor Manuel Osorio (1986) points out that the preventive bankruptcy is the procedure, based on the existence of a situation of default, by virtue of which the insolvent debtor requests a withdrawal, wait or extension regarding the fulfillment of their debts. Your proposal, to take effect, must be approved by the majorities of creditors that the law provides, based on a number and the value of your credits, and approved by the intervening judge. (p. 190) From the point of view of Peruvian law, it seems to be in this same concept, since it is stated that "in theory, this insolvency procedure encourages an economic reconversion of the bankrupt's assets through a Global Refinancing Agreement of obligations celebrated with all its creditors within a Creditors' Meeting ". (Aguila, 2000)

> The preventive procedure is nothing more than a mechanism to anticipate the crisis that is coming to the debtor. It has been designed for those agents who are not yet in a situation of insolvency, general moratorium or generalized cessation of payments, but who find it convenient to anticipate that situation, before being overwhelmed by their obligations. (Agurto, 2017)

In our procedure, in the request to initiate the bankruptcy, the debtor, in addition to meeting the formal requirements of a lawsuit, will indicate: 1) The events or reasons that have made it impossible for him to fulfill his obligations on the due dates , 2) The detailed list of your creditors, individualized, with the indication of the number of your citizenship card, sole registry of taxpayers or equivalent, the exact address of your domicile, which will include country,

province, canton, town, street, number , intersection, phone numbers, email; as well as the amount owed, the expiration dates and the type of instrumentation of the credits, 3) The detailed and valued status of your assets and liabilities, 4) The waiting time you request, which may not exceed three years and, 5) The payment plan that it proposes with the precise indication of the financing sources, the terms and conditions, including the refinancing to which it aspires. (COGEP, 2015, art. 419)

Once the request is accepted by the competent judge, it will provide that, provisionally, the payments to be made by the debtor be suspended, it will order that the creditors be summoned and it will appoint an auditor of the payroll of the Council of the Judiciary, in order to that verifies the accuracy and veracity of the detailed and valued status of the assets and liabilities, having to report within a maximum term of ten days from the date of appointment and possession. If it is a merchant debtor, he will assume the joint management of the business until the creditors' meeting meets. It is important to highlight the obligation that the judge has, in this kind of concordat, to communicate this request to all creditors in order to avoid inequalities in the collection of their respective obligations.

> One of the pillars on which the bankruptcy system is based is the principle of par conditio creditorum which is based on the intention not to generate inequalities between creditors when a situation of insolvency of their common debtor is presented to them. (Valdivieso, 2013)

On this last point, according to Professor Sánchez Calero (2004, cited by Valdivieso, 2013) an important sector of the doctrine points out that although the principle of equality between creditors should constitute the rule, currently the current legislation has regulated so many cases of Exception that it seems that the principle - foundation of the bankruptcy procedure - has lost its content.

If the auditor's report confirms the information indicated by the applicant and there is no novelty, a hearing will be called in which the creditors' meeting will be held. On the other hand, if from the aforementioned report it appears that there were one or more credits whose expiration occurred before the filing of the bankruptcy request, or that the liability exceeds 120% of the assets, the judge will declare the bankruptcy procedure concluded and will start the voluntary bankruptcy. In the first case, the law punishes the debtor's presumed bad faith for not presenting complete information and, in the second, his excessive recklessness in the conduct of his business.

Furthermore, it is clear from this rule that the request for the bankruptcy proceeds only before the maturity of any of the credits that make up the debtor's liability.

It is important and necessary to point out that when the bankruptcy is requested by the debtor in his capacity as a natural person or merchant, the applicable regulations are those established in the General Organic Code of Processes, while when the debtor is a commercial company, they must apply the rules of the Preventive Bankruptcy Law (2006) and the Application Rules of the referred Law (1999). This is recognized by the final paragraph of article 415 of the Procedural Code.

> **Art. 415.- Preventive competition**. The debtors, whether merchants or non-merchants, may file for bankruptcy in order to avoid bankruptcy. The debtor who has sufficient assets to cover all their debts or permanent income from salaries, income, remittances from abroad, leasehold pensions or other sources of periodic income and foresees the impossibility of making the payments thereof on the dates of their respective maturities, you may go to the judge of your domicile requesting that you initiate the preventive bankruptcy procedure, in order to seek an agreement with your creditors, which allows you to settle your debts within a reasonable period of time, no longer than three years.

Companies will be subject to the law. (COGEP, 2015, art. 415)

2.1. Preventive bankruptcy in the case of commercial companies

This concordat prevents them from being declared bankrupt while this procedure has not been exhausted and seeks that the debtor and his creditors enter into an agreement or concordat that allows the obligations of the debtor company to be extinguished, thus preserving it.

The subjects are companies incorporated in Ecuador and that are subject to surveillance and control by the Superintendency of Companies; as long as they have: a) An asset greater than US $ 10,515.60 or more than 100 permanent workers and, b) A liability greater than US $ 5,257.80.

In this case, when the request is presented by the debtor, it must comply with a series of requirements and present it within a period of 60 days from the cessation of payments; On the contrary, when the creditor presents it, it is not necessary to comply with any requirement and the content of the request is transferred to the debtor company for a period of 15 days to agree or oppose it. If it is raided, the debtor must present the requirements established by law; if it is opposed or if there is defiance, the process will be declared concluded.

Once the contest is admitted, it is done through a resolution that is notified to the parties and the public through a publication in a newspaper with greater circulation at the company's domicile, this resolution is registered in the corresponding Mercantile Registry and there is no recourse on it.

This resolution, among other things, must contain the term to present the receivables and a term for the holding of the preliminary hearing in which the presented credits will be

verified and the concordat will be discussed. Creditors who do not present the documents to justify the credits within the granted term, cannot participate in the preliminary hearing, nor in the deliberation of the concordat and to exercise actions against the debtor, they must wait until the concordant agreement is fulfilled or that the bankruptcy process has been declared completed.

The admission of this preventive contest generates: a) Suspension of all kinds of judicial processes of a patrimonial nature, in the state in which they are, except those derived from work relationships, b) Suspension of any precautionary measure that has been issued in against the debtor, c) It prevents creditors from initiating legal proceedings of a patrimonial nature or requesting precautionary measures against the debtor's assets, d) It suspends in favor of the bankrupt's creditors, guarantors, guarantors and guarantors, the statute of limitations and expiration of the respective legal actions.

Once the presented credits are qualified, the final deliberations are called, at this point, if the debtor or the creditors that represent 75% of the value of the credits, do not present themselves, the bankruptcy process is declared concluded. On the contrary, if an agreement or concordat is reached, it will be recorded in minutes and approved by resolution with the favorable vote of the creditors representing at least 75% of the value of the credits.

2.2. Exceptional preventive contest

Through the Law of Humanitarian Support to Combat the Health Crisis derived from Covid-19 (2020), the National Assembly incorporated this exceptional concordat which will be valid for 3 years from the publication of the aforementioned law (22 of June 2020).

This bankruptcy is subsidiary and is carried out only after having tried a pre-bankruptcy agreement with its creditors

(also regulated in the aforementioned law) and not having achieved it. In this case, the debtor may present an exceptional judicial request for preventive bankruptcy, accompanying the act of impossibility of mediation and a statement under oath before a notary public, that he will not be able to regularly comply with his due obligations, or that he reasonably foresees that he will not be able to fulfill regularly and punctually with their obligations.

The rule indicates that the judge who admits this procedure, will order the suspension of all proceedings against the debtor and the prohibition of initiating any administrative, judicial, arbitration and even coercive action against the debtor. At the same time, it must summon all its creditors (natural and legal persons, whether public or private) to the corresponding Board.

When referring to various matters on which there would be current or future obligations, the problem lies in the jurisdiction of the judge who is going to hear this exceptional preventive agreement. Note that it includes administrative procedures or judicial processes initiated by State entities. The solution, perhaps, could be in article 240, numeral 2 of the Organic Code of the Judicial Function (2009), which indicates the powers and duties of civil and commercial judges:

> **Art. 240.- ATTRIBUTIONS AND DUTIES**. - The powers and duties of the judges and civil judges are:
>
> **2.**Know and resolve, in the first instance, all matters of patrimonial and commercial matters established in the laws, except those that correspond to know privately other judges and judges. (art. 240.2)

Spanish legislation establishes that bankruptcy has a procedure that is made up of two successive phases: a first, which the Law calls "common phase", basically aimed at determining the active and passive amounts, and a "second phase" alternative content, which may be either the "agreement phase"

or the "liquidation phase" (Campuzano, 2016), something that, apparently, is also intended with this exceptional preventive agreement.

3. VOLUNTARY CONTEST

When the assets or assets of the debtor are not sufficient to cover their obligations, present or future, the debtor may request the judge of his domicile, the beginning of the voluntary bankruptcy. This procedure will also be initiated by order of a judge when the auditor, within the preventive bankruptcy, determines that there were one or more overdue credits before the presentation of the bankruptcy request or that the debtor's liabilities would exceed 120% of their assets, as already mentioned above.

The debtor who voluntarily submits to this contest -or to which he is submitted in the two cases indicated above-, recognizes his state of insolvency, whether current or upcoming, and seeks to make payment agreements with new terms and financing, in order that its main obligations do not continue to generate default interest.

The request to start the voluntary bankruptcy, in addition to the requirements of a lawsuit, must include: 1) A detailed list of all your assets and rights, 2) A statement of debts with an expression of origin, maturity, name and address of each creditor and the account books, if it has them, 3) The titles of active credits and, 4) A memory on the causes of its presentation. If these legal requirements are not fulfilled, the debtor loses the right to, in the future, make observations for the arrangement and improvement of the administration of its assets by the trustee, as well as for the liquidation of assets and liabilities. (COGEP, 2015, art. 439)

7) Order the accumulation of those processes that contain pending obligations of which the bankrupt is a part, since there cannot be two bankruptcy proceedings against the

same person. It should be clarified, on this, that the accumulated processes must have an obligation judicially declared or approved through an enforceable sentence; 8) Provide for the registration in the property registry of the car that orders the formation of the contest and if it is bankruptcy have also registration in the commercial register, 9) Notify the State Attorney General's Office, to carry out the respective investigations regarding the state of the debtor's insolvency and, 10) Prohibit the debtor from being absent from the national territory.

Creditors may oppose the continuation of the voluntary bankruptcy, within a period of 10 days after being summoned. This opposition will be resolved at a hearing, on which creditors may file an appeal with non-suspensive effect, in the event that the first instance judge decides to continue with the development of this contest.

There is only one rule that refers to the creditors' meeting, the wording of which is obscure since it involves the auditor and the trustee in its participation, although the former, according to the law, must be appointed by the judge in the preventive bankruptcy and not in the volunteer, which puts his participation in doubt. Already at the creditors' meeting (COGEP, 2015, art. 427), the auditor's report and the waiting and payment proposal made by the debtor (through the trustee) will be known, which may be accepted or rejected by the creditors who represent the majority vote, taking into account that they will vote by percentages of the claims against the total mass of the liabilities.

If the proposal is accepted, they will negotiate the concordat, in which new terms and financing and other valid agreements may be contemplated that facilitate the solution of the debt. The judge will approve, by means of a sentence, the aforementioned concordat which the debtor must comply with.

However, if the majority decides to reject the proposal, they must justify their opposition, which will be analyzed by the judge and, if found to be unfounded, they will order that

the agreement be approved in the terms of the debtor's request. If the refusal is founded, it will send the application to be filed, after payment of the auditor's fees, which will be borne by the applicant. Both decisions are subject to appeal with non-suspensive effect.

The judge, given the lack of agreement between creditors and debtor, will order: 1) The appraisal of the seized property owned by the bankrupt, 2) That the balance of the bankrupt's assets be known, 3) That, on the day and time indicated, the auction of the seized goods owned by the debtor is carried out and, 4) The grading of credits according to their priority[2].

Once the assets have been auctioned, there are two possible scenarios: If the proceeds of the auctioned assets are enough to pay all the credits, the judge will declare their obligations extinguished and reinstate the debtor. On the contrary, if the proceeds from the auction are not enough to pay all the credits, a new creditors' meeting will be called, in which they will decide whether to remit the balance of the obligation and grant or not a payment certification that will release totally to the debtor for the unpaid balance, lifting all the measures executed against him, rehabilitating him.

Spanish legislation makes a difference between voluntary bankruptcy procedures and the necessary one regarding the processing of the bankruptcy. In this way, it establishes that:

> The bankruptcy will be considered voluntary when the first of the applications submitted would have been that of the debtor himself. In all other cases, the bankruptcy will be considered necessary when, in the three months prior to the date of the debtor's request, another by any legitimized person had been submitted and accepted for processing, even if he had withdrawn, had not appeared or had not been ratified. ". (cited by Pavía, 2018, p. 145)

2 See Arts. 2367 and following of the Civil Code (2005).

4. CONTEST REQUIRED

Finally, when the debtor does not comply with the execution order, does not resign assets or resign disputed assets, which are not in his possession, are located outside the Republic or are insufficient for the payment of the obligation, the creditor may initiate, in against him, the necessary bankruptcy of creditors so that the insolvency or bankruptcy of the debtor is judicially declared.

In order to request the opening of this type of bankruptcy, it is not necessary for the creditor, in the execution phase of the main lawsuit, to verify and prove that the debtor has assets susceptible to seizure, since article 416 only requires that the execution order be has been breached or has been imperfectly fulfilled. Hence, this procedure is a last option to force the debtor to fulfill his obligation.

> The general rule and common sense provide that the only one who knows the true financial situation of a natural or legal person is the debtor himself; with much less possibility the creditor, so it sounds obvious and logical that unlike the other two preventive and voluntary contests, in the necessary the plaintiff is not required, in addition to the formal requirements of any claim, other arguments or documents of which it can legitimately possess, which allow it to reasonably deduce or presume the existence of the objective budget of the necessary bankruptcy, which is the insolvency of the debtor, which is the basis of its claim. (Castillo, 2017, p. 258)

The initial application must comply with the formal requirements of the claim (COGEP, 2015, art. 422) and will be presented to be drawn by a judge other than the one who knows the main process. If it is clear and complete, the competent judge will issue the order to open the necessary bankruptcy in which: 1) He will order that the debtor be summoned at his address and will summon him to the creditors' meeting, 2) He

will require the debtor to present of the documents provided for the request for the voluntary bankruptcy that were analyzed ut supra, 3) It will declare the interdiction of the debtor, 4) It will appoint a trustee who, in addition, will be the custodian of the debtor's assets, if there are any, 5) It will have the embargo of all movable or immovable property, property of the bankrupt, if any, 6) order the annotation of insolvency or bankruptcy,

Note that the debtor may: a) Oppose it for which he must pay the entire debt and, b) File an appeal for bankruptcy, in a period of 10 days. appeal which will only be granted in non-suspensive effect.

Once the debtor complies with what is required in the initial order, the judge will convene the creditors' meeting which will be governed by the rules previously reviewed in the voluntary bankruptcy, that is, the creditors may sign a concordat, remit the debt, granting a payment certificate or they will request that the debtor's state of insolvency or bankruptcy be ratified with all the effects that its interdiction will generate. In this last scenario, the judge will declare the debtor's state of insolvency or bankruptcy and will order that the file be sent to the Public Prosecutor's Office in the event that such state is presumed to have been the result of a fraudulent action by the debtor.

The state of bankruptcy or insolvency will last at least 10 years and only then can the debtor be rehabilitated, provided that the creditors have not promoted the process during that time and that the insolvency or bankruptcy has not been declared fraudulent (COGEP, 2015, art. 430)

It is important and timely to clarify that the necessary bankruptcy rules established by COGEP are applicable to both natural persons, merchants and commercial companies since the Preventive Bankruptcy Law and the Application Rules of the referred Law are applicable only to preventive bankruptcy . Precisely in the case of commercial companies, the duly executed bankruptcy declaration will lead to the dissolution

of the company, in accordance with what is established in the Companies Law (1999, art. 360.2).

CONCLUSIONS

There is no doubt that agreements or contracts are sources of obligations, hence they must be fulfilled in the terms and conditions that the parties have agreed upon. However, our legal system provides for the possibility of eventual faults and breaches and allows such expired or expiring obligations to be restructured, or legally required in the event that the debtor is in default to do so.

Bankruptcy proceedings or concordats are the last possibility that the debtor has to fulfill his obligations. In the 5 types of procedures that were reviewed in this text, the common factor was the existence of obligations whose fulfillment was impossible.

Preventive and voluntary bankruptcies are proposed by the debtor himself and their objective is to request a withdrawal or waiting of the obligation from his creditors, in order to be able to quickly rehabilitate his state of bankruptcy or insolvency. Undoubtedly, the debtors in this type of procedure recognize the existence of the obligation and express their willingness to comply with them in good faith, which is always important in a legal relationship of this nature.

For its part, the necessary bankruptcy evidences the decision of the expired debtor not to comply with a court order for payment, hence the Law allows the application of real and personal enforcement measures which breaks (in part) our system of compliance with civil obligations that It was born with the Poetelia Papyria Law (year 326 or 325 BC) and developed in the mandate of the Emperor Augustus (year 44 BC). However, this is allowed as it is the last possibility of the creditor to satisfy his credit.

Compliance with obligations generates certainty in people's legal relationships, hence our legal system seeks their effective achievement, either through new and exceptional agreements or in a coercive manner.

We hope that this descriptive analysis of several scattered norms in our legislation on the concordat and comparative doctrine, allows a unification of dogmatic concepts and of the different types of bankruptcy proceedings.

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Growth and Institutions in Latin American Countries: An Experimental Review for the XXI Century[1]

Crecimiento e instituciones en los países de América Latina: Una revisión experimental para el siglo XXI

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ABSTRACT: Institutions have been widely studied as triggers of economic growth. Latin American countries in the XXI century have shown an increment in State interventionism; nevertheless, the region exhibited an average annual growth rate around 3.31 percent in the first seventeen years. This research is trying to establish the causality between economic freedom, oil-production, and collectivism with economic growth. In this research in progress report we show early results of our experimental design, which demonstrates the importance

1 This is a research in progress report. Authors declare that there is the possibility to do some methodological changes throughout the research process. Results presented here are robust but could differ to the final paper depending on the strategy of identification and final chosen methodology. Authors thank all members of BeLatin for the opportunity to show this report in their workshop series. Authors bear sole responsibility for the content of this paper.

of these institutions. Using basic statistics on growth, we conclude that countries that reduced their economic freedom experienced an economic growth of about 1.81 percentage points lower than those countries that did not reduce it, at 1% of significance level. On average, our findings suggest that in Latin America during the analyzed timeframe (2001-2017), non-oil producer countries enjoyed an average annual economic growth rate of about 1.14 percentage points higher that the economic growth experienced by oil-producers. Interestingly, more-collectivist countries grew 0.48 percentage points more than less-collectivist. Finally, we estimated a difference-in-differences model using OLS, and generated instruments (Lewbel, 2012; Lewbel, 2018) accounting for country fixed effects, and applied a variety of estimators to determine the effect of economic freedom in these countries. Our results, statistically significant, suggest that Latin American countries that lose economic freedom grow at a lower rate than the rest of the countries.

KEYWORDS: Latin American, Economic Analysis , Growth, Freedom.

RESUMEN: Las instituciones han sido ampliamente estudiadas como impulsoras del crecimiento económico. Los países Latinoamericanos en el siglo XXI han tenido un incremento en el intervencionismo del Estado; sin embargo, la región presenta un promedio de la tasa anual de crecimiento alrededor de 3.31 por ciento en los primeros diecisiete años. Esta investigación está tratando de establecer la causalidad entre la libertad económica, producción petrolera y colectivismo con el crecimiento económico. En este informe de investigación en progreso, mostramos los primeros resultados de nuestro diseño experimental, el cual demuestra la importancia de estas instituciones. Utilizando estadísticas básicas de crecimiento, concluimos que los países que redujeron su libertad económica experimentaron aproximadamente una tasa de crecimiento

de 1.81 puntos porcentuales menos que aquellos países que no redujeron la libertad económica, este resultado es estadísticamente significativo al 1%. En promedio, nuestros hallazgos sugieren que en Latinoamérica durante el período de estudio (2001-2017), los países no-petroleros disfrutaron en promedio de una tasa anual de crecimiento aproximadamente 1.14 puntos porcentuales mayor que los países petroleros de esta región. Sin embargo, los países más-colectivistas crecieron a una tasa anual promedio que superó en 0.48 puntos porcentuales a la de los menos-colectivistas. Finalmente, estimamos un modelo de diferencias en diferencias, para ello utilizamos MCO, y variables instrumentales generadas controlando por efectos fijos por país y aplicando una serie de estimadores para determinar el efecto de la libertad económica en estos países. Nuestros resultados, estadísticamente significativos, sugieren que los países Latinoamericanos que pierden libertad económica crecen a una menor tasa que el resto de los países.

PALABRAS CLAVE: América Latina, Análisis Económico, Crecimiento, Libertad.

INTRODUCTION

Scholars are interested in economic growth because of its relationship with prosperity, quality of living, and the human well-being (Pritchett, 2000). Nevertheless, understanding and analyzing economic growth is thorny and sensitive for the many endogenous and exogenous factors that affect the performance of countries. In the literature, researchers tend to explain the great differences in the living standard among countries through small differences of economic growth for long periods of time as Pritchett (2000) defines it as "the power of compound interest, over long periods" (p. 221). Following this trend, we could state that the effect of 0.09 percent difference in the economic growth rate between Uruguay and Chile helped the latter surpass the former in terms of GDP per capita, consolidating Chile as the best performing economy in

the Region with the higher standard of living in our period of analysis. Nevertheless, such as statement would rely on just the result of the economic performance and could not consider other important characteristics that countries of this region have and that could affect their economic growth.

However, the question of whether institutions could affect, positively or negatively, the economic growth is a basic concern for researchers in the field of economic growth and development that has not a general accepted answer. Many scholars support that there are two main sources of growth: (1) the addition of more inputs (physical capital and labor), and (2) innovation, technological change, or, in technical economic terms, total factor productivity. The former source of economic growth is also known as brute-force and the later was labeled smart-growth by Robert Solow who defended that smart-growth is more important than brute-force (more inputs) in generating additions to output over time (Solow, 1956, 1957; Denison, 1962, 1967; Easterly and Levine, 2001).

Currently, there are institutional variables that have captured the attention and approach of development economists. A large body of literature suggests that such as variables have a positive and significant impact on economic growth (Acemoglu, Laibson and List, 2018). For example, the geography, the latitude and altitude of a country play a fundamental role in the economic development, showing that as northern the country is the more developed it could be (Gallup, Sachs, and Mellinger, 1999) [2]. Other authors support that culture and institutions can explain why some countries grow faster than others (Acemoglu et al., 2019)[3]. The literature also shows that other factors could affect the economic growth. Corruption and military violence

2 See also Krugman (1999), Boschma and Ron (2006), Yeung, Kelly and Phillip (2007), Combes, Mayer and Thisse (2008), Dicken (2003), Lee and Wills (1997), Carvalho and Barros (2018), Chen (2019), De Oliveira (2019), Kaneko, et al. (2019)

3 See also Ghardallou, Wafa, and Dorsaf Sridi (2019), Acemoglu, Robinson, and Verdier (2017), Bennett et al. (2017), Faria et al. (2016), Alesina and Guiliano (2015), Fernandez (2011), Guiso, Sapienza, and Zingales (2006),

affects negatively the economic growth, and democracy is essential for growth (Halperin et al., 2005). Political freedom has been also studied and scholars argue that it is a factor of economic growth (Bueno de Mesquita and Downs, 2005). Finally, economic freedom—an institutional variable that measures the non-interventionism of state in the economy and the capacity of private individuals to take their own economic decisions and establish transactions without the intervention of governments—has a positive and significant effect on growth (Gwartney et al. 2019)[4]. Notwithstanding, many authors have argued that there are not reliable results to support the relation between these institutional variables and economic growth (Sturm and De Haan 2001; Doucouliagos and Ulubasoglu 2006; Sturm, Leertouwer, and De Haan 2003; Ram 2000).

On the other hand, Latin American region has had an average economic growth rate around 3.31 percent in the first seventeen years of the XXI century (Penn World Table 9.1). This is not a poor result at all because if we look at the same statistic, the last 6 years (from 2012 to 2017) the average economic growth rate decreased to 1.40 percent. In addition, these countries seem to have more common characteristics than just being in the same region, such as high degree of collectivism (Hofstede, 2001), economies that are highly intervened by governments, and high dependency on a specific commodity as crude oil and natural gas (Mora and Acevedo, 2019). Furthermore, countries of this region have experienced many social, political and economic shocks in the 21st century. Ecuador dollarized the economy in 2000 while El Salvador did it in 2001. Between 2002-2003 Venezuela, in that moment the largest oil exporter of the region, suffered a coup and an oil-workers strike. The increment of oil price, that started

Bueno de Mesquita and Downs (2005), DiTella and Schargrodsky (2005), Glaeser, La Porta and Lopez-de-Silane (2004), Acemoglu, Johnson and Robinson (2002), Hofstede (2001), Landes (1999).

4 See also Bergh and Bjornskov (2019), Erdal (2019), Williamson and Mathers (2011), Saurabh (2007), Faria and Montesinos (2009), Pitlik (2002)

around 2005-2006 marking its highest between 2011-2012, also affected the social-economic-political performance of this region if you consider that six of these countries are among the larger exporters of oil in the world.

Considering the specific uniqueness of each of these countries and the geopolitical relevance that the Latin American region has within the Americas, our research is aimed to find a reliable evidence to establish the causality of economic freedom, and other variables such as oil production and collectivism, on economic growth during the first seventeen years of the XXI century. For this, we try to determine if those countries in Latin America that reduced economic freedom—oil-producers, and/or more collectivists—have enjoyed less economic growth than countries that did not weakened their economic freedom—non-oil-producers and less collectivists.

We divided this research in progress report in four sections. First, we present a general overview of the intent of our research, introduce the literature review, and outline the relevance and objective of our research. Second, we detail the experimental design that we are following to achieve the objective. Third, we report the results we have at this moment. Finally, we conclude and present some future research directions.

1. METHODOLOGICAL ASPECTS

This research is trying to establish the causality between some institutional variables and economic growth in the Latin American countries. Glennester and Takavarasha (2013) explain, "Measuring causal impact requires us to compare what happened with the program with what would have happened without the program" (p. 24). For this research, the *program* is having the characteristic that we are interested to study (diminishing economic freedom, oil-producer, and more collectivism). Then, following the cited authors we

developed an experimental design that allowed us to measure the difference of the economic growth rates between countries that have and that do not have those characteristics.

Data

The data used in this research is the expenditure side of real GDP at chained purchasing power parity in US dollars (2011) and the population size from the Penn World Table 9.1 of 18 countries for 17 years beginning in 2001. The countries analyzed are: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Peru, Paraguay, El Salvador, Uruguay, and Venezuela. We also used data from the Economic Freedom of the World Index (*EFW*) published by the Fraser Institute and, from the Economic Commission for Latin America and the Caribbean (ECLAC), we obtained the information to determine whether a country is considered an oil-producer country. Finally, using Hofstede (2001) we could classify countries as "more collectivists" or "less collectivists". In **table 1**, we report a brief description and the summary statistics of the data.

Table 1. Description and Summary Statistics

Variable	Description		Summary Statistics				
	Name & Estimation	Source	Obs.	Mean	S.D.	Min.	Max
GDP	Real GDP growth rate: $[Ln(GDP_{year(j)}) - Ln(GDP_{year(j-1)})]$	Penn World Table 9.1	306	0.033	0.059	-0.556	0.239
EFW	Dummy variable that indicates if the country decreased its economic freedom index of the world score. *EFW*=1 if: $ScoreEFW_{year(j)}<ScoreEFW_{year(j-1)}$	The Fraser Institute	306	0.509	0.501	0	1
Oil-prod	Dummy variable that indicates if the country an oil-producer. *Oil-prod*=1 if the country has the enough production capacity to export.	CEPAL	306	0.333	0.472	0	1
Collect	Dummy variable that indicates if the country is more-collectivist. *Collec*=1 if the score of the country divided by the maximum of our sample is lesser than 0.5	Hofstede	221	0.615	0.488	0	1
Ed. Attain	Dummy variable related with educational attainment, measured as years of schooling. *Ed. Attaint*=1 if the score of years of schooling of the country is lesser than the average of the region.	World Bank	289	0.471	0.5	0	1

Treatments

In a research with this experimental design, the definition of the *treatment* is very important. First, we must consider that *treatment* indicates that an individual was included in the program which, in this research, means that the country has the characteristic that we want to analyze. Secondly, the success of this kind of research design depends on how researchers define if an individual is considered *treated* or *not treated* (control group), (Glennester and Takavarasha, 2013).

Our research presents a straightforward definition of the *treatments*. We have three institutional variables of interest, then, we defined our *treatments* as follows:

a) Economic freedom (*EFW*): we consider that the decrement of the score is the result of applying at least one policy that undermined the property rights and/or the possibility of making your own economic decisions. Then, if the country is a treated unit. We classified countries in the control group if they had an economic freedom score higher or equal than the previous year.

b) Oil-Producer (*Oil-prod*): we defined a country as treated if it exports oil; otherwise, the country classifies in the control group. The quantity of oil exported is not considered, as well if the country produces but does not export, for example Chile produces but just covers barely 3% of its internal consumption, then it classifies in the control group.

c) Collectivism (*Collect*): firstly, we classified countries as "More Collectivists" (treated) or "Less Collectivists" (control). Hofstede (2001) scores each country with a number between 0 to 100, countries closest to 0 are more collectivists. Argentina has the highest score of

the region, 46, and the lowest is Guatemala with 6. If the country's value divided by Argentina's value was less than 0.5 then it classified as treated unit, otherwise it classified in the control group[5].

Identification Strategy

The first methodology we used was the basic statistical analysis of economic growth. For this we estimated the annual growth rate of the real GDP per capita for each country and calculated the average for the full sample and each group (treated and control). Finally, we estimate the difference between groups using OLS and following equation (1)

$$\Delta GDP_{ij} = \alpha + \beta_1 T_{ij} + \mu \quad (1)$$

where is the economic growth rate of country in year , is a dummy indicating whether the country is treated or no in year . Then, is the parameter that indicates us the difference in the average growth rates between treated and control groups.

The second methodology we used was the difference-in-differences (diff-in-diff). Gertler, et al (2016) explain that "the difference-in-differences method compares the changes in outcomes over time between a population that is enrolled in a program (the treatment group) and a population that is not (the comparison group)" (p.139). It has been used in research to analyze the impact of a policy (or treatment) between individuals affected and not affected by that policy (the treated and control groups). It is widely used in political science research to analyze the impact of a public policy as in Nykiforuk, et al (2019)[6]. Other authors have used this methodology to analyze economic and/or decision-making issues, as Mukhopadhyay (2019)[7]. This method

5 Given Hofstede's database does not include all countries of the main sample, when we controlled by collectivism our analysis includes 13 countries, 5 of them classified as less collectivists and 8 as more collectivists.

6 See also Saeed et al. (2019); Enos (2015); De Janvry, Finan, and Sadoulet (2011); Di Tella and Schargrodsky (2004); and Duflo (2001).

7 See also Rosa (2019); Kaneko, Nakagawa, and Phun (2019); Steinmeir, and Stich (2019); Grier, Hicks, and Yuan (2016); and Slaughter (2001).

has been used in papers analyzing the impact of an event or policy on economic growth as in Chen (2019)[8].

Gertler, et al. (2016) explain that for an analysis of difference-in-differences the researcher should measure the outcome before and after the program in both groups the treated and control. Then we should have a dummy for the period, pre-treatment (value 0) and post-treatment (value 1). However, and following the methodology proposed by Grier, Hicks, and Yuan (2015), it is possible analyze a difference-in-differences considering other characteristic(s) in the analysis even if the sample does not have a period dummy variable. We estimated the diff-in-diff model using OLS, and the generated instruments proposed by Lewbel (2012 and 2018) to analyze the reliability of our results. The specification model estimated is represented in equation (2):

$$\Delta GDP_{ij} = \alpha + \beta_1 EFW_{ij} + \beta_2 SC_{ij} + \beta_3 \left(EFW_{ij} * SC_{ij}\right) + \beta_z Z + \mu \qquad (2)$$

Now, is the same dummy variable we used in equation (1) for classifying the country if is treated (decreased economic freedom) or no in year . stands for the "second characteristic" and is the dummy variable for oil-producer or more-collectivist. is a vector of control variables, and the error. We used our variables *Oil-prod*, *Collect*, and for human capital the educational attainment[9], as the control variables. is the diff-in-diff parameter and shows the effect of those countries that diminished their economic freedom and with the other characteristic (oil-producer or more collectivist) on the growth rate.

8 See also Heger and Neumayer (2019); Pham, Katsuhiro, and Pham (2019); Carvalho and Barros (2018); and Miles (2008).

9 Published by the World Bank. If the average score of the country is lesser than the average of the region we classified it in the treated group, otherwise in the control group.

2. RESULTS AND EMPIRICAL THOUGHTS

Basic Statistical Results

T**able 2** presents the basic statistical results on economic growth. The region, represented by the *full sample,* had an average of the annual growth rate of around 3.31 percent. When we break our timeframe in short periods, we can see that the best performance was between 2004 and 2008, with an average annual rate of around 5.77 percent. The second-best performing period was between 2008 and 2012 with an economic growth of around 4.63 percent. These two periods correspond to the beginning and the end of the last oil price increase. Between 2012 and 2017, the region experienced its worst economic growth, not surprisingly during these years the price of oil plummeted and political-social and economic problems were experienced in Latin America. The region seemed to be richer, at the end of the period the final average income represents around 178.25 percent of the initial average income, which could be interpreted as an improvement in the quality of living.

Table 2. Basic Statistics on Economic Growth.

		Economic Growth Rate (%)							GDP per capita (2011 US$)	
2001 - 2017		2001 – 2008	2008 - 2017	2001 – 2004	2004 -2008	2008 -2012	2012 – 2017	Initial	Final	
Full Sample		3.31	4.01	2.91	2.17	5.77	4.63	1.40	7139.98	12726.36
		(0.003)	(0.004)	(0.005)	(0.006)	(0.005)	(0.005)	(0.006)	(758.49)	(1428.86)
EFW	Control	4.25	4.51	4.26	2.48	6.38	6.31	2.37	6815.24	14903.54
		(0.004)	(0.004)	(0.004)	(0.008)	(0.006)	(0.006)	(0.004)	(815.66)	(1999.97)
	Treated	2.40	3.49	1.77	1.88	5.11	3.23	2.37	7399.78	10549.17
		(0.006)	(0.007)	(0.008)	(0.009)	(0.007)	(0.008)	(0.004)	(1234.98)	(1868.7)
	Difference (T-C)	*-1.85****	*-1.02*	*-2.49****	*-0.6*	*-1.27*	*-3.08****	*-1.73*	*584.53*	*-4354.37*
		(0.007)	*(0.009)*	*(0.009)*	*(0.013)*	*(0.009)*	*(0.009)*	*(0.013)*	*(1566.59)*	*(2737.14)*
Oil-Prod	Control	3.69	3.75	3.63	2.46	4.86	4.64	2.68	7134.37	13479.2
		(0.005)	(0.005)	(0.003)	(0.007)	(0.005)	(0.005)	(0.003)	(1010.42)	(1976.92)
	Treated	2.55	4.53	1.46	1.59	7.61	4.63	2.68	7151.21	11220
		(0.009)	(0.009)	(0.013)	(0.013)	(0.009)	(0.012)	(0.003)	(1172.97)	(1717.09)
	Difference (T-C)	*-1.14*	*0.78*	*-2.17***	*-0.86*	*2.75****	*-0.01*	*-3.83****	*16.82*	*-2258.52*
		(0.007)	*(0.009)*	*(0.009)*	*(0.13)*	*(0.009)*	*(0.011)*	*(0.013)*	*(1658.50)*	*(3072.91)*
Collect	Control	2.92	2.89	3.09	-1.74	5.96	5.20	1.16	10958.28	18774.52
		(0.006)	(0.009)	(0.007)	(0.012)	(0.008)	(0.011)	(0.005)	(776.86)	(1686.31)
	Treated	3.39	4.97	2.41	3.20	6.73	4.71	1.16	6567.79	12018.86
		(0.006)	(0.006)	(0.009)	(0.009)	(0.008)	(0.008)	(0.005)	(726.73)	(1857.49)
	Difference (T-C)	*0.48*	*2.08**	*-0.68*	*3.38***	*0.77*	*-4.96*	*-0.59*	*-4390.5****	*-6755.66***
		(0.009)	*(0.011)*	*(0.013)*	*(0.014)*	*(0.012)*	*(0.014)*	*(0.017)*	*(1109.25)*	*(2718.26)*

Notes: Standard errors are in parentheses. *p<0.1, **p<0.05, ***p<0.001. The Differences was estimated with OLS

The *EFW* data suggests that those countries that reduced economic freedom experienced a lower economic growth than those which did not reduce economic freedom. If we look at the entire timeframe from 2001 to 2017, it is possible to conclude, with a 1% of significance level, that countries that reduced economic freedom had an economic growth of at least 1.85 percentage points less than those that did not hurt their freedom. When we analyzed the economic growth rates in shorter periods, this relation remains the same and our findings suggest that there is evidence that suggests that, even at 1% significance level, a reduction in economic freedom leads to a lower economic growth rate.

The average on initial and final income also seems to sign the causality that economic freedom has on the economic performance of this region. Treated units had a greater initial income than the control group, for instance, in 2001 while individuals from a country of the treated group earned $1, individuals from countries of the control group earned $0.92. Nevertheless, the final income of the control group offset the initial difference and is even larger. In 2017 while an individual from any country of the treated group earned an average of $1 individuals in the control group earned an average of $1.41.

As we stated before, this region is characterized for having six of the larger exporters of oil in the world. For this reason, any analysis of economic growth for these countries must account for the heterogeneity caused by this condition. Furthermore, another main characteristic is that all oil-producer countries in Latin American have the condition that oil enterprises are state-owned, which could hurt the potential benefits of having this scarce natural resource as public sector implements managerial decisions based more on the political benefit than in the economic utility. During the entire timeframe analyzed (2001-2017), results showed that non-oil producers enjoyed an economic growth rate at least 1.14% higher than oil-producers.

During 2004-2008, oil-producers enjoyed the highest rate of economic growth of around 7.61 percent, surpassing by 2.75 percentage points the average economic growth rate enjoyed by the non-producers (control group) at 1 percent of statistically significance. This was the result of the oil price surge experienced during those years. Nevertheless, the dependency on oil prices to promote economic growth is evident between 2012 and 2017 when oil-producers experienced a lower economic growth rate of around 3.83 percentage points, at 1% level of significance, than the non-oil-producers. The average incomes are also suggestive, individuals living in oil-producers impoverished in comparison with their peers in non-oil-producers (from almost 1:1 to almost 1:1.2).

When we turn to the last panel *Collect (*collectivism), we noticed that more collectivists countries (treated group) grew around 0.48 percentage points faster than the control group, but non-statistically significant, for the whole period. This relation remains in most of the short periods, with the 2001-2004 timeframe showing the higher difference of around 3.38 percentage points at 5% level of significance. Nevertheless, if we look at the differences of incomes between groups, the gap was closed from 1:1.67 to 1:1.56, meaning that, despite individuals in less collectivist countries earn much than in more collectivists, the latest had a greater proportionally improvement.

Diff-in-Diff OLS Results

In **table 3,** we report the results obtained when we estimated equation (2) using OLS. The coefficient of interest, (from now, diff-in-diff), is negative and statistically significant at the 10% level, as we expected, when the variable production is included in the interaction (columns 1 to 4). These results support that in average countries that suffered a decrement in their economic freedom score and are oil-producers grew around 3.4 percentage points less than those non-oil-producers and/or that keep at the same level or increased their score of the

economic freedom index. The *EFW* is statistically significant at 5% level and suggests that if a country decreased its economic freedom score it grew around 1.34 percentage points less than those that did not diminished their economic freedom.

Table 3. Results of the Difference-in-Differences Model: OLS

	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
EFW	-0.0339*	-0.0341*	-0.0346*	-0.0351*	0.0122	0.0125	0.0120	0.0123
	(0.020)	(0.020)	(0.019)	(0.019)	(0.016)	(0.016)	(0.016)	(0.016)
	-0.0133**	-0.0135**	-0.0134**	-0.0137**	-0.0345***	-0.0342***	-0.0349***	-0.0346***
	(0.006)	(0.006)	(0.006)	(0.006)	(0.010)	(0.010)	(0.010)	(0.010)
Oil-prod	0.0079	0.0082	0.0091	0.0098	-	-	-	-
	(0.010)	(0.010)	(0.011)	(0.011)				
Collect	-	-	-	-	-0.0000	-0.0004	0.0013	0.0006
					(0.010)	(0.010)	(0.010)	(0.010)
Controls:								
Production	N/A	N/A	N/A	N/A	N	Y	N	Y
Collectivism	N	Y	N	Y	N/A	N/A	N/A	N/A
Ed. Attain.	N	N	Y	Y	N	N	Y	Y
Obs.	221	221	221	221	221	221	221	221
R^2	0.0636	0.0657	0.0649	0.0678	0.0464	0.0517	0.0486	0.0529

Notes: *p<0.1, **p<0.05, ***p<0.001. Robust standard errors reported in parenthesis. N/A reported when that variable is interacting with the treatment. N: variable is not included as control. Y: variable is included as control.

When we turn to columns 5 to 8, using collectivism as the interacting term in the model, results changed. Now, the diff-in-diff shows a positive but non-statistically significant coefficient, but interestingly the dummy that captures the impact of the change in the economic freedom score (*EFW*) in these specifications is negative, as we expected, and improved its significance at 1% level. Despite the diff-in-diff is not significant we can assume that those countries that suffered a decrement in their score of the economic freedom grew at least 3.4 percentage points less than those that keep the same level or improved their scores. Despite results are not significant, they also seem to suggest that countries with decrements in their score and more collectivists grew at least 1.2 percentage points faster than those less collectivists, and those that maintained the same level or increased their *EFW*. At this point, we should highlight that Argentina, Brazil, and Mexico are in the group of the less collectivist countries, in addition, those countries are oil-producers. Furthermore, in the more collectivist group, there are four of the six highest economic growth rates of this sample, Peru, Panama, Colombia, and Ecuador[10], and then these arguments justify the results obtained.

Diff-in-Diff Generated-IV Results

In **table 4**, we report results of estimations of the equation (2) but using the generated instrumental variables methodology proposed by Lewbel (2018 and 2012). From columns 1 to 4, **table 4**, we estimated the model in column 4, **table 3**. Using a variety of estimators, we obtain that the diff-in-diff is negative and statistically significant at 10% level, suggesting that losing economic freedom and being an oil-producer country impacts in at least around 2.5 percentage points less in economic growth rate that those countries that do not decreased their freedom. The *EFW* is still negative and statistically significant at 5%

10 Paraguay and Bolivia had a higher average of economic growth rate during the period than Colombia and Ecuador, but those two countries have no a measure of collectivism, then they are out of this consideration.

level suggesting that those countries that decreased their *EFW* grew around 1.1 percentage points less than those that did not decrease their economic freedom.

Table 4. Results of the Difference-in-Differences Model: Generated –IV (Country Fixed Effects)

	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
EFW	-0.0321*	-0.0321*	-0.0247*	-0.0248*	0.0126	0.0126	0.0281**	0.0279**
	(0.018)	(0.018)	(0.013)	(0.013)	(0.016)	(0.016)	(0.012)	(0.012)
	-0.0148**	-0.0148**	-0.0106**	-0.0107**	-0.0348***	-0.0348***	-0.0339***	-0.0342***
	(0.006)	(0.006)	(0.005)	(0.005)	(0.010)	(0.010)	(0.010)	(0.010)
Oil-prod	0.0082	0.0082	0.0126	0.0125	-0.0089	-0.0089	0.0030	0.0016
	(0.011)	(0.011)	(0.011)	(0.011)	(0.011)	(0.011)	(0.009)	(0.009)
Collect	0.0073	0.0073	0.0132*	0.0132*	0.0004	0.0004	-0.0015	-0.0020
	(0.009)	(0.009)	(0.008)	(0.008)	(0.010)	(0.010)	(0.010)	(0.010)
Ed. Attain	-0.0066	-0.0066	-0.0117	-0.0117	-0.0051	-0.0051	-0.0137*	-0.0125
	(0.009)	(0.009)	(0.008)	(0.008)	(0.009)	(0.009)	(0.008)	(0.008)
Obs	221	221	221	221	221	221	221	221
p(UID)	0.0000	0.0000	0.0000	0.0000	0.0000	0.0000	0.0000	0.0000
p(OID)	0.3752	0.3753	0.3548	0.3752	0.3120	0.3120	0.3244	0.3120

Notes: *p<0.1, **p<0.05, ***p<0.001. Robust standard errors reported in parenthesis. Models (2) and (6): Limited Information Likelihood; Models (3) and (7): continuously-updated GMM estimator; Models (4) and (8): two-step efficient GMM estimator. p(UID): p-value of under-identification test (Kleibergen and Paap). p(OID): p-value of over-identification test (Hansen-J) of all instruments.

When the specification included collectivism as the interacting term with *EFW*, columns 5 to 8 in **table 4**, and used the continuously-updated GMM and the two-step efficient GMM estimator, columns 7 and 8 respectively, the diff-in-diff was positive and statistically significant at 5% level. These results suggest that more collectivist countries that diminished *EFW* grew faster at least 2.8 percentage points more than the rest of the countries. Notwithstanding, all estimations also reported at 1% level of significance that without considering the more collectivist characteristic, the fact of losing *EFW* means that countries grew around 3.4 percentage points less than those that do not lose freedom. All results are robust for the tests of under and over identification performed in this methodology.

3. CONCLUSIONS

The early results of our on-going research suggest and signal a potential causality between the institutional variables, that we are using, on the economic growth in Latin America. However, further research must analyze other characteristics of economic growth in these economies, such as volatility and instability.

The results that we provide in this research in progress report coincides with the available literature which stresses the positive and significant effect of economic freedom on economic growth. In addition, our statistical analysis has help us to show evidence that oil-producer countries in Latin America did not have the economic performance enjoyed by non-oil producers; perhaps the higher dependency on this commodity makes them more susceptible to shocks. However, our results differ from the empirical corpus reviewed in the collectivism characteristic. Latin America is a region where collectivism plays a fundamental role in the culture however it seems to be that this characteristic does no harm to the growth potential in these countries, but further research is needed to draw a more robust and reliable conclusion.

We used methodologies that are robust and allowed us to estimate the effect of the institutional variables of interest (economic freedom, oil-producer, collectivism), and to measure the effect of decreasing economic freedom on economic growth (while accounted for other characteristic). However, a caveat that we should make regarding our research is that there could be limitations related with our sample size. Ideally, we could include other countries, years, and variables as well as use other causal effect methodologies to establish the causation. Even thought this would help to draw a more general conclusion, a wider region or worldwide sample is not the geographical and political research interest of our investigation and such as researches have been addressed by other scholars (for example, Grier and Grier, 2018). Given this caveat, our research will continue addressing these nuances and analyzing the data following an experimental design that seems to be the path for strongly establish the causality.

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Self-Defence against Non-State Actors: Possibility or reality?

Legítima defensa contra actores no estatales: ¿Posibilidad o realidad?

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ABSTRACT: The United Nations Charter has enshrined the general prohibition of the use of force as well as the exception to it through the inherent right of States to defend themself if an armed attack occurs under article 51. However, the proliferation of non-State actors and the response given by States to them are challenges the international community faces to maintain international peace and security. International law must find a balance between the legitimate need of States to defend themselves from the threats that non-State actors present and at the same time to defend the essential principles of sovereign equality, territorial integrity and prohibition of the use of force.

KEYWORDS: international security, equality of States, sovereignty, international tribunal, international conflict.

RESUMEN: La Carta de las Naciones Unidas ha consagrado la prohibición general del uso de la fuerza, así como la excepción a la misma mediante el derecho inherente de los Estados a defenderse si se produce un ataque armado en virtud del artículo 51. Sin embargo, la proliferación de agentes no estatales y la

respuesta que les brindan los Estados son desafíos que enfrenta la comunidad internacional para mantener la paz y la seguridad internacionales. El derecho internacional debe encontrar un equilibrio entre la legítima necesidad de los Estados de defenderse de las amenazas que presentan los actores no estatales y al mismo tiempo defender los principios esenciales de igualdad soberana, integridad territorial y prohibición del uso de la fuerza.

PALABRAS CLAVE: seguridad internacional, igualdad de Estados, soberanía, tribunal internacional, conflicto internacional.

INTRODUCTION

It is well known that the United Nations (UN) Charter[1] was envisioned as a framework of an international community of nation-States (art. 4, para.1). Furthermore, in order to maintain international peace and security, it prohibits the threat or use of force by its Member States (art. 2, para. 4). Even though, Chapter VII of the UN Charter allows, as an exception, the inherent right of every State to defend itself against armed attacks, in both individual and collective manner (article 51) (Van Den Hole, 2003, pp. 73-80).

However, non-state actors (NSAs) have entered into the international scene using "*force*" and some States have based its counter-terrorism answer under the international law governing the use of self-defence. This new sort of response could have blurred the lines between the universally accepted prohibition of the use of force and its exception, as treaties, custom, and case law do not address the issue in a way that allows States to defend themselves by targeting NSAs directly.

For instance, the "Islamic State of Iraq and the Levant" (ISIL) or the "Islamic State of Iraq and Syria" (ISIS), more commonly

1 The U.N. Charter was adopted June 26, 1945, and entered into force on October 24, 1945. Currently, the Charter has 193 States Parties.

known as "Islamic State" (IS), emerged in 2014 (Mueller and Stewart, 2016). By that time, ISIS captured parts of territories of Iraq (the entirety of northern) and Syria (Mosul, border regions), and it generated severe threats to the security of several States developing a rudimentary governance system in these territories based on an estimated of 30,000 militants (Qureshi, 2018, p. 5).

The initiative to form a coalition to fight against the Islamic State received broad support and commitment from many States, including the United States of America (US). While the United States airstrikes on Iraq were justified as the Iraqi government itself asked for military intervention to tackle the threat of NSAs in its territory (Arimatsu and Schmitt, 2014, p. 6; Flasch, 2016, p. 38), the military operations in Syria lacked the consent of the Syrian government. European states and Canada confined their military interventions against ISIS on Iraqi soil. However, they did not question the legality of US military operations in Syria (Akande and Vermeer, 2015).

The article focuses on one of the most controversial issues in modern international law as it addresses the claim of certain States to "*use force in self-defence*" in response to "*armed attacks*" by NSA launched from other States when the attacks are not necessarily attributable to the latter. It is not the purpose of this research to provide a comprehensive study of this issue, but rather to identify the different approaches and edges on the matter.

The article is divided into three parts. The first part will set out the current debate about the possible interpretations of the UN Charter right of self – defence. The second part will analyse the right of self – defence in the case-law of the International Court of Justice. The third part will present a general overview of States practice. The article concludes that International law must find a balance between the legitimate need of States to

defend themselves and to defend the essential principles of International Law.

1. ARTICLE 51 UN CHARTER

The general prohibition on the threat or use of force is a treaty rule, a customary rule, and an international law principle (G.A. Res. 2625 (XXV), Oct. 24, 1970). Therefore, the prohibition has a binding nature that applies to all States worldwide. Moreover, it is well-established that the right of all States to defend themselves is a principle of international law, and it was customary international law (CIL) before the adoption of the UN Charter (Jennings, 1938, pp. 82–99; U.N. Sec. Council, Res. 1368 (2001); U.N. Sec. Council, Res. 1373 (2001); Nicaragua case, para. 176).

Article 51 provides for the protection of a State's "inherent right" to self-defence if an armed attack occurs or is imminent (Nicaragua case, para. 194). Here, the use of force must satisfy the criterion of necessity (last resort), proportionality (the level of force is reasonable to counter that threat), and immediacy (Dinstein, 2011; Nuclear Weapons, para. 40-41). Additionally, the State exercising self-defence shall immediately inform the UN Security Council (SC) of the measures taken and shall subordinate its action at the disposal of that body. Therefore, the measures taken will be temporal until SC takes appropriate action.

2. POSSIBLE INTERPRETATIONS ON THE UN CHARTER RIGHT OF SELF-DEFENCE

It is clear the elements that present Article 51; however, what happen if a State is attacked by a NSA located in another State (host State) which has not provided its consent (Dinstein, 2011, p. 118; Corten, 2008, p. 389)[2] or support to the NSA's actions? Would it be possible for the attacked State to allege, under article 51 of the UN Charter, self-defence to target NSAs directly? In the exercise of self-defence, some argue in favour of a more restrictive approach of the UN Charter. Others, however, support its expansive interpretation. The doctrine efforts to address the new challenges are essential, but not necessarily have been enough to cover all the necessities that came up with the new scenario.

On the one hand, the restricted approach of self-defence based on the textual interpretation of what is stated in article 51, along with article 2.4, would lead us to believe the right of self-defence is reserved only for armed attacks launched by States, the full and primary subjects of international law. Therefore, to trigger the right to self-defence, an armed attack carried out by NSAs must be attributable to the host State (Cassese, 1989, pp. 589 and 596 – 597). By this approach, there is not a denial to attack NSA as such. However, the use of force operates exclusively, as an exception, between States, as it implies targeting the State territory in which NSA operate avoiding contradictions to the international law and preventing unilateral military interventions.

2 It is a corollary of the principle of the sovereignty of States that is backed by broad state practice. The commentary to article 20 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries mentions different modalities of military intervention (establishment of a military base or foreign troops) as examples of behaviours whose illegality is excluded by the consent of the territorial State. Additional information is provided by the definition of the aggression. The intervention will be valid as long as it remains within the limits of the expressed consent, which must be granted freely, clearly and effectively, and not be vitiated by error, fraud, corruption or coercion.

For instance, Olivier Corten (Corten, 2016) has said that, according to with international law, Article 51 of the UN Charter "*should not be re-written or re-interpreted*" (UNSC S/PV.7621, Feb 15, 2016, pp. 33–34).) having a restrictive and classical reading of the UN Charter. In this context, it is worth noting "*A plea against the abusive invocation of self-defence as a response to terrorism*" (Centre de Droit International, 2016). The instrument does not deny as such the possibility of using self-defence in the context of the fight against terrorism, but it recalls that such a resort to force is an exception to the prohibition of the use of force and then must be in conformity with the conditions laid down in the UN Charter.

On this basis, he sets out two main ideas. The first one is related to the self-defence as a last resort only relevant when other means – peaceful measures (police and judicial cooperation), military measures (with the cooperation of the territorial State) or the referring the situation to the SC – are not available or have failed. The second one related to the necessity to identify the conditions for validly invoking self-defence, once the other means have been exhausted. According to the plea,

> "*This may occur either where acts of war perpetrated by a terrorist group can be attributed to the State, or by a substantial involvement of that State in the actions of such groups. (...) However, the mere fact that, despite its efforts, a State is unable to put an end to terrorist activities on its territory is insufficient to justify bombing that State's territory without its consent*" (Centre de Droit International, 2016).

On the other hand, the expansive approach focuses on the possibility of invoking the right to self-defence against NSAs on the basis that the customary right of self-defence which is pre-existent to and broader than the UN Charter, together

with the fact that article 51 does not specify the source of the armed attack. Indeed, it does not specify that a State must have carried out the armed attack; therefore, textual reading of the article would allow the inclusion of NSA. This approach would allow States to defend themselves, under the international law to use force in self-defence (Dinstein, 1987), directly against NSAs, regardless of the territorial host State's non-involvement in the attacks or the source of an attack (International Law Commission, 2016). In this context, some support the raising of a new rule, although incipient, of customary international law by which States would be able to intervene militarily only targeting NSA located in foreign territory.[3]

For instance, Michael Scharf has supported the evolution of the right to use force in self-defence directly against NSA. For him, the use of force against ISIS has given rise to a "*Grotian Moment*", namely, "*an instance of rapid formation of a new rule of customary international law*" related to the right of States to attack NSA when the territorial State is "*unable or unwilling*" to suppress the threat they pose (Scharf, 2016). Regarding the "*unable or unwilling*" test, Ashley Deeks has considered that there has been virtually no discussion of what that test requires. However, she has provided guidance on what inquiry a victim State must undertake when assessing whether it is necessary to use force in self – defence against a NSA located in another State's territory to impose significant limits (Deeks, 2012).

There are others, which have taken a middle of the road position accepting the expansive definition of the right to use force in self-defence based on a broader interpretation of its customary requirements. Although this approach would be interesting, it must be complemented with a coherent and practical development. For example, Kimberley Trapp has

3 Article 3g) of the "*[d]efinition of [a]ggression*" prohited to States from sending armed bands, groups, irregulars or mercenaries, that carry out acts of armed force against another State of such gravity as to amount to an act of armed aggression.

pointed out that nothing in Article 51 limits the actors against whom defensive force can be used as the balance between the right of self-defence against NSA in foreign States territory and the right of States to respect for their territorial integrity lies in the customary law elements of the right of self-defence itself. Therefore, the use of force must be necessary and proportionality in order to amount to a legitimate exercise of self-defence. Therefore, the customary requirements operate as a mediator between the security interests of States victim and States in whose territory the NSA operates (Trapp, 2008, pp. 141 – 156).

Certainly, the doctrinal efforts to address the new legal challenges are impressive, but not necessarily have been enough to cover all the necessities that came up with new scenarios. In any event, they must be complemented with a coherent and practical development based on the rulings from the Internacional Court of Justice (ICJ) and the States practice.

3. THE RIGHT OF SELF-DEFENCE IN THE CASE-LAW OF THE INTERNATIONAL COURT OF JUSTICE

Increased scrutiny of self – defence has involved the case-law of the International Court of Justice (ICJ). The first time that the ICJ issued a merits judgment on self-defence was in the *Nicaragua Case* (1986). Later, the Court dealt with the topic in its *Nuclear Weapons Advisory Opinion* (1996). Furthermore, it handed down the *Oil Platforms Case* (2003), the *Wall Advisory Opinion* (2004), and the *Congo Case* (2005).

In *Nicaragua Case*, Nicaragua alleged that the United States (US) supported the *contras*' actions against Nicaragua's government; At the same time, the US claimed that its actions amount to self-defence (along with El Salvador) against the armed attacks launched by rebel groups, in El Salvador, supported by the Nicaraguan Government. In the assessment whether American assistance to the Nicaraguan *contra* forces

amounted to a legitimate exercise of the right of collective self-defence, the ICJ took into account the relationship between the State and NSA and defined the rules on attribution (Nicaragua case, para. 101–104 and 106–108).[4] Therefore, it accepted that the *jus ad bellum* could be violated by "*the sending by or on behalf of a state of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another state*" (Nicaragua case, para. 195). Consequently, "*[b]y adopting a restrictive approach to attribution the Court effectively restricted seld-defence to the inter-state context*" (Tams, 2009, pp. 368–369), the ICJ rejects the American justification of self-defence[5].

In the *Nuclear Weapons Advisory Opinion*, the ICJ was asked to rule on the compatibility of the threat or use of nuclear weapons with the rules of international law, in particular, the provisions of the UN Charter.[6] According to the Court, articles 2, paragraph 4 and 51 the UN Charter do not refer to specific weapons, then the rule apply to any use of force, regardless of the weapons employed (para. 39). Also, it stated that the right of self-defence is subject to the conditions of necessity and

4 The ICJ held that the US was responsible for financing, training, and providing logistical support to the *contras* (including the supply of intelligence as to Nicaraguan troop movements). The ICJ held that Nicaragua was not responsible for the arms traffic (para. 154–155).

5 It should be noted that, through the definition of aggression of Resolution 3314, the ICJ contemplates two modes of connection: the "sending by the State or on its behalf" of the armed group, or the "substantial participation" of the State in the use of the armed force of the non-state actor against another State. The ICJ does not determine what this substantial participation consists of, but it does exclude "assistance to the rebels in the form of weapons provision or logistical or other support." (I.C.J. Reports 1986, para. 195).

6 The Court handed down its advisory opinion on the question concerning whether '*Is the threat or use of nuclear weapons in any circumstance permitted under international law?*'" (Nuclear Weapons, para. 1–9). The ICJ affirmed that there is in neither customary nor conventional international law any specific authorization of the threat or use of nuclear weapons, that threat or use is contrary to article 2, para. 4, of the UN Charter, and it fails to meet the requirements of article 51. However, it could not conclude whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake (para. 10 – 18, and 105).

proportionality as a rule of customary international law[7]. Judge Guillaume in his separate opinion stresses that neither the UN Charter nor any conventional or customary rule can detract from the natural right of self-defence, including the possibility to resort to nuclear weapons if that resort is the ultimate means for ensuring its survival (para. 8, 9 and 12). Judge Fleischhauer seems to confirm this view but adding objectives elements to reconcile the conflicting principles as the extreme situation and the requirement of proportionality (para. 6). However, to Judge Koroma, the use of nuclear weapons in any circumstance would at the very least result in the violation of the principles and rules of the international law and is, therefore, unlawful.

The *Oil Platforms Case* was around the issue of the legality of the use of force concerning two attacks against Iranian oil platforms by the US during the Iran-Iraq Warv (para. 23).[8] Iran rested its claims on the 1955 Treaty of Amity, Economic Relations and Consular Rights between the US and Iran, as well as on broader international law.[9] The US asserted that it was acting in self-defence as the Iranian platforms were being used for military

7 The Court said "*[t]his dual condition applies equally to Article 51 of the Charter, whatever the means of force employed*". It argued that the proportionality principle might "*not in itself exclude the use of nuclear weapons in self-defence in all circumstances*". Nevertheless, a proportional nuclear response in self-defence, "*must, in order to be lawful, also meet the requirements of the law applicable in armed conflict*" taking into account, at the same time, the nature of nuclear weapons and the risks associated in addition to that (para. 41 – 43).

8 The events occurred during the "Tanker War" in the 1980-1988 war context. Iran and Iraq attacked military and commercial vessels of varying nationalities in the Persian Gulf, including vessels from neutral countries. Later, the United States placed neutral countries' vessels under U.S. registry. However, these ships were attacked during 1987 and 1988. In particular, on October 16, 1987, the Kuwaiti oil tanker, *Sea Isle City,* which had been re-flagged to the United States, was hit by a missile while in Kuwaiti waters. Later, on April 14, 1988, the U.S. naval vessel USS *Samuel B. Roberts* was struck by a mine in international waters near Bahrain. In both cases, and some days later, U.S. naval forces took action against Iranian oil platform (para. 23-24, 44, 66-67 and 69.

9 Article I of the Treaty provided that "*there shall be firm and enduring peace and sincere friendship between the United States of America and Iran*" and article X(1) provided that there should be freedom of commerce and navigation between the parties' territories.

purposes, including surveillance of US vessels.[10] In examining Article XX(1)(d) of the Treaty, the Court found that the US attacks on the Iranian oil platform had exceeded the boundaries of international law on self-defence. Indeed, for the ICJ, the US failed to produce sufficient evidence to prove that there had been an "armed attack" on the United States by Iran (para. 61 and 72). Moreover, even if they had constituted "armed attacks", could not be regarded as having been "necessary" responses to the attacks on the two American vessels (para. 76). While the US attack might have been considered proportionate if it was necessary, the Court thought that the US attack was not proportional.[11]

In the *Wall Advisory Opinion,* Israel invokes its right of self-defence against terrorist attacks committed by Palestinian groups (para. 138); however, the ICJ gave limited consideration to Israel's claim that the construction of a security wall within the Occupied Palestinian Territories was a defensive measure of self-defence against terrorist attacks because it exercised control over territories from which the terrorist attacks originated (Ruys, 2010, pp. 474–475). The Court repeated the position it took in *Nicaragua* that NSA armed attacks must be imputable to a foreign State in order to activate the right of self-defence (para. 139). However, the Court's Opinion has been interpreted as, at least, implicitly recognizing a right to use force in self-defence against NSA, while refusing to accept such a right as applicable in these circumstances (Murphy, 2005; Canor, 2006, pp. 129–132). It also held that the occupied territories from which terrorist attacks were launched were

10 The US denied that it had breached its obligations to Iran under Article X(1). We asserted that its actions were necessary to protect its national security and fell within Article XX (1)(d) of the Treaty of Amity regarding the application of measures to fulfil the obligation for the maintenance or restoration of international peace and security or to protect its essential security interests.

11 In its judgment, the Court "*[f]inds the actions of the [US] against Iranian oil platforms on 19 October 1987 and 18 April 1988 cannot be justified as measures necessary to protect the essential security interests of the United States of America under Article XX, paragraph 1(d), of the 1955 Treaty of Amity (...), as interpreted in the light of international law on the use of force; (...)*".

under Israeli control and therefore could not be view as attacks launched from abroad[12]. Thus, the Court did not address any light regarding the State's right to use defensive force directly against NSA in foreign territory.

In *Congo Case*, the Court held that the attacks carried out by rebel groups operating from the Congo's territory against Uganda are "*non-attributable to the DRC*" (para. 146), because the circumstances giving rise to the right to self-defence are not satisfied.[13] The ICJ reaffirmed the position taken in *Nicaragua* but the context of the definition of aggression. The Court did not rule out that a lesser degree of State involvement could form the basis for attributing the armed activities of NSA to the State from whose territory they operate – but regarded attributability for an armed attack as limited to the definition of aggression. Besides, the ICJ did not stipulate that armed attacks in the sense of article 51 require an armed attack by one State against another. Instead, it noted that Uganda's measures were carried out against Congo (para. 118, and 147). Furthermore, therefore focused its decision on the grounds of attribution. The decision reflects the distinction between force used in self-defence against Congo and NSA within Congo while refusing to address the conditions for the latter. As Uganda's use of force was not directed against Ugandan NSA, the ICJ did not consider the cases under which such a force would be legitimate (para. 140 and 145).

12 However, the critique of that position deals with the fact that if Palestine is sufficiently an international entity for appearing before the Court and benefiting from the protections of international humanitarian law, then it should be sufficiently international to apply the prohibition of armed attacks on other States (ICJ, Separate Opinion of Judge Higgins, para. 34).

13 Uganda sought to justify control over Congolese territory (airports and towns) by invoking its right of self-defence. However, the ICJ considered that the armed attacks referred to by Uganda did not come from the armed forces of the Congo, but a rebel group opposed to the Ugandan government (ADF). According to the Court, even if the conditions for the exercise of the right of self-defence had been given, it could hardly be considered that Uganda's actions were proportionate to the cross-border attacks to which they intended to respond (para. 147).

In the light of the preceding, under the ICJ's case law, the victim State may not resort to force in response to attacks by NSA unless the NSA had effective control of the State or the NSAs actions were attributable to that State. Therefore, if none of those situations exists, the use of force by the victim State will be considered an unlawful armed attack since it contradicts the principles of the sovereign equality of States and the prohibition of force in international relations (Nicaragua case, para. 191 and 195; Oil Platforms case, para. 101, 195–196; Legal Consequences of the Construction of a Wall, para. 139; Congo case, para. 146).

The ICJ has not guided the cases under which a victim State is entitled to use force in self-defence directly against NSA nor, except for those as mentioned above, has made particular statements related to the source of the armed attack. Nevertheless, as it proclaimed in the Nuclear Weapons Advisory Opinion, in any event, the exception to the prohibition of the use of force under self-defence should be exercised in conformity with the principles of proportionality and necessity.

4. GENERAL OVERVIEW OF STATES PRACTICE

Since the 2011 Syrian civil war, organised networks have spread out across borders, overtaking cities (Couzigou, 2016). In 2014, the ISIS shook the international scene, by posing a new -- and possibly the greatest -- threat to peace and security in the Middle East (Di Giovanni, McGrath and Sharkov, 2014; Flasch, 2015, p. 3). ISIS enjoys financial and military resources (i.e. massive wealth, sophisticated training and organization, access to destructive weaponry, and others) and controls some territory of both Syria and Iraq as well as an area in Libya. ISIS has killed and injured thousands of people, IS-related violence has led to the displacement of over a million people, and its atrocities have extended to other countries in the Middle-East, West-Africa, and Europe (Zerrouky, Audureau and Vaudano,

2015). The conduct of ISIS cannot be attributed to the Assad government and thus to Syria.[14]

To address the issue, Iraq has requested that the United States (USA) assist it in defending itself against ISIS. Therefore, since September 2014, the USA, along with other States, launched attacks against ISIS in Iraq and Syria (Mills, 2017). However, it must be considered that "[w]hile the Iraqi government has consented to foreign military action against ISIS within Iraq, the Syrian government did not. Rather, Syria protested that the airstrikes in Syrian territory were an unjustifiable violation of international law" (Scharf, 2016). The USA informed the Security Council that the military actions against ISIS on Syrian territory are were lawful acts of collective self-defence on behalf of Iraq (Scharf, 2016), while Iraq claimed its right to individual self-defence[15]; and also, lawful acts of individual and collective self-defence against the threat that ISIS and other terrorist groups in Syria represent for "many other countries", including USA and its allies. The USA formulated the following justification:

> *"States must be able to defend themselves, following the inherent right of individual and collective self-defence, as reflected in Article 51 of the Charter of the United Nations, when, as is the case here, the government of the State where the threat is located is unwilling or unable to prevent the use of its territory for such attacks. The Syrian regime has shown that it cannot and will not confront these safe havens effectively itself. Accordingly, the United States has initiated necessary and proportionate*

14 Under international law, the conduct of a person may be attributed to a State where the acts were done under the instructions, direction or control of the government of the State. However, Such control is not exercised by the Assad government over IS (Article 8 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts, 2001).

15 Then, it was not only the attacks of ISIS against Iraq on its border with Syria but also the request of Iraq for the USA to lead international efforts to attack the military strongholds and sites of ISIS in Syria.

> *military actions in Syria in order to eliminate the ongoing ISIL threat to Iraq... Also, the United States has initiated military actions in Syria against al-Qaida elements in Syria known as the Khorasan Group to address terrorist threats that they pose to the United States and our partners and allies." (*U.N. Sec. Council, Letter from the Permanent Representative of the United States of America to the United Nations *addressed to the Secretary-General*, U.N. Doc. S/2014/695, (Sep 23, 2014).

Additionally, in the beginning, France restricted its action to the Iraqi territory; however, following the 2015 and 2016 ISIS attacks in Paris and Nice, it expanded its military intervention in Syria based on the right to individual self-defence. In the notification addressed to the Security Council, France invokes art. 51 of the Charter, but without specifying whether it was proceeding under the title of the individual or collective self-defence. France formulated the following justification:

> *"By resolutions 2170 (2014), 2178 (2014) and 2199 (2015) in particular, the Security Council has described the terrorist acts of [ISIL], including abuses committed against the civilian populations of the Syrian Arab Republic and Iraq, as a threat to international peace and security. Those acts are also a direct and extraordinary threat to the security of France.*
>
> *In a letter dated 20 September 2014... the Iraqi authorities requested the assistance of the international community in order to counter the attacks perpetrated by ISIL.*
>
> *By Article 51 of the Charter of the United Nations, France has taken actions involving the participation of military aircraft in response to attacks carried out by ISIL from the territory of the Syrian Arab Republic." (*U.N. Sec. Council, Letters from the Permanent Representative of France

> to the United Nations *addressed to the Secretary-General and the President of the Security council*, U.N. Doc. S/2015/745, (Sep 9, 2015).

Moreover, many States were taking action in Syria and Iraq on different legal bases. As explained by Dapo Akande and Marko Milanovic:

> "*The US-led coalition relies on consent concerning action taken within Iraq, and the collective self-defence of Iraq about the action taken in Syria. However, the US, the UK and perhaps France have also referred to individual self-defence concerning strikes in Syria. Russia for its part (and presumably Iran) would rely on consent from the Syrian government about their action in Syria, and like Syria regard actions taken by Western states in Syria without the consent of the Syrian government to be unlawfu*l" (Akande and Milanovic, 2015).[16]

While ISIS has raised following examples of invocations by States of the right to self-defence against an NSA, it is interesting to note that this kind of invocations has existed before. Since 1837 Caroline incident (Collins and Rogoff, 1990, pp. 81-107; Reisman, 1999, pp. 42-47)[17] until 1998 when the USA used the justification of self-defence for its attack against Al Qaeda facilities in Afghanistan as a response to terrorist attacks on the U.S. embassies in Nairobi and Dar Es Salaam (U.N. Doc. S/1998/780, Letter from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, (Aug. 20, 1998).

16 Regarding Russia, it must be considered that the consent by Syria to the resort to force by Russia provides legal grounds for Russian military action. See, Article 20 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001.

17 A famous historic case based on the armed attacks against Canada and the recognition of the right to use necessary and proportionate military force in self-defence as a response to NSA attacks launched from the U.S. territory.

Another relevant example was 2006 when Israel invoked the right of self-defence against Hezbollah in Lebanon (U.N. Sec. Council, 5503 Meeting, *The situation in the Middle: East Letter from the Chargé d'affaires a.i. of the Permanent Mission of Lebanon to the United Nations addressed to the President of the Security Council*, U.N. Doc. S/PV.5503 (July 31, 2006). Despite its actions were disproportionate Human Rights Watch, 2009, p. 49), many States accepted the Israel's right to defend itself" (Trapp, 2015, p. 691).

After the 9/11 attacks, action in self-defence by the US and its allies was no longer against Afghanistan that was not governed by the Taliban regime anymore, but directly against the Taliban forces and the Al-Qaeda (Couzigou, 2016). By that time, "the international community has been practically unanimous that the US invasion of Afghanistan was a lawful exercise of self-defence" (Akande and Milanovic, 2015), though some have expressed doubts because of the particular situation (Roberts, 2009, p. 15).[18] Besides, Russian Federation claimed its right to use force in self-defence on Georgian territory against Chechnya for Chechen attacks launched against Russia (U.N. Sec. Council, U.N. Doc. S/2002/854, (Jul 31, 2002).

In light of these events, some States seems to recognize the right to use force in self-defence targeting NSAs in foreign

18 In this particular case, the recognition of the right of self-defence is found in resolutions 1368 (2001) and 1373 (2001). However, in informing the Security Council about the military operation in Afghanistan against al Qaeda, the United States referred to the support of the Afghan Taliban regime. The Taliban Government had not been directly involved in the organization or execution of the attacks, nor did it possess the necessary degree of control. However, it granted al Qaeda refuge in violation of the obligation derived from the resolutions that requested the delivery of Bin Laden; and, the general obligation of every State to refrain from organizing, instigating, helping or participating in terrorist acts in another State or consenting to activities in its territory for the commission of such acts when they imply resorting to threat or use of force.

territory when the host State cannot be relied on to prevent or suppress terrorist actions. The international community's response to ISIS in Syria, through the UN SC Resolution 2249, does not endorse a legal justification or basis for military action. However, its call on States to use all necessary measures to fight against ISIS in Syria will likely be viewed as confirming that use of force in self-defence is permissible against NSA where the territorial state is unable to suppress their threat.

On the other side, some states are reluctant to recognize from the UN SC Resolutions any kind of legal authorization for the forcible action (Tams, 2009, pp. 379-381). Indeed, "*though the [UN SC] resolution [2249 (2015)] (...) might confer a degree of legitimacy on actions against IS, the resolution does not authorize any actions against IS, nor does it provide a legal basis for the use of force against IS either in Syria or in Iraq*" (Akande and Milanovic, 2015). The SC's practice to reference the inherent right to use of force under self-defence, while does not authorize such action, it gave an SC "*stamp of legitimacy*" to them. Indeed, as Milanovic affirmed, Resolution 2249 is ambiguous as it can be used to provide political support for military action, without endorsing any particular legal theory on which such action. However, the Resolution is also worded in such a way that it equally allows Russia, Syria and others to insist that the use of force in Syria without consent of the Syrian government is unlawful.

CONCLUSIONS

Self-defence constitutes an exception to the international prohibition on the use of force between States. The right to self-defence is guaranteed in Article 51 of the UN Charter and customary international law. The self-defence can be individual when the victim State reacts to an armed attack or collective when other States react to an armed attack on the request of the victim State.

The military interventions in Syria raise the question of whether a right to self-defence directly to NSA exists. On the one hand, some consider that the armed attacks must be attributable to a State before giving rise to a right to use force in self-defence in foreign territory. Consequently, the use of force operates exclusively between States, as it implies targeting the State territory where the NSA operates.

On the other hand, some support raising a new right under international law to use force in self-defence directly against NSA, regardless of the territorial host State's non-involvement in the attacks. From this point of view, such a new rule, although incipient, is based on CIL. Therefore, States would be able to intervene militarily only targeting NSA located in foreign territory.

International law needs to provide legal solutions to this situation from a practical point. However, it is not an easy task since it would be necessary to balance the legitimate interests from both sides. The legitimate need of States to defend themselves by one side and respect the principles of sovereign equality, territorial integrity and the prohibition of the use of force, by another side.

Moreover, we must recall that international law is a tool constructed based on and influenced by the values and interests of its subjects, primarily States. As such, international law rules represent, at first, the values of a community at a certain point of time but should be, it is possible, malleable according to the needs of new scenarios as the asymmetrical threats coming from NSAs.

Furthermore, a first step should be to clarify whether the values safeguarded by the UN Charter remain the same or, instead, in this new context, there is room for new approaches. In any case, it must be taking into account that self-defence is always the last resort, only applicable when other means –

peaceful (police and judicial cooperation) or military measures (with the cooperation of territorial State) or the referring the situation to the SC – are not available.

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En el umbral de una nueva era: El derecho privado ante la robótica y la inteligencia artificial

On the threshold of a new era: Private law versus robotics and artificial intelligence

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RESUMEN: Este ensayo enfrenta los temas conceptuales que permiten aquilatar la magnitud de la irrupción de la IA, la robótica y el Big Data al concluir la segunda década del siglo XXI. Hace un repaso por las sorprendentes bondades que ofrece al hombre la tecnología inteligente que pretende ser autónoma y que, por esa misma razón, plantea desafíos éticos no fáciles de abordar y menos de resolver. La Era Digital está removiendo, desde sus raíces, la forma que tenemos de entender el Derecho positivo, como una potestad de *imperium* del Estado, pues la regulación normativa de la actividad humana, con inusitada rapidez, está pasando a la iniciativa privada. La UE ha generado importante normativa regional que bien podría servir de guía para el resto de Estados en el mundo. La robótica, en particular, genera honda preocupación en el ámbito de la responsabilidad civil y en el mundo laboral por la potencial eliminación de fuentes de empleo para los seres humanos.

PALABRAS CLAVE: Inteligencia artificial, robótica, algoritmo, aprendizaje activo, sistema legal.

ABSTRACT: This essay addresses the conceptual themes that allow the magnitude of the emergence of AI, robotics and Big Data at the end of the second decade of the 21st century. It reviews the surprising goodness offered to man by intelligent technology that is intended to be autonomous and, for the same reason, poses ethical challenges that are not easy to address and less to solve. The Digital Age is removing, from its roots, the way we understand positive Law, as a power of *imperium* of the State, because the regulation of human activity, with unusual speed, is moving to private initiative. The UE has generated important regional regulations that could well serve as a guide for the rest of the world. Robotics, in particular, raises serious concern in the field of civil liability and in the world of work due to the potential elimination of sources of employment for human beings.

KEYWORDS: Artificial intelligence, robotics, algorithm, active learning, legal system.

INTRODUCCIÓN

Se ha comparado la irrupción de la robótica y la inteligencia artificial (IA) con el impacto que en su momento significó la invención de la imprenta en el siglo XV por Gutenberg que, como sabemos, hizo posible que la búsqueda del conocimiento empírico sustituyera a la doctrina sagrada y que la Era de la Razón reemplace gradualmente a la Era de la Religión, dando lugar, entre otras cosas, al aparecimiento de la Ilustración, en una transformación que duró siglos.

Asimismo, se acepta que la primera revolución industrial se produjo con el aparecimiento de la máquina a vapor, en la segunda mitad del siglo XIX; la segunda revolución fue la de los inventos mecánicos producto del descubrimiento de la electricidad; la tercera corresponde a la irrupción de la electrónica y la informática en la vida del hombre, al finalizar el siglo pasado. Hoy, asistimos a la cuarta revolución, transformadora de la sociedad, la de los entes ciberfísicos, que admite la posibilidad de crear entes con estructuras capaces de tomar decisiones autónomas (en base a algoritmos matemáticos), y que tendrán una incidencia decisiva en nuestras vidas.

Como señala la Asamblea del Consejo de Europa (2017b) la convergencia tecnológica[1] "tiene consecuencias no sólo para los derechos humanos y la forma en que pueden ejercerse, sino también para el concepto fundamental de lo que caracteriza a un ser humano". La omnipresencia de las nuevas tecnologías y sus aplicaciones está desdibujando los límites entre el ser humano y la máquina, entre las actividades en línea y fuera de línea, entre el mundo físico y el virtual, entre lo natural y lo artificial, y entre la realidad y la virtualidad. Lo que ahora se avecina en el horizonte es el ser *humano aumentado*.

¿Frente a esta realidad que cala en lo más hondo de la naturaleza humana, qué papel le corresponde al Derecho? ¿Es acaso el último bastión que le queda a la humanidad para defenderse de las amenazas que implican la IA y la robótica? ¿La IA y la robótica traerán consigo el progreso y el bienestar de la humanidad, abreviando procesos y simplificando las tareas humanas, al punto que se eliminen los conflictos y el mundo del Derecho pierda su razón ser?

1 Se refiere a la convergencia de la IA, la robótica y el Big Data.

Estos tópicos pretenden abordarse en esta investigación, pero de antemano anticipo que no se ofrecerán certezas, pues el sacudón que implica la irrupción de la inteligencia artificial en la vida de los seres humanos es de tal envergadura que no sólo volatiza la ley y el Derecho en su sentido clásico, garantizados por el Estado y fundamentados en su poder de *imperium*, sino que incluso llega a comprometer derechos humanos que se daban por sentados como verdades absolutas. La libertad, la privacidad, la dignidad humana han sido puestas en el tapete del debate. En la otra orilla, el todopoderoso derecho a la información, ha creado la *sociedad de la transparencia*, y arrecia con su discurso en aras de la libertad también, para que todos contribuyamos con nuestros datos a un mercado planetario que se mueve en Internet.

Tampoco se ofrece una visión apocalíptica, pues el desarrollo de la ciencia y la tecnología siendo producto del ser humano (por naturaleza inteligente y creativo) deben estar diseñadas para el servicio a la humanidad y oponerse a su avance y desarrollo sería una insensatez. La IA aplicada a la investigación científica, a la medicina, a la exploración del cosmos, son sólo pocos ejemplos de cómo estos nuevos desarrollos tecnológicos pueden contribuir al bienestar y al perfeccionamiento del hombre. Pero resultaría miope no advertir de los riesgos y es irresponsable no estar preparados para los cambios rotundos y rápidos que ya han empezado a llegar.

1. INTELIGENCIA ARTIFICIAL, ROBOTS Y BIG DATA

1.1. Los algoritmos

El término algoritmo se ha vuelto tan utilizado cuando se habla de inteligencia artificial que conviene empezar asumiendo su significado. Según la RAE (2014) es el "conjunto

ordenado y finito de operaciones que permite hallar la solución de un problema". Y en una segunda acepción lo define como "método y notación en las distintas formas del cálculo". Aunque bien se podría al algoritmo como una secuencia de comandos para que una computadora transforme un *input* en *output*, o un código software que procesa un conjunto limitado de instrucciones (Cotino, 2019). Los algoritmos son de diversas clases y tienen diferentes aplicaciones, pero se podría afirmar que sus propiedades básicas son: universalidad, opacidad y el impacto en la vida de las personas. (Monasterio, 2017)

Los algoritmos no son nuevos, han sido utilizados en programas informáticos por décadas. Lo que ocurre es que actualmente algoritmos avanzados de aprendizaje automático (*advanced machine-learning algorithms*) están revolucionando y automatizando la vida del ser humano. Pero debemos tener presente que la creación de algoritmos no es exclusivamente un procedimiento estadístico o matemático, sino que requiere la intervención humana para recopilar, preparar y analizar datos, incluyendo decisiones de desarrolladores y directivos. (Coglianese y Lehr, 2017)

1.2. La Inteligencia Artificial (IA):

La IA[2] hace posible que las máquinas aprendan de la experiencia, se ajusten a nueva información y realicen tareas como seres humanos, recurriendo para ello al aprendizaje profundo y al procesamiento del lenguaje natural. De este modo, las computadoras se entrenan para efectuar tareas específicas

2 La Comisión Europea señala que: "El término inteligencia artificial (IA) se aplica a los sistemas que manifiestan un comportamiento inteligente, pues son capaces de analizar su entorno y pasar a la acción -con cierto grado de autonomía- con el fin de alcanzar objetivos específicos". IA para Europa, Comunicación de la Comisión al Parlamento Europeo, al Consejo Europeo, al Consejo, al Comité Económico y Social Europeo y al Comité de las Regiones. (COM, 2018, 237 final; SWD, 2018, 137 final; Bruselas, 2018, p. 1)

mediante el procesamiento de grandes cantidades de datos, siendo capaces de reconocer patrones en los datos.

La IA difiere de la automatización de robots soportada en hardware, pues, en vez de automatizar tareas manuales, realiza tareas computarizadas frecuentes de alto volumen de modo confiable, haciendo posible la automatización del aprendizaje y el descubrimiento repetitivo a través de datos. Este tipo de automatización requiere de la investigación humana para configurar el sistema y alimentarlo con los datos apropiados, de ahí que la IA puede agregar inteligencia a productos ya existentes.

Sin embargo, mediante algoritmos de aprendizaje progresivo, la IA se adapta para permitir que los datos realicen la programación, encontrando estructura y regularidades en los datos de tal suerte que el algoritmo adquiere la *habilidad* de ser clasificador o predictor; los modelos se van adaptando cuando se les alimentan con nuevos datos; y, además, la técnica de *retropropagación* permite al modelo ajustarse cuando la primera respuesta no es del todo correcta. La IA procesa datos profundos utilizando redes neuronales que tienen varias capas ocultas, requiriéndose una enorme cantidad de datos para *entrenar* modelos de aprendizaje profundo que aprenden directamente de ellos. Mientras más datos se les entrega, más precisos se vuelven, por lo que, actualmente, la IA alcanza una increíble precisión a través de redes neuronales profundas, lo que antes era imposible.

La limitación principal de la inteligencia artificial es que aprende de los datos que se le suministran y no existe otra manera en que se pueda incorporar el conocimiento. Eso significa que cualquier imprecisión en los datos se verá reflejada

en los resultados y que toda capa adicional de predicción o análisis se tiene que agregar por separado.

Por el momento, los sistemas de IA están entrenados para realizar una tarea específica. Son sistemas absolutamente especializados que se enfocan en una sola actividad y están lejos de comportarse como humanos. Igualmente, los sistemas de autoaprendizaje no son autónomos y, aunque las tecnologías de inteligencia artificial que se observan en el cine y la televisión continúan siendo ciencia ficción, las computadoras que pueden sondear datos complejos para aprender y perfeccionar tareas específicas cada vez son más y están en constante evolución.

1.3. Robot y robot inteligente:

La palabra *robot* fue utilizada de manera pública por vez primera el 25 de enero de 1921, fecha en que el escritor checo Karel apek (1890-1938) estrenó en el Teatro Nacional de Praga su obra *Rossum's Universal Robot* (*Rossumovi univerzální roboti*) que, en la trama, es el nombre de la fábrica que produce los robots. Etimológicamente, viene del vocablo eslavo *robota*, que designa al trabajo efectuado de modo forzado, el trabajo esclavo[3]. En la obra, los robots terminan matando a su creador.

Pero el origen más remoto de la idea de crear seres no humanos se remonta al *golem*, que en la mitología judía es la personificación de un ser animado creado a partir de materia inanimada (barro, piedra). La palabra *golem* ya la encontramos en la Biblia (salmos 139:16) y en las narraciones talmúdicas en referencia a una sustancia embrionaria o incompleta.

La industria cinematográfica generalmente ha ofrecido una visión apocalíptica sobre la presencia de robots y autómatas que llegan a controlar y dominar la vida de los seres

3 En checo, *robotnik* quiere decir *servidor*.

humanos. Aunque también existen otras que muestran a ciertos androides[4], incluso con sentimientos, y en afán colaborativo con el hombre. La humanidad ha cumplido un siglo con la idea, muchas veces atemorizante, de compartir su existencia con los robots. Una buena representación de esta afirmación está plasmada en películas como: *Metropolis* (1927); *Planeta prohibido* (1956); *Terminator* (1984); la saga de *La Guerra de las Galaxias* (1977-2019); *Blade Runner* (1982); *El hombre bicentenario* (1999); *Matrix* (2001); *A.I. Inteligencia Artificial* (2001); *Yo, robot* (2008); y, *Ex Machina* (2015). En todas ellas, podríamos concluir, que la emoción y los sentimientos son la última frontera en la evolución de las máquinas.

Más allá de la ciencia ficción, de los temores y del entusiasmo por el avance de la ciencia y la tecnología al servicio del hombre, el mundo de la robótica ha hecho su aparecimiento con evidencia incontrastable de que cambiará muchos de los paradigmas sobre los que hasta ahora se ha asentado la sociedad contemporánea: el trabajo, las relaciones humanas, la producción de bienes y servicios, la cultura, el derecho.

La Norma ISO 8373 (2012) define *robot* como el "mecanismo accionado programable en dos o más ejes con un grado de autonomía, que se mueve dentro de su entorno, para realizar las tareas previstas". Pero ha sido necesario crear una nueva categoría para los robots inteligentes, así, la misma Norma define al *robot inteligente* como el "capaz de realizar tareas detectando su entorno y/o interactuando con fuentes externas y adaptando su comportamiento". (2.28)

Según el Parlamento Europeo (2017a), las características de un robot inteligente deben ser:

4 Según el RAE (2014), la definición de androide es: autómata de figura humana.

- Capacidad de adquirir autonomía mediante sensores y/o mediante el intercambio de datos con su entorno (interconectividad) y el intercambio y análisis de dichos datos;
- Capacidad de auto aprendizaje a partir de la experiencia y la interacción (criterio facultativo);
- Un soporte mínimo;
- Capacidad de adaptar su comportamiento y acciones al entorno; y,
- Inexistencia de vida en sentido biológico.

De lo cual podemos concluir con Santos González (2017) que:

> Robot inteligente será aquella máquina física que de manera autónoma a través de programas y sensores inteligentes pueda llegar a tomar decisiones basándose en la lógica e IA prediciendo las necesidades de los humanos y de las situaciones en las que se ven envueltos actuando, alterando e interactuando con el mundo físico, todo ello sin estar sometidos al control continuo de los humanos.

1.4. Big Data (Macrodatos)

El término *Big Data* se debe al libro de Schönberger y Cukier (2013) que se ha difundido incluso en el ámbito del habla castellana. Sin embargo, el Parlamento Europeo (2017b) utiliza el vocablo *macrodatos*, al que lo ha definido del siguiente modo:

> El concepto de macrodato se refiere a la recopilación, análisis y acumulación constante de grandes cantidades de datos, incluidos datos personales, procedentes de diferentes fuentes y objeto de un tratamiento automatizado mediante algoritmos informáticos y avanzadas técnicas de tratamiento de datos, utilizando

tanto datos almacenados como datos transmitidos en flujo continuo, con el fin de generar correlaciones, tendencias y patrones (analítica de macrodatos).

Para visualizar las características del Big Data se ha hecho referencia a las V (Gartner, 2012): volumen, variedad, velocidad y valor. A éstas se debería añadir, al menos una V adicional: veracidad (Puyol, 2015). El propósito del Big Data es captar, gestionar y tratar enormes volúmenes de datos agregándoles valor al rescatar datos poco utilizados o inaccesibles para descubrir un conocimiento hasta ahora oculto, utilizando información de fuente muy variada: datos generados por humanos, generados biométricamente, producidos máquina a máquina, productos de grandes transacciones o del uso de la web, redes sociales, archivos públicos, bancarios, entre otros.

Pero, el Big Data no sólo dice relación a descomunales cantidades de datos, a las herramientas y procedimientos utilizados para tratarlos, sino que ofrece un giro en el pensamiento computacional y en la investigación, al producirse una convergencia con la IA y la robótica, lo que en conjunto hace que los sistemas computacionales sean capaces de tratar, aprender, resolver problemas y tomar decisiones autónomas a partir esa enorme cantidad de datos analizados. (Boyd y Crawford, 2011)

2. BIG DATA, IA Y ROBÓTICA: LA NUEVA REALIDAD

Los robots y los sistemas de inteligencia artificial (IA) son uno de los grandes inventos verdaderamente disruptivos del entorno digital, y constituyen, sin duda, un vector de cambio vertiginoso de nuestras sociedades que apenas si hemos comenzado a vislumbrar. Empiezan a invadir todos los ámbitos de la vida, todos los escenarios, no sólo la carrera armamentista,

sino autos, aspiradoras, robots de compañía, robots de entretenimiento, religión, trabajo, juegos que compiten con el ser humanos, vehículos autónomos, sex-bot, entre otros.

El Big Data, la IA y la robótica son auténticos aceleradores de la vida y de la sociedad, de esta *modernidad líquida* en la que, como describe Bauman (2004), lo único estable es el cambio continuo y debemos quedar dispuestos y flexibles al mismo, preparados para cambiar la sintonía, la mente en cualquier momento. Dice el filósofo polaco que: "La fluidez o la liquidez son metáforas adecuadas para aprehender la naturaleza de la fase actual -en muchos sentidos nueva- de la historia de la modernidad" (Bauman, 2004)

2.1. Aplicaciones sorprendentes

En las dos primeras décadas del siglo XXI hemos sido testigos de aplicaciones sorprendentes de la tecnología autónoma y la inteligencia artificial. Al día de hoy, sin intervención humana directa o control externo, los sistemas inteligentes entablan diálogos con clientes en centros de llamadas en línea, manejan incesantemente y con gran precisión manos robóticas que recogen y manipulan objetos, compran y venden grandes cantidades de acciones en milisegundos, maniobran o frenan automóviles para prevenir choques, clasifican personas y su comportamiento, imponen multas a automovilistas recogiendo información de cámaras en carreteras, resuelven conflictos por productos defectuosos entre personas situadas en países distintos.

Hasta hace poco, los robots industriales sólo podían realizar movimientos rígidos y tareas específicas, al ser incapaces de percibir un entorno en tres dimensiones, apenas podían servir una comida o limpiar una casa. Sin embargo,

hace casi una década, Microsoft creó *Kinect*, que permitió a los jugadores de videojuegos interactuar con sus juegos a través de los movimientos del cuerpo. La tecnología de *Kinect* interpreta los movimientos físicos en tres dimensiones y emulándolo los ingenieros han creado robots que se mueven como humanos. Antes los robots necesitaban de una programación compleja. Hoy en día, las empresas los *entrenan*, guiándolos simplemente por los movimientos que deben realizar, de este modo se acelera exponencialmente su velocidad de aprendizaje y aumenta su funcionalidad[5]. *Monument Machines*, por ejemplo, tiene robots que preparan y sirven 360 hamburguesas por hora en restaurantes totalmente automatizados. *Kura*, una cadena de sushi japonés, utiliza robots para preparar la comida y cintas transportadoras automatizadas para entregarla. *Redbox*, un operador de quioscos de DVD en EE.UU. y Canadá, ofrece unos dos millones de videos a los consumidores todos los días. *Blockbuster* operaba decenas de tiendas y empleaba a cientos de personas en el mismo territorio que hoy con siete empleados que recargan los quioscos.

Todo esto, sin mencionar los robots que hacen exploraciones submarinas, los que son lan*zados al espacio para la exploración del universo; las plataformas de aprendizaje (Machine Learning Platforms); TechRadar: Artificial Intelligency Technologies; Speech Recognition; Virtual Agents; AI-optimized Hardware; Decision Management; Deep Learning Platforms; Biometrics; Robotic Process Automation; Text Analytics and NLP.*

5 La Ley de Moore, dice que la capacidad informática se duplica aproximadamente cada dos años. Si alguien ofrece un centavo hoy, dos centavos mañana, cuatro centavos al día siguiente, y así sucesivamente, cada día durante un mes, tendría más de U$ 2 millones a finales del mes.

2.2. ¿Necesitamos a los robots?:

Parece evidente que los robots ofrecerán a la humanidad un gran apoyo. Es muy común la referencia a las posibilidades que los robots presentan con la anglosajona expresión *3 D*, esto es, permiten afrontar tareas que se caracterizan por los tres adjetivos que empiezan por d: *dull* (tedioso), *dirty* (sucio) y *dangerous* (peligroso). Así pueden llevar a cabo tareas muy largas, aburridas y físicamente muy exigentes, superando los inconvenientes del cansancio y la tensión acumulada de la plantilla y la imposibilidad o gran dificultad de los relevos. Se destaca igualmente que los robots están especialmente pensados para trabajar en ambientes sucios porque permiten operar en zonas donde existe contaminación *NbQR* (nuclear, biológica, química y radiactiva) y donde los riesgos para el organismo humano serían demasiado elevados si se realizasen misiones con personal de carne y hueso. Finalmente, la tercera "d" está relacionada con misiones en las que el peligro para un ser humano es demasiado importante debido a amenazas en tierra, como es el caso de las catástrofes naturales.

Pero más allá de estas formidables capacidades y el apoyo que ellas representan para el ser humano, el peligro existe. Baste recordar lo señalado por el físico británico Stephen Hawking en 2014 que, tras reconocer que los sistemas inteligentes desarrollados hasta ahora han resultado útiles y beneficiosos para la humanidad, advertía que los esfuerzos por crear este tipo de tecnología avanzada pueden poner en riesgo la supervivencia de los seres humanos. Mencionaba que: "El desarrollo de la inteligencia artificial podría significar el fin de la raza humana", pues "los robots podrían llegar a tomar el control y se podrían rediseñar a sí mismos" para reemplazar a los humanos. Podría entonces invertirse la pregunta y los

robots podrían llegar a preguntarse: ¿Para qué necesitamos a los humanos?

Por lo pronto nos reconfortamos dando por cierto que los robots nunca serán capaces de adquirir inteligencia emocional y que, por lo tanto, el ser humano será siempre insustituible.

2.3. El aprendizaje profundo y la opacidad de las herramientas

El aprendizaje profundo, que es parte del aprendizaje automático, se refiere al uso de redes neuronales para mejorar aspectos como el reconocimiento de voz, la visión por ordenador y el procesamiento del lenguaje natural. Rápidamente se está convirtiendo en uno de los campos más solicitados en informática. En los últimos años, el aprendizaje profundo ha ayudado a lograr avances en áreas tan diversas como la percepción de objetos, la traducción automática y el reconocimiento de voz (todas ellas áreas especialmente complejas para los investigadores en IA). Está menos sometido a supervisión, e implica, entre otras cosas, la creación de redes neuronales a gran escala que permiten que el ordenador aprenda y *piense* por sí mismo sin necesidad de intervención humana directa.

Se puede constatar que las herramientas cognitivas más poderosas son también las más opacas, puesto que sus acciones han dejado de ser programadas linealmente por humanos. Al parecer, es la primera vez que el hombre está creando algo sobre lo que tal vez no va a tener control. Sobre esto ha escrito Slavoj Zizek (2006), comparando la técnica actual con la propia de la Modernidad:

> La tecnología moderna era 'transparente' en el sentido de que mantenía viva la ilusión de que era posible comprender 'cómo funciona la máquina', es decir, se suponía que la interfaz debería permitir al usuario un acceso directo a la máquina que había detrás (...) la 'transparencia' posmoderna designa exactamente lo contrario de esta actitud analítica global (...) el precio de esta ilusión de continuidad con nuestros entornos cotidianos es que el usuario se 'acostumbra a una tecnología opaca', la maquinaria digital 'tras la pantalla' se vuelve totalmente impenetrable, incluso invisible.

Citemos un par de ejemplos: *Google Brain* desarrolla una IA que al parecer construye otras de su misma naturaleza mejor y más rápidamente que los humanos. *AlphaZero* puede autoejecutarse y pasar en cuatro horas de ser completamente ignorante de las reglas del ajedrez a alcanzar el nivel del campeón del mundo. De hecho, es imposible comprender exactamente cómo logró *AlphaGo* vencer al campeón mundial de Go. Estos dos casos ilustran que el aprendizaje profundo y los llamados "*enfoques de redes generativas antagónicas*" (en inglés *generative adversarial networks*) hacen posible que las máquinas se *enseñen* a sí mismas nuevas estrategias y adquieran nuevos elementos para ser incorporados en sus análisis. De esta forma, las acciones de estas máquinas se vuelven indescifrables y escapan del escrutinio humano. Esto se debe, en primer lugar, a que resulta imposible averiguar cómo se generan los resultados más allá de los algoritmos iniciales. En segundo lugar, porque el rendimiento de estas máquinas se basa en los datos utilizados durante el proceso de aprendizaje y estos pueden no estar disponibles o ser inaccesibles. Esto también implica que, si estos sistemas usan datos con sesgos y errores, estos dos últimos quedarán enraizados en el sistema. A menudo, cuando los sistemas pueden aprender a realizar este tipo de tareas complejas sin la instrucción o supervisión humana, se les califica como

autónomos. Dichos sistemas pueden manifestarse en forma de sistemas robóticos de alta tecnología o software inteligente, como los *bots*. En muchos casos, estos sistemas autónomos son lanzados y liberados en nuestro mundo sin supervisión, a pesar de que poseen el potencial de alcanzar objetivos que no fueron previstos por sus diseñadores o propietarios humanos.

2.4. Lo que podemos constatar al día de hoy

La IA en la forma de aprendizaje automático, especialmente el *aprendizaje profundo* que se alimenta de datos masivos, se está volviendo cada vez más poderosa. Asimismo, la IA se está aplicando en mayor medida a nuevos productos y servicios digitales, en los sectores público y privado, y en contextos tanto militares como civiles. El funcionamiento interno de la IA puede ser extremadamente difícil o imposible de monitorear, explicar y evaluar críticamente. Además, las capacidades avanzadas de la IA se están acumulando sobre todo en manos del sector privado y, por lo general, con derechos exclusivos.

La mecatrónica avanzada posibilita una gama amplia de sofisticados sistemas robóticos y de alta tecnología de aplicación práctica. Por ejemplo, en los sectores de servicios y producción industrial, asistencia sanitaria, comercio minorista, logística, domótica (automatización del hogar), seguridad y protección. Dos campos de particular importancia en los debates públicos son los sistemas robóticos aplicados a las armas y los vehículos autónomos.

Se están creando sistemas cada vez más inteligentes que dicen exhibir un alto grado de *autonomía*, lo que significa que son sistemas que de forma independiente desarrollan y realizan tareas, sin necesidad de operadores o de control humano. Se constata una tendencia a incrementar la automatización

y *autonomía* en robótica, IA y mecatrónica, pues Estados y grandes empresas hacen enormes inversiones en este campo y las superpotencias del mundo aspiran a asegurarse una posición de liderazgo en la investigación de la IA.

Existe un desarrollo dirigido a estrechar aún más la interacción entre humanos y máquinas, por ejemplo, equipos compuestos por sistemas de IA y profesionales humanos obtienen mejor rendimiento en algunos campos que cuando trabajan por separado. La IA y la robótica son mundos fascinantes que nos demuestran cómo el hombre puede transformar este planeta en un mundo más fácil y confortable. Pero, como en todo, los riesgos están al asecho, y en este caso pueden ser fatales.

3. LOS DESAFÍOS ÉTICOS

3.1. La dignidad humana

La dignidad humana supone el valor básico fundamentador de los derechos humanos que tienden a explicitar y satisfacer las necesidades de la persona en la esfera moral (Pérez Luño, 2017). Constituye no sólo la garantía negativa de que la persona no va a ser objeto de ofensas o humillaciones, sino que entraña también la afirmación positiva del pleno desarrollo de la personalidad de cada individuo (Bloch, 1980). El pleno desarrollo de la personalidad supone, a su vez, de un lado, el reconocimiento de la total autodisponibilidad, sin interferencias o impedimentos externos, de las posibilidades de actuación propias de cada hombre; de otro, la autodeterminación (*Selbstbestimmung des Menschen*) que surge de la libre proyección histórica de la razón humana, antes que de una predeterminación dada por la naturaleza. (Maihofer, 1968)

Por lo tanto, el derecho a la libertad, al honor, a la privacidad y a la propia imagen, que son el contenido básico de la dignidad humana, no pueden verse disminuidos en ningún caso por la actividad que despliega la inteligencia artificial[6]. En otras palabras, diríamos que son su límite, señalan sus bordes y encausan sus ímpetus. El potencial de la robótica se ve matizado por una serie de tensiones o posibles riesgos que debe ser evaluado detenidamente a la luz de la seguridad y la salud humanas; la libertad, la intimidad, la integridad y la dignidad; la autodeterminación y la no discriminación, y la protección de los datos personales.

3.2. La robótica genera nuevas vulnerabilidades:

Si el concepto de consumidor implicaba ya una vulnerabilidad ante las fuerzas del mercado. La IA y la robótica generan una nueva categoría de vulnerabilidad, nos hacen aún más débiles que los consumidores normales.

El consumidor vulnerable – y todos lo somos - está expuesto a los riesgos del mercado: vía limitada para maximizar su bienestar, menor capacidad para elegir, dificultad para obtener información, menor capacidad para comprar. El consumidor tiene una nueva categoría de vulnerabilidad, que merece una nueva protección, más aún si se trata de personas con capacidad mental, física o psicológica distinta, o en razón de su edad, credibilidad, género, quienes quedan más expuestos a los fenómenos derivados de la IA y la robotización.

6 El Código de Conducta para los ingenieros en robótica, del Parlamento Europeo señala: "Derechos fundamentales: Las actividades de investigación en materia de robótica deben respetar los derechos fundamentales; y por su parte, las actividades de concepción, ejecución, difusión y explotación, por su parte, han de estar al servicio del bienestar y la autodeterminación de las personas y de la sociedad en general. La dignidad y la autonomía humanas — tanto físicas como psicológicas — siempre tienen que respetarse".

3.3. Las tres leyes de Asimov

Isaac Asimov, en su relato *Circulo Vicioso* (*Runaround, 1942*), estableció tres leyes que deben aplicarse a los robots. Hasta el momento, sin que tengan ninguna fuerza vinculante, sirven para dimensionar la magnitud de lo que podría deparar la construcción de robots sin ninguna regla o parámetro de orden ético o moral. Estas tres leyes dicen:

1ª Un robot no hará daño a un ser humano ni permitirá que, por inacción, éste sufra daño.

2ª Un robot obedecerá las órdenes que reciba de un ser humano, a no ser que las órdenes entren en conflicto con la primera ley.

3ª Un robot protegerá su propia existencia en la medida en que dicha protección no entre en conflicto con las leyes primera y segunda (un robot no hará daño a la humanidad ni permitirá que, por inacción, ésta sufra daño).

3.4. Principios éticos de la robótica europea:

El Parlamento Europeo (2017a) en su Normas de Derecho civil sobre robótica, establece los siguientes principios éticos:

1. El riesgo de la robótica debe ser evaluado detenidamente a la luz de la seguridad y la salud humanas; la libertad, la intimidad, la integridad y la dignidad; la autodeterminación y la no discriminación, y la protección de los datos personales.
2. El marco normativo debe actualizarse y completarse por medio de directrices éticas que reflejen la comple-

jidad del ámbito de la robótica y sus numerosas implicaciones sociales, médicas y bioéticas. Es preciso un marco ético claro, estricto y eficiente que oriente el desarrollo, diseño, producción, uso y modificación de los robots.

3. El principio de transparencia consiste en que siempre ha de ser posible justificar cualquier decisión que se haya adoptado con ayuda de la inteligencia artificial y que pueda tener un impacto significativo sobre la vida de una o varias personas. Siempre debe ser posible reducir los cálculos del sistema de inteligencia artificial a una forma comprensible para los humanos; los robots avanzados deberían estar equipados con una "caja negra" que registre los datos de todas las operaciones efectuadas por la máquina, incluidos, en su caso, los pasos lógicos que han conducido a la formulación de sus decisiones.
4. Las orientaciones éticas deben basarse en principios de beneficencia, no maleficencia, autonomía y justicia, así como en los principios consagrados en la Carta de los Derechos Fundamentales de la Unión Europea, como la dignidad humana, la igualdad, la justicia y la equidad, la no discriminación, el consentimiento informado, la vida privada y familiar y la protección de datos, así como en otros principios y valores inherentes al Derecho de la Unión, como la no estigmatización, la transparencia, la autonomía, la responsabilidad individual, y la responsabilidad social, sin olvidar las actuales prácticas y códigos éticos.
5. Se debe prestar especial atención a los robots que representan una amenaza significativa para la privacidad debido a su ubicación en espacios tradicionalmente

protegidos y privados y a su capacidad para obtener y transmitir información y datos personales y sensibles.

Además, el Parlamento Europeo ha aprobado los siguientes documentos: Carta sobre robótica; Código de Conducta Ética para los ingenieros en robótica; Código Deontológico para los Comités de Ética de la Investigación; Licencia para los diseñadores; y, Licencia para los usuarios.

4. LA RESPUESTA DEL DERECHO

4.1. Falta de regulación de Internet

Desde su origen, en los años 90, ha existido una falta de regulación o regulación tardía respecto de los fenómenos derivados del uso de Internet. La experiencia demuestra que el derecho ha funcionado de manera reactiva mediante la jurisprudencia, generalmente tardía, y una legislación tibia y dispersa. Esto ha desembocado en una *alegalidad* masiva en la red, con los problemas jurídicos y culturales que vienen adjuntos. Entre los beneficiarios de este escenario desregularizado están las grandes empresas tecnológicas que en la *alegalidad* logran una posición y tamaño de dominio tal que cuando la respuesta regulatoria llega, su eficacia real es ínfima. (Cotino, 2017)

Esta preocupación ha motivado que el Parlamento Europeo (2017a) reconozca que:

> Es necesario disponer de una serie de normas en materia de responsabilidad, transparencia y rendición de cuentas que reflejen los valores humanistas intrínsecamente europeos y universales que caracterizan la contribución de Europa a la sociedad; que esas normas no deben afectar al proceso de investigación, innovación y desarrollo en el ámbito de la robótica.

Asumiendo que es necesaria una regulación, las preguntas saltan a la vista: ¿Quiénes deberían regular: los gobiernos locales, los Estados nacionales, las organizaciones internacionales? En efecto, una problemática global ¿necesitaría una normativa nacional o supranacional?; ¿hablamos de autorregulación, de heterorregulación, de autorregulación impuesta?; ¿una regulación promovida, a través de normas públicas, privadas, estándares industriales, códigos tipo?; ¿cuál debe ser el nivel de participación de los sectores implicados en la elaboración e implementación de las normas?; ¿qué instrumentos normativos, para qué niveles o ámbitos, por cuánto tiempo, sobre qué temas, qué mecanismos de evaluación normativa pueden implementarse?; ¿los órganos legislativos tradicionales, están en condiciones de dictar leyes apropiadas, eficaces y efectivas?; ¿de qué manera se va compatibilizar la regulación sobre inteligencia artificial y robótica con los derechos fundamentales de los seres humanos?

4.2. Riesgos y respuestas jurídicas

Una clasificación de los riesgos que implican la IA y la robótica para determinar la respuesta jurídica que merecen, distingue tres niveles de *externalidades*: discretas, sistémicas y existenciales. (Petit, 2017)

Las discretas son aquellas que no afectan significativamente a la sociedad, pues se resuelven *ex post*, de modo reactivo, mediante la aplicación de normas jurídicas vigentes y, eventualmente, con la intervención de jueces y tribunales. Las externalidades sistémicas (*systemic externality*) afectan significativamente a la sociedad y al interés público, por lo que se hace necesaria una regulación previa que debería fundamentarse en la planificación, la evaluación y la experimentación. En el tercer nivel están los riesgos

existenciales (*existernality*), que dicen relación con la existencia misma de la humanidad, cuya respuesta natural debería ofrecer la comunidad internacional.

El mismo Petit (2017) señala tres grandes enfoques y tipos de respuesta jurídicos:

a) el legalista, que es la respuesta del derecho actual sobre la realidad de la IA y robótica: responsabilidad, privacidad, trabajo, ciberseguridad, entre otros. El peligro de este enfoque es que juristas ajenos a lo tecnológico realicen propuestas incompletas o sesgadas, y que se generen *puntos ciegos* al tratar los nuevos fenómenos desde las normas existentes;
b) el tecnológico, que partiendo del tipo de servicio tecnológico específico (autos sin conductor, robots sociales, educación, salud, seguridad, empleo, domésticos, entretenimiento exoesqueletos, entre otros.) cada ámbito se analiza en clave jurídica; y,
c) el enfoque que parte de las tres leyes de la robótica de Asimov, ya mencionadas, según el cual la normas se pueden incorporar directamente a la tecnología, en el sentido de que un comando y su cumplimiento está imbuido en la tecnología misma.

4.3. Nuevas formas de regulación y gobernanza:

Frente a una tecnología vertiginosa que va creando nuevas realidades a paso acelerado, cabe preguntarse si es hora de introducir, asimismo, nuevas formas y mecanismos de regulación y gobernanza.

Le Déaut (2017), en el Consejo de Europa, planteaba una *regulación biodegradable* pues no hay tiempo:

> Para evaluar los riesgos y determinar las consecuencias a mediano y largo plazo para la salud humana y las implicaciones para los derechos humanos [...] necesitamos un nuevo tipo de legislación que pueda revisarse regularmente para acompañar a estos desarrollos a menudo cambiantes ya menudo radicales en la ciencia y la tecnología y su aplicación. (Consejo de Europa, 2017a)

Posiblemente debamos seguir el nuevo paradigma del *beta continuo,* propio a la filosofía de la web 2.0, según el cual, descartando versiones definitivas de un programa, utilidad o aplicación, todo queda dispuesto para el cambio y adaptación continuos. De tal forma que, incluso las políticas y las normas de derecho, deben quedar permanentemente "*a modo de prueba"*. Desde luego, este Derecho líquido (Pibá, 2016) enerva todo sentido de estabilidad y seguridad jurídica tal cual los hemos conocido hasta ahora. Aunque, por supuesto, existen juristas que reivindican un derecho sólido, "objetivo y estable del Estado y en especial los derechos fundamentales como tal". (Villaverde, 2018)

Ante la dificultad de *falta de ritmo* de la legislación o escasa información para regular, se postula la conveniencia de técnicas como: las *sunset clauses*, por las que la regulación tiene fecha o condiciones de caducidad, y la legislación experimental (Ranchordas, 2014); las *regulatory sandboxes*, en alusión a zonas de arena cercadas para que jueguen los niños; o, de una *smart regulation* (Zetzsche, 2017). Cualquiera de las formas pasa por experimentar, probar o testear regulaciones por espacios de tiempo reducidos, a pequeña escala en ámbitos o sectores reducidos para, sobre la prueba y el error, reunir más y mejor información que garanticen un mayor nivel de acierto de la respuesta regulatoria.

Lo que sí parece evidente es que los problemas derivados de la irrupción tecnológica no pueden resolverse exclusivamente de forma reactiva y a través de sentencias jurisdiccionales que pueden devenir en arbitrarias y tardías. Es necesario que se adopten decisiones políticas, que los legisladores asuman que el mundo cambia aceleradamente y que la forma clásica de elaboración de la ley se muestra abiertamente insuficiente y hasta retardataria. Pero también los actores políticos, sociales, institucionales y académicos deben intervenir en este debate crucial para la vigencia del Derecho.

La toma de decisiones no siempre puede esperar a que se prueben todas las opciones e intereses en un entorno cambiante. Por ello, sin renunciar a la idea de un Derecho *sólido*, hay que introducir nuevas fórmulas regulatorias, más dinámicas, que incorporen la evaluación y adecuación normativa, que faciliten diversas versiones, que introduzcan fórmulas de remisiones a la determinación normativa por órganos capacitados técnicamente y con suficiente legitimación. Esto permitirá que el Derecho despliegue razonablemente su eficacia ante los nuevos retos, naturalmente sin vulnerar los derechos humanos de nadie.

4.4. Privatización de la regulación:

La regulación que pretenda tener alguna eficacia debe ser el resultado de fórmulas de gobernanza en las que intervenga activamente el sector tecnológico privado afectado sobre el que tienen que aplicarse las normas. Particularmente necesario es un Derecho en red con participación horizontal de todos los operadores (Muñoz Machado, 2000)[7]. La regulación debe emanar de la comunidad afectada (instituciones, individuos y empresas implicadas) y se articula a través de variadas formas,

7 En el ámbito del *Big Data* no falta quienes se inclinan hacia formas de regulación suaves (Tene y Polonetsky, 2013). En el ámbito de la nube se insiste en modelos de co-regulación transnacional. (Reed, 2012)

en especial, de *soft law*. Otra vía es la estandarización técnica internacional de naturaleza privada, cuya regulación una vez adoptada por el sector, en muchas oportunidades es aceptada por los Estados e instituciones cediendo espacios a lo privado. Se produce así, el reenvío desde la normativa pública a la privada o remisiones directas o indirectas a las distintas versiones de la norma técnica privada (por ejemplo, las normas ISO), para asegurar así la adecuación sin necesidad de modificación normativa (Tarrés Vives, 2003). También es una opción articular a través de códigos, normas de conducta, modelos de autorregulación más o menos impulsada por los poderes públicos de los diferentes niveles. En muchos casos estas fórmulas tienen mayores garantías de eficacia real teniendo en cuenta además que se trata de un fenómeno especialmente transnacional.

La participación del sector sin duda es necesaria, pero son también muchos los riesgos. Por ejemplo, en el ámbito de la IA, está latente el peligro de la *captura regulatoria* o el *capitalismo clientelar* por el que grupos influyen haciendo prevalecer su interés privado frente al interés general (Petit, 2017). De hecho, y frente a lo que se pueda pensar, tales capturas del regulador en el ámbito de las tecnologías emergentes no sólo se dan a favor del siempre poderoso sector tecnológico. En muchas ocasiones el regulador queda capturado por el sector social o empresarial que queda desplazado por las tecnologías emergentes, pero que suele gozar de importantes apoyos políticos y sociales. (Doménech, 2017)

No hay que descuidar el potencial del Big Data y la AI para la misma generación y creación de normas (*algorithmic regulation*). Los peligros de dejar en manos de programadores o directamente de algoritmos las propuestas regulatorias no son

escasos como los derivados de mala información y sesgos que pueda tener el algoritmo que proponga regulaciones (Lodge y Mennicken, 2017). Tampoco las graves deficiencias o errores sustanciales en que incurren los programadores al traducir normas jurídicas en código (Citron, 2007); y, la mala influencia algorítmica en los procesos normativos democráticos a través de sistemas de manipulación masiva y desinformación.

4.5. Principios de precaución y responsabilidad:

Ante la incertidumbre sobre el futuro que genera la ciencia y tecnología hay que responder con nuevos instrumentos del Derecho como son los principios de precaución y de responsabilidad. (Sánchez Barrilao, 2016)

El principio de cautela o precaución proclamado por la Comisión Europea (2000) desde el año 2000 señala que, si una política o acción puede causar daño a las personas o al medio ambiente, y no existiera consenso científico al respecto, la política o acción en cuestión debe abandonarse. Implica un enfoque de la gestión del riesgo a partir del cual se han desarrollado técnicas, directrices y garantías jurídicas. Identificados los riesgos, quienes los alegan deben demostrarlos y, como consecuencia, pueden exigir que el productor, fabricante o importador demuestren la ausencia de peligro. En los procesos e investigación es exigible transparencia y la participación de los implicados. Se deben consultar y evaluar los datos científicos, evaluar las consecuencias de actuar o no actuar y las decisiones deben ser proporcionales, no discriminatorias, coherentes con otras decisiones. El resultado de estos procesos es la adopción de decisiones a lo largo del tiempo, puesto que deben actualizarse periódicamente al estado de la técnica, conocimiento y evaluación permanente de riesgos. Las técnicas

que implica este principio se adecúan a las necesidades de regulación dinámica y continua que exige el fenómeno del Big Data y la IA.

4.6. Incorporación de técnicas de responsabilidad activa y una aproximación a la responsabilidad algorítmica

El principio de responsabilidad activa se ha proyectado en el Derecho a través de técnicas bien conocidas como los estudios de impacto previos, de especial importancia en el ámbito del medio ambiente o la discriminación. Debiendo destacar por su afinidad tecnológica las técnicas de responsabilidad *proactiva*, *demostrada* o *accountability* que últimamente se exigen en materia de protección de datos. De este modo quien asume la responsabilidad de tratar datos personales debe cumplir las exigencias normativas y ser capaz de demostrarlo. (González, 2017)

El Reglamento Europeo de Protección de Datos (2016) apuesta por mecanismos proactivos y preventivos en vez de reactivos, imponiendo la protección de datos desde el diseño y por defecto (art. 25), de modo que la privacidad se integre desde el inicio en la gestión y ciclo de vida del tratamiento de datos. Igualmente, se exige la evaluación de impacto de protección de datos (art. 35). El principio de responsabilidad proactiva incorpora una filosofía de acción que apuesta por el valor del diseño tecnológico basado en el cumplimiento normativo (Martínez, 2017). No sólo los riesgos de privacidad y protección de datos, sino la prevención de la discriminación y los sesgos algorítmicos pasa en muy buena medida por incorporar estas técnicas preventivas de evaluación de impacto. (Cotino, 2017)

La fundamental cuestión de la responsabilidad por las consecuencias de los usos de inteligencia artificial o robótica amerita un estudio profundo del tema. Por el momento mencionemos que el Parlamento de la UE (2017a) considera *crucial* la fijación de la responsabilidad por cuanto que los robots "interactúan con su entorno y pueden modificarlo de forma significativa". A mayor autonomía del robot, "más difícil será considerarlos simples instrumentos en manos de otros agentes" (humanos) y, por tanto, seguir el general esquema de responsabilidad. Como punto de partida se afirma que "independientemente del instrumento jurídico futuro que se escoja en materia de responsabilidad civil por los daños y perjuicios causados por robots" en ningún caso hay que "limitar el tipo o el alcance de los daños y perjuicios que puedan ser objeto de compensación, ni tampoco limitar la naturaleza de dicha compensación, por el único motivo de que los daños y perjuicios hayan sido causados por un agente no perteneciente a la especie humana" (139. nº 52). Esta misma línea sigue la Asamblea Parlamentaria del Consejo de Europa (2012):

> Las referencias a la toma de decisiones independiente por parte de los sistemas de IA no pueden eximir a los creadores, propietarios y gerentes de estos sistemas de la responsabilidad por violaciones de los derechos humanos cometidas con estos sistemas, incluso en casos en que un acto responsable no haya sido ordenado directamente por un humano responsable comandante u operador. (140, nº 9. 1.1)

4.7. Autoridades especializadas e independientes

Fundamental elemento no sólo para la *regulación*, sino para la adopción de políticas y de la misma gobernanza en materia de IA, Big Data y robótica es fijar quién o quiénes

determinan criterios, controlan y supervisan el sector tecnológico. Aspecto sustancial por la especialización y el carácter técnico de la materia, su condición de impredecible, la necesidad de evaluación continua, de flexibilidad y adaptación a los cambios, la importancia de integrar a los técnicos, interesados y especialistas. Lo cual nos dirige hacia el reconocimiento de organizaciones sectoriales y de autoridades con competencias especializadas en estas materias.

A estas autoridades se les debe reconocer vigorosas potestades de conocimiento de los algoritmos, lógicas y acceso a las descomunales bases de datos que manejan tanto el sector privado como el público. De un lado, se trata del acceso a una información y conocimientos que requiere de una enorme especialización y, de otro, el reconocimiento de fuertes facultades de acceso a estas instancias reguladoras puede ser el mecanismo idóneo para conciliar la necesidad de control y supervisión del cumplimiento normativo con las obligaciones de confidencialidad, secreto, derechos legítimos de propiedad, propiedad industrial, propiedad intelectual del sector respecto de sus datos, algoritmos e IA.

La independencia de estas autoridades del poder público parece ser un imperativo categórico.

4.8. Los avances de la Unión Europea

Como ya hemos manifestado, la Unión Europea es la Región que lidera al mundo en cuanto a regulación sobre IA, robótica y Big Data, entre otras materias que las nuevas tecnologías de la información han traído consigo. El mundo, ciertamente debe mirar a Europa para saber el camino que debe recorrer, incluso para no tropezar en la misma piedra.

Solamente en los últimos cuatro años la UE ha producido los siguientes instrumentos jurídicos: Resolución con recomendaciones destinadas a la Comisión sobre normas de Derecho civil sobre robótica (16 de febrero de 2017); Resolución sobre la digitalización de la industria europea (1 de junio de 2017); Resolución sobre los sistemas armamentísticos autónomos (12 de septiembre de 2018); Resolución sobre la igualdad lingüística en la era digital (11 de septiembre de 2018); Propuesta de Reglamento del Parlamento Europeo y del Consejo (6 de junio de 2018, COM/2018/0434) por el que se establece el programa Europa Digital para el período 2021-2027; Reglamento por el que se crea la Empresa Común de Informática de Alto Rendimiento Europea (Reglamento 2018/1488, de 28 de septiembre de 2018); Informe de la Comisión de Industria, Investigación y Energía y las opiniones de la Comisión de Mercado Interior y Protección del Consumidor, de la Comisión de Asuntos Jurídicos, de la Comisión de Libertades Civiles, Justicia y Asuntos de Interior y de la Comisión de Medio Ambiente, Salud Pública y Seguridad Alimentaria (A80019/2019); Declaración sobre Inteligencia Artificial, robótica y sistemas "autónomos" (De la Comisión Europea, 9 de marzo de 2018); Política Industrial Global Europea, sobre una industria global europea en materia de inteligencia artificial (12 de febrero de 2019).

4.9. Nuevos derechos

Los posibles efectos de los *sistemas autónomos* en la vida privada y la privacidad generan expectativas, desafíos y preocupaciones. A la luz de tales inquietudes, en los ambientes académicos europeos se ha puesto en el tapete de discusión la necesidad de incorporar, al menos, dos nuevos derechos, que emanan de las realidades tecnológicas que vivimos:

1. El derecho al contacto humano significativo.

2. El derecho a no ser perfilado, medido, analizado, aconsejado (*coached*) o provocado (*nudged*).

Desde luego, no son los únicos derechos que reclaman la luz frente a las nuevas tecnologías de la información y el conocimiento, pero por el momento parecería que son los más importantes para *modular* el embate de la IA y la robótica.

4.10. Personalidad jurídica para los robots:

Un aspecto importante tiene que ver con la eventual personalidad jurídica de los robots. Así, se discute actualmente sobre la posibilidad de otorgar una personalidad robótica específica, de tal manera que puedan ser consideradas como personas electrónicas. Al respecto el Parlamento Europeo (2017) ha propuesto:

> Crear a largo plazo una personalidad jurídica específica para los robots, de forma que como mínimo los robots autónomos más complejos puedan ser considerados personas electrónicas responsables de reparar los daños que puedan causar, y posiblemente aplicar la personalidad electrónica a aquellos supuestos en los que los robots tomen decisiones autónomas inteligentes o interactúen con terceros de forma independiente.

Es decir, se podría crear una personalidad robótica, al menos para los robots autónomos más avanzados, de tal manera que sean considerados como personas electrónicas con capacidad jurídica para responder por los daños que ocasionen. Pero esta personalidad electrónica se atribuiría también a aquellos robots que tomen decisiones autónomas e inteligentes y a aquellos que interactúen de forma independiente con terceros.

4.11. Impacto de la robótica en el mundo del trabajo:

4.11.1. Las oportunidades

La robótica y la IA son descritas como *tecnologías disruptivas* que pueden "*transformar vidas y prácticas de trabajo*", afectar al mercado laboral y los niveles de empleo. Las eventuales oportunidades que la robótica podría ofrecer al mundo del trabajo incluye la sustitución de algunos puestos de trabajo, pero también la creación de otros nuevos que transformarán nuestras vidas y prácticas profesionales; un mayor uso de la robótica y la inteligencia artificial también debe reducir la exposición de los seres humanos a condiciones perjudiciales y peligrosas, así como contribuir a crear más puestos de trabajo de calidad y dignos y a mejorar la productividad; reconversión de los trabajadores programas de alfabetización digital: invertir en la formación y el reciclaje profesional de la mano de obra existente; promover la reindustrialización y permitir que también los trabajadores se beneficien del incremento de la productividad; rediseñar las políticas del mercado de trabajo, los regímenes de seguridad social y la fiscalidad; impulsar las capacidades digitales, incluida la programación, a lo largo de la enseñanza y formación, desde los primeros años de escolarización hasta el aprendizaje permanente.

4.11.2. Los desafíos

Pero los desafíos son también formidables: los robots amenazan muchos puestos de trabajo para los seres humanos (fuentes directas e indirectas); ¿quién cotizará a la seguridad social en sistemas deficitarios (la gran mayoría) que necesitan los aportes de los trabajadores actuales para pagar las pensiones a los jubilados?; ¿tienen responsabilidad jurídica los robots por productos defectuosos o daños a terceros?; ¿los robots deben pagar impuestos?

De todo lo cual podemos concluir en lo siguiente: el robot debe trabajar únicamente en plazas peligrosas, insalubres y tediosas; el robot debe cotizar a la seguridad social, de acuerdo al número de horas laboradas; el robot debe ser responsable por los daños que cause, transmitiendo esa responsabilidad a su propietario, a sus constructores (en la parte proporcional y pertinente), siempre que disponga de autonomía[8]; tenga una configuración física; y, disponga de capacidad de interacción física con otros trabajadores (Guanter, 2018); y, el derecho del trabajo se fundamenta en el trabajo humano y el *robot* aunque con altas dosis de IA no puede ser considerado como tal.

CONCLUSIONES

La IA, los robots y el Big Data son creaciones verdaderamente disruptivas del entorno digital que constituyen un vector de cambio vertiginoso de la sociedad actual. Su presencia en nuestras vidas tiene una evidencia incontrastable y cada día nos vamos adaptando a su uso y modificando nuestras pautas de conducta a la l**ógica** algorítmica que nos imponen.

En la hora actual, somos testigos de aplicaciones sorprendentes de la tecnología autónoma y la inteligencia artificial puestas al servicio de la humanidad. Sin embargo, los sistemas inteligentes no dejan de significar desafíos y peligros para los seres humanos y su forma de vida moderna, apoyada cada vez con más frecuencia e intensidad a las máquinas inteligentes y a los robots.

Debemos sostener entonces, de manera emblemática, que la dignidad humana es el valor básico fundamentador de los derechos humanos que tienden a explicitar y satisfacer las necesidades de la persona en la esfera moral. Es la garantía

8 Autonomía, adquirida a través de sensores y/o mediante el intercambio y análisis de datos (interconectividad).

negativa de que la persona no va a ser objeto de ofensas o humillaciones y es la afirmación positiva del pleno desarrollo de la personalidad de cada individuo. Por tanto, el derecho a la libertad, al honor, a la privacidad y a la propia imagen, que son el contenido básico de la dignidad humana, no pueden verse disminuidos, bajo ninguna consideración, por la actividad que despliega la inteligencia artificial.

El mundo del Derecho ha actuado de forma reactiva mediante la jurisprudencia, generalmente tardía, y una legislación tibia y dispersa, que ha desembocado en una *alegalidad* masiva en la red, con los problemas jurídicos y culturales que vienen adjuntos. Ante una tecnología vertiginosa que va creando nuevas realidades a paso acelerado, es necesario introducir nuevas formas y mecanismos de regulación y gobernanza.

Para determinar los riesgos y la respuesta jurídica que merecen, Petit (2017) distingue tres niveles de *externalidades*: las *discretas* son las que no afectan significativamente a la sociedad, pues se resuelven *ex post*, de modo reactivo, aplicando normas jurídicas vigentes y con la intervención de jueces y tribunales; las *sistémicas* afectan significativamente a la sociedad y al interés público, por lo que es necesaria una regulación previa que debe fundamentarse en la planificación, la evaluación y la experimentación; y, las *existenciales*, que dicen relación a la existencia misma de la humanidad, cuya respuesta natural debe ofrecer la comunidad internacional.

El sistema legislativo tradicional parece incapaz de modernizarse y ofrecer, acorde a los tiempos que corren, no sólo regulación, sino políticas para la gobernanza en materia de IA, Big Data y robótica. Entonces, quién o quiénes determinan criterios, controlan y regulan el sector tecnológico, cuyas características son su honda especialización técnica, su

condición de impredecible, la necesidad de evaluación continua, de flexibilidad y adaptación a los cambios. De ahí la necesidad de un Derecho en red con participación horizontal de todos los involucrados, cuya regulación emane de la comunidad afectada (instituciones, individuos y empresas) articulado de variadas formas, en especial, mediante *soft law*. También se puede recurrir a la estandarización técnica internacional de naturaleza privada cuya regulación una vez adoptada por el sector, es aceptada por los Estados, produciéndose el reenvío desde la normativa pública a la privada o remisiones directas o indirectas a las distintas versiones de la norma técnica privada (por ejemplo, a las normas ISO). Otra opción es articular a través de códigos, normas de conducta, modelos de autorregulación permitida por los poderes públicos, fórmulas regulatorias que en muchos casos tienen mayores garantías de eficacia considerando que se trata de un fenómeno fundamentalmente transnacional.

Según el principio de cautela o precaución, proclamado por la Comisión Europea desde el año 2000, si una política o acción puede causar daño a las personas o al medio ambiente, y no existe consenso científico al respecto, la política o acción en cuestión debe abandonarse. Además, el principio de responsabilidad activa en el ámbito del Derecho a implicado el uso de técnicas como los estudios de impacto previos, especialmente en el ámbito del medio ambiente o la discriminación, y las técnicas de responsabilidad *proactiva*, *demostrada* o *accountability* que se exigen en materia de protección de datos, de tal modo que quien asume la responsabilidad de tratar datos personales debe cumplir las exigencias normativas y ser capaz de demostrarlo.

Es digno de destacarse cómo en los últimos 5 años, la Unión Europea ha puesto en vigencia una copiosa normativa que procura regular la IA, la robótica y el Big Data, en aras de proteger

al ser humano de eventuales peligros. Lo cual contrasta con la escasa o ninguna regulación que al respecto dispone América Latina, Región ésta que debería *asimilar* inmediatamente la normativa europea sin ningún prejuicio ni temor.

En el ámbito de la IA surgen nuevos derechos, necesarios para proteger al individuo de nuevas amenazas que el uso de la tecnología hace posible. Entre otros, son especialmente importantes: el derecho al contacto humano significativo y el derecho a no ser perfilado, medido, analizado, aconsejado (*coached*) o provocado (*nudged*). Y se discute actualmente sobre la posibilidad de otorgar una personalidad robótica específica, de tal manera que puedan ser consideradas como personas electrónicas.

Una adecuada regulación sobre robótica, en relación al mundo del trabajo, debe permitir que el robot trabaje exclusivamente en plazas peligrosas, insalubres y tediosas; obligar que el robot cotice a la seguridad social; y, que sea responsable por los daños que cause, transmitiendo esa responsabilidad a su propietario y a sus constructores.

Todas estas reflexiones nos llevan a concluir que, así como en el mundo de la tecnología y la inteligencia artificial, en el ámbito del Derecho hemos traspasado ya el umbral de una nueva era, pletórica de bondades, desafíos, y amenazas.

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The Abbreviated Criminal Procedure within the COIP: Analysis according to the procedural principle of prohibition of self-incrimination

El Procedimiento Penal Abreviado dentro del COIP: Una reflexión a partir del principio procesal de Prohibición de Autoincriminación

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ABSTRACT: As a consequence of the accumulation of criminal cases in the Ecuadorian criminal system, legislators have opted to implement an abbreviated procedure. It consists of an agreement between the prosecutor and the prosecuted person. Thus, the alleged offender is held responsible for committing the criminal offence, provided that the Integral Organic Criminal Code established the procedural requirements. However, this procedure may violate the accused's rights and guarantees, precisely the principle of non-self-incrimination. Therefore, this article aims to analyze whether there is a correct application of the procedural principle of prohibition of self-incrimination within the abbreviated procedure in Ecuadorian criminal legislation.

KEYWORDS: Legal procedure, legal principles, criminal law, administration of justice, due process.

RESUMEN: Debido a la acumulación de causas penales en el sistema penal ecuatoriano, los legisladores han optado por implementar un procedimiento abreviado el cual consiste en un acuerdo entre el fiscal y la persona procesada, para que el presunto infractor se declare responsable del cometimiento de la infracción penal, siempre y cuando se cumpla con los requisitos de procedibilidad establecidos en el Código Orgánico Integral Penal. Sin embargo, este procedimiento puede vulnerar derechos y garantías del procesado, específicamente el principio de no autoincriminación. Por ello, el presente artículo reflexiona entorno a la correcta aplicación del principio procesal de prohibición de autoincriminación dentro del procedimiento abreviado en la legislación penal ecuatoriana.

PALABRAS CLAVES: procedimiento legal, principios jurídicos, derecho penal, administración de justicia, debido proceso.

INTRODUCTION

This research addresses a study regarding applying the principle of prohibition of self-incrimination in the abbreviated criminal procedure provided in the Comprehensive Organic Criminal Code of the Ecuadorian system. Said analysis is established as a criminal principle due process of constitutional rank and recognized by international instruments. Therefore, its non-observance would violate the rights of the accused.

In the first section, the abbreviated criminal procedure guidelines will be established in the Comprehensive Organic Criminal Code, that is, all the procedural requirements to submit to the process and its development. Equalform, the purposes pursued by the abbreviated criminal procedure will be established to understand its existence within the Ecuadorian criminal system.

In the second section, the principle of non-self-incrimination will be indicated, in the Ecuadorian regulations and in the international treaties ratified by Ecuador, as a principle that must be observed and applied in a mandatory manner so that there are no violations of criminal due process or to the guarantees of the processed.

Finally, in the third section, an analysis will be carried out on whether or not there is a violation of the principle of non-self-incrimination at the time the defendant accepts the guilt of the criminal offence in order for the prosecutor to offer a reduction to the penalty provided within the criminal type.

1. ABBREVIATED CRIMINAL PROCEDURE

In the Comprehensive Organic Criminal Code (2014), various criminal procedures are established, among which are: direct procedure, expedited procedure, the procedure for the private exercise of criminal action, and abbreviated procedure. The latter was incorporated for the first time in Ecuador in 2000 within the Criminal Procedure Code. Within the Ecuadorian penal system, the abbreviated procedure is still in force, established from Article 635 to 639 of the Comprehensive Organic Criminal Code.

In both flagrant and non-flagrant offences, abbreviated criminal proceedings may be accessed as long as the procedural requirements established in the COIP are met. It is worth mentioning that the abbreviated procedure can only be accessed in the case of crimes punishable by imprisonment of up to 10 years, except the following crimes: kidnapping, against sexual and reproductive integrity, and those of sexual violence against women or some member of the family nucleus. Individuals will only be able to access the abbreviated procedure within the crimes of public exercise criminal action. The abbreviated procedure does not apply when it comes to crimes of private exercise of criminal action (COIP, 2014, art. 635).

For the defendant to access an abbreviated criminal procedure, the prosecutor, from the hearing for the formulation of charges to the evaluative and preparatory hearing for the trial, must present an agreement to the processed party in which the latter must expressly accept voluntarily. Their desire to access the procedure accepts the attribution of criminal acts and accepts the penalty proposed by the prosecutor (COIP, 2014, art. 636).

If the prosecutor orally proposes submission to the abbreviated procedure within the flagrante delicto qualification hearing, charge formulation hearing, or evaluative and preparatory trial hearing, the same audience may initiate the abbreviated procedure. On the other hand, if it is not proposed within the same hearing, the prosecutor must request the judge to submit to the shortened criminal procedure, so the latter will install a hearing in the following 24 hours, where the acceptance or rejection of it (COIP, 2014, art. 637).

Upon acceptance by the defendant, his defence must instruct the defendant regarding the effects of submitting to the abbreviated procedure. Once this has been done, the accused's will accept or not avail himself of said procedure. In the case of refusal, the case continues to be substantiated by the initial procedure. In the case of accepting, the defendant's defence will confirm that the latter agreed to submit to the procedure voluntarily, accepted the crime's attribution, accepted the penalty suggested by the prosecutor, and is aware of what this entails (COIP, 2014, art 636).

The penalty agreement proposed by the prosecutor may not be less than a third of the minimum penalty for the crime charged to the accused. For the prosecutor to determine the penalty, he performs an analysis between the facts accepted by the defendant and the mitigating factors established in the COIP, always respecting the established legal limit (COIP, 2014, art. 636).

Once the hearing is installed, the prosecutor will present the investigation's facts and their due legal basis. Subsequently, the judge must obligatorily consult the processed person if the procedure was accepted voluntarily and if the latter is aware of all that it entails undergoing the abbreviated procedure. Consequently, if the defendant accepts the abbreviated procedure, the judge must accept or deny the prosecutor and the defendant (COIP, 2014, art. 637).

If the judge accepts the agreement, it will issue a conviction to the accused. The accused will be punished with the agreed penalty, which under no circumstances may be greater than the penalty suggested by the prosecutor (COIP, 2014, art. 638).

On the other hand, the judge may reject the agreement when he considers that the processed person's rights are violated. If applicable, the judge orders that the case is carried out by ordinary procedure, without prejudice, because the agreement was made with the prosecutor. It is used as evidence within the ordinary procedure (COIP, 2014, art. 639).

1.2. Purposes of the Abbreviated Procedure

The abbreviated procedure has the purpose for the prosecutor to reach an agreement to reduce the sentence with the accused, as long as the latter admits the criminal offence commission. One of the purposes is speed, that is to say, that the abbreviated procedure decongests criminal proceedings since the said sentence was obtained in less time than in an ordinary procedure. Regarding speed in criminal matters, Caro Coria (2006) mentions that:

> It is a subjective constitutional right, which assists all subjects who have been part of a criminal procedure, autonomous, although instrumental in the right to guardianship, and which is addressed to the organs of the Judicial Power (even when in its exercise must be committed all other powers of the State), creating in them the obligation to act within a reasonable time the

> ius puniendi or to recognize and, where appropriate, immediately restore the right to liberty. (p. 1041)

In that order, the judicial function must resolve in a reasonable time the criminal proceedings of the users who go to the body of administration of justice, that is to say, that the process is finalized, either by declaring the accused guilty and establishing penalty imprisonment or declaring the accused innocent and ending the criminal process.

On the other hand, there is the purpose of the procedural economy within the abbreviated procedure. To better understand procedural economics, it is essential to analyse it as a principle. According to Scarparo (2010):

> When we speak of a procedural economy principle, we are on the deontic plane, which does not represent only that evaluative criterion. The principle is a norm that seeks support in other values reflected in the deontic field. This induces a correlation between the economy and the effectiveness, determining interference in taking advantage of the procedural acts or the powers of the judge. Thus, as the purposes of the process must be achieved in the least burdensome way for the State and the parties, the procedural economy acts in the distribution of power in the process, to endow the judge with powers of initiative, so that administer justice actively, quickly and profitably. (p. 500)

Therefore, criminal proceedings must be processed and concluded promptly so that neither the State nor the procedural parties are affected. The abbreviated procedure is a clear example of the procedural economy because it swiftly puts an end to the criminal process. Therefore, both the prosecutor and the judge (both public officials of the State) will continue attending and resolving the rest of the cases. Criminal.

Finally, it is worth mentioning that the abbreviated procedure, from a guarantee perspective, aims to reduce the state ius puniendi, that is, the State with its power to sanction

and establish a custodial sentence, decides to reduce said power and give the accused the option of being punished with a lesser penalty if the criminal offence is attributed.

One of the purposes of applying the procedure is to reduce the punitive power of the State against the processed person, that is, to provide a reduction of the sentence in order for the accused to attribute the criminal acts. However, the primary purpose of the abbreviated procedure is to solve criminal cases quickly so that judges and prosecutors can deal with other cases. Although this process is still in force within the Ecuadorian criminal system, it is essential to mention below the guarantees of mandatory observation that the defendants have when they are within a criminal procedure to observe if the submission to the abbreviated procedure could violate the guarantees of the processed.

2. DUE PROCESS

The origin of due process can be found in Anglo-Saxon law with the evolution of the principle of due process of law since the most crucial historical precedent dates back to the 13th century when the Norman barons forced King Juan Sin Tierra Urge the establishment of a constitution. The document called Magna Carta (1215), in its chapter 39, prohibits the arrest, detention, elimination, dispossession of property or disturbing any free person, except "legal prosecution and by the law of the land" (Agudelo Ramírez, 2005, p. 91).

Once the birth of due process has been established, Prieto Monroy (2003) has specified its concept as "the judicial activity ordered to resolve claims, which is developed a following and observance of principles, gathered in the concept of justice, and particularized in the rules of procedure and those of each process" (p. 817). In other words, due process implies a judicial authority that must ensure all the guarantees within the process for the parties involved in it.

It should be noted that due process is generally incorporated into the dogmatic part of the written Constitution of the recognized first-generation rights because it is part of a group of rights known as individual, civil and political rights as it is considered a superior fundamental right (Agudelo Ramírez, 2005, p. 90).

Regarding the development of Ibero-American procedural theories, the relationship between due process and adequate judicial protection is established since it is established that:

> The Due Process of Law is nothing other ... than the institution of Anglo-Saxon origin referred to the Due Process of Law, as a guarantee with a constitutional substrate of the judicial process, defined by a concept that arises from the jurisprudential order and justice that support the legitimacy of the certainty of the right finally determined in its result. (FixZamudio, 1987, n. p.) (cited by Gómez Lara, 2006, p. 345)

Then, we can establish the close relationship it has with judicial protection, since if due process is guaranteed, adequate judicial protection is being supported, which provides us with legal security, defined as the certainty of legal consequences.

In Ecuador, the guarantees of Due process are established in the Constitution of the Republic of Ecuador (2008, art. 76), in which several numerals and literals are established regarding the guarantees that must be fulfilled to observe due process. However, the guarantees that concern us in the present analysis collected in the said article will be mentioned in the following specific subtopic.

Also, it is fundamental to mention the definition that the Constitutional Court of Ecuador establishes regarding due processes, such as:

> On the set of guarantees with which it is intended that the development of activities in the judicial or administrative sphere is subject to minimum rules to

> protect the rights guaranteed by the constitutional norm, constituting this is a limit to the judges' discretionary action. (Judgment 0101-16-SEP-CC, 2016, p. 10)

In this line and by collecting the main elements of due process, we can define it as a series of fundamental guarantees designed to ensure that the procedures and their results are as close as possible to the ideal of justice stipulated in the constitutional text since these are obligations of the State in any judicial or administrative process.

2.1. Criminal due process and the principle of prohibition of self-incrimination

Ecuadorian criminal law, it should be emphasized, is regulated according to a guarantee system. That is, norms are established that observe the guarantees of both victims and those processed within a criminal process. The guarantees within criminal proceedings amount to a constitutional mandate since article 77 of the Constitution of the Republic of Ecuador (2008) establishes all those guarantees that will be mandatory to observe to respect the rights of the procedural parties.

The guarantees of criminal due process, as mentioned above, are established in the Constitution as mechanisms to, in some way, limit the ius puniendi (sanctioning power) of the State by not allowing the parties' rights to be arbitrarily undermined of the process, especially the defendant, since he has been accused of committing a crime and his responsibility must be determined without reasonable doubt, through evidence.

These mechanisms make it possible to determine the "legitimacy" of the State to continue with the criminal process and to sustain that said process has complied with validity parameters, thus observing the rights, guarantees and principles established in International Instruments, the Constitution and in the Special legislation reference to criminal cases, since in ignorance it would leave one of the parties defenceless and violate fundamental human rights established in national and international legislation.

One of the guarantees of the criminal process is the principle of the prohibition of self-incrimination. For the relevant purposes, we must mention what will be understood by self-incrimination since it is nothing more than the confession of the accused to facilitate the work of the prosecutor or judge, promote the "procedural speed" since mitigating circumstances are established, which allow certain highly debatable previous agreements to target criminal prosecution (Andrade Castillo, 2013, p. 136).

Then, it is essential to establish the definition of the principle. According to Avila Santamaría (2012):

> Robert Alexy argues that principles are optimization mandates. By saying that they are mandates, he reinforces the idea that the principles are legal norms and, as such, must be applied. Stating that they are optimization means that their purpose is to alter the legal system and reality. (...)
>
> The principle is an ambiguous, general and abstract rule. (...)
>
> The solutions derived from a case are multiple and can only be determined in the specific case, which is why Alexy affirms that the principles provide a range of possibilities for the person who interprets or applies the law. (p. 63)

Furthermore, we can determine that the principles are optimization mandates considered by legal norms. As such, it represents an obligation to give, do or not do. Also, it is applied through degrees regarding the optimisation aspect since it must be applied to the greatest extent possible depending on the specific case and the legal possibilities within it.

Furthermore, Avila Santamaría (2012) adds: "The principles, on the other hand, serve as parameters of interpretation. They help decisively to assess the legal system.

Thanks to the principles, we can identify contradictory norms (antinomies) and also the gaps in the legal system (anomalies)." (p. 64). This indicates that the principles help interpretation within the legal system. They provide guidelines so that there are no inconsistencies within the system, and if there are, the principles allow us to recognize existing antinomies and anomalies in the legislation.

Once the panorama regarding the principles and their application has been expanded, we move on to observe the principle of prohibition of self-incrimination that is part of the relevant judicial procedural guarantees because of the American Convention on Human Rights or also called the Pact of San José (1978) that in its article 8 regarding judicial guarantees, establishes that:

> Article 8.- Judicial Guarantees: (...)
>
> 2. Every person accused of a crime has the right to be presumed innocent until his guilt is legally established. During the process, everyone has the right, with full equality, to the following minimum guarantees: (...)
>
> g) the right not to be compelled to testify against himself or to plead guilty. (art. 8.2.g)

The International Covenant on Civil and Political Rights (1976) also mentions this principle: "Article 14.3. During the process, every person accused of a crime will have the right, with full equality, to the following minimum guarantees: (...) g) Not to be forced to testify against himself or to confess guilt. " (art. 14.3.g), which indicates its recognition in different International Instruments regarding human rights.

Regarding national legislation, in article 77, numeral 7, literal c of the Constitution of the Republic of Ecuador, it is established that: ''The right of every person to defence includes: (...) c) No one may be forced to declare against himself, on matters that may cause his criminal responsibility'' (CRE, 2008), it is worth mentioning that we can clarify the

existence of the principle of prohibition of self-incrimination with constitutional rank and with support in International Instruments.

The constitutional mandate to prohibit self-incrimination in the Comprehensive Organic Criminal Code as one of the most critical procedural principles for all criminal proceedings, which provides the following:

> The right to criminal due process, without prejudice to others established in the Constitution of the Republic, international instruments ratified by the State or other legal norms, will be governed by the following principles:
>
> 8. Prohibition of self-incrimination: no person may be forced to testify against himself in matters that may cause his criminal responsibility. (COIP, 2014, art. 5.8)

This principle of prohibition, as it has a mandatory and higher degree of compliance, due to the harmonization of the other norms with the Constitution and International Instruments (constitutional control), should not be violated under any circumstances, since it would be against express standard and guarantees, principles and fundamental rights of higher hierarchical rank.

Based on the previous, it is essential to consider that the principle of prohibition of self-incrimination is a mandate (obligation not to do) of optimization (it must be fulfilled to the highest degree possible) in which it is established that "no person may be forced to testify against herself in matters that may cause her criminal responsibility" (COIP, 2014, art. 5.8).

This principle is fundamental within a guarantee criminal system since a guarantee must be established in the legislation that allows fully respecting the rights of the defendants, since, and due to the interrelation between principles, "the innocence of every person, and will be treated as such, as long as their

responsibility is not declared by a final resolution or final judgment" (CRE, 2008, art. 76.2).

As mentioned, this principle is related to the presumption of innocence and also, as established in the Constitution of the Republic of Ecuador (2008), is part of the necessary guarantees of the right to defence (art. 76.7.c), For this reason, we consider that there should be no procedures that violate these guarantees intended to protect the accused within a process in which their criminal responsibility is determined.

3. ANALYSIS OF THE APPLICATION OF THE PRINCIPLE OF NON-SELF-CRIMINATION IN THE ABBREVIATED PROCEDURE

Under the assumption that in all criminal proceedings, the rights, principles and guarantees recognized by both international instruments and internal regulations must be observed, which attack the defendant at any stage of the criminal process, it is essential to analyse the application of the principle of prohibition of self-incrimination in abbreviated criminal proceedings, because, by its nature, it may incur a violation of rights.

In the abbreviated criminal procedure, the processed person has the power to decide whether or not to access said procedure. In case of access, the defendant must claim the criminal offence commission, and the prosecutor will offer a lesser custodial sentence for the defendant. Therefore, the defendant incriminates himself to obtain an arrangement with the prosecutor so that the latter gives the defendant the possibility of being punished with a custodial sentence more minor than that established within the criminal category.

Based on the aforementioned, Zavala Baquerizo (2004) establishes that: "From the moment the law authorizes the prosecutor to negotiate the penalty in exchange for the defendant's self-incrimination, the State declines its punitive power and leaves it to the will of the businessman procedural

that the prosecutor becomes" (n. p.). Therefore, powers are attributed to the prosecutor, of which only the judge has since he must have the ratio decidendi to impose a penalty on the person responsible and for this, there must be an assessment of the evidence since the judge's decision must go beyond a reasonable doubt.

Within the shortened criminal procedure, at the hearing of the same, it should be emphasized that only the prosecutor will present the results of his investigation. On the other hand, the defendant only declares the criminal offence commission. This is how the judge to issue a sentence only assesses the results of the prosecutor's investigation and the defendant's self-incrimination. Furthermore, due to the nature of the shortened criminal process, the defendant's defence cannot be pronounced. It is more than evident that the judge does not value the defendant's defence and is only guided by the agreement between the prosecutor and the defendant to issue a sentence.

In this context, we must refer to reasonable doubt, which is referred to in the North American jurisprudence in the case Commonwealth v. Costley (1875) indicates that:

> As applied to a judicial trial for the crime, the two phrases are synonymous and equivalent; eminent judges have used each to explain the other; and each signifies such proof as satisfies the judgment and consciences of the jury, as reasonable men, and applying their reason to the evidence before them, that the crime charged has been committed by the defendant, and so satisfies them as to leave no other reasonable possible conclusion. (p. 24)

As indicated, a reasonable certainty must be had based on the evidence presented to determine criminal responsibility. As mentioned previously, only what is presented by the prosecutor is valued, and the defendant does not present his defence. Therefore, the judge does not assess the evidence as such based on parameters of conviction.

Taruffo (2005) indicates that:

> The fundamental reason why a criminal system should adopt the standard of proof beyond any reasonable doubt is essential of an ethical or ethical-political nature. Thus, it is about ensuring that the criminal judge can convict the accused only when he has reached (at less in trend) the "certainty" of his guilt; while the accused must be acquitted every time, there are reasonable doubts, despite the evidence against him, that he is innocent. Therefore, the evidentiary standard in question is exceptionally high - and is much higher than the prevailing probability - because guarantees in favour of the accused come into play in criminal proceedings. (pp. 1305-1306)

The judge must be provided with evidence so that he, through sound criticism, issues a reasoned judicial decision and determines the specific case's procedural truth. This analysis carried out by the judge is very important, because if the decision indicates the guilt of the accused, it must be supported by a motivation, which we can define as a "rendering of accounts" of the judge, which indicates, through the legal syllogism, the reasons by which that conclusion was reached and promptly, the standards of conviction beyond a reasonable doubt.

It should be noted that what is at stake is the freedom of the defendant, which is why the latter must be in a fair criminal process in which all the guarantees and principles that the defendant has been compulsorily observed, since, although it is not the subject of discussion in this investigation, as an open secret it is known that "the prison is full of innocents."

Based on the preceding and finally, the violation of the prohibition of self-incrimination is evident since, in order for the defendant to be able to access the shortened criminal procedure, he must accept responsibility for the criminal act is, the defendant must incriminate himself with the objective that the prosecutor offers a lower penalty than that established in

the criminal type. Additionally, since the judge only observes the agreement, the judge will motivate his sentence based on the defendant's self-incrimination.

CONCLUSIONS

The abbreviated procedure is a criminal process used to conclude as many criminal cases as possible to decongest the judicial system. If the judge declares the defendant guilty, the criminal case ends and leaves the prosecutor and judge (both public officials) free so that they can act in other criminal proceedings.

To confirm the state of innocence or guilt, the judge analyses the prosecutor's investigation and the agreement between the prosecution and the defendant, the agreement being the main component on which the judge makes a decision and dictates the sentence. The judge does not apply the rules of sound criticism or certainty beyond a reasonable doubt since the conviction is a destructive element for his analysis since his decision is based on the defendant's self-incrimination, even though the prosecutor has announced the elements of conviction that he obtained through his investigation.

It can be considered that the defendant is forced to accept the agreement by admitting his participation in the criminal act and accessing the abbreviated procedure. However, the defendant will be deprived of his freedom and, therefore, the right to equality of the parties is violated because the individual who avails himself of the abbreviated procedure is persuaded to "negotiate" about his criminal responsibility since the prosecutor points out the risk of not accepting and obtaining a more significant penalty. It establishes the importance of applying the principle of prohibition of self-incrimination since the accused would not be rendered defenceless.

Also, this violation of the principle of prohibition of self-incrimination stalls due process because it does not follow its course, and the pursuit of the truth stops, thus

affecting the obtaining of a sentence based on the elements that demonstrate the guilty. It affects legal security since there is no certainty of applying other rights and principles, such as the right to defence, the principle of presumption of innocence, and criminal due process.

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The governance of the Ecuadorian Social Security Institute: Towards a restructuring of its highest governing body?

La gobernanza del Instituto Ecuatoriano de Seguridad Social: ¿Hacia una reestructuración de su máximo órgano de gobierno?

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ABSTRACT: The composition of the IESS Board of Directors is tripartite. In 2016, the Constitutional Court declared the deferred unconstitutionality of the second and third paragraphs of article 28 of the Social Security Law, until the National Assembly approves legal reform to ensure the constitutional rights of equality and participation for the integration of this body. As of 2018, by decision of the General Controller of the State, the IESS Board of Directors had only two members. In 2020, by decision of the Court, the Board of Directors has once again a tripartite structure. Therefore, this paper aims to analyze the current structure of the Board of Directors and other factors around the governance of the highest governing body of the Ecuadorian Social Security Institute.

KEY WORDS: Ecuador, social security, government, law reform.

RESUMEN: La conformación del Consejo Directivo del IESS es tripartita. Sin embargo, en 2016, la Corte Constitucional declaró la inconstitucionalidad diferida de los incisos segundo y tercero del artículo 28 de la Ley de Seguridad Social, hasta que

la Asamblea Nacional apruebe la reforma legal que garantice los derechos constitucionales de igualdad y participación para la integración de este órgano. A partir del 2018, por decisión de la Contraloría General del Estado, el Consejo Directivo del IESS únicamente contó con dos miembros. En 2020, por decisión del órgano jurisdiccional, el Consejo Directivo ha vuelto a tener una estructura tripartita. Por tanto, el presente documento tiene la finalidad de analizar la estructura actual del Consejo Directivo y otros factores en torno a la gobernanza del máximo órgano de gobierno del Instituto Ecuatoriano de Seguridad Social.

PALABRAS CLAVE: Ecuador, Seguridad social, gobierno, reforma jurídica.

INTRODUCTION

Social security is an economic, social and cultural human right guaranteed by the Universal Declaration of Human Rights, as well as by the International Covenant on Economic, Social and Cultural Rights. In Ecuador, the Constitution of the Republic guarantees social security as a right of good living and, for its protection, it has organized a public and universal social security system, which cannot be privatized. This system is based on the principles of the national system of inclusion and social equity[1] and for the mandatory, sufficiency, integration, solidarity, participation[2]and subsidiarity (CRE, 2008). Likewise,

1 Article 340 of the Constitution of the Republic (2008) defines the national system of inclusion and social equity as the articulated and coordinated set of systems, institutions, policies, regulations, programs and services that ensure the exercise, guarantee and enforceability of the rights recognized in the Constitution and the fulfillment of the objectives of the development regime. The system will be articulated with the National Development Plan and the decentralized national participatory planning system; It will be guided by the principles of universality, equality, equity, progressiveness, interculturality, solidarity and non-discrimination; and it will work under the criteria of quality, efficiency, effectiveness, transparency, responsibility and participation. The system is made up of the areas of education, health, social security, risk management, physical culture and sports, habitat and housing, culture, communication and information, enjoyment of free time,

2 Despite the fact that article 34 of the Constitution (2008) provides that social security will be governed by the principles of solidarity, obligation, universality, equity, efficiency, subsidiarity, sufficiency, transparency and

it will be managed based on the criteria of sustainability, efficiency, speed and transparency (CRE, 2008).

This system's mission is to protect the population from contingencies through compulsory universal insurance and its special regimes. The compulsory universal insurance has the purpose of "covering the contingencies of sickness, motherhood, paternity, work risks, unemployment, unemployment, old age, disability, disability, death and those defined by law" (CRE, 2008), through a public entity called the Ecuadorian Social Security Institute.

Similarly, the Constitution (2008) provides that "health benefits for contingencies of illness and maternity will be provided through the comprehensive public health network", and that mandatory universal insurance should be extended to the entire urban and rural population independence of your employment situation.

Article 370 of the Constitution of the Republic of Ecuador (2008) provides that the Ecuadorian Institute of Social Security (hereinafter IESS) is an autonomous entity responsible for providing contingencies of compulsory universal insurance to its members. In its development, article 16 of the Social Security Law (2001) provides that the IESS is an autonomous, decentralized public entity, with legal status, with its own assets whose non-delegable purpose is the provision of Mandatory General Insurance throughout the national territory, as provided by the constitutional mandate. The autonomy of this institution is limited to five areas: regulatory, technical, administrative, financial, and budgetary.

participation, for the attention of individual and collective needs; Article 367 of the Constitution, when referring to the principles that guide the social security system, does not expressly include among them the principle of participation.
This could represent, at first, a kind of ignorance or violation of this optimization mandate. However, this is corrected by highlighting that the system is guided by the principles of the national system of inclusion and social equity, which constitutes an articulated and coordinated set that ensures the exercise, guarantee and enforceability of the rights recognized by the Constitution, including , the participation.

This public entity has an administrative structure headed by a highest governing body with governing (political and government) and administrative functions, called the Board of Directors, whose tripartite composition has been affected in recent years as a result of various factors.

Thus, on the one hand, there is a ruling of the Constitutional Court that, in 2016, declared the unconstitutionality with deferred effect of the second and third paragraphs of article 28 of the Social Security Law, strictly in relation to the designation of the representatives of the insured and the employers, with their alternates respectively.

However, up to now, the problem of the conformation of the IESS Board of Directors is related to some of the following factors: a) the National Assembly has not reformed these provisions; b) the deferred effect of the declaration of unconstitutionality of the aforementioned paragraphs for the appointment of the representatives of the insured and the employers has not been taken into account; and, c) the removal of the member representing the insured in 2018, by order of the General Comptroller of the State; and, their subsequent return in 2020, by decision of the competent court.

Consequently, this research constitutes an analysis of the general aspects of the regulations regarding the organization of the IESS Board of Directors and its attributions, as well as the effects of judgment No. 019-16-SIN-CC, which declared the unconstitutionality of the second and third paragraphs of article 28 of the Social Security Law, in the face of a lack of reform on the part of the National Assembly and the existence of a Board of Directors with two members , after the removal of the representative of the insured.

In this vein, this analysis aims to answer the following questions. Is it legally viable for the IESS Board of Directors to function with only two members despite having a tripartite structure, in accordance with the Social Security Law? What are

the implications and effects of the Constitutional Court ruling on the tripartite structure of the IESS Board of Directors? Is it pertinent to maintain a tripartite structure for the IESS Board of Directors?

Finally, this research seeks to propose some recommendations for a future integration of the Board of Directors of the Ecuadorian Institute of Social Security, taking into consideration the obligation of the National Assembly to comply with the disposition of the Constitutional Court and issue the respective reform to the second and second paragraphs. third of article 28 of the Social Security Law subject to unconstitutionality with deferred effect.

1. GOVERNANCE OF THE IESS AND ORGANIZATION OF ITS BOARD OF DIRECTORS: APPLICABLE REGULATIONS.

The International Social Security Association (ISSA), governance is understood as the way in which the competent authority "administers its powers to achieve the institution's objectives, including its capacities to design, apply and innovate policies. , norms, systems and processes of the organization, with the participation and commitment of the interested parties "(Musalem et. al, 2011, p. 13) (Cited by Calasí et. al., 2020, p. 3).

Therefore, this international organization points out that "good governance implies that the exercise of the conferred authority is responsible, transparent, predictable, participatory and dynamic." (ISSA, 2020).

The governance of social security institutions, and in the case of Ecuador, is configured in its Constitution, which consolidates the system "agreed upon as a society and implemented in the social security program administered by the IESS" (Calasí et. al., 2020, p. 8), since the bases of the program are established there, as well as the powers, faculties, attributions and responsibilities granted to the authority responsible for applying that mandate. Hence, for Cichon et

al. (2006), "national legislation constitutes a key element of governance" (p. 138).

The governance of social security entities is based on several principles such as transparency (Calasí et. Al., 2020, p. 8) which, in the Ecuadorian Constitution, has been included as a criterion for managing the social security system.

Transparency refers to "the unrestricted and timely availability of essential and accurate information that allows interested parties to stay well informed about how to manage the institution" (Calasí et. Al., 2020, p. 8).

In Ecuador, the current Constitution was issued in 2008, while the Social Security Law came into force in 2001, hence the International Labor Organization. On the basis of several decisions of the Constitutional Court, it concludes by noting that "there are some elements in the Law that may contravene the Constitution; even two have already been observed through the rulings of the Constitutional Court No. 019-16-SIN-CC[3] and No. 380-17-SEP-CC[4]"(Calasí et. Al., 2020, p. 4).

In this way, the International Labor Organization points out that this lack of articulation and deficiency of the regulations weakens and violates the social security system that as a society has been consolidated in the Constitution of the Republic of Ecuador; and, therefore, undermines the good governance of the IESS.

3 Judgment No. 019-16-SIN-CC of the Constitutional Court declared the deferred unconstitutionality of the second and third paragraphs of article 28 of the Social Security Law regarding the appointment of the representatives of the insured, employers and their alternates before the IESS Board of Directors.

4 Judgment No. 380-17-SEP-CC, of the Constitutional Court modulated the effects of the judgment and modified the second paragraph of article 102 of the Social Security Law, thereby guaranteeing health coverage for minor dependents up to eighteen years of age, declared by the competent authority in cases of family custody, foster care or appointment of a guardian.

This lack of articulation of the national regulations on social security is evidenced in aspects such as transparency which, even though it constitutes a criterion for managing the public social security system, article 1 of the Social Security Law does not include transparency among its guiding principles, which generates friction between the principles and management criteria that govern the concept of social security agreed upon as a society and those that are implemented in the social security program administered by the IESS (Calasí et. al., 2020, p. 8).

The Ecuadorian Institute of Social Security as an autonomous entity, responsible for providing the contingencies of compulsory universal insurance to its members, has an administrative structure whose highest governing and management body is the Board of Directors.

The IESS Board of Directors is the body responsible for issuing policies for the application of the Mandatory General Insurance. The mission of this body is related to: a) the issuance of the regulations for the organization and operation of general insurance administered by the IESS, b) the strategic planning of pension savings, c) the regulation and supervision of insurance directorates general and special applied by the IESS; and, d) the supervision of the acts of the IESS administration, as provided by the Social Security Law.

In general, the Social Security Law provides that the IESS must have the following administrative structure:

a) Governing and management bodies: They are governing bodies and senior management of the IESS, responsible for the application of the Compulsory General Insurance in the national territory (Social Security Law, 2001). The IESS has the following governing and management bodies:

a. Board of Directors.	b. General Management[5].	c. The Provincial Directorate[6].

b) Specialized Directions: They are management bodies, specialized in the assurance of contingencies and qualification of the right to benefits granted by the Compulsory General Insurance, with the degrees of operational autonomy indicated by the Regulation. (Social Security Law, 2001). The IESS has the following specialized addresses:

a. The Directorate of the General Individual and Family Health Insurance;	b. The Directorate of the Pension System;
c. The Directorate of General Labor Risk Insurance; and,	d. The Rural Social Security Directorate.

c) Administrative claim bodies: They are administrative claim bodies and responsible for the approval or denial of claims for benefits raised by the insured, the following:

a. The National Appeals Commission.	b. The Provincial Commission of Benefits and Controversies.

d) Auxiliary Body[7]: The IESS has an Actuarial Directorate that constitutes a technical advisory body of the IESS, hierarchically subordinate to the IESS Board of Directors.

5 The Director General is appointed by the IESS Board of Directors and is the legal, judicial and extrajudicial representative of the IESS.

6 The Provincial Directors are appointed by the Director General of the IESS.

7 The Technical Investment Commission was an auxiliary body of the IESS; however, in 2009, with the creation of the Bank of the Ecuadorian Institute of Social Security, this body was abolished.

e) Internal Control Body[8]: The IESS has an Internal Audit that depends hierarchically on the IESS Board of Directors.

Next, for the purposes of the topic addressed in this article, the composition, the attributions of the highest governing body of the Ecuadorian Social Security Institute (IESS) and other factors that concern the governance of this entity will be analyzed.

1.1. Formation of the Board of Directors of the Ecuadorian Institute of Social Security

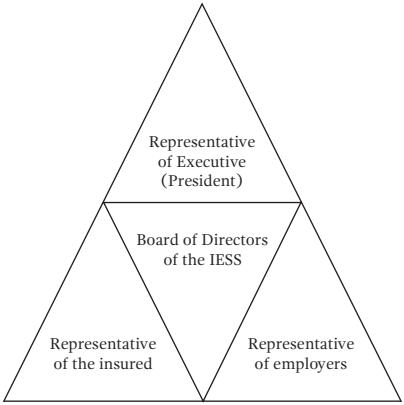
Article 28 of the Social Security Law (2001) provides that the composition of the highest governing body of the IESS is tripartite[9] and parity, as detailed in the following graph:

8 The International Labor Organization (Calasí et. Al., 2020, p. 10) points out that the IESS, as it does not have an internal mechanism to promote the oversight and impartial evaluation of its processes, is manifested as a concern of the actors, who They mention that the Ethics and Transparency Committee is new and there are no results yet (6 out of 20 specialists consulted). Additionally, half of the IESS officials (50.2%) are not aware of the existence of the Ethics and Transparency Committee. Added to the above is the perception that the Ethics and Transparency Committee does not allow an impartial evaluation of compliance with the actions of the Institution's collaborators; since more than half of the specialists consulted mention that corruption is directly related to political interference in the IESS.

Hence, several experts consulted by the ILO (2020, p.38) highlight the importance of real internal control mechanisms, such as through an internal audit that is endowed with real levels of independence, as well as generating another mechanism to avoid possible conflicts of interest between the Board of Directors of the IESS and the internal auditor, since the appointment of the latter is in charge of the highest governing body of the IESS, according to article 27, literal g, of the Social Security Law. In addition, it must be taken into account that the IESS has a really new Ethics and Transparency Committee, so there are no major elements to consider.

9 The tripartite structure of the IESS Board of Directors is supported by Convention 102 of the International Labor Organization that contains the minimum standard on social security. Said Convention establishes that the governing bodies of social security entities must have the authority as well as the representative of the insured and the employers.

Figure 1: Formation of the Board of Directors.



Source: Article 28 of the Social Security Law (2001)

Own Elaboration

The election process for each of the three members of the Board of Directors, in accordance with the Social Security Law (2001), is governed by the following precepts:

a) The representative of the Executive Branch and his alternate shall be appointed by the President of the Republic for a period that will end at the end of the presidential term. However, said delegate will continue in office until the incoming President makes the new appointment. In accordance with resolution No. CD. 469, which contains the Substitute Internal Regulations for Operation and Sessions of the Board of Directors of the Ecuadorian Institute of Social Security, this representative has the casting vote in the event of a tie against the decisions that the highest governing body of the entity must take.

b) The representative of the insured and their alternate will be appointed jointly by the legally recognized Trade Union Centers, the National Confederation of

Public Servants, the National Union of Educators, the National Confederation of Retirees, and the legally constituted organizations of the members of the Rural Social Security. Their term of office will be four years.

c) The employer representative and his alternate will be appointed jointly by the National Federations of the following Chambers: of Industries, Commerce, Agriculture and Livestock, Construction, and Small Industry. Their term of office will be four years.

Likewise, to be a member of the Board of Directors it is required[10]: a) be in enjoyment of political rights; b) prove professional title; and, c) have exercised with notorious probity the profession or university teaching or some position of managerial responsibility in private or public activities, and prove experience in the performance of them for a period of not less than ten years, as provided in article 29 of the Social Security Law (2001).

In addition, the same rule provides that those who incur in the following circumstances cannot be members of the IESS Board of Directors: a) IESS officials or employees; b) Those sentenced for fraud against private or public entities; c) IESS defaulters due to employer or personal obligations; d) People who have their own interest or represent third parties in the ownership, management or management of the companies awarded the pension savings administrators, the insurance companies or other people that make up the national social security system; e) Those who as a result of a judicial resolution are disqualified from the performance of a public function; and, f) Those who are prevented by other legal provisions.

10 In Article 29 of the Social Security Law published in the Official Gazette Supplement No. 465, of November 30, 2001, it was established that, to be a member of the IESS Board of Directors, it was required to be over 40 years of age. Said requirement was declared Unconstitutional through a Constitutional Court ruling No. 11, published in the Official Gazette Supplement No. 504, dated May 20, 2015.

In addition, in response to the guarantee of good governance of the IESS, as a principle of organization of the entity, the Superintendency of Banks must verify compliance with the requirements prior to the appointment, as well as the declaration of impediment to the exercise of the position when incur in any of the prohibitions or inabilities previously described and detailed.

For the performance of functions, the members of the Board of Directors shall exercise the powers conferred on them by the Social Security Law, full time and may not provide other remunerated services or perform other positions, except the university chair[11].

Additionally, article 101 of the Social Security Law provides that, in the performance of their duties, all IESS officials, including the members of the Board of Directors, will have direct responsibility for actions and omissions, therefore, in the event of any non-observance, breach or transgression of the regulations, will be removed from their representation or position, as indicated below:

> The directors, officers, servants and workers of all dependencies of the IESS, which are directly responsible for actions or omissions, carried out in the fulfillment of their functions, and that are not covered by the Law or regulations, will be removed from their representation or position and will have civil liability for damages that they may have caused, regardless of the criminal liability that may arise. The resolutions of the Board of Directors and the administrative decisions of the executive bodies of the IESS, which contravene the provisions of this Law and its regulations, or which cause damages to the IESS, they will determine personal and pecuniary responsibility to those who have dictated

11 The members of the Board of Directors will receive the remuneration set in the Institute's Budget, with prior approval of the Minister of Economy and Finance (Social Security Law, 2001).

> or to whom They have contributed to them with their vote, regardless of the criminal responsibility that may arise. (Social Security Law, 2001, art. 101)

For the appointment of the representatives of the insured, of the employers and of their alternates, as provided by the Social Security Law (in force since 2001), the President of the Republic must issue the respective Regulations.

In observance of said legal mandate, the Regulations were issued for the appointment of the representative of the insured, the representative of the employers, and their respective alternates before the IESS Board of Directors. However, Resolution No. 0024-2007-TC, of the Constitutional Court, published in the Official Registry Supplement No. 375, of July 7, 2008, declared the unconstitutionality of articles 1, 2 and 3 of the referred Regulation due because they did not guarantee equity in the participation of the actors involved in social security.

Consequently, the constitutional body ordered the Constitutional President of the Republic to issue the pertinent regulations for the appointment of the representative of the insured before the Board of Directors of the Ecuadorian Institute of Social Security based on criteria that guarantee equity in participation. of the different organizations that make up the respective electoral college.

Years later, the Econ. Rafael Correa Delgado, constitutional president of the Republic of Ecuador, by Executive Decree No. 1257, of August 3, 2012, published in the Official Gazette Supplement No. 765, of August 13, 2012, issued the replacement Regulation for the designation the representative of the insured and the representative of the employers, and their respective alternates before the Board of Directors of the Ecuadorian Institute of Social Security.

This Regulation granted the National Electoral Council a period of 45 days from the publication of the Decree in the Official Registry to summon: a) the legally recognized Trade Union Centrals, the National Confederation of Public Servants, the National Union of Educators , to the National Confederation of Retirees, and, to the legally constituted third degree national organizations of the affiliates of the Rural Social Security; and, b) the National Federations of: Chambers of Industry, Commerce, Agriculture and Livestock, Construction and Small Industry.

In both cases, said call was intended to integrate the respective Electoral Colleges for the appointment of the main and alternate representatives of the insured and employers before the Board of Directors of the Ecuadorian Institute of Social Security. This appointment had to be carried out through democratic, participatory and transparent processes that ensured the representation of all those involved.

The electoral colleges were integrated as follows:

Insured	Employers
a) A representative of the legally recognized national trade union centers. b) A representative of the Confederation of Public Servants. c) A representative of the National Union of Educators. d) A representative of the National Confederation of Retirees. e) A representative of the legally recognized national organization of the Campesino Social Security affiliates.	a) A representative of the National Federation of Chambers of Industries. b) A representative of the National Federation of Chambers of Commerce. c) A representative of the National Federation of the Chambers of Agriculture and Livestock. d) A representative of the National Federation of Construction Chambers. e) A representative of the National Federation of Chambers of Small Industry.

Figure 2: Actors involved in the appointment of the members of the Board of Directors.

Source: Executive Decree No. 1257 (2012)
Own elaboration

Finally, once the procedure provided for in the Substitute Regulation issued by the President of the Republic of Ecuador had concluded, in November 2012, the insured named Paulina Guerrero as their main representative and Luis Clavijo as alternate, while the employers appointed Felipe Pezo

as its main representative and César Rodríguez as its alternate. Said representatives were appointed to fulfill their functions as members of the IESS Board of Directors for a period of four years, in accordance with the Social Security Law.

However, on November 12, 2015, the Superintendency of Banks removed Paulina Guerrero from her position as a member representing the insured. And in the face of this definitive absence, according to the provisions of article 28, first paragraph of the Social Security Law and article 2 of the Regulation for the Integration of the Board of Directors of the Ecuadorian Institute of Social Security, Mr. Luis Clavijo, as alternate representative of the insured subrogated the holder until the end of their term of office.

1.2. Competence and powers of the Board of Directors of the Ecuadorian Institute of Social Security.

Article 27 of the Social Security Law (2001) confers on the IESS Board of Directors a series of attributions, including the following: a. The approval of the policies and programs for the application of the Mandatory General Insurance; b. The administrative regulation for the provision of the Mandatory General Insurance; c. The issuance of technical standards and resolutions of mandatory compliance by the others IESS authorities; F. The issuance of the internal regulations of the IESS; g. The appointment of the Director General, Deputy Director General, of the members of the Commission National Appeals, the Actuarial Director, the Internal Auditor, the Director of the Administrator of the General Individual and Family Health Insurance, of the Director of the Administrator of the Pensions, the Director of the Rural Social Security, and the Director of the General Risk Insurance from work.

In accordance with this provision, the actions of the Board of Directors are not only limited to the approval of policies, technical standards, resolutions, actuarial balances, financial statements, budgets and authorization to celebrate

acts and contracts that exceed the maximum amount authorized to the General Director of the IESS, as it also corresponds to " assume strictly administrative powers and participate in management processes, including the appointment of officials "(Borja, 2018, pp. 157-158).

Hence, Durán (2008) affirms that the "powers of the Board of Directors are rather administrative, instead of focusing on the direction of institutional policy itself" (pp. 26-27). This is due to the fact that "it is completely unusual in social security institutions, since it is normally understood that the role of a Board of Directors consists of directing policies (leadership) and regulations" (ILO, 2008, p. 26).

In this regard, the Good Governance Guidelines of the International Social Security Association (ISSA) constitute "a guide for a responsible, transparent, predictable, participatory and dynamic administration of social security institutions" (ILO, 2020, p. 6), because they establish that:

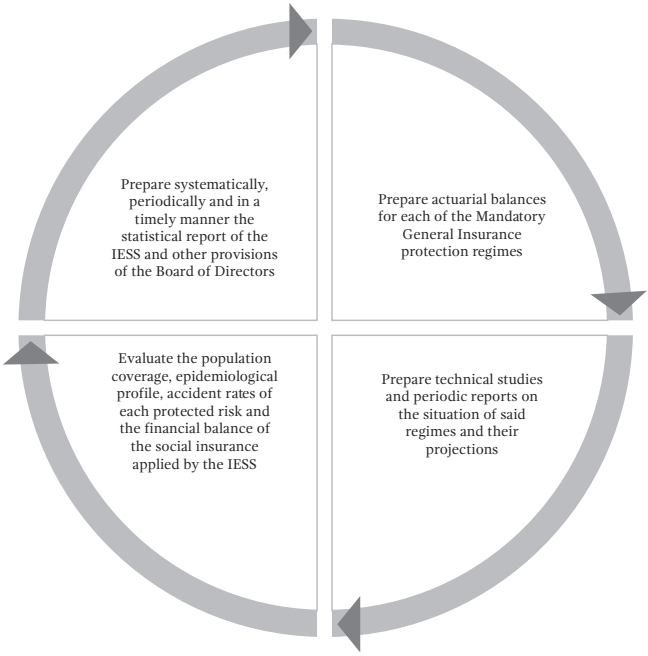
> The mandate of a social security program usually distinguishes between 'board of directors' and 'management'; the first is the institutional governing body in charge of formulating policies, and the second is in charge of managing the program and applying the resolutions of the board of directors. (ISSA, 2020, n. p.)

The Ecuadorian Institute of Social Security and its governance do not conform to the guidelines of the International Social Security Association, because in the Ecuadorian social security entity a model prevails that breaks into the administration, since the IESS Directive Council also intervenes in management, despite the fact that this attribution should be in charge of the General Directorate and other hierarchically lower positions.

But, the International Labor Organization points out that this problem is not current, since "historically these two functions (government and management / administration) have been intermixed in the IESS, which has generated a model of tripartite political representation that "invades" the administration" (ILO, 2008, p. 163)., And, at the same time, it suggests, if not expressly, at least tacitly a review at the normative level of this matter in order to guarantee adequate management and good governance of the Ecuadorian Institute of Social Security.

Additionally, as previously analyzed, the Social Security Law has provided that the IESS will have an advisory body subordinate to the Board of Directors. This body corresponds to the Actuarial, Research and Statistics Directorate. This Directorate is in charge of the Actuarial Director, whose appointment falls on the Board of Directors and his functions have a period of four years. The powers of the Actuarial Directorate are detailed in the graph below:

Figure 3: Attributions of the Actuarial Directorate of the IESS.



Source: Article 45 of the Social Security Law (2001).

Own elaboration

The existence of this auxiliary body is intended to provide technical support and support to the IESS and its Board of Directors to guarantee that the adoption of the different decisions leads to the appropriate organization and operation of general insurance administered by the IESS, strategic planning of pension savings, regulation and supervision of the general and special insurance directorates applied by the IESS.

However, this body requires the implementation of the mechanisms for technical actuarial strengthening and independence in the issuance of results and recommendations; and subsequent application (Actuarial Valuation IESS, 2019,

p. 242), for avoid the influence that may exist of third parties on the results of actuarial studies (Actuarial Valuation IESS, 2019, p. 242).

Thus, as a guarantee mechanism for the good governance of social security entities, The Guidelines of the International Social Security Association (2019) emphasize that "actuarial work must be framed within technical actuarial parameters, using internationally accepted methodologies for the actuarial issue; as well as guaranteeing the sufficient independence of the professionals who carry out the studies to issue their results, conclusions and recommendations" (n. p.).

In this regard, the International Labor Organization agrees by suggesting the strengthening of the "Actuarial Research and Statistics Directorate of the IESS to expand and improve its capabilities in actuarial matters. Similarly, it is recommended to improve the quality of the information used in actuarial studies." (ILO SEGURO IVM, 2020, p. 53).

In this case, the Actuarial, Research and Statistics Directorate of the IESS presents some difficulties marked by some factors such as: a) the quality of the base information for actuarial studies due to factors such as the preservation of documentation; b) the weak management of archives, c) the deficiency of the systems and the need to implement technological systems[12]efficient; d) the lack of implementation of internationally accepted methodologies, which has even generated contradictions between actuarial studies; e) the influence that may exist from third parties on the results of actuarial studies; and, f) the lack of necessary levels of

12 The International Social Security Association points out that one of the ten global challenges of social security is the technological transition (The technological transition) because communication and information technology plays a strategic role in the implementation of social security programs, since it allows improvements in the performance and quality of the service of the social security administration. (ISSA, 2019, p. 19). ICTs allow not only the automation of specific processes, but also the transformation of operations and services. (ISSA, 2019, p. 19). ICTs constitute "a strategic enabler of innovative solutions to respond to social transformations and challenges." (ISSA, 2019, p. 19).

independence of the body in charge of appointing its Director, in issuing its results and recommendations.

This constitutes a major problem that deserves solutions in the short term, because the adequate management of this technical body constitutes the support of the decisions that must be adopted to guarantee the sustainability of the system and the right to social security of the insured, and these cannot be subject to purposes other than those provided for in current regulations.

1.3. Unconstitutionality of the second and third paragraphs of article 28 of the Social Security Law

On October 20, 2015, Mrs. Silvia Carolina Vásquez Villareal presented a public action of unconstitutionality before the Constitutional Court, against the third paragraph of article 28 of the Social Security Law, published in the Official Registry Supplement No. 465, of 30 of November 2001, considering that said provision violated one of the principles that govern the exercise of rights, in this case the principle that all people are equal and will enjoy the same rights.

The third subparagraph of article 28 of the Social Security Law (2001) object of the unconstitutional public action provides the form of designation of the employers 'representative, in the following terms: "The employers' representative and his alternate shall be appointed jointly by the National Federations of Chambers: of Industries, Commerce, Agriculture and Livestock, Construction, and Small Industry".

The plaintiff based its claim on various constitutional provisions, such as the right to formal and material equality and non-discrimination, especially on the guiding principles of the social security system, as provided in article 367 of the Constitution of the Republic of Ecuador, in the sense that in the IESS Board of Directors:

All employers must be (sic) as representatives, this in compliance with the principle of universality, inclusion and integration, enshrined in the Constitution, thus responding effectively to the right to representation in the social security system, as all natural or legal person, public or private, etc., by the simple fact of becoming an employer in Ecuador, covering more than just the chambers of commerce, agriculture and livestock, construction and small industry, who would be the only representatives to the system of Ecuadorian social security (Sentence No. 019-16-SIN-CC, 2016, pp. 4-5).

Similarly, the plaintiff based its claim on the fact that not all employers are represented on the Board of Directors and cited some examples, including domestic employers and those who belong to the system of the popular and solidarity economy, employers of self-employment. , employers of various federations and associations in the country, and other employers. The plaintiff pointed out that even though the Social Security System[13] It is universal and inclusive and even more, since employers are an active part and economic contributors of it, it is considered only the National Federations of Chambers whose main objective, at their discretion, is to work according to the particular interests of its partners, hence it concludes by stating that the provision is unconstitutional.

During the analysis of the norm whose unconstitutionality was demanded and in general of all article 28 of the Social Security Law, the Constitutional Court highlights the disarticulation between the Social Security Law and the Constitution of the Republic of Ecuador. The Court notes that said "normative acts with general effects contain preconstitutional normative provisions dating from the year 2001, the same ones that, as analyzed ut supra, do not conform to the current constitutional framework and the model of

13 Article 367 of the Constitution of the Republic of Ecuador (2008) provides that the social security system is universal and public. Said system is guided by the principles of the national system of inclusion and social equity and by those of obligation, sufficiency, integration, solidarity, participation and subsidiarity.

the constitutional State of rights and justice." (Judgment No. 019-16-SIN-CC, 2016, p. 25).

Furthermore, in this analysis, the Court reaches the conclusion that not only the third paragraph (designation of the representative of the insured respectively) generates a burdensome situation to the current constitutional framework, since that also occurs with the second paragraph (designation of the representative of employers).

Said incongruity between the Law and the constitutional precepts lies in the lack of recognition of the regulations for the different forms of work, the rights of participation that include access to public sector institutions, as well as the principles of equality, non-discrimination and equity within the social security system (Sentence No. 019-16-SIN-CC, 2016, p. 25).

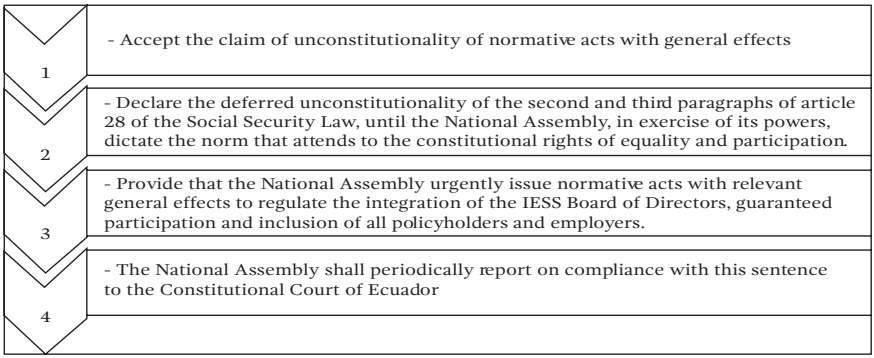
And, since these are current legal provisions, which are having legal effects for "their recipients -users of the social security system-, the Court emphasizes that it is not pertinent prima facie to expel the normative provisions in a radical way" (Judgment No. 019 -16-SIN-CC, 2016, p. 26)., In order to avoid a regulatory vacuum that causes a greater violation of the rights to equality and participation; and, in this way, guarantee the integrity of the Constitution of the Republic.

In accordance with article 130 of the Organic Law of Jurisdictional Guarantees and Constitutional Control (2009) "when the declaration of unconstitutionality of a legal provision produces a normative omission that is a potential source of violation of constitutional rights or causes serious damage, it may be postpone the effects of the declaration of unconstitutionality. ". In this sense, from article 96 of the Organic Law of Jurisdictional Guarantees and Constitutional Control (2009), it follows that a declaration of unconstitutionality with deferred effect is intended to "preserve the normative force and hierarchical superiority of the constitutional norms, and the full validity of constitutional rights. ".

Hence, the Constitutional Court has resorted to an atypical ruling to modulate the effect of the declaration of unconstitutionality of the normative acts with general effects to guarantee the harmony and supremacy of the Constitution of the Republic of Ecuador (2008) and the unrestricted respect of the rights recognized in the Constitution and International Human Rights Instruments (Sentence No. 019-16-SIN-CC, 2016, p. 26).

Therefore, the Constitutional Court resolved what is detailed below:

Figure 4: Provisions of the Constitutional Court in Sentence No. 019-16-SIN-CC.



Source: Sentence No. 019-16-SIN-CC (2016).

Own elaboration

For the deferred declaration of unconstitutionality of the subsections in question, the Constitutional Court has considered that, based on the abstract nature of the unconstitutionality action, the National Assembly "must immediately issue the regulations that are adapted to the constitutional rights in force, guaranteeing the rights of

participation and including representatives of all insured persons and employers within the IESS Board of Directors" (Sentence No. 019-16-SIN-CC, 2016, p. 25).

However, it is striking that despite the fact that the Court has emphasized that the sentences of deferred unconstitutionality are based on the "need to guarantee the integrity of the Constitution of the Republic" (Sentence No. 019-16-SIN-CC, 2016 , p. 27), in those situations in which "it is not possible prima facie to immediately expel an infra-constitutional normative provision from the legal system, for which a reasonable time must be established for the legislator to correct said unconstitutionality." (Emphasis out of the text) (Sentence No. 019-16-SIN-CC, 2016, p. 27), has not established the referred reasonable time and has limited itself to providing an urgent reform of said normative acts by the Assembly National.

Even so, the Constitutional Court, as part of the deferred effect of the declaration of unconstitutionality, has determined in a ruling that until the National Assembly carries out the corresponding reform, all acts and decisions issued by the aforementioned Board of Directors will be valid and in force, as long as are subject to the legal norms and provisions that regulate them (Sentence No. 019-16-SIN-CC, 2016, p. 28).

From this it follows that until the body that presides over the Legislative Branch does not issue the amendment to the second and third paragraphs of article 28 of the Social Security Law -norms referring to the appointment of the representative of the employers and the insured, said Norms continue to be applicable, because the effect of their unconstitutionality has been postponed, with the purpose set forth in articles 96 and 130 of the Organic Law of Jurisdictional Guarantees and Constitutional Control (2009), that is, until there is a new norm according to the Constitution of the Republic of Ecuador.

Since the decision of the Constitutional Court, more than four years have elapsed without, to date, the National Assembly having complied with the disposition of the Court, that is, reforming the aforementioned rules of article 28 of the Security Law Social (2001) whose purpose, according to the judgment, is none other than to guarantee respect for the principle of equality and non-discrimination and the right to participation.

This delay of the National Assembly has caused that both the employers and the insured have not been able to count on their respective representative in the terms and conditions provided in Sentence No. 019-16-SIN-CC, issued on March 22, 2016, by the Constitutional Court; and, as will be detailed later, the IESS Board of Directors has also not been able to have a representative of the employers and a representative of the insured designated in accordance with the paragraphs whose unconstitutionality was deferred until the respective legal reform.

1.4. Dismissal of the representative of the insured before the IESS Board of Directors.

The Office of the Comptroller General of the State (2017) carried out a special examination of the process for determining the amount "of the debt for the State contribution for health benefits made to the Ecuadorian Institute of Social Security, IESS, for the period between 1 December February 2013 and December 31, 2016" (n. p.), contained in Report No. DAAC-0059-2017.

As a consequence of this special examination, the Office of the Comptroller General of the State, by means of Official Letter No. 1187-DNPR, of October 11, 2017, by predetermining the culpable administrative responsibility against Mr. Luis Antonio Clavijo Romero, member representing the insured before the Council Director of the IESS, imposed as a sanction his dismissal and a fine of seven thousand three hundred and

twenty US dollars (Judgment Process No. 17811-2018-01064, 2018).

Said act was notified in person to the aforementioned member, on October 31, 2017, due to the fact that in the exercise of his functions and in his period of performance comprised between March 24, 2015 and December 31, 2016, in his capacity as a member representing the insured before the Board of Directors of the Ecuadorian Social Security Institute, "despite knowing the conclusion reached by the Delegates of the IESS and the Ministry of Finance, in the Inter-institutional report 001 of April 13, 2015, on the non-existence of the State debt for medical benefits "(Judgment Process No. 17811-2018-01064, 2018, n. p.), the member in question, did not issue any pronouncement" on the legality and applicability of this conclusion in precautionary interest institutional, causing that, of the Verification Balance of the Health Fund, the right to collect from the State is eliminated, for the value of USD 2,527'819,221.81 "(Judgment Process No. 17811-2018-01064, 2018, n. p.).

According to the Comptroller's Office (Sentence Process No. 17811-2018-01064), this omission constituted a breach of the provisions contained in articles 7, 10, 50, 51 and 96 of the Social Security Law, published in the Official Registry Supplement No. 465, dated November 30, 2001, and non-observance of the following provisions:

> [...] Article 4, numeral 1, literal h) of the IESS Organic Functional Regulations, issued with Resolution CD 457, published in the Supplement to Official Registry No. 45 of August 30, 2013"; as well as a violation of "Internal Control Standards Nos. 100-03" responsible for internal control "and 400" control activities ", for which it incurred the causes established in paragraphs 3, 6, 7 and 14 of article 45 of the Law[14]Organic of the

14 The Comptroller General of the State determined that, according to article 45 of the Organic Law of the Comptroller General of the State (2002), the

> Comptroller General of the State. (Process Judgment No. 17811-2018-01064, 2018, sp)

Likewise, the Office of the Comptroller General of the State indicated that the representative of the insured, "despite knowing the conclusion reached by the Delegates of the IESS and the Ministry of Finance, in the Inter-Institutional Report 001, of April 13, 2015, on the non-existence of the State debt for medical benefits "(Process Judgment No. 17811-2018-01064, 2018, n. p.), it did not rule on the legality and applicability of this conclusion in caution of institutional interests, which caused that, "from the Health Fund Verification Balance, the right to collection from the State is eliminated, for the value of USD 2,527'819,221 , 81. ". (Sentence Process No. 17811-2018-01064, 2018, n. p.).

This dismissal sanction led the former representative of the insured to challenge the administrative act in court before the Administrative Litigation Tribunal based in the Quito canton, Pichincha province. Said Court, after the respective procedure, in a ruling issued on April 11, 2019, at 10:17 a.m., resolved accept the demand raised by Dr. Luis Antonio Clavijo Romero and, at the same time, decided to "declare the nullity of Resolution No. 36096 of November 23, **2017, notified on April 18, 2018** confirming faulty administrative responsibility 1187-DNPR of October 11, 2017 corresponding penalty for dismissal and a fine of USD 7,320.00" (Sentence Process No. 17811-2018-01064, 2018, n. p.) (Emphasis out of text).

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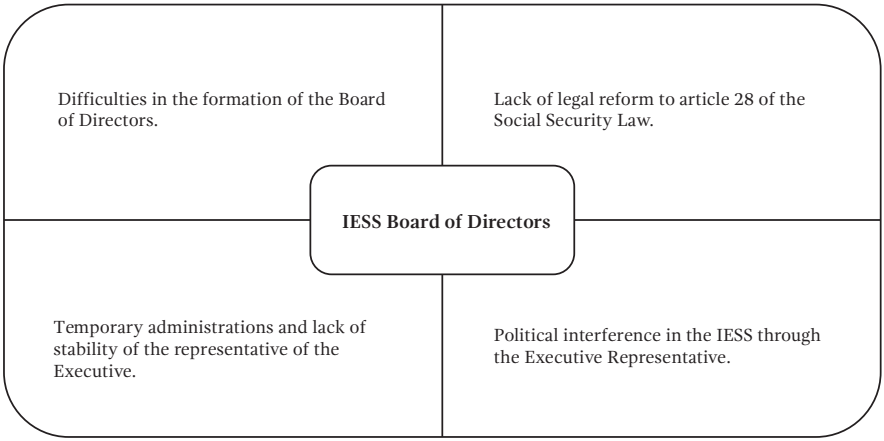
member representing the insured has incurred in negligent administrative responsibility, because its omission is included in the following causes: 3. Allow the violation of the law, of specific norms issued by State institutions, or of generally mandatory norms issued by the competent authority, including those related to the performance of each position; 6. Failure to establish or not apply, subject to this Law and other pertinent regulations, the subsystems of internal control and external control; 7. Not establishing or not applying, subject to the law and more pertinent regulations, the planning systems, administration of goods and services, public investments,

This judgment has already been executed and executed, after the appeal filed by the Comptroller's Office was inadmissible. This generated that, in November 2020, Mr. Luis Clavijo rejoined his functions as a representative of the insured; and, therefore, the IESS Board of Directors has resumed its tripartite composition with a representative of the insured and a representative of the employers in extended functions in both cases.

1.5. A Board of Directors with two members for more than two years, the lack of a legal reform for its formation and a governance conflict in the IESS

Currently, the Board of Directors of the Ecuadorian Social Security Institute faces several problems as detailed in the following graph:

Figure 5: Governance problems at the IESS.



Source: ILO (2020, n. p.)

Own elaboration

From this graph, each of the factors that trigger a governance conflict within the Ecuadorian Social Security Institute will be analyzed in detail, as follows:

1.5.1. The reinstatement of the Representative of the Insured and representatives in extended functions and the lack of consideration of the deferred effect of the Constitutional Court ruling:

As a result of the removal of the member representing the Insured by decision of the General Comptroller of the State, the Board of Directors of the IESS was made up of only two members, one of them, the member representing the employers[15]in extended functions, because he has not been legally replaced: and, by the delegate of the Executive.

Although, article 13 of Resolution No. CD. 469, of the Internal Substitutive Regulation of Operation and Sessions of the Board of Directors of the Ecuadorian Social Security Institute, provides that the highest governing body of the entity will work with at least two of its members, it is no less true that since 2016, no the deferred effect of the unconstitutionality of the second and third paragraphs of article 28 of the Social Security Law has been considered.

This means that a new appointment of the members representing the insured and the employers with their respective alternates has not been proceeded in accordance with said regulations, which even when they have been declared unconstitutional, their effect has been deferred until the National Assembly issues the pertinent reform, which has not happened, because at present the report for the first debate of the draft Reform Law to the Social Security Law that addresses the treatment of article 28 of said normative body has barely been approved.

15 In May 2020, Eng. Felipe Pezo, the main representative of the employers before the IESS Board of Directors, submitted his resignation; and, therefore, the alternate member, Mr. César Rodríguez, has assumed such functions.

This unusual situation regarding the composition of the IESS Board of Directors was even questioned by several experts interviewed by the Office of the International Labor Organization for the Andean Countries, in a report containing the Results of a qualitative study: Interviews with social security specialists about the performance of the IESS, in which it is highlighted that this situation generates that there is no "Governance or administration in the entity" (ILO, 2020, p. 26).

In this case, more than four years have elapsed since the second and third paragraphs of article 28 of the Social Security Law (2001) were declared unconstitutional with deferred effect, and this has given rise to several omissions and non-compliance on the part of the competent bodies, because:

a) A new election process for the two members of the Board of Directors has not been carried out, due to the inaction of the competent bodies (Executive and National Electoral Council);

b) The National Assembly has not approved any reform in compliance with the ruling of the Constitutional Court.

c) For more than two years, the Board of Directors did not have a representative of the insured and all decisions were adopted by only two representatives.

d) By decision of the competent court, in November 2020, the representative of the insured has been reinstated to the IESS Board of Directors.

e) Despite the fact that the IESS Board of Directors has once again had a tripartite structure, the representatives of the insured and the employers are in extended functions.

Therefore, all this series of inactions, omissions, non-compliance and non-compliance have violated the principle of social security participation and violate the good governance guidelines of social security entities.

1.5.2. Lack of legal reform to article 28 of the Social Security Law:

At present, the National Assembly continues to discuss the Draft Reform Law to the Social Security Law that contains the proposed amendment to article 28 of that normative body, regarding the formation and appointment of the IESS Board of Directors.

The report for the first debate of this bill was sent to the Presidency of the Assembly on December 5, 2018 and was approved in the first debate in the first months of 2019. As of that date, it is still under treatment by part of the Permanent Specialized Commission on Workers' Rights and Social Security.

In this bill, certain aspects related to the composition of the IESS Board of Directors are modified, in the sense that it establishes that the composition will be tripartite and equal between men and women. This means that gender criteria have been incorporated, despite the fact that the number of members remains at three, which would prevent compliance with gender parity (Canessa, 2019, p. 79).

In addition, a series of guidelines is incorporated for the members of the insured and the employers. Thus, in the case of those who are the incumbents, they must last two years in office, and once this period ends, they must be replaced by the alternate without the need for an administrative act.

Likewise, it is expressly provided that, in the case of employers, there will be a member who represents the chambers and one who jointly represents the popular and solidarity economy and non-union employers, either as principal or

alternate, but the reason for a formation of this nature is not justified in both the titular representative and his alternate.

The project eliminates any selection limited to the Federations of Business Chambers, because it only refers to legally constituted national employers' organizations but is vague in the concretization of the participation mechanism.[16]

In the case of the insured, it is mandatory to have a member of the active affiliates and one of the retirees, either as principal or alternate, but, equally, the reason for such a formation is not justified either in the titular representative as in his alternate.

The bill abolishes the criterion of trade union centers are general, since the current norm is limited to recognizing the participation of national trade union organizations. In addition, the criterion of "legally recognized" organizations is modified to "legally constituted" organizations.

For Canessa (2019), this brings with it a relevant legal distinction "between demanding that the national union organization be duly recognized by the labor authority, as expressed in the original regulation, and demanding that the national union organization comply with the legal requirements in its constitution. " (p. 80).[17]

16 Canessa (2019) suggests that the voters on the employers' side could be all those mandates designated by the employers contributing to the IESS and who are up to date in the payment of the contributions, according to the data provided by the entity. While the presentation of the candidates could be in charge of the Federations of Chambers due to their status as the most representative organization and in the case of non-union employers, they could present their independent candidates with the support of a percentage of the employers' voters. (p. 81).

17 To avoid this disparity, Canessa (2019) suggests that the Ecuadorian legislator could take elements of the Uruguayan model in which all contributors registered with the Social Security Bank are voters, who are precisely those who make up the electoral roll and elect their representative. Thus, it is not considered whether or not they belong to a trade union center. In the Ecuadorian case, it indicates that it could be proposed that the legally constituted national workers' organization can directly present its candidates (owner and alternate) given its status as the most representative

Even those who are not members of the union are considered voters; However, this could generate an unjustified distinction because no requirements are required for these voters, while the other voters are required to be members of a legally constituted organization (Canessa, 2019, p. 80).

Finally, the presidency of the Board of Directors would continue to be the responsibility of the representative of the Executive, for whose appointment only the decision of the Executive is sufficient, without there being a selection process.

In addition, the regulation of the election process would no longer be the responsibility of the Executive but of the National Electoral Council, in accordance with the provisions of Article 219 of the Constitution of the Republic of Ecuador, since this entity is responsible for "organize, direct, monitor and guarantee, in a transparent manner, the electoral processes, convene elections, carry out the electoral counts, announce the results, and possess the election winners. " (CRE, 2008).

The Permanent Specialized Commission of Workers and Social Security continues with the preparation of the report for second debate; However, for the moment, it has not resolved the observations previously described, and, instead, has raised some additional elements that could generate more complex scenarios, due to factors such as:

a) The darkness in the wording, since it would seem that the members of the Board of Directors could be empowered to exercise their profession by stating "they will carry out their professional duties without work dependency exclusively, full time" (Project text, 2020, p. 1). Unless the purpose of the legislator is that said members are not IESS officials, although the implications of a provision of this nature and the nature of the actions of the members of the Board of

organization. In contrast, non-union policyholders can present an independent list of candidates as long as they have the support of a significant percentage of voters defined by the project. Here,

Directors should be considered for purposes of control and responsibility. And, if they are considered as civil servants, they must limit themselves to exercising such function, such position for which they have been appointed, except for the university chair.

b) An article 28.1. Would be incorporated, which could be the subject of analysis for a reform to 29 of the Social Security Law, in terms of requirements, inabilities and prohibitions.

c) The representative of the Executive, who is also called the State Delegate, would be given a main function oriented to the defense and sustainability of the Ecuadorian social security system. This approach does not consider that the Board of Directors is a whole and in this lies its operation and actions. In addition, the social security system is comprised of public entities, rules, policies, resources, services and social security benefits and one of these entities is the IESS, therefore, with this provision, the scope of action of the State Delegate would be totally wide.

d) The participation in the electoral colleges of organizations with legal status that are related to social security issues and organizations without legal status would be allowed, in the latter case provided that there is certification that, at least, 75% of its members It is not in unjustified delay with the IESS, BIESS and with the Internal Revenue Service. But, the underlying problem remains, because in the first case, the only requirement is related to being unionized, regardless of pending debts, and, in the second case, it is established that a certain percentage of its members should not have debts .[18]

18 This approach could generate greater difficulties and costs due to the imprecision in the wording and its implications. In this way, the most appropriate thing would be to take into consideration the Uruguayan model and consider as voters all active members and retirees, for the appointment

e) Additionally, a bank of eligible persons would be created who could reach the Board of Directors in the event that the titled alternate member is absent permanently, which raises some questions, because these people would not be appointed by the voters and even their legitimacy could be questioned.

1.5.3. Political interference in the IESS through the representative of the Executive.

The Office of the International Labor Organization for the Andean Countries, in a report containing the Results of a qualitative study: Interviews with social security specialists on the performance of the IESS have indicated that the Presidency should not be exclusive to the government representative who should not have a casting vote, as provided in article 28 of Resolution No. CD. 469, which contains the Substitute Internal Regulations for Operation and Sessions of the Board of Directors of the Ecuadorian Institute of Social Security.

The experts consulted by the International Labor Organization (2020) highlight the following:

> The importance of establishing mechanisms to limit its actions (in reference to the Executive delegate), to avoid interference by governments in the management of funds and reserves of the insured, and thus to safeguard the autonomy of the IESS, in the terms provided by the Constitution and the Social Security Law, such as establishing that the presidency of the Board of Directors does not fall on said representative, to avoid the permanence of this in the performance of this role, an aspect questioned by the experts; as well as to reform the norm that attributes to this delegate the casting vote in decision-making, and even to establish that the presidency of this body can be rotating. (p. 30)

of their representative. In the case of employers, they should proceed in the same way, with the only limitation that their participation should be conditional on compliance with their employer obligations with the IESS.

Some of these experts such as Fernando Mosquera point out that the IESS Board of Directors should not have a delegate from the Executive "because it is morally very questionable that the largest debtor of this Institution has an impact on decision-making, that is, a voice and casting vote in the management of the entity. "(ILO, 2020, p. 30); However, one cannot fail to consider the provisions of Convention 102 of the International Labor Organization that guarantees the "Principle of participatory management of beneficiaries, employers and government authority in the management bodies." (Canessa, 2019, p. 1).

In general terms, the experts agree that the presence without limitations of the Executive Representative before the Board of Directors has led to the entity not having an effective autonomy that conforms to the mandate of articles 370 and 372 of the Constitution of the Republic of Ecuador, due "the preponderance of government interests over the objectives of the Institution "(ILO, 2020, p. 27).

Hence, through the Board of Directors "chaired by a delegate from the Executive Branch, various measures have been adopted whose financial support has been highly questioned and has had a significant impact in terms of sustainability in the long term.[19]"(ILO, 2020, p. 27).

The experts have highlighted the need to have suitable profiles on the Board of Directors and highlight the insufficiency of article 29 of the Social Security Law, on the minimum requirements, inabilities and prohibitions to form part of this governing body.

19 It is pertinent to note that on November 13, 2015, the IESS Board of Directors with the vote of the representative of the Executive and the representative of the insured approved Resolution No. CD. 501 through this decision, the contribution rates of three insurances administered by the IESS (Pensions, Health and Work Risks) were illegally redistributed, against sustainability as a criterion for managing social security with constitutional rank, since that the measure did not have financial support.

One of the experts interviewed states that "The members of the Board of Directors must comply with ethical and moral conditions such as not exercising politics (militancy), likewise, they must be people who are known, who have a level of expertise in related matters (in reference to social security) and In negotiation."(ILO, 2020, p. 31).

However, the problem does not end in the establishment of requirements to be met by those who will make up the Board of Directors, since the difficulties also originate in the lack of an integrating axis of the social security system structured by the Constitution. This axis could be channeled through "an organism destined to the rectory of social security, of social protection." (ILO, 2020, p. 31).

This entity should be in charge of establishing all social protection policies and the control of all entities that are part of the Ecuadorian social protection system based on the principles and criteria provided by the Constitution, for which it must be staffed with qualified personnel. for the good governance of the system and to guarantee the right to social security of the insured population.

1.5.4. Temporary administrations and lack of stability of the representative of the Executive:

During the last presidential term, the IESS Board of Directors has had four representatives of the Executive whose duration in office has been very short-lived, and even without any legal support, it has even had a delegate in charge, despite the fact that the Social Security Law does not foresee the figure of the commission. As of May 2020, by virtue of the resignation of its fourth delegate, in this case, Dr. Paúl Granda López[20], its fifth delegate was appointed.

20 The departure of Dr. Granda occurred in the midst of several scandals for alleged acts of corruption in various medical units of the IESS and for alleged purchases of medical supplies with surcharges and non-observance of the maximum amount authorized to the Director General of the IESS and his subsequent removal by the Board of Directors, through Resolution No. CD. 601.

This situation has caused a constant change of officials as each administration starts with a new team, in addition, this has had an impact in a certain way, the absence and subsequent return of the representative of the insured, together with the resignation of the representative of the employers.

The experts consulted by the International Labor Organization for the Andean Countries have indicated that "the high turnover of the President of the Board of Directors implies a lack of continuity in administrative management"(ILO, 2020, p. 32). This problem is evidenced in "the number of changes in management positions, starting with the CEO."(ILO, 2020, p. 32).

Consequently, the great instability and ungovernability of the Ecuadorian Social Security Institute is even due to "the absence ... of a strategic plan that is used as a management instrument." (ILO, 2020, p. 32).

In addition, the experts consulted, among them, Jorge Madera, have stated that "" if there is planning within the IESS it is an ornament, because the destabilizing model is still in force. " (ILO, 2020, p. 32). In the same way, it has concluded by noting that the great destabilizer of the Ecuadorian Social Security Institute has been the Government due to the high turnover of its representative and due to the distortion of the mission and purposes of the entity, due to the preponderance of government decisions, which once again shows a lack of effective autonomy of the IESS.

This factor is closely related to the lack of suitable profiles in the Board of Directors of the IESS, management positions and in general, in a large part of the rest of the entity's payroll, which has increased without any technical support even to the detriment of the entity, and even the confluence of stewardship and administration functions in the Board of Directors, the lack or deficiency of efficient technological systems, as analyzed in a report carried out by the Social Security Studies Board (2020, p.

13)., which highlights the importance of the IESS carrying out an analysis of its payroll in order to optimize resources through the use of technological tools and technical management of the entity based on the principles and management criteria provided by the Constitution of the Republic of Ecuador.

2. POSSIBLE SUGGESTIONS FOR THE FORMATION OF THE BOARD OF DIRECTORS OF THE IESS AND GOVERNANCE OF THE ENTITY

In this document some factors have been detailed that show the urgent need for a legal and administrative restructuring for the Ecuadorian Institute of Social Security in order to guarantee the good governance of the entity, the sustainability of its funds and the right to the insured population.

In such a way that this restructuring should start from a future reform regarding the formation of the Board of Directors, for which, it will be essential that the National Assembly safeguard and institute the necessary technical elements so that: a) the presence of a representative of the Executive does not constitutes a violation of the autonomy of the Ecuadorian Social Security Institute, b) the insured and the employers can count on their respective representative after the processes that guarantee real compliance with the guiding principles of the social security system in Ecuador, for this An election system could be consolidated in which all active and retired members of the IESS participate, regardless of whether or not they belong to a trade union organization, and, all employers with the only limitation intended for those who are in default.

It could be established that the presidency is rotating, and, in any case, this reform should be linked to establishing a selection process for the representative of the Executive, in addition to providing this representative with real levels of stability and independence from the Executive. In addition, Resolution No. CD should be reformed. 469, so that the representative of the Executive does not have a casting vote.

The people who are going to make up the IESS Board of Directors should meet requirements related to knowledge and proven experience in social security and related matters, together with the existence of ethical and moral conditions and the prohibition that those who are going to make up this governing body are part of political organizations.

Therefore, the National Assembly should not only limit itself to the reform of article 28 of the Social Security Law, since it is also necessary to reform article 29 ibidem referring to requirements, inabilities and prohibitions.

Limitations could even be established for the representative of the Executive before the IESS Board of Directors, for which the scope and effects of Convention 102 of the International Labor Organization, which contains the minimum social security standard and other recommendations, must be taken into account. and inputs from the international organization to guarantee that the IESS Board of Directors is only an institutional governing body and does not have interference in the administration of the entity, to stop the irruption of interests outside the institutional ones, therefore the reform of the Article 27 of the Social Security Law regarding the powers of the Board of Directors.

In addition, it would be appropriate for the amendment to article 27 of the Social Security Law to attribute to the IESS Board of Directors only the functions of government (rectory), while the administrative functions provided for in said regulation should be performed by the Director General and, according to be the case, by other subordinate managerial positions, to guarantee a technical management of the entity based on current regulations.

In the same way, stability should be guaranteed to the General Director regardless of the continuity or not of the members of the Board of Directors, for this, their management period could be extended to five years or generate

some other mechanism that prevents that when starting a new administration, said official is replaced only by change of authorities and without legal support. In any case, its management must be subject to the strictest controls, evaluation and levels of transparency.

Furthermore, given that the Director General is subject to the same requirements, disabilities and prohibitions as the members of the Board of Directors, article 33 of the Social Security Law should be amended. The General Director must meet more rigorous requirements than the members of the Board of Directors, because this position is eminently technical, therefore it is necessary to establish more rigorous requirements due to the nature of the functions of this official.

Similarly, this restructuring must be accompanied by suitable and timely control by the control entities provided for by the Constitution of the Republic of Ecuador and the Social Security Law, or by the implementation of a governing body of security. Social; as well as the guarantee that the management of the entity will be governed by compliance with the principles and criteria of management of the Ecuadorian social security system, among which the transparency with which it must proceed in everything related to decisions of the Board of Directors, the Director General and other officials, to the use of efficient technological tools that guarantee this criterion and optimize resources, and, to the strengthening of the auxiliary technical body of the IESS (Actuarial, Research and Statistics Directorate).

Finally, while the National Assembly reforms article 28 of the Social Security Law, the appointment of representatives of the insured, the employers and their alternates respectively, could be carried out, taking into consideration that the second and third paragraphs of said article were declared unconstitutional with deferred effect; and, therefore, they continue to form part of the Ecuadorian legal system.

CONCLUSIONS

The governance of social security entities is materialized in the way in which the competent authority manages and achieves the entity's purposes, through the design, application and innovation of policies, standards, systems and organizational processes with the participation of the actors involved in the social security system.

The International Social Security Association has established a series of guidelines for the good governance of social security entities, among them, the importance that the Boards of Directors are only institutional governance bodies of these entities, therefore, the functions of administration must necessarily fall on the governing bodies. Likewise, the need to have an efficient regulatory framework constitutes another guideline for the good governance of these institutions.

The governance of the IESS is deficient because there is a disarticulation between the Social Security Law and the Constitution of the Republic of Ecuador. Another factor is given by the presence of a Board of Directors with functions of rectory and administration, which causes an invasion in the direction of the entity.

For some years, the IESS Board of Directors was not formed in a tripartite manner according to article 28 of the Social Security Law, due to the lack of a new process for electing the representative of the insured and the employers, which generated that both members remain in extended functions, and upon subsequent dismissal of the representative of the insured, by decision of the State Comptroller General.

Despite the fact that, in November 2020, by decision of the competent court, the representative of the insured has been reinstated to its functions and although the structure of the highest governing body has once again been tripartite, the violation of participation as a principal rector of social

security persists, due to the fact that the term of office of this representative and the employer representative should have concluded at the end of 2016. Furthermore, this situation also diminishes the legitimacy of their actions.

The second and third paragraphs of article 28 of the Social Security Law were declared unconstitutional by decision of the Constitutional Court; however, the effect of such declaration was deferred until the National Assembly issues the corresponding reform. And, as the National Assembly has not complied with this provision of the Constitutional Court, the paragraphs in question have not been immediately expelled from the Ecuadorian legal system, in accordance with the Organic Law of Jurisdictional Guarantees and Constitutional Control.

The lack of a new process for electing the representatives of the insured, the employers and their alternates, as provided for in the second and third paragraphs of article 28 of the Social Security Law constitutes a violation of the principle of participation, to the governance of the IESS, and, at the same time, an inaction of the competent bodies (Executive and National Electoral Council) and even a breach of their functions, because those provisions continue to be in force since the National Assembly has not yet reformed them.

The National Assembly has not complied with the provision of the Constitutional Court in the March 2016 ruling, that is, it has not amended the paragraphs of article 28 of the Social Security Law that were declared unconstitutional with deferred effect. The report for the first debate on the Reform Law of the Social Security Law has barely been approved, in relation to article 28 of said normative body and to date, the discussion of this bill has not advanced, despite the fact that they have excessively exceeded the times established in the Organic Law of the Legislative Function.

The draft Reform Law to the Social Security Law in which the conformation of the IESS Board of Directors is discussed (Article 28 of the Social Security Law) is not technically oriented and there is obscurity in the wording of the changes incorporated by the Assembly Committee while it continues the discussion of the report for second debate.

In the event that this project was to be approved with the changes that, up to now, the National Assembly Commission has introduced, the magnitude of the IESS problem could increase as indicated in previous lines.

The Ecuadorian Institute of Social Security is subject to a totally deficient regulatory framework given by the disagreement between the Social Security Law and the Constitution of the Republic of Ecuador, therefore, a legal and structural administrative reform is required to solve the problems that, at the level of governance, institutionalist, quality of benefits and services and other aspects that concern this entity.

Although it will very probably no longer occur during this presidential period very close to the end of a few months, it will undoubtedly be the subject of a structural reform to the Ecuadorian Social Security Institute, the modification of the composition of the IESS Board of Directors, together with the establishment of Rigorous guidelines and requirements for those who are going to integrate this highest governing body of the entity, among which stand out, knowledge requirements, verified experience and other aspects that prevent interference in the technical management of the IESS.

The Director General of the IESS, said official should meet remarkably rigorous requirements in attention to the technical functions that he must perform, in addition, he should be provided with levels of stability so that he is not replaced without legal support.

It is imperative that the Actuarial, Research and Statistics Department of the IESS be strengthened through the use of efficient technologies, as well as the implementation of measures that guarantee the technicality of its products (reports) and recommendations; and, therefore, the independence of its Director and of the work of this body against aspects outside the institution.

Finally, for prevent the IESS from continuing to be subject to interests unrelated to its mission and purposes set forth in the Constitution of the Republic of Ecuador and in the Social Security Law, in a new regulatory body it will be essential to separate the government function: rectory or issuance of policies, management function: operational and administrative (ILO, 2008, p. 164), for which it will be important to take into account the recommendations made by the International Labor Organization throughout the nineteen years of validity of the Social Security Law (2001).

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"Startups" network as an instrument for open innovation during uncertainty: the legal framework in Ecuador

La red de emprendimiento como instrumento para innovación abierta durante tiempos inciertos: el marco legal en Ecuador

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ABSTRACT: The purpose of an entrepreneurship is to build and scale a sustainable business model through an enterprise. The lack of tangible and intangible resources is often at this very early stage. According to previous studies, new ventures could overcome the lack of resources -key to their success- forming relationships with partners (networking) through open innovation (OI) processes. However, the structure of each network affects their own processes and outcomes; the innovation processes and the network structure mutually shape each other. Opening up the innovation process implies the involvement of startups in relationships with different typologies of actors: Incubators, Large corporations, Higher education institutions, among others. Understanding the role, relation, position and power of each actor in the ecosystem allow us identify its network position which is critical for resource access.

In order to determine the level of ecosystem maturity and its interactions is necessarily to analyze the entrepreneurship context. According to the Ecuadorian Entrepreneurship Profile (GEM, 2019) Ecuador has a strong position related to physical infrastructure, cultural and social norms and entrepreneurial education at post-school stage comparing with the media of the World. However, indicators like entrepreneurial finances, taxes and bureaucracy, government support, R&D transfer and entrepreneurship programs are quite far from the global average.

Utilizing the newly publish Ecuadorian Organic Law for Entrepreneurship and Innovation (Official Registry No. 151, 2020) which aims to provide a normative framework that encourages the entrepreneurship, innovation and technological development this article analyzes startup's network centrality elements focusing on:

i) Main actors and the nature of these relations;
ii) Institutions which hold the central position in the network;
iii) Partnerships and networks to support innovation processes and outcomes;
iv) Financial mechanisms to support entrepreneurship and innovation; and,
v) Education to carry out partnerships.

As a consecuence, the main actor determined by law is CONEIN as a ruling body and the Entrepreneurship Advisory Council. The presence of individual entrepreneurs is scarce. Although, CONEIN holds the central position in the network, in that aspect is a vast opportunity for Entrepreneurship Advisory Council to boost participation among private sector members and be a higher influence in the public policy making. By law, partnerships and networks to support innovation processes and outcomes are not clear, but entrepreneurs acquire greater

centrality in the ecosystem than before, which could privilege their access to resources and knowledge especially from Higher education institutions.

Financial mechanisms to support entrepreneurship and innovation are established, but will be necessary to allocate budget for this instrument, as well as for the entrepreneurship national strategy. The private investment is mentioned, nevertheless deep legal reforms are demanded in order to incentive its presence. Education regulation is incorporated in the law to carry out entrepreneurship and innovation. In the hereafter, will be necessary to incorporate partnership and financial education programs.

The conception of adequate articulated programs for entrepreneurship, management, research and development, transfer, R&D funding, networking and human capital strengthen could favor open innovation. However, other instruments are necessary in terms of information release, taxability, bureaucracy, labor and direct investment that allows open innovation appear. The purpose of the Government is key to ensure governance, rule of law, and accountability of itself and entrepreneurship actors to ensure stability and economic prosperity.

KEY WORDS: Entrepreneurship, open innovation, networking, networking structures, performance, rule of law.

RESUMEN: El propósito de un espíritu empresarial es construir y escalar un modelo de negocio sostenible a través de una empresa. La falta de recursos tangibles e intangibles se encuentran a menudo en esta etapa muy temprana. Según estudios previos, los nuevos emprendimientos podrían superar la falta de recursos, clave para su éxito, formando relaciones con socios (networking) a través de procesos de innovación abierta (OI). Sin embargo, la estructura de cada red afecta sus

propios procesos y resultados; los procesos de innovación y la estructura de la red se moldean mutuamente. Abrir el proceso de innovación implica involucrar a las startups en relaciones con diferentes tipologías de actores: Incubadoras, Grandes corporaciones, Instituciones de educación superior, entre otros. Comprender el papel, la relación, la posición y el poder de cada actor en el ecosistema nos permite identificar la posición de su red que es fundamental para el acceso a los recursos.

Para determinar el nivel de madurez del ecosistema y sus interacciones es necesario analizar el contexto del emprendimiento. Según el Perfil de Emprendimiento Ecuatoriano (GEM, 2019) Ecuador tiene una posición fuerte relacionada con la infraestructura física, las normas culturales y sociales y la educación emprendedora en la etapa post-escolar en comparación con los medios del mundo. Sin embargo, indicadores como las finanzas empresariales, los impuestos y la burocracia, el apoyo gubernamental, la transferencia de I + D y los programas de iniciativa empresarial están bastante lejos del promedio mundial.

Utilizando la recién publicada Ley Orgánica de Emprendimiento e Innovación (Registro Oficial No. 151, 2020) que tiene como objetivo proporcionar un marco normativo que fomente el emprendimiento, la innovación y el desarrollo tecnológico, este artículo analiza los elementos de centralidad de la red de startups enfocándose en:

i) Principales actores y naturaleza de estas relaciones;
ii) Instituciones que ocupan una posición central en la red;
iii) Alianzas y redes para apoyar los procesos y resultados de innovación;
iv) Mecanismos financieros para apoyar el espíritu empresarial y la innovación; y,
v) Educación para realizar alianzas

En consecuencia, el actor principal que determina la ley es el CONEIN como órgano rector y el Consejo Asesor de Emprendimiento. La presencia de empresarios individuales es escasa. Si bien el CONEIN ocupa la posición central en la red, se presenta una gran oportunidad para que el Consejo Asesor de Emprendimiento impulse la participación de los miembros del sector privado y tenga una mayor influencia en la formulación de políticas públicas. Por ley, las alianzas y redes para apoyar procesos y resultados de innovación no son claras, pero los emprendedores adquieren una mayor centralidad en el ecosistema que antes, lo que podría privilegiar su acceso a recursos y conocimientos, especialmente de las instituciones de educación superior.

Se establecen mecanismos financieros de apoyo al emprendimiento y la innovación, pero será necesario asignar presupuesto para este instrumento, así como para la estrategia nacional de emprendimiento. Se menciona la inversión privada; sin embargo, se demandan profundas reformas legales para incentivar su presencia. La regulación educativa está incorporada en la ley para llevar a cabo el emprendimiento y la innovación. En lo sucesivo, será necesario incorporar programas de asociación y educación financiera.

La concepción de programas articulados adecuados de emprendimiento, gestión, investigación y desarrollo, transferencia, financiamiento de I+D, networking y fortalecimiento del capital humano podría favorecer la innovación abierta. Sin embargo, son necesarias otros instrumentos en términos de divulgación de información, tributación, burocracia, mano de obra e inversión directa que permitan que surja la innovación abierta. El propósito del Gobierno es clave para garantizar la gobernanza, el estado de derecho y la rendición de cuentas de sí mismo y de los actores empresariales para garantizar la estabilidad y la prosperidad económica.

PALABRAS CLAVE: Emprendimiento, innovación, redes de colaboración, estructura de las redes de colaboración, desempeño, normativa.

INTRODUCTION

According to the definition by Blank (2010) a startup is a company, partnership or temporary organization designed to search for repeatable and scalable business model. In this phase, new ideas are brought to the market and transformed into economically sustainable enterprises (Spender et al., 2016). However, the establishment of startups presupposes a lack of tangible and intangible resources (Wymer and Regan, 2005) in order to build new business models. Existing studies give evidence that forming relationship with partners is key to their success (Teece, 2010). In addition, by adopting open innovation (OI), new ventures could overcome the lack of resources derived from the liability of their smallness and newness (Bogers, 2011) allowing both the acquisition of resources and the introduction of new products in the market. In the OI literature, networks have been considered as an instrument to their success (West and Gallagher, 2006).

Although startups are powerful engines of open innovation (OI) processes (Colombo and Piva, 2008; Davila et al.,2003; Mustar et al., 2008). Wang and Fang (2012) have found that network structure affects new firms' innovativeness. It is necessary for startups as well as for other actors involved in the innovation processes to understand how the structure of the network affect their own processes and outcomes. Neyens et al. (2010) considered the impact of the duration of alliances on startups' innovation performance. Zhang and Li (2010) have found that having relations with intermediary organizations (e.g. technology service firms, accounting firms, law and talent search firms) is positively related to new ventures' product

innovation. Pérez Pérez and Sánchez (2003) have found that startups' networks evolve over time.

These findings are just some of the examples of how innovation processes and network structure mutually shape each other: actors in the network define the requirements for new products or services, accept or refuse them, and modify their relations in the process. This phenomenon is especially relevant when considering startups, which change the structure and processes of the network when entering the market (La Rocca and Snehota, 2014). Likewise, Spender *et al.* (2016) notes that regardless of the context, environmental uncertainty, affects the causal link between network structure and the considered measure of performance.

1. THE ACTORS BEHIND STARTUP'S NETWORKING

Opening up the innovation process implies the involvement of startups in relationships with different typologies of actors. Qualitative aspects of the relations in the network underlines the importance of two factors: the actors involved and the evolution of the relations over time (Spender et al., 2016). Understanding the nature of these relations and the mechanisms used to manage them is just as important as understanding their structure. The following actors are frequently related with Startups and Open Innovation:

> **a) Incubators.** An incubator is a company that promotes the development of a new startups by providing technical advice, services such as management training or office spaces. According to studies, there are three types of incubators: technology-based, industrial and higher education incubators. Each of them are focus on stimulate innovation processes along the lifecycle of a startup. According to the Higher Education,

Science, Technology and Innovation National Secretary (SENESCYT, 2020), 24 incubators are registered and active, 11 (45.8%) of them belong to higher education institutions and 13 are private (54.2%).

b)Large corporations. In the entrepreneurship ecosystem large companies play an important role for startups to create new spin-offs or spinouts (Spender, J. *et al.,* 2017) as well as to give access for resources and information. Large corporation adopt different mechanisms to fund startups as venture capital or joint ventures collaborations. According to UNESCO (2020) in United States 71.5% ($340,728M) of the R&D country spending corresponds to large corporations, equivalent to 1.93% of its GDP. Meanwhile, in 2019 China and Japan large businesses invested in R&D $287,795.3M and $131,839.8M respectively, equivalent to 77.29% and 77.76% of the total R&D national expenditure (Fig.1). Unfortunately, in Ecuador this type of mechanism is not developed; the data of UNESCO (2020) show that large companies invested in R&D only $343,061K equivalent to 0.17% of the GDP and 42,3% of the total R&D national investment.

c) Higher education institutions. A relevant actor in new ventures' network is Higher Education Institutions (HEIs); an OI ecosystem for startups is not complete without their integral role. HEIs are an important source of knowledge, upon which innovation has become dependent, making HEIs crucial for open innovation. Simões *et al.* (2012) analyzed the role of HEI as an intermediary, bridging the gap between producers and consumers of knowledge, since they possess staff and various research units that can help venture startups

and entrepreneurs to identify opportunities, mobilize resources, and create value. As a network actor HEIs incentivize and energize the diverse elements to integrate into an innovation network (Spender, *et al.*, 2016), that promotes knowledge sharing and supports nascent entrepreneurs at the various stages of venture creation. In high-income countries innovation processes are well supported by HEIs that each year receives and compete for public funds to fund innovation, science and technology development. In 2018 US HEIs invested $62,349.0M in R&D. Nevertheless, in the same year the total R&D investment of South America countries reached $52,546.4M, $9,802.6M less than US HEIs (UNESCO, 2020).

d) Other actors. According to the "Regulation for the registry, accreditation and strengthening of innovation spaces and agents in Ecuador" (SENESCYT, 2017) other innovation actors involved in the national entrepreneurship ecosystem are entrepreneurship accelerators linked with financial, market and internationalization services. Risk capital operators which focus on the risk capital management and investment; they have a similar structure like the Venture Capital firms (VC). Also, are the innovation managers dedicated to design research and innovation projects for knowledge transfer. Finally, are the coworking spaces dedicated to provide coworking services like events, networking and shared-based infrastructure areas for new entrepreneurs.

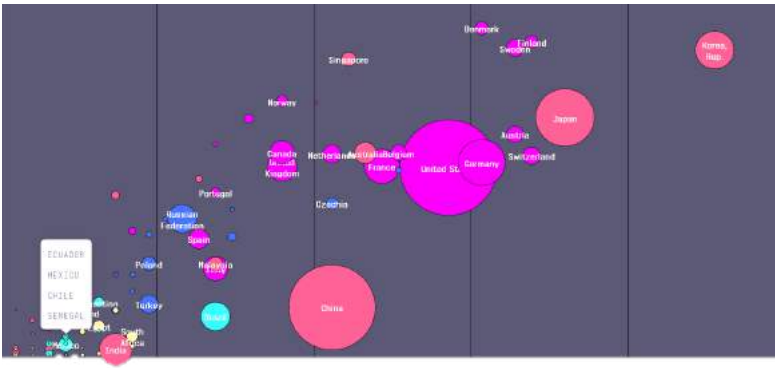

Figure 1: Rank of R&D investment per country.
Source: UNESCO (2020, s. p.).

Understanding the role, relation, position and power of each ecosystem actor is key to identify the maturity of a startup ecosystem. Strong networks allow startups to merge from low innovation to high innovation initiative in a relative short time.

2. NETWORK ORIENTATION

Network position represents a critical resource for startups because it allows to exchange and leverage its substantial resources and the activities of partners in the network (Wang and Fang, 2012). Network centrality defined as the level of position, which the new venture occupies within its industry boundaries. Centrality will be established by the relation among actors within startup network: HEIs, incubators, VC firms, large companies, among others. Therefore, network centrality provides a positional advantage to a new venture enabling it to obtain resources or information from others, which is needed for growth and promote its innovation. Network centrality increases the volume of innovation and knowledge acquired from a wide variety of sources. In other

hand, cooperative network is determined by social network acceptance. According to literature, cooperative relationships can assist a new venture's competition. The hypothesis about network centrality and innovation bet that there is a positive relationship between the degree of network centrality a startup occupies in their network and its innovative performance. Therefore, there is a negative relationship between the degrees of interaction with cooperators a startup fostered and its innovative performance.

3. ECUADORIAN ENTREPRENEURSHIP PROFILE

According to Global Entrepreneurship Research Association (2019), the ranking of entrepreneurial framework in Ecuador evidence a strong position of the country related with physical infrastructure (6.97), cultural and social norms (5.92) and entrepreneurial education at post-school stage (5.39) comparing with the media of the World. However, indicators like entrepreneurial finances (2.88), taxes and burocracy (2.66), government support and relevance (2.66), research and development transfer (3.10) and government entrepreneurship programs (3.44) are quite far from the globe average.

In the region, Ecuador ranks second in the Total early-stage (TEA) entrepreneurial activity and forth on Establish business ownership rate (Fig. 2). One important function of new entrepreneurship can be to introduce new products and services into markets. According to the Global Entrepreneurship Monitor GEM (2019) answers to new questions in the 2019 research reveal that in seven economies (Canada, Colombia, Guatemala, Ecuador, Panama, Chile and the United Arab Emirates), one in 20 adults are starting or running a new business with products or services that they say are at least new to the local area. This is an encouraging sign that innovation is truly entering the heart of entrepreneurship but

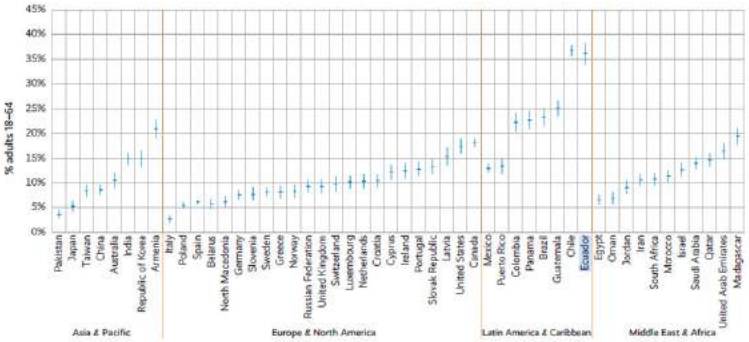

Figure 2: Total early-stage Entrepreneurial Activity (TEA) rate (%adults) in 50 economies in four regions

Source: GEM adult population survey (2019, s. p.)

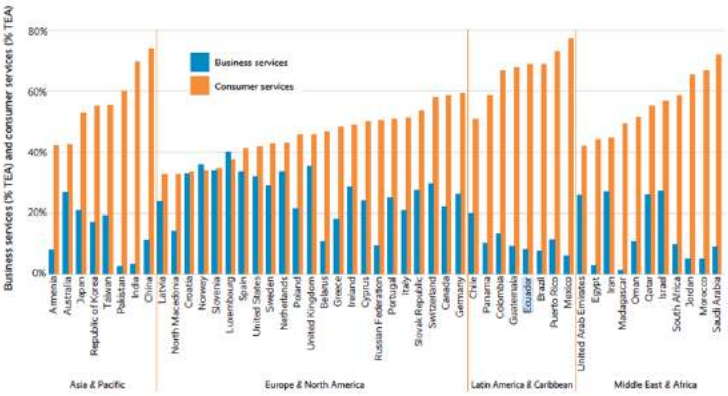

Figure 3: Business services and consumer services as % TEA.
Source: GEM adult population survey (2019, s. p.)

Also, as shown in the Fig. 4 the TEA rate related with the GDP/per capita shows a concentration of entrepreneurs well-paid in the high-income countries, meanwhile in the low- and middle-income economies like Ecuador the concentration of entrepreneurs surveyed are in the lowest decile of the GDP/per capita rank. Of the 33 economies in the high-income group, 26 have a TEA rate that is less than 15%.

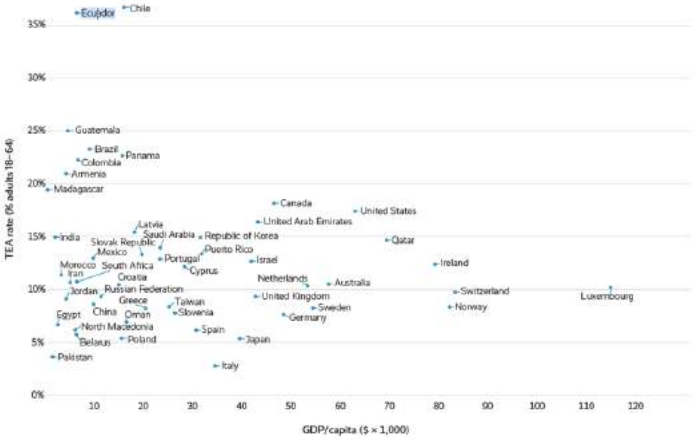

Figure 4: Total early-stage Entrepreneurial Activity (TEA) rate and GDP/Capita.

Source: GEM adult population survey (2019)

In terms of the social and cultural foundations of entrepreneurship 59% of adults (18-64) in Ecuador reports knowing someone who has started a business in the past two years, 56% mention that there are good opportunities to start a new business in their area and 55% of adults surveyed believe that is easy to start a business in Ecuador (GEM, 2019). However, around 82.7% of early-stage entrepreneurs reported

that they started a business because of a lack of better options, which stills as the main motivation to start a business (Fig. 5).

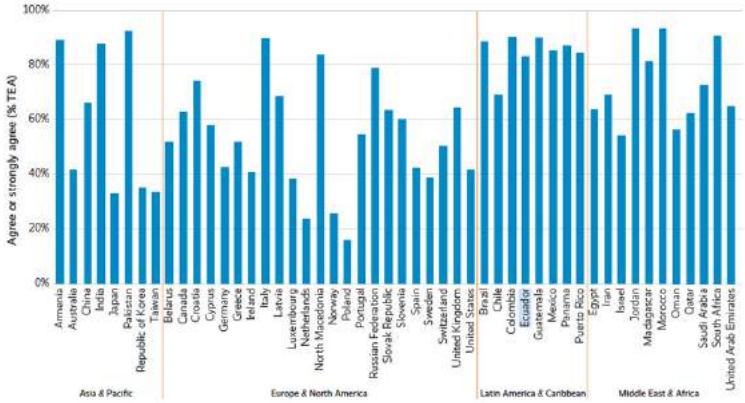

Figure 5: Motivation to earn a living because jobs are scare.

Source: GEM adult population survey (2019)

According to the World Bank Group's Doing Business report (2020), Ecuador is among the lowest-ranked countries in terms of the cost (time and money) of starting a business. And while there have been some recent reductions, import tariffs are still relatively high compared to neighboring countries. This may translate into higher production costs, limiting the competitiveness of Ecuadorian products in the international market. Furthermore, foreign direct investment is much lower than in neighboring countries and is currently trending towards a much lower figure than the official expected number for this year. Policies aimed at boosting foreign investment are not having the anticipated impact.

The discernment of the entrepreneurial profile of the country gives us a proper framework for the analysis of the entrepreneurship and innovation law –from the networking

point of view- that catalyzes entrepreneurship from a necessity-driven business, to a sophisticated model based on high-revenue, innovation, technology-based and internationalization of enterprises.

4. LAW FOR ENTREPRENEURSHIP AND INNOVATION IN ECUADOR

After several rounds of analysis, on February 28, 2020 the National Assembly of Ecuador approved the Organic Law of Entrepreneurship and Innovation, published in the Official Registry No. 151. According to its Article 1 the purpose of the law is to provide a normative framework that encourages the entrepreneurship, innovation and technological development in Ecuador for all economic activities of public and private nature, in its various forms.

Art. 2 mentions the following objectives of the law:

a) Facilitate the creation, operation and elimination of enterprises;
b) Promote the efficiency and competitiveness of entrepreneurs;
c) Promote public policies and programs for technical, financial and administrative support for entrepreneurs;
d) Strengthen the articulation and synergy between higher education institutions and the actors of the national productive system; and,
e) Promote innovation in productive development. (Organic Law of Entrepreneurship and Innovation, 2020)

In the regulatory context, the plenary session considers that: "a law is required to facilitate and harmonize the participation of actors in the entrepreneurial ecosystem that encourages entrepreneurship, as well as maximizes its duration,

economic and social results" (Organic Law of Entrepreneurship and Innovation, 2020) Therefore, it is necessary to analyze how the new regulation affects the particular aspects of strengthening networking and innovation that have been previously mentioned.

5. ANALYSIS OF THE ENTREPRENEURSHIP AND INNOVATION LAW ON STARTUPS NETWORKING

Understanding the complexity of new ventures' networks is key adopting innovation processes for startups' success. According to the literature, the centrality of an enterprise in its network positively influences the obtaining of information and access to resources, aspects that favor its acceleration and success. However, getting the system to embrace new initiatives is a great challenge for decision makers, since it implies risk and resources for the oldest members of the business, knowledge and innovation networks. Therefore, will be appropriate to highlight the wide opportunity that the public sector has through the new Entrepreneurship and Innovation Law to promote the articulation the institutions and actors in the entrepreneurship system to allow a subtle transition of new entrepreneurs in the system until reaching greater centrality. Below is shown the analysis of the startup's network centrality elements and their approach in the new law.

5.1. Main actors and the nature of these relations

According to Art. 3 of the Entrepreneurship and Innovation Law (2020) in order to have a governing body for entrepreneurship and innovation public policy, the National Council for Entrepreneurship and Innovation (CONEIN) is created. Additionally, a Entrepreneurship Advisory Council is also created in charge to advise and support CONEIN. It will be constituted for the monitoring of public policies integrating

representatives from several industries like manufacture, tourism, commerce, finances among others public and private institutions. The following are also recognized: the governing body of public real estate management and business accelerators or entrepreneurship support centers (Art. 13), commercial offices in Ecuador abroad (Entrepreneurship and Innovation Law, 2020, Art. 15), the Ministry of Education, SENESCYT, and the Technical Secretariat for Training and Vocational Education (Art 19). Different types of investors appear on the radar of the entrepreneurial ecosystem, such as: seed capital and venture capital investors (Entrepreneurship and Innovation Law, 2020, Art. 25-26), angel investors (Entrepreneurship and Innovation Law, 2020, Art. 27) and crowdfunding managers (Entrepreneurship and Innovation Law, 2020, Art. 32) that connect promoters with investors.

The spirit of the legal framework promotes better articulation and collaboration between the public and private sectors in order to stimulate entrepreneurship. In addition, an institutional framework is strengthened by the creation of CONEIN as a governing body in charge to regulate and control a large part of the ecosystem members to reach a national strategy and the formulation of public policies, programs and projects to support entrepreneurship. However, from the point of view of startups networks and open innovation the law without a clear configuration of how this structure will put forward more specific instruments and programs to cover the lack of tangible and intangible resources, entrepreneurship collaboration, data generation and management of innovation and technology driven process stills sketchy.

Without prejudice to their corporate status, the law identifies entrepreneurs as "individuals" or "subjects" of these services, losing sight of their relations in networks that

could benefit the ecosystem and therefore in opportunities to consolidate and grow the public and private startup investment.

5.2. Institutions which hold the central position in the network

Although there is a broad mapping of actors that nourishes the map of entrepreneurship networks, since the object of the law is to achieve mainstreaming of the public policy in charge of the National Council for Entrepreneurship and Innovation (CONEIN), this institution gains power and prominence compared to the rest of the actors. From the point of view of entrepreneurs, regarding the publication of the law, the CONEIN owns a central point in the network diminishing the impact of the relationships between startups among the actors (Fig. 6).

The role that the Entrepreneurship Advisory Council can play, as an organization that brings together tall type of private actors is essential, as well as its relationship with industry associations and cluster representatives strengthening their participation as entrepreneurs in the formulation of policies and programs. According to the law, new entrepreneurs are beneficiaries, despite the fact that their articulation and coordination with all actors, especially funding institutions and knowledge facilitation organizations is key to achieving innovation success.

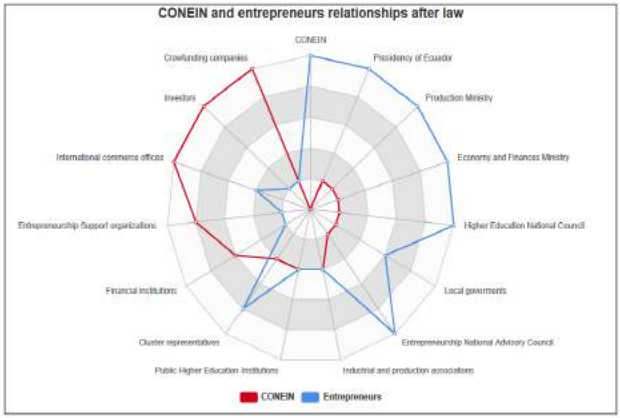

Figure 6: Location by law of CONEIN and entrepreneurs in the network.

Own elaboration

5.3. Partnerships and networks to support innovative processes and outcomes

According to the Article 2 is a purpose of the Organic Law of Entrepreneurship and Innovation (2020): "to strengthen the interaction and synergy between the educational system and public, private, mixed, popular and solidarity-based, cooperative, association, community and artisanal actors of the national productive system". This objective is possible within an entrepreneurial framework that facilitates, includes and encourages the development of companies and projects in a specific place (Organic Law of Entrepreneurship and Innovation, 2020, Art 3). Therefore, connections between public and private actors are highlighted for the formulation of public policies through CONEIN (Organic Law of Entrepreneurship and Innovation, 2020, Art. 6), and the Consultative Council on Entrepreneurship and Innovation (Organic Law of

Entrepreneurship and Innovation, 2020, Art. 10). Likewise, the law implements new simplified corporate modalities for the creation and liquidation of companies, which favor the optimization of time and resources for entrepreneurs.

In Fig. 7 roles and actors described in the law and their location on the entrepreneurship map are drawn where the centric positions reflect greater incidence and impact of the actors in the ecosystem. As is shown, entrepreneurs acquire greater centrality than before, regarding financial services, investment, access to knowledge and other support services, while their relationships with the public institutions are centralized in the CONEIN. Relations with local governments and industry representatives are maintained.

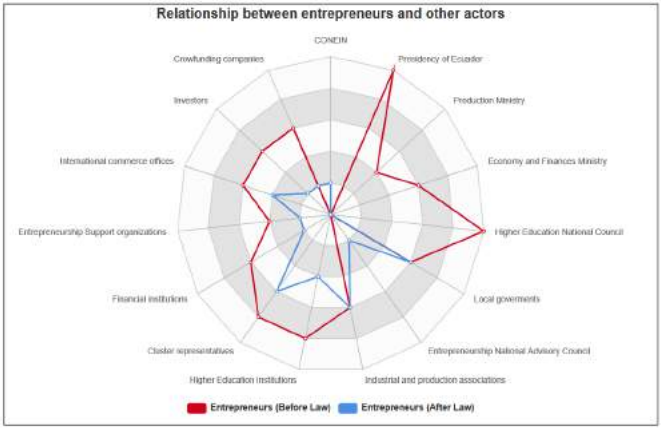

Figure 7: Relationship between entrepreneurs and other actors before and after the Law of Entrepreneurship and Innovation.

Own elaboration

In terms of the centrality theory, the lack of tangible and intangible resources and the liability of the smallness and newness of new firms characterized in the Ecuadorian entrepreneurship profile could be mitigated if the startups

occupy a central position in the network like now. The Entrepreneurship Advisory Council again will play an important role to release information between their members and promote initiatives for entrepreneurship training, R&D transferring, networking and human capital strengthen that could favor open innovation processes.

Unfortunately, the law does not explicitly encourage collaboration between entrepreneurs, nor does it propose schemes for greater articulation between public and private for the provision of services other than real estate (Organic Law of Entrepreneurship and Innovation, 2020, Art. 13). The 'necessity-driven business' mention by GEM (2019) in the Ecuadorian profile will still lack of better options if they do not join together and if they do not participate in decision-making processes. The application bylaw publication of the Organic Law of Entrepreneurship is pending which is expected to allow us a better understanding of the public and private decision-making procedures.

5.4. Financial mechanisms to support entrepreneurship and innovation

From the original considerations of the Organic Entrepreneurship Law, access to credit is considered as a mechanism to strengthen the entrepreneurial ecosystem. Among the attributions of CONEIN, in addition to formulating binding policies and guidelines for credit access (Organic Law of Entrepreneurship and Innovation, 2020, Art. 9. b) in Chapter V of the Law, it is established that all enterprises registered in the National Registry of Enterprises (Organic Law of Entrepreneurship and Innovation, 2020, Art. 12) must have immediate access to financial services (Organic Law of Entrepreneurship and Innovation, 2020, Art. 24), such as: seed capital (Organic Law of Entrepreneurship and Innovation, 2020, Art. 25), venture capital (Organic Law of Entrepreneurship

and Innovation, 2020, Art. 26), angel investment (Organic Law of Entrepreneurship and Innovation, 2020, Art. 27) and public credit programs (Organic Law of Entrepreneurship and Innovation, 2020, Art. 29). This access represents a great advance in the consolidation of innovation processes that require high technological investment, but if the Government do not promote deep legal reforms and other instruments for data release, taxability, bureaucracy and labor, private investment will stills scarce causing a huge negative impact for the innovation funding. Entrepreneurship training programs are necessary in order to promote financial education.

5.5. Education to carry out partnerships

One of the most important advances in entrepreneurship law is the understanding of a culture and education that requires strengthening the ecosystem to enable better conditions. Entrepreneurial culture is understood as a set of qualities, knowledge and necessary skills that an entrepreneur possesses (Organic Law of Entrepreneurship and Innovation, 2020, Art. 3. Literal 5). Aspects and values such as self-esteem, autonomy, sense of belonging to the community, teamwork, solidarity, associativity, encouragement of research and lifelong learning are part of an integral entrepreneurship formation (Organic Law of Entrepreneurship and Innovation, 2020, Art. 4. Literal 5). Hence, Chapter IV proposes the promotion of entrepreneurial culture and education which ratifies the law objective of "improving capacities, abilities and skills that allow successful entrepreneurship" (Organic Law of Entrepreneurship and Innovation, 2020, Art. 18), among others. Soft skill training for the development of entrepreneurial and innovative spirit is highlighted at all education levels, including a clear content and criteria for its evaluation (Organic Law of Entrepreneurship and Innovation, 2020, Art. 19). The coordination of strategies is delegated to the Ministry of Education for the basic and

intermediate education levels, as well as to the SENESCYT for higher education.

A deepening of education is necessary to promote entrepreneurship. The Global Entrepreneurship Monitor (2019) recognizes great advances in higher education in Ecuador, which qualifies at 5.39 / 10 points. Not so, basic level education that has an evaluation of 3.49 / 10.

CONCLUSIONS

Considering the bibliography reviewed as well as the Ecuadorian entrepreneurship profile, the majority of new firms establish in Ecuador are 'necessity-driven businesses' started because of the lack of better options. Likewise, because of the lack of tangible and intangible resources, an individual entrepreneurship intervention and the liability of their smallness and newness, the innovation process is difficult to emerge resulting on low-impact startups from the consumer services sector maneuvering in a highly competitive market lack of revenues.

Higher import tariffs -compared to neighboring countries-, non-technology driven process and few training programs derivate in higher production costs and limit the competitiveness of Ecuadorian products in the international market. Low direct investment also reduces the financial opportunities for new firms and startups internationalization. Accordingly, just few startups in Ecuador achieve sustainability and high economic impact.

From the dynamic of a network point of view, understand that the structure of a network affects new firms' innovativeness and startups change the structure of their networks when entering the market is key to promote new

firm's centrality. Thus, to promote new firm's resources access, innovation and technology-based transferring is only possible if key actors of the Ecuadorian ecosystem like incubators, higher education institutions, acceleration companies, venture capital firms, large corporations, financial institutions and the Government of Ecuador strengthen their relations, articulate actions, release information, open networking spaces and are able to embrace open innovation.

The analysis of the law shows a great advance regarding aspects such as the strengthen of the governance and rule of law for the entrepreneurship ecosystem. Also, articulates efforts between the institutions for entrepreneurship education and financial access as a started point for public policy. Still necessary to build mechanisms to support innovation process in their different phases. The design of adequate articulated programs for R&D transfer, R&D funding, networking and human capital strengthen could favor open innovation. Nevertheless, deep legal reforms and other instruments are necessary in terms of data release, taxability, bureaucracy, labor and direct investment that allows open innovation to appear. The role of the Government is key to ensure governance, rule of law, accountability as well as to coordinate efforts between the public and private sectors to guarantee stability and economic prosperity.

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The beginning of a new era in mental health. A paradigm change: The Argentine Case

El comienzo de una era en salud mental. Cambio de Paradigma: El Caso Argentino

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ABSTRACT: This paper aims to go through the radical transformation produced in Argentine Republic's legal and health system in the approach to mental illness, based on the paradigm changes that slowly but effectively it was installed from the Mental Health Law 26,657. The drastic replacement of a system with paternalistic criteria for that of the dignity of risk, the recognition of the person autonomy with mental illness in the exercise of their rights with due assistance, interdisciplinary treatment, the interaction between the institutions of the system health and the restrictive nature of hospitalization measures as a final ratio in cases of severe and imminent risk. The objective is to share this route in order to reflect on how society considers mental illness and the need to complete the evolution of the new paradigm in pursuit of the integration of all people through knowledge as the only useful tool to dethrone the preconceptions and ignorance that traditionally postponed the subject.

KEYWORDS: Mental health, capacity, human rights, safety, mental illness.

RESUMEN: El presente trabajo propone recorrer la radical transformación producida en el sistema jurídico y sanitario de la República Argentina en el abordaje de la enfermedad mental, a partir del cambio de paradigma que lenta pero efectivamente se instaló a partir de la Ley de Salud Mental 26.657. La drástica sustitución de un sistema con criterio paternalista por el de la dignidad del riesgo, el reconocimiento de la autonomía de la persona con padecimiento mental en el ejercicio de sus derechos con la debida asistencia, el tratamiento interdisciplinario, la interacción entre las instituciones del sistema sanitario y el carácter restrictivo de las medidas de internación como última ratio en los casos de riesgo grave e inminente. El objetivo es compartir dicho recorrido a fin de reflexionar acerca de la forma en que la sociedad considera a la enfermedad mental y la necesidad de completar la evolución del nuevo paradigma en pos de la integración de todas las personas mediante el conocimiento como la única herramienta eficaz para destronar los preconceptos y la ignorancia que tradicionalmente postergaron el tema.

PALABRAS CLAVE: Salud mental, capacidad, derechos humanos, seguridad, enfermedad mental.

INTRODUCTION

As in all branches of the hard and social sciences, at some point in their evolution, whether by exhaustion or overcoming, new conditions are produced, new knowledge is acquired that leads to a modification of the paradigm used until now. Fortunately, in recent times, from international regulations to the prevailing conceptions in society, this transformation has been reaching one of the most neglected areas in the framework of health and law; that of mental illness.

The Argentine Republic, like most of Latin America, has had an uncertain and fickle course in this matter. Its institutions and norms since colonial times in the River Plate - inherited from Western culture, where the Greeks established the dichotomy between the irrational and the rational - rarely adopted specific measures for the mentally ill, with few residences created for this purpose.

Although some asylums had already emerged in Spain in the 15th century and London Bethlem Hospital began to specialize early on in the treatment of mental illness, in the River Plate during the colonial era, this did not happen, and the mentally ill always depended on social charity and some religious orders that were responsible for their accommodation and care. At the same time, the most aggressive were usually locked up in the standard cells of the Cabildo. However, from the 17th century onwards, movements emerged in Europe that threatened to segregate the mentally ill, and these spread until the beginning of the 19th century.

In Argentina, on the other hand, during the 20th century, monovalent hospitals began to emerge, promoted by alienist doctors, designed for the treatment and hospitalization of the mentally ill in a free social environment -not a prison- and later on. Then, in some units of the prison service, the establishment of wards and then specialized psychiatric institutes, to house mentally ill people who had been declared not guilty of mental illness in the framework of criminal proceedings. All societies in different times feared the mentally ill, perhaps the unpredictability of their behaviour, the spectacular nature of some events, added to excessive and distorted dissemination, can influence the attitude that society assumes in these cases. However, without a doubt, ignorance is the basis of all apprehensive and segregated behaviour towards them.

It can be seen even though in the total number of homicides, those committed by insane persons are under-represented, being, per case, in the area of the city of La Plata, Argentina - where the Supreme Court of Justice of the province of Buenos Aires has its seat - barely 0.5% of the total number of verified cases (Folino et al., 2008). Then a proportion similar to that reported by other countries; 1% in the United States (Lamb and Talbott, 1986) and consistent with figures from other latitudes such as Copenhagen (Gottlieb and Gabrielsen, 1990); Sweden (Lindqvist, 1986); Finland (Eronen et al., 1996); Canada and England (Côté and Hodgins, 1990), 1%; Italy where the same can be seen in the research of Casarino et al. (1978) and Bandini, Gatti, Traverso (1983).

In Brazil, the research of Dr Paulo O. Teitembaum (2009) aimed at estimating the baseline rate of relapse of male and female psychiatric patients released after security measures at the Forensic Psychiatric Institute of Porto Alegre, during ten years between 1994 and 2004, is noteworthy. It showed an overall result of 32 per cent of post-external relapses, characterizing it as the recording of - at least - one police incidence of criminally sanctioned behaviour.

This research also showed that the discharge implemented progressively had a protective effect, with an increased probability of survival without recurrence. These results also led to not stipulating a minimum duration for the measure, since it was found to be more efficient to adapt it to the particular evolution of each patient. Also, accompanied by a follow-up of the patient when he or she was discharged, carried out by the judge and the judicial institution and trusts, favouring a quick and flexible decision making to control the risk factors more quickly. Then, since in many cases the relapse was due to

a delayed reaction of the system in detecting the risk factors, and deficiencies in offering support, because of not providing regular psychiatric care, medication and hospital places.

It was caused by a lack of interest in investment by the State in the training and implementation of professionals and health service environments for the evaluation and management of risk factors. In all cases the research confirms what Mulvey had already indicated in 1994 when analysing the prevalence of violence among the mentally ill; *the absolute risk when compared to the general population is shallow, only a small proportion of violence in society can be attributed to mental illness*.

The fear, even though it is unjustified and extends to the civil sphere concerning the actions and exercise of rights by the person who has a mental illness of a particular entity. Also, it has delayed the evolution in the treatment that society gives them and has determined that only in recent years, already in the 21st century, Argentina can celebrate a change of paradigm in the conception of the mentally ill, which finally respects their dignity and autonomy in both the civil and criminal law spheres.

The Constitution of the Argentine Republic not only regulates the process of creating and applying laws and the functioning of state bodies. In its first part, it makes declarations, recognizes rights and establishes guarantees, which limit individuals and the State, to safeguard the rights it considers fundamental.

Article 75, paragraph 22, provides that specific international instruments that have already been enacted and those that will be adopted in the future by the National Congress -the Legislature- have constitutional hierarchy and must be

understood as complementary to the rights and guarantees that they recognize (CRA, 1853). It is how they should be included in the subject, from the Minimum Rules for the Treatment of Prisoners (UN General Assembly, 1957). Also, to the treatment of persons with disabilities set out in the Declaration of the Rights of Disabled Persons (UN General Assembly, 1975), and more specifically in the case of mental illness, the European Convention on Human Rights (1953) article 5 regarding the cases in which the deprivation of liberty is appropriate in the case of mental derangement, subject to due process. In the American sphere, the American Convention on Human Rights (the judgments of the Inter-American Court and the work of the Commission are relevant).

In line with international standards, the American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities is of primary application - the first American international legal instrument that addresses this group explicitly.

Subsequently, on 17 December 1991, Resolution 46/119 (1991) adopted a more specific document entitled Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care.

The following resolution 46/120 dealt with Human rights in the administration of justice. On 13 December 2006, the United Nations General Assembly adopted the Convention on the Rights of Persons with Disabilities, ratified by Argentina through Law 26.378 in June 2008, constituting the highest international instrument on the subject incorporated into Argentine legislation. However, we had to wait until 2010 to see the promulgation of the National Mental Health Law No. 26,657 -and wait until 2013 to have its regulatory decree 603/13- a

significant rule in that it implied a change of paradigm in the field of Mental Health.

1. MENTAL HEALTH PARADIGM SHIFT

This law prompted a series of changes and brought new alternatives to the mental health perspective, which are still under development. One of the highlights of the law is the establishment of different restrictive conditions of confinement in mental health institutions, within a temporary context of imminent risk assessment.

Considering in its article 2 an integral part of it, the international norms, principles and documents it cites, it leaves no doubt about the contemplation of the right to mental health in relevance to human rights (National Mental Health Law No. 26,657, 2010). On the other hand, in addition to establishing forms of control and installing an interdisciplinary approach, it also commits the State in aspects such as budgetary improvement in mental health to provide adequate assistance (art. 32 of the National Mental Health Law No. 26,657 (2010) progressively sets a percentage that will reach 10 per cent of the budget allocated to health by the State).

Therefore, the impact of the law within the normative, institutional and social universe is increasing, associated with the change of paradigm. The previous paradigm that governed mental health with a regime of guardianship, paternalism and dependence, very similar to the regime of minority, was abandoned, and the new parameters now included in the recent Civil and Commercial Code of the Nation - Law 26.994 (2015).

The change started slowly since the National Constitution reformed in 1994 - under Art. 27 of the Vienna Convention (1969) on compliance with treaties - by

incorporating those ratified by Argentina, making the situation more flexible, by giving rise to the jurisprudence of the courts receiving more ductile criteria based on the law of conventions.

It is how the "Tufano" and "RMJ" or "Duarte" rulings issued between 2005 and 2008 by the Supreme Court of Justice of the Nation, applying criteria from the European Court of Human Rights and the conventions on the rights of persons with disabilities and the American Convention on Human Rights, came about.

Within this progressive harmonization, the Mental Health Law (2010) consolidated the tendency to recognize the legal capacity with support instead of its total substitution by the guardian, while the principle "pro homine" or pro persona -art. 3 Convention on Persons with Disabilities- regulated the international issue, the reports of the UN High Commissioner for Human Rights resulting from the thematic study on the interpretation of the convention were analyzed, and it was accompanied by policies in the legislative branch -art. 75 inc. 23- and reception in the judicial branch. Nevertheless, the definitive modification would be installed from the new law of mental health.

1.1. National Act 26,657

In addition to the tendency to maintain the patient's autonomy, as well as his or her family and social ties in the environment, it imposes interdisciplinary treatment, provides for active State interference in mental health care measures and the creation of new care arrangements, allocating a mandatory budget. It reinforces respect for human rights through review bodies. It incorporated 152 ter into the previous Civil Code then in force and replaced with 43 ter that of the original 482

of the previous code. It regulated in a more detailed and precise manner the issue of involuntary internments.

1.2. Regulatory Decree 603/2013

As a novelty, the regulatory Decree 603/2013 (2013) provides for the advance directives of the patient or legal representative on mental health. -art. 7 (k), as well as the application of informed consent. It specifies the exceptional nature of restrictions that limit visits, correspondence and any other contact with the outside world and its environment for the patient -art. 14- urging to provide community referrals to patients who do not have relatives or friends; it promotes the creation of care devices for addictions and mental health, pointing out in art. 10 that the devices established by law must include persons deprived of their liberty under the terms of art. 34 paragraph 1 of the Argentinean Criminal Code. (CP, 1922)

Article 20 defines "certain and imminent risk" as the contingency or proximity of damage that is already known to be real, specific and unquestionable, and which threatens or causes harm to the life or physical integrity of the person or third parties. It does not include, as clarified by the decree, the risks derived from attitudes or behaviours that are not conditioned by mental illness. (Regulatory Decree 603/2013, 2013)

The security forces that come into contact with a situation of specific and imminent risk due to an alleged mental illness must intervene, trying to avoid damage, reporting it immediately and collaborating with the health emergency system. The implementing authority and the Ministry of Security will jointly draw up a protocol for action and training in this regard. The transition to new care services in community

facilities and public and private general hospitals is also regulated. -(Regulatory Decree 603/2013, 2013)

1.3. Judgments representative of the new paradigm handed down by higher courts

In a brief review, we must highlight the ruling of the Supreme Court of Justice of the Province of Buenos Aires (2014) on May 7, 2014, accepting the new paradigm, followed by the ruling in the same sense on July 8 of the same year. Then, a new path was taken in the jurisprudence in favour of the new parameters on disability and legal protection of people affected by mental pathologies.

The first of these is case C 115,436 "Z, A. M Insania" (2014) and was brought based on the extraordinary appeal of inapplicability of the law filed by the Incapacity Adviser, alleging a violation of article 3 of the Civil Code (2015), article 28 of the National Constitution (1853) and article 152 ter - law 26,657 (2010) - as well as the plexus of conventionally enshrined rights and constitutional hierarchy recognized for persons with intellectual disabilities.

The Court considered that it was absurd to evaluate the facts and evidence in this case since a new interdisciplinary evaluation of the victim was required under the parameters set out in Law 26657 and based on the time that had elapsed since the ruling declaring her incapacity due to schizophrenia on February 28, 1997.

Similarly, in dismissing the petition, the judge considered that the ruling that consolidated the current legal relationship was not based on an interdisciplinary examination and did not set a time limit for validity or re-evaluation and

that the mere passage of time did not per se impose a duty to re-evaluate the person declared incapable.

The SCJBA, with the rapporteur's vote of Minister Luis Genoud, considered that the appeal of the Advisor should be allowed. It is because:

> The Convention for Persons with Disabilities and the Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities incorporated into our domestic law by-laws 26,378 and 25,280 marked a paradigm shift in the concept of persons with disabilities, based on autonomy and dignity (...) Thus the CDPD, Article 3 establishes as a principle the respect for inherent dignity, individual autonomy, including the freedom to make one's own decisions and the independence of persons -inc. a)-; it expressly regulates that the States parties undertake to ensure and promote the full exercise of all human rights and fundamental freedoms of persons with disabilities without any discrimination based on disability (...) It reaffirms the right to recognition as a person before the law and legal capacity on an equal basis with others in all aspects of life. Declares that States parties shall ensure that in all actions concerning the exercise of legal capacity, adequate and sufficient safeguards are provided to prevent abuse under international human rights law. (...) The aim is to achieve full respect for the dignity of every person, with particular emphasis on cases where the vulnerability exists, such as, in the present case, those resulting from lack of full mental health. The Inter-American Court of Human Rights has affirmed that the Court cannot fail to rule on the individual attention that States owe to persons suffering from mental disabilities because of their particular vulnerability ...any person in such a situation is entitled to special protection because of the special duties whose fulfilment by the State is necessary to satisfy the general obligations to respect and guarantee human rights; it is not enough that States refrain from

violating the rights, it is imperative to adopt positive measures (CTDH 4-VII-2006 Ximenes Lopez c/Brasil). (Case 115.436, 2014)

Accordingly, Minister Genoud said:

It cannot be denied the right recognized by article 152 ter of the Civil Code in a text ordered by law 26.657 (...) because as the explanatory statement of the 100 Rules of Brasilia on access to justice for people in a condition of vulnerability, to which the CSJN adhered, points out Agreement 5/2009 of 24-II-2009 the judicial system must be configured for the active defence of the rights of people in a condition of vulnerability (...) In the new paradigms that are being drawn up concerning vulnerable groups, Gonzáles Granda expresses that there is still much effort to be made in the area of mental disability due to mental illness because it affects one of the most socially vulnerable groups and consequently one that is most in need of help and protection, mainly because of the social stigma that has always accompanied this type of suffering (...) Law 26. 567 is part of the new concept of mental health, which has been referred to as the social model of disability (‘). In this context, article 1 of the Act states that its purpose is to ensure the right to the protection of mental health of all persons and the full enjoyment of the human rights of persons with mental illness in the national territory (...) and declares that mental health is a process determined by historical, socio-economic, cultural, biological and psychological components, the preservation and improvement of which involves a dynamic of social construction linked to the realization of the human and social rights of every person - art. 3- (...) Respect for the social model, the authors explain, implies that the person should not be deprived of his or her possibility to choose and act.

The application of the system created by the UN Convention for persons with disabilities must be guided by the principle of the dignity of risk, that is, the right to move and live in the world, with all the dangers and the possibility of making mistakes. In contrast to the tutelary and assistance paradigms that have been based on the dichotomy of the capacity for enjoyment and the exercise capacity, without respecting the latter under the excuse of protecting people with disabilities from the dangers of life in society. Based on such principles, the criterion of the elevation cannot be shared when denying Mrs Z. the possibility of a new interdisciplinary evaluation in terms of art. 152 ter of the CC, As we have described, the main focus of the Chamber's decision is to consider that Law 26657 does not apply to the case in question because it was issued after the decision that declared the incapacity of the plaintiff. We agree with the Deputy Attorney General when he warns that a psychiatric pathology is a dynamic, provisional and perfectible concept, and its evolution is linked to other factors that go beyond pharmacological treatment. The aim was to ensure that personal reality was reflected in the declared and protected legal situation to the extent that the person needed it. It can only be deduced from an interdisciplinary evaluation of each particular situation at a given time - art. 5 law 26.657. In this case, as the Deputy Procurator shows, Z was acquiring skills and abilities (...) the evolution that can be observed in the mental framework of the perpetrator, - duly evaluated - could lead to a new judicial ruling that limits the incapacity he currently possesses. Bearing in mind the new mental health paradigm recently established by law, which is based on the constitutional and conventional guidelines referred to above, this possibility justifies making room for the request of the representative of the Public Prosecutor's Office. Consequently, if this opinion is shared, the appeal for the inapplicability of the law must be made, and the decision appealed against (art. 289 CPCC). The orders will be sent to the original instance so that an interdisciplinary team can

> proceed to evaluate Mrs A.M.Z. (art. 152 ter CC, y RC 3196/11). (Case 115.436, 2014)

Ministers Soria, Kogan and Hitters adhered on the same grounds, and thus the sentence allowed the Advisor's appeal appealed the decision and sent the orders to the instance for an interdisciplinary team to evaluate the cause.

In similar terms, the SCJBA, in a ruling of July 8, 2014, this time with the vote of Minister Soria followed by Ministers Genoud, Pettigiani and Kogan in the extraordinary appeal of inapplicability of law filed by the Advisor of Incapacity against the ruling of the Family Court of Morón that confirmed the decision of the judge who declared the incapacity of ERE due to insanity, considering unconstitutional art. 152 ter of the CC, by rejecting the request for re-evaluation made by the Advisor.

In this ruling, Minister Soria recalled that: "the laws that aim to delimit personal aptitudes for the ownership or exercise of a right, to establish the legal status or regime that corresponds to certain legal situations, are of immediate application" (Judgment of July 8, 2014). It is the case with the rules that, as in the present case, deal with the status and capacity of persons -Ac. 45,304 sentence of 10-III-1992-. Here too, the Advisor's appeal was granted, the ruling was appealed, and the case was referred to the Court to evaluate Mr E.R.E., by an interdisciplinary team and to establish a system of representation and support and safeguards following the rules mentioned above (art. 152 ter CC, and RC 3196/11). Then, having issued the highest provincial Court, it is clear that its scope is expanding by following the guidelines of its jurisprudence, thus multiplying the importance of this paradigm shift that is being consolidated in this area.

The Supreme Court of Justice of the Nation has also applied the new standards developed from the mental health law 26.657 related to the security measures of article 34 paragraph 1 of the Criminal Code. It is highlighted by the ruling in "Antuña, Guillermo" on 13XI-2012 (Corte Suprema de Justicia de la Nación, 2012) in which, following the grounds of the Attorney General, the treatment standards established by the National Mental Health Law were considered applicable, especially art. 6 without distinction to any health service aimed at people with mental illness, whatever their legal nature (criminal or civil regime), citing the precedent of rulings 331:211 and resolution 1370/2008 file 2317/08 of 17/6/2008 aimed at ensuring compliance with such standards in the Central Psychiatric Service for men of the Federal Prison Service.

In this ruling, it was considered that according to the doctrine that emerges from rulings 139:154, 328:4832 and 331; 211 the decision of compulsory psychiatric confinement should be a process with all the procedural guarantees against arbitrary imprisonment or confinement (...) and should evaluate the opportunity for confinement, its limitation in time and the conditions of its execution - Rulings 331:211 considering 13. When the security measure is the one regulated by paragraph 1 of the Penal Code, to the general requirements must be added the requirement of proof, with the standards of evidence and of contradiction typical of the penal process.

In the case, it was considered that these guarantees had been violated since, on the sole basis of a report by a single forensic doctor, the judge had dismissed the case and ordered the accused to be admitted to the psychiatric unit of the Federal Prison Service, 48 hours after the victim's complaint had been filed and the investigating judge's decision. As a result, the

procedure did not meet the standard of due process stipulated for the imposition of psychiatric confinement measures, in violation of article 18 of the National Code (2015).

Consequently, sharing the grounds and conclusions of the Attorney General, the complaint was upheld, declaring the extraordinary federal appeal admissible and revoking the contested sentence, returning the proceedings to the Court of origin so that a new one could be issued following the law (Ministers Ricardo Lorenzetti, Juan Carlos Maqueda, Raúl E. Zaffaroni and Carlos S. Fayt voted).

2. THE NATION'S NEW CIVIL AND COMMERCIAL CODE

The evolution that had been seen since the change of paradigm was completed with its reception in the new Civil and Commercial Code of the Nation - Law 26.994 (2014) that ascribed to the new paradigm the capacity of law was limited concerning facts, simple acts or determined legal acts -art. 22 - and what is more important, by regulating the capacity of exercise - art. 23 - which recognizes every human person and which can only be expressly limited by the Code and in a judicial sentence, indicating in art. 24 the classification of persons who can be reached by such limitation to the exercise of their rights.

Article 31 is particularly important as it establishes the general rules governing the restriction of the exercise of capacity, which is attached to the social model of disability and establishes a minimum nucleus of guarantees, referring in particular to the regulation of specific legislation, Law 26.657 in this case.

Article 31(a) presumes the overall capacity to exercise a human being, even when he or she is confined to a care facility, and is supplemented by the following paragraphs, which are transcribed here because of their importance (b) limitations on capacity are exceptional and always imposed for the benefit of the person; (c) State intervention is always interdisciplinary, both in treatment and in the judicial process; (d) the person has the right to receive information through means and technologies appropriate to his or her understanding; (e) the person has the right to participate in the judicial process with legal assistance, which must be provided by the State if he or she lacks the means; (f) priority must be given to therapeutic alternatives that are less restrictive of rights and freedoms. Article 32 states that the judge may restrict the capacity for certain acts of a person over 13 years of age who suffers from a permanent or prolonged addiction or mental disorder of sufficient seriousness, provided that he or she considers that the exercise of his or her full capacity may result in damage to his or her person or property. (Law 26,994, 2014)

About such acts, the judge must designate the necessary supports provided for in Article 43, specifying the functions with reasonable adjustments according to the needs and circumstances of the person. The supports must promote autonomy and favour decisions that respond to the preferences of the protected person. By exception, when the person is unable to interact with his environment and express his will by any appropriate means or format and the support system proves ineffective, the judge may declare the incapacity and appoint a guardian.

Registration in the Civil Status and Capacity Registry is decisive because, from that moment, the validity of the acts performed is established according to the regulations of the

code and the provisions of the respective sentence. Up to this point, the most relevant aspects of the system implemented by the new code in this area and to illustrate better the differences between the old model and paradigm and the current one, the most critical items in the Table 1 are as follows.

Table 1: Comparison between the previous Civil Code, the New Code and Law 26.657

COMPARISON TABLE		
Previous Civil Code	**New Code CC**	**Law 26.657 Current Paradigm**
Paternalistic paradigm. Declared person incapable was subject to protection with restrictions on his autonomy to exercise his rights.		The paradigm of the dignity of risk.

In 1968, Law 17.711 began to make the original system more flexible through the 152 bis disqualification of a capable person with the limitations imposed in the CC and the sentence that disqualified him.		The 26.657 in this line incorporated the 152 ter to the old CC for the disabled or incapacitated. It demands limit 3 years and interdisciplinary evaluation that should specify limited functions and acts trying the possible minor affectation of personal autonomy.
Replacement model in the decision making.	Assistance model and support (Articles 31 and 43).	Assistance and support model.
		Art. 7: Less restrictive therapeutic alternative.
		Art. 8: Interdisciplinary care.
		Art. 8: Ambulatory with a dynamic approach. They are reinforcing ties.

		Art.10: Informed consent.
		Art. 11: Promoting inclusive actions.
Prisoner of personal freedom when it is feared that using it will harm or injure another.	Article 41 of the Special Law applies.	Art. 14: Restrictive criterion of Interdisciplinary Admission. They are maintaining ties.
		Art. 15: Brevity of hospitalization.
		Art. 20: Certain and imminent risk of hospitalization is exceptional.
		Art. 23: Discharge, externalization or exit decided by the health team without judicial authorization, except in cases 34.
		Art. 27 and 28: General hospitals.
		Art. 29: Irregularities are obligations of the team.
		Art. 30: Priority is given to family containment.
		Art. 32: Fixed budget item.

		Art. 35: Compulsory census of boarding schools.

Sources: Old Civil Code (law 17.711, 1968), Civil Code (2015) and National Mental Health Law (law 26.657, 2010).

Own elaboration

As can be seen at first sight in the comparison of both systems, the change of paradigm has been established in favour of the person and the exercise of his or her capacity, far from the system that assimilated him or her to the regime of minority, it prioritizes his or her voice. It will, contemplates support and ways of assisting him or her to maintain his or her autonomy and recognizes him or her in the criterion of the dignity of risk, the right to make mistakes that any human being has.

That exaggerated protection that paradoxically culminated in leaving him voiceless and helpless has been abandoned. However, in the institutions and the mentality of the operators and above all in society, there is still much to be done, because the law can impose a new paradigm relatively immediately, however, overcoming the resistance and preconceptions of human beings is a task that requires continuity and consistency.

The incorporation of interdisciplinary teams is also an aspect to be studied in-depth because it does not mean that several members of a team with different specializations act in parallel or divide their tasks, but rather the search for a joint contribution and exchange of opinions coming from the different knowledge and areas of expertise that each member contributes. Much remains to be done; through protocols, the highest institutions of the judiciary are implementing

coordinated action by magistrates and operators in the civil and criminal spheres, so that there is no longer that blatant division that excluded from the social sphere those mentally ill persons admitted to the criminal system for committing crimes and subject to security measures.

It also remains to ensure that extra-mural institutions are integrated so that the prison service's specialised psychiatric units are not necessary and that all persons can receive consistent and coordinated assistance in their treatment, making it more feasible and less challenging to move from the maximum measure of confinement (internment), which is applied restrictively to the most severe cases, to the trial discharges that may culminate, by appropriate therapeutic accompaniment and containment during their stay, to externalisation and cessation of the internment that is a further step for the person with mental illness.

CONCLUSIONS

Many aspects have been carried out, the tendency to reduce or eliminate large monovalent hospitals in favour of primary mental health care in general hospitals is maintained and deepened, but everything that remains to be done will be possible thanks to the evolution and development of a new paradigm that has already been installed and that fortunately contemplates health and mental illness with another look, an inclusive and humane vision, following the dignity that we all have essentially and basically for the fact of being human.

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Judicial reform: brief considerations on Constitutional Amendment 45/2004

Reforma judicial: breves considerações sobre a Emenda Constitucional 45/2004

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ABSTRACT: This paper analyses the problems regarding the efficiency in the Judicial System, showing the difficulties in identifying that, once it has to deal with the output of the system, studying quality and quantity. It shows the possible reasons for the inefficiency and studies the solutions suggested to improve the system, including some reforms in the legislation. After, it focuses on the constitutional amendment in Brazil, no. 45\2004, that has established another demand for the appeals to be accepted at the Supreme Court. It also questions the utility, once most of the appeals were retained in the lower-level courts waiting for the Supreme Court's decision in similar cases. It concludes that reforms to search for a more efficient system have to study each country's condition to adopt the best solution for the problem.

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

ABSTRACT: Esse artigo analisa os problemas de eficiência nos sistemas judiciais, demonstrando a dificuldade na sua identificação, uma vez que lida com o *output* do sistema judicial, que mescla qualidade e quantidade. O artigo mostra as possíveis razões para a ineficiência e estuda soluções

sugeridas para melhorar o sistema, dentre elas a reforma das legislações. Passa, então, a analisar a Emenda Constitucional 45\2004, que estabeleceu outra exigência para que os recursos extraordinários fossem aceitos no Supremo Tribunal Federal. Na sqeuência, questiona a utilidade da reforma, uma vez que a maioria dos recursos foram sobrestados, esperando a decisão final do Supremo Tribunal Federal. Conclui que as reformas para a melhoria do sistema judicial devem estudar a particularidade de cada país de modo a adotar a solução mais indicada para a melhoria do sistema.

PALAVRAS-CHAVE: justiça, reforma jurídica, norma jurídica, constituição, sistema político.

INTRODUCTION

This paper will analyse the measures suggested for greater jurisdictional efficiency because of the global judicial system's crisis, focusing on the general repercussion instituted by Constitutional Amendment 45/2004.

By way of introduction, we will indicate the causes that are doctrinally pointed out as responsible for the delay and lack of quality of the jurisdictional provision and the various solutions proposed, collating statistics that seek to delimit the spectrum of actions aimed at an improvement in the system.

Next, we will make a brief study of the modification made to the Constitution about the processing of extraordinary appeals, citing examples and statistical data.

1. EFFICIENCY OF JUDICIAL PROVISION

It can be stated that the central aspect of the crisis that affects the jurisdiction throughout the world is precisely the fact that the jurisdictional provision arrives late, failing to effectively grant the holder of the right the subjective right pursued.

According to Dakolias (1999, p. 5), the performance of the Judiciary can be analysed based on efficiency, access to jurisdiction, fairness of decisions, trust of the population and independence, which, in turn, are interrelated concepts, efficiency being measured by the quality and time of the process.

Thus, measuring efficiency is an arduous task since it mixes quality and celerity, the former being challenging to conceptualize. Indeed, what are the apt parameters to qualify the jurisdictional provision?

Botero et al. (2003) teach that the concept of efficiency and how to evaluate it is controversial. For Hassan (1999), the difficulty in the analysis and adoption of measures for judicial reform is precisely that of measuring the output of the judicial system.

The reasons for the inefficiency of justice are varied. Based on an analysis of the world's legal systems, Botero et al. (2003) point out four doctrinal reasons. One relates inefficiency to the scarcity of resources, making it necessary to increase the number of judges and legal professionals and modernise the judicial system through computerisation and training. Another, which indicates that facilitating access, which should bring more justice, has ended up flooding the Judiciary with irrelevant lawsuits, delaying the provision of justice, and advocates its limitation through measures such as restricting the fees paid to lawyers. As an example of a legal system that would benefit from this measure, he mentions the American system since the high amounts received would stimulate litigation (Olson, 1992). A third reason points to the need to encourage alternative means of conflict resolution, such as out-of-court settlements, by all law operators, be they judges, lawyers or third parties. Finally, it blames inefficiency on the complexity of the procedure and the rigidity of the rules of law (Botero et al., 2003; Tsuro, 2003).

Proposed solutions

Botero et al. (2003) point out that financial support would be of interest in systems that do not have structures and that there are concrete examples of improvement through the hiring of personnel in Argentina and Ecuador, while there is no positive effect in the United States and the countries of Latin America and the Caribbean. In Paraguay, there was a combination of factors, such as financial support and changes in legislation, leading to the adoption of the oral procedure (Dakolias, 1996).

Although studies indicate that increasing the number of judges is not the solution to inefficiency, one cannot fail to observe that, once all other needs are met, more judges would bring about better performance of the jurisdiction. Not necessarily in quantitative terms, but in qualitative terms (Dakolias, 1996, pp. 19-21; Sadek, 2004).

It is valid to collate the data related by the World Bank, establishing that the number of judges in Brazil per 100,000 inhabitants in 2000 was 0.54, with an average of 6.38, and that it reached 18.06 in Colombia, 10.79 in Italy and 9.61 in Spain. (Albers, 2003).

In Brazil, and essentially in the federal courts, this problem is aggravated by excessive litigation by the executive branch, with the constant filing of appeals. According to Linn (2004), it is a way to control expenses, denying the concession of the right in administrative matters.[1] . Moreover, it concludes, in the end, that the Executive Power, although it is the worst critic of the system, is one of those who most contribute to the

1 *In original wording:* "We also found, unexpectedly, that government litigation is often a large part of the growth in demand, and that government attorneys have a habit of increasing congestion by appealing every negative judgment. This is true whether the government was the plaintiff or the defendant, although the latter situation is increasingly linked to a practice of controlling the cash flow by sending routine administrative cases (e.g. calculation of pension benefits) to the Court. Hence, while the executive branch is often one of the Judiciary's strongest critics, it is also a major contributor to the problems".

problem.[2]. This conduct is also perpetrated in private suits as a way to postpone the fulfilment of the obligation. [3-4] .

Regarding the reduction of access to jurisdiction, leaving aside the legal issue of its unconstitutionality, which in Brazil would be insurmountable, given the provision outlined in Art. 5, XXXV, of the Federal Constitution, the same authors cite studies which indicate that in some countries the effective reduction of the demands in the course had positive effects (Argentina and Ecuador, Buscaglia; Dakolias, 1996 apud Botero et al. 2003), and in others, the irrelevance of this factor (Latin America and the United States, Buscaglia; Ulen, 1997 apud Botero et al. 2003; Church et al., 1978 apud Botero et al. 2003; Feeley, 1983, apud Botero et al. 2003; Goerdet et al. 1989, 1991, apud Botero et al. 2003; Mahoney et al. 1985 apud Botero et al. 2003).

Reforms to encourage more efficient prosecution are analysed from the perspective of all legal practitioners. Studies indicate that rules imposing trial deadlines are not always observed. (Dakoilas, 1996). The author adds a factor that would provide further incentive, which links the judge to the demand, which has led to more incredible speed in the United States (Church et al. 1978 apud Botero et al. 2003). In Latin America, its importance has been noted in some countries

2 This is also the thought of Sadek (2004, p. 89-139).

3 Pinheiro (2002) states that: "The survey assessed two types of causes for the slowness of justice. The first concerns the large number of cases brought before the courts by individuals, companies and interest groups, not to fight for a right, but rather by exploiting the slowness of the Judiciary to postpone the fulfilment of an obligation. As the results in Table 5.1 illustrate, the magistrates observe that this is a widespread practice in the tax area, particularly at the federal level. It is also frequent in cases involving loans, rents, and commercial and labour disputes. This suggests that there is room to unclog the Judiciary by penalising this type of behaviour and that measures that speed up the progress of cases, particularly in the tax area, can bring significant gains in terms of reducing the workload of magistrates since they would discourage the misuse of justice".

4 "Our evaluation of the Brazilian experience was mixed. Courts provided relief rapidly to individual plaintiffs, but the proceeding used ("mandado de segurança" to protest a violation of protected rights) only fixed the individual case. It left the abusive administrator to continue the practice undeterred. The finding in both senses has wider relevance, as most judicial reforms have assumed it is commercial and not administrative law that most affects private sector activity" (Linn, 2004).

(Buscaglia; Dakolias, 1996 apud Botero et al. 2003), but no relevant results have been obtained in others. (Nimmer, 1978 apud Botero et al. 2003).

Here, the specialization of jurisdiction is added as a means of increasing effectiveness. He specifically mentions the example of Brazil, concerning the creation of the State Special Courts in 1995 (Bermudes, 199:347), as an experience that yielded good results.

In addition, it establishes that specialized courts for simplified collection have been created in Germany, Japan and the Netherlands (Blackenburg 1999; Kojima 1990; Rohl 1990 apud Botero et al. 2003); specialized courts for labour cases in Ecuador and commercial courts in Tanzania have shortened case processing times (Cole 2001; Dakolias, 1996; Finnegan 2001 apud Botero et al. 2003).

Regarding procedural changes and simplification, in Brazil, reforms have been made in the Constitution and the procedural codes, and other proposals have been implemented, implying changes of great relevance, with the creation of institutes such as the anticipation of jurisdictional guardianship, the reduction of applicable appeals.[5]And the creation of more straightforward procedures for certain types of actions.[6 and 7].

5 The Federal Senate Bill 166/2010, which aims to reform the Code of Civil Procedure, establishes a change in the procedural system, with the prohibition of appeals to interlocutory decisions, except for some hypotheses, since this is one of the factors that considerably increase the number of proceedings in the courts.

6 Constitutional Amendment 45/2004 established the possibility of issuing a binding precedent, that is, the pronouncement of the STF on a given matter, which is binding on the other organs of the administration and the Judiciary, in verbis: "Art. 103-A. The Federal Supreme Court may, ex officio or at its initiative, upon the decision of two-thirds of its members, after repeated decisions on constitutional matters, approve a precedent which, as from its publication in the official press, shall be binding on the other bodies of the Judicial Power and the direct and indirect public administration, in the federal, state and municipal spheres, as well as revise or cancel it, as established by law".

7 Concerning this issue, Linn (2004) takes the opposite view when he states that the problem of inefficiency in Latin American judicial systems is generally attributed to the codes, when in fact they originate in the week selection, training and motivation of staff and political interference, inadequate supervision and poor organisational design.

The studies carried out by Botero et al. (2003) conclude that, in general, the measures are taken simultaneously, making it challenging to identify which measure generated the positive effects.

Thus, for example, about the special courts, it is not possible to say whether the greater efficiency was due mainly to the specialisation of the Court or to procedural simplification.

Moreover, many of the measures end up achieving the desired goal only in some countries, leading to the conclusion that a specific study of local peculiarities is indispensable before seeking judicial reform (Dakolias, 1996)[8].

2. THE INSTITUTE OF GENERAL REPERCUSSION: BRIEF CONSIDERATIONS ON STATISTICAL DATA

Having highlighted the most relevant problems that are usually indicated concerning the lack of celerity of the Judiciary and the measures that could be adopted, a more specific question arises. What would be the solution to the crisis that the Judiciary is going through in Brazil, given its characteristics?

Here, we will briefly address the institute of general repercussion as a requirement for processing extraordinary appeals and its scope.

As we pointed outlines ago, the greater efficiency of the jurisdiction cannot be sought as a mathematical formula. According to Linn (2002), what is necessary for an excellent judicial reform is an investigation to propose changes in the legal system. Furthermore, it is essential to analyze the utility generated, employing a study of costs and benefits.

8 In this sense, Dakolias (1996): "The most important elements include Independence of the Judiciary - appointments, appraisals, disciplinary system; judicial administration - administration of the Courts of Justice, case management, procedural legislation; access to justice - alternative dispute resolution mechanisms, costs of the Courts of Justice, public defenders, small claims courts, and gender issues; legal education - for students and the general public, and training for lawyers and judges; and professional bar councils. Although these are the basic elements, the particularity of each judicial system does not allow for complete specificity in the recommendations proposed in this document. These specificities may only emerge as a result of in-depth analysis and review of the judicial sector in each country" (Translated by Sandro Eduardo Sarda, 1996).

As we have already established, Dakolias (1999) states that effectiveness can be measured by the quality and time of the process. More timely jurisdictional provision, but also of higher quality. Thus, it should be observed if there was the maximization of utility for society with the rule's implementation.

2.1. The Federal Supreme Court

Sadek (2004) points out that a positive measure would be the specialisation of the Supreme Federal Court, transforming it into a Constitutional Court.[9], determining the binding of other organs to its decisions[10] and having as a consequence the reduction of the number of cases in progress[11].

The Constitutional Amendment 45/2004 partially operated this form of specialization of the highest organ of the Brazilian Judiciary,[12] introducing some of the proposed changes.

Thus, Art. 103-A[13] established the possibility of the Court issuing binding precedents, with mandatory compliance by lower courts and the public administration.

9 Dallari explains that "the Supreme Federal Court should be transformed into a Constitutional Court, keeping only the competencies that directly concern the interpretation of the Constitution, the verification of the Constitutionality of rules and acts issued by public authorities, the solution of competence conflicts derived from doubts about the correct application of constitutional provisions, as well as other facts and other circumstances that involve the guarantee of supremacy and effectiveness of constitutional rules".

10 Since the pronouncements in diffuse control do not have binding force, but only those of complete control.

11 According to data contributed by the same doctrinaire, more than 80% of the cases brought before the STF refer to matters that have already been judged, and there are repeated cases that have been judged more than 10,000 times by the body (Sadek, 2004, p. 126).

12 Although the body's jurisdiction nevertheless remains very broad. Arts. 102 and 103 of the Federal Constitution.

13 "Art. 103-A. The Federal Supreme Court may, ex officio or at its initiative, upon the decision of two-thirds of its members, after repeated decisions on constitutional matters, approve a precedent which, as from its publication in the official press, shall be binding on the other bodies of the Judicial Power and the direct and indirect public administration, at the federal, state and municipal levels, as well as review or cancel it, as established by law.

Furthermore, access was restricted to extraordinary appeals, indicating the general repercussion for their processing, as can be extracted from the reading of Art. 102, paragraph 3[14][15].

The evolution of the STF's procedural progress can be seen in the following graphs:

Graphic 1: Movements STF (1990-1999)
Source: Supremo Tribunal Federal (2021, s. p.)

Movements STF	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999
Field cases	18.564	18.438	27.447	24.377	24.295	27.743	28.134	36.490	52.636	68.369
Distributed procedures	16.226	17.567	26.325	23.525	25.868	25.385	23.883	34.289	50.273	54.437
Judgements	16.449	14.366	18.236	21.737	28.221	34.125	30.829	39.944	51.307	56.307
Published rulings	1.067	1.514	2.482	4.538	7.800	19.507	9.811	14.661	13.954	16.117

Graphic 2: Movements STF (2000-2009)
Source: Supremo Tribunal Federal (2021, s. p.)

Movements STF	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
Filed cases	105.307	110.771	160.453	87.186	83.667	95.212	127.535	119.324	100.781	84.369
Distributed procedures	90.839	89.574	87.313	109.965	69.171	79.577	116.216	112.938	66.873	42.729
Judgements	86.138	109.692	83.097	107.867	101.690	103.700	110.284	159.522	130.747	121.316
Published rulings	10.770	11.407	11.685	10.840	10.674	14.173	11.421	22.257	19.377	17.704

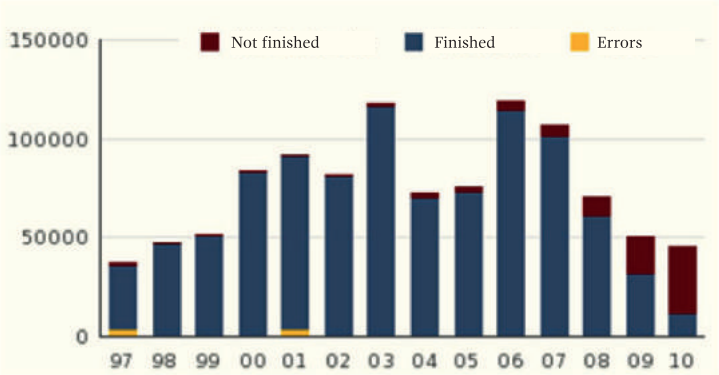
14 Processing the case would suspend other appeals pending judgment and refer one or more other appeals to the STF. A decision denying the general repercussion would apply to all the suspended appeals. If accepted and judged, the Courts could dismiss them or retract their decisions, or, failing this, the STF would hear all the cases in "limine".

15 The general repercussion occurs whenever the decision is contrary to the dominant jurisprudence of the body or a precedent.

Graphic 3: Movements STF (2010-2011)
Source: Supremo Tribunal Federal (2021, s. p.)

Movements STF	2010	2011
Files	71.670	4.274
Distributed procedures	41.014	2.073
Judgements	103.869	2.143
Published rulings	10.814	- –

Graphic 4: Judicial Process (1997-2010)
Source: Jurídico High Tech (2010, s. p.)



The graph represents the number of cases that have been filed with the STF, starting in 1997, with the red ones being non-finalised, the blue ones finalised, and the yellow ones contain errors.

After an increase in the number of new cases in 2006, there was a reduction in 2007, from 119,324 cases filed in 2007 to 71,670 in 2010.

It should be noted that, although Constitutional Amendment 45 dates back to 2004, the legislation that established the general repercussion procedure, Law 11,418/2006 of 19 December 2006, came into force sixty days after its publication in 2007, the year in which the number of cases filed began to decrease. There was a significant increase in the number of cases heard, surpassing, since 2007, the number of cases distributed.[16].

Indeed, a more detailed empirical study is needed to extract whether the reasons for the decrease are directly related to the legislative change, treating the present question as a starting point for studying the topic[17] (Meritíssimos, 2015).

According to data gathered from the STF *website*, from 2007 to 2012, there was a 64% reduction in the distribution of appeal cases. Of the cases brought before the STF, 70.59% had their general repercussion recognized, 28.3% were denied, and 1.11% are still under analysis. Of those whose general repercussion was recognized, 72.99% are pending trial (Supremo Tribunal Federal, 2021).

Thus, there was a significant decrease in distributed cases (64%). However, according to Almeida (2013), 89.29% of the extraordinary appeals filed currently were suspended, awaiting the decision of the Supreme.[18] .

Thus, another question arises: whether there has been a practical improvement in efficiency through the measure adopted in light of the delay in judging the cases submitted for review. It is observed that the delay in the judgment of extraordinary appeals has led to a chain reaction throughout the Judiciary's structure, as countless cases have come to a standstill awaiting the Supreme Court's final decision on the matter.

16 The form of processing and judgment affected all cases with the same law to be analyzed and established the possibility of suspending appeals in the STJ.

17 This, however, is the understanding endorsed by the NGO Transparency Brazil and the STF itself.

18 Repercussão geral: quando a busca por eficiência paralisa o Judiciário. Revista Consultor Jurídico, January 28, 2013, available at: <http://www.conjur.com.br/2013-jan-28/fabio-portela-quando-busca-eficiencia-paralisa-poder-judiciario>.

An analysis of the data found on the STF website shows that there were 423,468 appeals stayed on 20/10/2012, as shown in the table below:

Graphic 5: Total number of cases stayed by the general repercussion per Court

Source: Supremo Tribunal Federal (2021, s. p.)

Total number of cases stayed by the general repercussion per Court		
Court	**Latest Update**	**Processes**
Federal Special Court of the Federal Regional Court for the 2nd Region	13/09/2011	8.683
Federal Special Court of the TRF of the 3rd Region	13/09/2011	33.325
Federal Special Court of the Federal Regional Court for the 4th Region	13/09/2011	29.878
Federal Special Court of the TRF 5th Region	13/09/2011	15.775
Superior Court of Justice	05/03/2012	2.027
Court of Justice of Minas Gerais	05/06/2012	16.015
Court of Justice of Santa Catarina	16/10/2012	2.725
Court of Justice of São Paulo	22/10/2012	194.907
Court of Justice of Rio de Janeiro	20/03/2012	6.554
Court of Justice of Rio Grande do Norte	20/09/2012	834
Court of Justice of Rio Grande do Sul	05/03/2012	47.085

That is, there was effectively a reduction in the number of cases in progress. Nevertheless, could it be said that utility was maximised?

Almeida, Fábio Portela Lopes states that there was a 41% increase in the filing of extraordinary appeals after

implementing the legislative change, compared to the previous year. This data should be considered but cannot be considered a direct consequence of the change.

Indeed, to analyse the improvement in the provision of justice, about the previous system, the average number of appeals lodged and appeals heard must be taken into account to glimpse a possible increase.

We believe that, given the existence of dual constitutional control in our jurisdictional system, with the possibility of a comprehensive analysis in the concrete case, it was salutary to impose a limitation on access to extraordinary through diffuse control instances.

Then, the current problem is to implement the constitutional amendment to achieve the desired goals, and the Court must prioritise the trial of extraordinary appeals.

Moreover, it is necessary to question the other constitutional competencies of the body, which are too extensive, eventually influencing the celerity of the trial, and the reduction of these competencies cannot be ruled out, aiming at greater efficiency of the constitutional judicial provision.

The economic advantage of seeking a solution through a change in procedure is apparent compared to other measures, such as hiring more public servants, expanding computer systems and the number of judges, although these cannot be dismissed out of hand.

CONCLUSION

The crisis experienced by the Judiciary throughout the world has its origin in the lack of efficiency of judicial provision. The holders of subjective rights are unable to protect their rights in an adequate time and manner. The consequences of this crisis are manifold. In Brazil, for example, it is estimated that the delay in the jurisdictional provision is the cause of the reduction of 10% of the investments and 9% of the offer of employment (Pinheiro, 1998 apud Dakolias, 1999).

Many are the measures indicated as adequate by the doctrine to improve the panorama. However, what is observed is the need to analyse the country situation, since research indicates that the providence chosen brings positive effects in only a few countries.

It is necessary to seek the maximization of utility by analysing costs and benefits, which is measured by the celerity and quality of the jurisdictional provision.

It was observed that the modifications operated by the Constitutional Amendment 45/2004, seeking to restrict the role of the STF to that of a Constitutional Court, even if timidly, led to a decrease in the number of cases filed and an increase in the number of cases sentenced, even exceeding annually the cases that entered the Court. Nevertheless, the number of cases that stayed in the lower courts has grown too much, and we cannot conclude that there has been a practical improvement in the outcome of the jurisdiction.

The studies made serve as a start since many variables can influence the data investigated and have not been adequately analysed.

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"Constitutional" public policy making in context: the peruvian experience

La formulación de políticas públicas "constitucionales" en el contexto: la experiencia peruana

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ABSTRACT: In this article the authors will identify how the reform of the "new" Peruvian Constitution policy was implemented, with particular emphasis on the influence of the Constitutional Court of Peru. At last, using the theory of public choice, we will present three cases that allow them to conclude that the Peruvian Constitution does not reflect a particular ideology but rather a mix of values that can be opportunistically used by interest groups. The first example deals with the regulation of the education, health and social security sectors. In this case, the authors conclude that the regulation is mercantilist. The second example deals with the "stabilization acts" for foreign investment contracts. In practice, this provision was used to concede a legal monopoly to Telefonica, a telecommunications company. Finally, our third case refers to the treatment of natural resources. In accordance to the Constitution, natural resources are property of the State, not the owner of the land. This anti-market provision has caused economic losses and social conflicts.

KEYWORDS: Public policy making, public choice, institutional framework, interest groups.

RESUMEN: En este artículo los autores identificarán cómo se implementó la reforma de la "nueva" política de la Constitución peruana, con especial énfasis en la influencia del Tribunal Constitucional del Perú. Por último, utilizando la teoría de la elección pública, presentaremos tres casos que les permiten concluir que la Constitución peruana no refleja una ideología particular, sino más bien una mezcla de valores que puede ser utilizada de manera oportunista por los grupos de interés. El primer ejemplo se refiere a la regulación de los sectores de la educación, la salud y la seguridad social. En este caso, los autores concluyen que la regulación es mercantilista. El segundo ejemplo trata de las "leyes de estabilización" de los contratos de inversión extranjera. En la práctica, esta disposición se utilizó para conceder un monopolio legal a Telefónica, una empresa de telecomunicaciones. Por último, nuestro tercer caso se refiere al tratamiento de los recursos naturales. De acuerdo con la Constitución, los recursos naturales son propiedad del Estado, no del propietario de la tierra. Esta disposición anti-mercado ha causado pérdidas económicas y conflictos sociales.

PALABRAS CLAVE: Elaboración de políticas públicas, elección pública, marco institucional, grupos de interés.

INTRODUCTION

The idea that the Peruvian Constitution is "neoliberal" is pervasive within constitutional scholars and, consequently, among the population. In this article, we have tried to prove that this is a myth. The Peruvian Constitution is a child of the Washington Consensus, but the Consensus itself is not "neoliberal". Also, constitutional practice, especially in a country with interventionist tendencies, will ultimately conspire against any constitutional efforts to institutionalize a free market economy.

In this article, we will go down to reality and prove how the Peruvian Constitution was far from the neoliberal ideal in two senses: i) it was enforced by authorities that did not share the values or interests of the Fujimori's regime; ii) it was habitually used to advance private interests. For this, in the first part of the article, we will show how these constitutional provisions were used in reality and were changed through constitutional practice, especially by the decisions of the Constitutional Court of Peru. We will characterize the provisions as "not neoliberal" and, ultimately, show that even when the provisions post Consensus are -at least on paperless interventionist than the former ones, they are not "neoliberal".

In the second and last part, we will present three cases to demonstrate that the Peruvian Constitution could be more easily explained in public choice theory terms than as an ideological pursuit of a neoliberal economy. The first example deals with the regulation of the education, health and social security sectors. In this case, we conclude that the regulation, rather than "neoliberal", is mercantilist. The second example deals with the "stabilization acts" for foreign investment contracts. In practice, this provision was used to concede a legal monopoly to Telefonica, a telecommunications company, when it entered the Peruvian market to replace the state-owned company. Finally, our third case refers to the treatment of natural resources. According to the Constitution, natural resources are property of the State, not the landowner. This anti-market provision has caused economic losses and social conflicts. Also, these cases had in common that they have an anti-market orientation. Indeed, the Peruvian Constitution does not mandate this outcome, but the institutions that it creates are perfectible compatible with it.

1. REAL IMPACT OF THE CONSTITUTIONAL REFORM

1.1. Private but Regulated

Before 1993, telecommunication, electricity, and mineral exploitation were –primarily– state-owned businesses in Peru. After the enactment of the 1993 Constitution, most formerly public utilities were privatized. The first one was Telefonica del Peru, in 1994. For that end, institutions like *PROINVERSION*[1] were created.

It is to be noted that the Privatization Act was passed in 1991, even before the enactment of the Constitution. However, no privatization was initiated before the Constitution, so –apparently– the Constitution played a role in changing the equilibrium of power, giving leverage to the government to undertake their reforms (Ortiz de Zevallos et al., 1999).

In the case of monetary stability, the Constitution also played a significant role, since the Constitution created an independent central bank, capable of structuring the Peruvian economy. It is also true in the case of opening the Peruvian economy to free trade. Norms like 'stabilization contracts' are unique to the Peruvian Constitution and are used continuously by corporations to secure their investments, along with other provisions.

In other aspects, like regulation, it is more difficult to see the influence of the Constitution. Before the 1993 Constitution, the Peruvian economy was small and mainly state-owned. In such a scenario, there is no need for economic regulation.

Conversely, a traditional state-owned economy would face difficulties when changing radically to a system of free enterprise. Therefore, when the Peruvian economy was privatized and opened to the world, a need for regulation emerged. Because of this, the Peruvian economy went from 'state-owned' to 'mostly privately owned but regulated.' Then, it

1 Spanish acronym for Investment Promotion Agency.

is not easy to see how the Constitution has helped to deregulate the economy.

In general, though, the balance in diminishing the degree of government intervention is positive. On the one hand, the Constitution has procedural and substantive mechanisms that help deregulate or stop regulations. On the other hand, a privately owned but regulated economy is freer than a State-owned one.

1.2. The Role of the Constitutional Court

As stated by Elster (1994), the impact of a Constitution on economic performance is not simply a matter of the text itself' because of three reasons. First, constitutional arrangements are not always explicitly stated in a constitution. Some countries do not even have a constitution in the formal sense (the United Kingdom, for example). Second, constitutions can be useful or ineffective. Some of the more repressive regimes in the world have a long list of fundamental rights. As we say in Peru, some norms are 'dead words.' Talk is cheap, and so is writing a bill of rights. The same applies to other constitutional commitments. Third, the text of the Constitution is alive in some sense, moreover when constitutional courts are in place, which is currently the case in Peru.

In Peru, the "meaning" of the Constitution is decided to a great extent by the decisions of the Constitutional Court. In this context, for example, the Peruvian Court has stated that 'stabilization contracts' have constitutional limits: *i.e.*, the government needs a justification to enter these agreements, and the content of the agreements is subject to constitutional scrutiny (Decision STC 0003-2001-AI, 2001).

The influence of the Constitutional Court in developing the 'second wave' of the Washington Consensus agenda can be seen in at least three areas:

a) The recognition of social rights beyond the scope of the Constitution

b) A pro-state-intervention interpretation of (neo) liberal constitutional provisions; and,

c) In general, sn indulgent treatment of economic regulation.

1.3. The Recognition of Social Rights Beyond the Scope of the Constitution

Similarly, as in the case of Colombia, even when the 1993 Peruvian Constitution has some provisions that can be interpreted as neoliberal, the Constitutional Court has had a more notable role in protecting social rights than other areas. The Court has even recognized some rights that are not explicitly considered in the Constitution, like the right to water. (Decision 06534-2006-PA/TC, 2006)

About the Colombian case, it has been said that:

> Since its creation in 1991, the CCC (Constitutional Court) has actively and progressively defended the protection of social rights in areas such as health, labour social security, education, and housing. Its endeavours have constituted active resistance to the neoliberal policies that have been implemented in Colombia. These policies have developed the neoliberal economic clauses present in the Colombian Constitution, which clash with the social promises of the constitutional text. Indeed, through a strategy of economic liberalization and with the support of international agencies, the Colombian government has privileged the neoliberal orientation of specific constitutional clauses over the rights-based general orientation of the Constitution. In contrast, the CCC has emphasized the importance of

> protecting constitutional rights, human dignity, social inclusion, and equality, and has, therefore, imposed specific, considerable limitations on neoliberal policies. (Decision 06534-2006-PA/TC, 2006; Saffon, 2007, n. 25) (The added text is mine)

The Peruvian case is similar in that the Court has a progressive approach to economic issues, always remarking the fact that the Peruvian Constitution does not privilege economic aspects over the dignity of people.

For example, even when the Constitution does not recognize a right to have water, the Peruvian Constitutional Court has declared water as a human right.

> 19. Water, as a natural resource, does not only contribute directly to the consolidation of the fundamental rights mentioned but from another personal perspective impacts the social and economic development of the country through the policies that the State undertakes in a series of sectors. That is the case of agriculture, mining, transport, industry, and others. It can be said, therefore, that thanks to its existence and employment it becomes possible the sustained development and the warranty that society as a whole does not get prejudiced, in the short, medium and long term.
>
> 20. Thus, even when it is not part of the controverted matter, it is clear that the consideration of the essential role that water has for the individual and society as a whole allows for situating its status not only at the level of a fundamental right but also as an objective value that the Constitutional State has to privilege.
>
> The context in which these declarations were made was a case of a person living in an apartment building with a contract with SEDAPAL (the state-owned Peruvian

> company of water supplier). The contract provided for separate invoices (one for each apartment owner) of water service, but if 25 per cent of owners in the building fail to pay, SEDAPAL will cut service to all. (Case file 06534-2006-PA/TC, 2006)

The Court considered this contract 'unreasonable' and declared it void. Thus, for this individual, the problem was solved and –for the entire society– a new right emerged. Nevertheless, the issue of access to water remains the same since that decision. More than 50 per cent of people in Peru do not have access to water.

Furthermore, the National Congress of Peru is trying to pass an amendment to convert water into a constitutional right within the text of the Constitution. It can be interpreted as a sign of the lack of impact of the Court decision since the recognition of the right by the Court theoretically should suffice to consider it a proper constitutional right.

Today in Peru, there exists a relevant discussion about whether or not water service should be privatized. The Court's decision in matters related to water does not solve any problems but are populist measures that confirm people's previous beliefs about the legal nature of water.

1.4. A-Pro State-Intervention Interpretation of Pro-Market Constitutional Provisions

As will be illustrated subsequently in a case, the 1993 Constitution has a prohibition on legal monopolies. Nevertheless, the Court stated that a previously state-owned firm could be granted a legal monopoly.

In the case against Congress for granting telecommunications company Telefonica del Peru SAA a legal monopoly, the Court noted that:

> Article 61 of the Constitution prohibits the legislature from creating or establishing new monopolies by law: "No law or constitutional provision or arrangement may authorize or establish monopolies." However, the ban on creating legal monopolies cannot extend similarly to regulating mechanisms and the process of eliminating monopolies that existed before the Constitution of 1993. As previously noted, the second section of the Eighth Final Transitional Provision of the Constitution has established a mandate to regulate monopolies, with emphasis on the process and mechanisms to eliminate the monopolies that existed before the enactment of the Constitution. (STC 0005-2003-AI, 2003, paragraph 27)

In other words, the Court does good legal gymnastics to conclude that not all norms that impose legal monopolies are prohibited, although in other cases, have said that all monopolies, including those achieved through market competition, are forbidden.

In another case, however, the Court was much harsher against an act imposing an even natural monopoly, but that had only the effect of restricting competition is such a way that helped to create a monopoly:

> Although a dominant position in the market is not prohibited—because that would prevent entrepreneurial success that is so provided that such dominance is acquired legitimately and not on legal norms granting privilege without reasonable justification, violating the principle of equality before the law—it is not acceptable that the Supreme Decree No. 158-99-EF set an arbitrary classification, which gives preferential treatment to a category of cigarettes, favouring some producers or traders, concerning the other. (STC 01311-2000-AA, 2000, paragraph 4)

It is not difficult to see that the Court has an ambiguous position regarding legal monopolies. Besides, the Court does not have a record of using this constitutional principle extensively, even when many markets have entry regulations that could be perceived as legal monopolies.

1.5. The Subsidiary State-Intervention Principle

The subsidiary principle is one of the most pro-market principles in the Peruvian Constitution. This principle, when interpreted correctly, imposes two restrictions upon the State. First, since the market is the rule, the State can only regulate when necessary. That is, only when regulation is the most reasonable way if compared with the market. Second, the State can only own a firm if the market is not capable of delivering the goods by itself (Quintana, 2011, p. 15).

Concerning the first use of the principle, the Court has never used this principle to take down a regulation. The Court has used a similar principle (the 'necessity' test, as part of the balancing test), but the 'necessity' principle is used to compare alternative methods of regulation, not regulation against the market.

Concerning the second use, the Court has never questioned the fact that the government acts as an entrepreneur in areas like water provision, education, and health. The only time that a State-owned firm was called out was in a case before Indecopi, an administrative agency (Decision 3134-2010/SC1-INDECOPI, 2010), not by the Constitutional Court, and the case was utterly irrelevant: The discussion was if the State could own a chicken restaurant inside a public university. The decision has never been applied to other cases.

1.6. An Indulgent Treatment of Economic Regulation in General

In general, the Court has an indulgent treatment of economic regulation. It is evidenced in cases in which the Court is very flexible in interpreting the goals of acts like the '*Ley Universitaria*' (Universities Act)[2] In which 'having a constitutional goal' (Decision 0014-2014-P1/TC, 0016-2014-PI/TC, 0019-2014-P1/TC, and 0007-2015-PI/TC) was enough justification for a policy.

Examining over 400 hundred decisions in the period between 2000-2010, the Court used the 'balancing test' in order to analyze the validity of hundreds of acts of Congress. The test consists of three parts, with the third, the 'cost and benefit analysis' is arguably the more complicated and technical one. It is notorious that, in those 400 cases, the third part of the test was never used, even when the act passed the first two sub-tests (Sumar, 2012).

Also, the relationship between the Court and the other branches of government does not always guarantee an optimal resolution of cases involving economic regulation. In some cases, the Court has helped the government to enforce economic regulations, like in the case of casinos, where the Court helped the government to overcome decisions of independents judges opposing their regulation in particular cases (Decision 006-2006-PC/TC). Even in cases where the Court has opposed economic regulations, the Congress and the Executive Branch have insisted on passing the laws regardless, making the ruling of the Court irrelevant.[3]

2 This is a statutory law that makes accreditation mandatory for all universities in Peru and creates standards to be met by them.

3 Here it is interesting to note that even when the Court declared, in a first case, that a decree (Supreme Decree 017-2005-MTC, 2005) was unconstitutional and therefore should not be applied (Decision 04197-2010-PA/TC, 2010), the Executive Branch enacted a very similar decree (Supreme Decree 003-2008-MTC, 2008) that passed another unconstitutional process (Decision 00863-2011-PA/TC, 2011).

From this, we can argue that, in general, the Court relies on the ability of the other two branches of government inadequately justifying economic regulations and does not have enough power to oppose the government when they do not.

2. THREE CASES OF OPPORTUNISM AND REFORM

Now, we will attempt an explanation of why the 1993 Constitution does not promote neoliberal values, as is regularly asserted. The explanation lies in the general theory of public choice. The Constitution, like every other norm, was not created with a genuine interest in achieving any social goal, but rather to primarily promote personal aims, reflecting interests that were already prevailing in that context and anticipating a favourable scenario to act opportunistically in the future.

As previously stated, constitutional reform in Peru was not primarily informed by a genuine desire to promote libertarian values. As in any regulatory process, the relevant factor is the pursuit of personal gains by interest groups. The reformers in Peru used the Constitution in three ways to obtain benefits, all predicted by Stigler (1971): (1) the restriction of rivals' entry and substitute products in the market; (2) direct subsidies; and (3) the weakening of buyers and suppliers.

All of this was achieved through direct modification of the Constitution (Case 1) or by creating institutions suited to subverting constitutional choices in the future (Cases 2 and 3).

2.1. Case 1: Education, Health and Social Security

According to the 1979 Constitution, health and social security must be run by public agencies. In the case of education, schools must be not-for-profit, even when administrated by private firms. The 1993 Constitution changed

As can be seen, if the Executive Branch would have considered the Court ruling in the subject, the second decree would have never been enacted, following the criteria of the Court in terms of economic regulation.

this. Today, private enterprises may create and run hospitals, private financial institutions may administer public trusts, and schools may be operated as for-profit institutions.

Until this point, one may say that this is an example of de-regulation; but, apart from that, the 1993 Constitution also encouraged the creation of more private universities, exonerating them from taxes. In the case of social security, an act established mandatory trusts for the public, and the designated private institutions in charge of their administration receive about 13 per cent of worker income every month.

Besides, the 1993 Constitution stated that these sectors would be closely supervised by the State. For each of the three, there exists a specialized regulatory agency in charge of supervising the quality of the services provided and imposing standards, which act as barriers to entry.

Therefore, far from a case of de-regulation, in Peru's case, public institutions have been replaced by highly regulated private ones, which are also beneficiaries of subsidies and rents.

It is to be observed, following Ortiz de Zeballos (1999, p. 9), That one of the foremost proponents of the reform, Carlos Boloña, Secretary of Economy under the Fujimori government, was later appointed director of a social security administration fund and was also the founder of a –now well established– for-profit private university.

In recent years, the education sector has entered a state of reform, based on the perceived lack of high-quality education due to the liberalization (including the spread of for-profit universities) that Fujimori's reform started. Keeping with this reform, in 2013, Congress passed the '*Ley Universitaria*' ('Universities Act'), which established hundreds of standards for universities, varying from campus extension requirements to the licensing of new programs. Now that

nearly 200 universities, including that of Boloña, have already been established, one can perceive this as an attempt to prevent further competition in the sector.

In the case of social security, an inverse path has taken place. In this industry, the emergence of more beneficiaries and pensions has led the government to liberalize part of these savings. Nevertheless, the aggregate impact of this on the total amount of saving currently in the hands of private funds is minimal, which explains the possibility of the reforms in the first place. If the impact were significant, the opposition of private funds would have probably prevented the reform.

These cases illustrate how constitutional reform was used not as a means to advance libertarian ideals (like privatization), but rather in an opportunistic manner. Peru's privatization, rather than reflecting genuine liberalization, includes massive subsidies and economic regulation. The link between the actors of the reform and the beneficiaries of it are also evident in the person of Boloña.

2.2. Case 2: Stabilization Contracts and Legal Monopolies

One way an interest group can benefit from stricter rules –in this case, rules imposing a free market– is when they are better suited to subvert that rule, and everyone else must comply.

Peru is the only country in the world with a 'stabilization contract'[4] At the constitutional level: These contracts are intended to provide investors with a guarantee of continuity of a given regulatory regime. At the same time, Peru has a rule prohibiting the creation of legal monopolies. Nevertheless, when the public telephone company was privatized, Telefonica del Peru (the Spanish buyer of the public company) used this

4 A type of contract that –at least in some countries- has the same formal value and its enacted by the same procedure as statutory law and has the effect of freezing the regulations for one person. *I.e.*, if we enter a stabilization contract today, tomorrow's regulatory changes do not apply to us.

same set of rules to create a legal monopoly.

Indeed, thanks to a provision in a contract –then formalized as an act using the stabilization contract provision– Telefonica gained a five years' monopoly. This monopoly was justified in the economic theory of 'natural monopoly.' According to the government and the Constitutional Court, the investment needed for telephonic infrastructure was high, then any potential investor would needes a monopoly to made profits.

> Article 61 of the Constitution prohibits the legislature from creating or establishing new monopolies by law: "No law or constitutional provision or arrangement may authorize or establish monopolies."
>
> Nevertheless, the ban on creating legal monopolies cannot extend similarly to regulating mechanisms and the process of eliminating pre-existing ones, before the Constitution of 1993. As previously noted, through the second section of the Eighth Final Transitional Provision Transitional of Constitution there has been established a mandate to regulate monopolies, with emphasis placed on the process and mechanisms to eliminate the monopolies that existed before the enactment of the Constitution. (decision STC 0005-2003-AI, 2003, paragraph 27)[5]

5 Free translation of: ...' el artículo 61° de la Constitución prohíbe al legislador crear o establecer nuevos monopolios mediante ley: "Ninguna ley –refiere dicho precepto constitucional- ni concertación puede autorizar ni establecer monopolios."
Pero esa prohibición de crear monopolios legales no puede extenderse análogamente, a la regulación de los mecanismos y el proceso de eliminación de los monopolios preexistentes a la Constitución de 1993. Como antes se ha señalado, a través de la segunda fracción de la VIII Disposición Final y Transitoria de la Constitución se ha establecido un mandato de legislar, con carácter prioritario, sobre el proceso y los mecanismos para eliminar los monopolios que existan con anterioridad a su entrada en vigencia' (STC 0005-2003-AI, 2003, par 27)

It is now clear that (1) the telephone market was not a natural monopoly, and (2) Telefonica made extraordinary profits from the concession.

It is to be noted that all three branches of government, acting one after another, granted Telefonica a monopoly even when there was a supposedly explicit constitutional provision prohibiting them. The rationale then was: The Constitution prohibits new legal monopolies, but not the granting of a monopoly in a previously state-owned industry.

Even when this rationale may sound somehow credible, it is unlikely that it would be used if this were not a 2 billion USD deal.

It raises questions about the use of political and economic power to subvert constitutional rules (Glaeser and Scheifel, 2003).

2.3. Case 3: The Ownership of Natural Resources

The 1993 Constitution states that natural resources (like water, gas, or electricity) are property of 'the Nation,' which is an elusive concept somehow similar to 'state-owned.' The consequence is that if petroleum is found in the land underfoot, the petroleum is not private property but of 'the Nation.' It is a rule contrary to the one in –for example– California, where if individuals find petroleum in their yard, it is their property.

Why is this norm a possible case of rent-seeking behaviour? If we are referring to a mining or petroleum corporation, then, these companies will probably prefer to pay a tariff to a government dependency rather than the price of the land to its actual private owner. This way, individuals have a 'less interested' seller, due to agency problems, accomplishing the 'weakening of the seller' as predicted by Stigler.

This kind of norm also generates many social conflicts, since the owners of the land feel displaced in the intrusion. It has led the government to pass an act recognizing the right of indigenous peoples to being consulted about projects to be performed in their territories. Nevertheless, these concessions of the government can be understood as strategic acts to calm them, rather than a real vocation to alleviate the problem.

CONCLUSIONS

As we showed, the Peruvian Constitution is far from being a "neoliberal" one. It indeed followed most of the Washington Consensus provisions. However, most of the provisions are far from "neoliberal". For instance, some replaced state-ownership with intensive regulation. Others privatized public utilities or public services but incorporated legal monopolies at the private sector.

At the same time, it also recognizes even more social rights that the former Peruvian Constitution. Even more important, the constitutional provisions were interpreted and applied by authorities that are far from followers of the "Consensus" ideas. In particular, the Peruvian Constitutional Court is a "progressive" court, that interpreted the provisions in a way alien to "neoliberal" thinking. For example, the "principle of subsidiarity" was interpreted very narrowly and leaving much space for public intervention, in disregard of the fact that it is a principle supposed to lead us to a freer economy.

Apart from public institutions and the cultural disregard for a free market economy, one can tell that the Peruvian economy is also plagued with mercantilism. Using public choice concepts, we can understand that the shape of regulations -including the Constitution- is not a by-product of neoliberal influences (mostly right with the Washington Consensus which is not even liberal itself), but the result of the competition between interest groups, in which firm conglomerates with political ties are winning the battle.

Thus, the Peruvian Constitution is best explained as a result of interventionist and mercantilist interest that converge in transforming an -otherwise ideologically neutral and technical constitution- in a constitution that serves to protect special interest couple with an always growing intervention of the State.

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Notes regarding transparency in the exercise of public functions and the right of accessto public information

Notas en relación con la transparencia en el ejercicio de las funciones públicas y el derecho de acceso a la información pública

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ABSTRACT: The objective of this paper is to present a series of elements that allow a conceptual and theoretical approach to be carried out on the principle of transparency as a guideline for the exercise of public function within the framework of a democratic system and the right of access to public information as a direct manifestation of this principle.

KEYWORDS: Transparency, advertising, public information, law, democracy.

RESUMEN: El objetivo del presente trabajo es exponer una serie de elementos que permitan llevar a cabo una aproximación conceptual y teórica del principio de transparencia como directriz del ejercicio de la función pública en el marco de un sistema democrático y al derecho de acceso a la información pública como manifestación directa de este principio.

PALABRAS CLAVES: Transparencia, publicidad, información pública, derecho, democracia.

INTRODUCTION

Access to public information implies in some way carrying out a democratisation process of the information held by the State and its organs. Access to information means "making it accessible to all, implies fragmenting the power position and shortening the distance between the State and society; However, it also has an amplifying effect of the power authority, insofar as it is interpreted by the inhabitants as a power that meets the requirements of the society it administers, by showing a real capacity to identify its needs and objectives in order to give them an answer". (Lavalle Cobo, 2009, p. 3)

The constitutional or legal recognition of the right of access to public information and its efficient operation is essential to improve the trust indexes between citizens and the State. A State that generates trust is endowed with a greater degree of legitimacy, which results in a strengthening of democracy and the protection of fundamental rights.

Specialized doctrine and various international instruments have expressly recognized the importance of the right of access to public information for the success of the democratic process. The Council of Europe (2009) has indicated that taking into consideration the importance of transparency in a democratic and pluralistic society, the right of access to documents provides a source of information for the public; helps you form an opinion about the state of society and public authorities; it fosters the integrity, effectiveness, efficiency and accountability of public authorities, thus helping to affirm their legitimacy.

The General Assembly of the Organization of American States (AG / OAS) has repeatedly affirmed the need to "reaffirm that everyone has the right to seek, receive, access and disseminate information, and that access to public information is a requirement indispensable for the strengthening of democracy "and to" urge the member states to respect and ensure respect for the access of all persons to public information and promote the adoption of the legislative or other provisions that may be necessary to ensure its recognition and effective enforcement ".

Informed decisions through due access to public information are an indispensable and inalienable requirement for the effective exercise of citizens' political rights. They, therefore, are an essential condition for the functioning of democracy and better and more stable governance of the political and social systems.

Once the paradigms of liberal democracy have been overcome, with a citizenry that increasingly demands greater participation in adopting major social decisions, the right of access to information is a fundamental presupposition for adequate citizen participation. The current democracy (demanded by more conscious and empowered citizenship) has overcome the logic of liberal representative democracy and complements the idea of participatory democracy to transform itself into a deliberative or dialogue democracy. This new way of understanding democracy results from the conjunction of several factors (Canales 2011, p. 21): globalization, multiculturalism, unstoppable urban growth and social, economic, technological and cultural complexity, among others.

This new scenario explains the appearance of different laws that recognize the right to access public information in Western democracies.

Also, the proper access to public information must be linked to democracy and political rights. Its recognition and effectiveness are related to the exercise of other fundamental rights insofar as it is configured as an assumption or instrument of facilitation.

The preceding is of utmost importance because the ultimate purpose of the State is and must be the human person, their protection, and the extent that the right to access public information has an absolute consecration, other fundamental rights will be better protected if this. Thus, that political system will enjoy greater citizen legitimacy.

Notwithstanding the preceding, transparency and access to public information constitute a critical tool to combat corruption. Although corruption is a complex social phenomenon, which response to many causes and factors that we will not address in this presentation, we believe that transparency and access to public information do contribute to confronting it (along with other institutional measures and cultural), either by inhibiting conduct that violates probity or by allowing control and thereby making the responsibilities of the rule of law effective.

The objective of this paper is to make available to readers a series of elements that allow carrying out a conceptual and theoretical approach to the principle of transparency as a guideline for the exercise of public function within the framework of a system democracy and the right of access to public information as a direct manifestation of this principle.

First of all, It will briefly address transparency, especially highlighting its importance to the development of democracy. Subsequently, the analysis will focus on the right to access public information, addressing the question of its legal nature and its intimate connection to the development of other fundamental rights.

Then, a proposal of the essential bases that any legislation that configures and develops this right should be recognized. In such a way that it can serve as a parameter to approach different access laws critically.

Finally, the present work concludes by delivering a concept of the right to access public information.

1. THE PRINCIPLE OF TRANSPARENCY IN THE EXERCISE OF PUBLIC SERVICE

According to the Dictionary of the Royal Academy of the Spanish Language transparency is "quality of transparent" and transparent is what "said of a body: through which objects can be seen clearly" (1), it also means "clear, evident, which is understood without doubt or ambiguity "(4).

Concerning the public function, transparency is an attribute or quality that allows us to have clear and precise information about a person or something, in this case, the State and its agencies, "which would increase our capacities for understanding, surveillance and communication "(Naessens, 2010, p. 2121) on the exercise of power.

The word transparency brings us to the idea of visibility. The transparent is visible. Furthermore, applied this characteristic to the exercise of a public function necessarily leads us to postulate that the actions of the State bodies must be visible to citizens and public opinion in general. The reasons for affirming that the exercise of the public function must be, by general regulation, always given the citizens, can be summarized in two:

i.- In the first place, the ownership of the sovereignty of the State does not belong to the rulers but to the ruled. Thus, it can be argued that between the people and the ruler, there is a

principal-agent relationship from which obligations of various kinds derive. Of course, the agent must adjust his duties to the principle of legality, adapt his actions to the ethical perceptions of the citizens to whom he owes his mandate and be always ready for his principal to take cognizance of the status of the matters in charge and to render accounts of its management. (Bustos Gisbert, 2010, pp. 79-84)

ii.- The agent handles power and power corrupts; therefore, starting from this basic premise of political philosophy, the demand for transparency is irrefutably justified.

Consequently, "the principle of transparency in official affairs and issues is, as has been repeatedly pointed out, inherent to contemporary democratic regimes. From a sociopolitical point of view, no one would probably dare to deny the profound substantive links that exist between the principle of publicity of government decisions - understood in its broadest sense - and the very foundations of democracy, since it is this a form of government that excludes, by principle, the concealment and secrecy of the measures and decisions that are produced to favour the general interests that it serves as a priority ". (Bermejo, 1988, pp. 17-27)

In this vein, our rulers are expected to be honest and not corrupt, but "probity cannot be considered if it is not associated with transparency, that is, the permanent will to decide on public matters openly and allowing citizens know the foundations and reasons for the decision, as well as how it is executed ". (Vivanco, 2008, p. 385)

According to the terms used in the Report of the Regional Meeting that took place in Santiago de Chile between December 3 and 5, 2004, sovereignty resides in the people, who delegate an essential part of their exercise to the authorities for them chosen. As delegates of the citizens, they fulfil a function at

the service of the common good, in an impersonal way, subject to laws and special responsibilities; These responsibilities include responding to their constituents, the citizens, giving an account of their management; Citizens can exercise, as constituents, a function of participation, supervision or supervision and control of state management, not only through periodic elections but at all times through the exercise of their rights of expression, association, demonstration and petition, among others; to allow all of the above, transparency of public information and management should be the general rule. (Zalaquett, 2005, p. 20)

The Inter-American Court of Human Rights (IACHR) (2006) has said that:

> The actions of the State must be governed by the principles of publicity and transparency in public management, which makes it possible for the people who are under its jurisdiction to exercise democratic control of State management, so that they can question, investigate and consider whether the adequate performance of public functions is taking place. (p. 86)

In the same sense, the Inter-American Democratic Charter of the General Assembly of the OAS (2001), in its article 4 expresses the importance of transparency for democracy, noting that this is a fundamental component for its exercise. The rule mentioned above reads as follows: "transparency of government activities, probity, the responsibility of governments in public management, respect for social rights and freedom of expression and the press are fundamental components of the exercise of democracy".

Thus, democracy is not only defined by the concurrence of universal, egalitarian and secret suffrage. It is also necessary that there is the legitimacy of exercise, which is achieved with transparency, probity and responsibility in the execution of

public functions, with a healthy respect for freedom of expression and other rights related to human sociability and rationality.

As Vivanco Martínez (2008, p. 385) has argued, the principle of transparency consists in respecting and safeguarding the publicity of the acts, resolutions, procedures and documents of the State administration, as well as their foundations, and in facilitating access to any person to this information, through the means and procedures established by law for this purpose. However, this concept must not only be limited to the administration of the State but also to all those who exercise public functions, be they executive, administrative, legislative, jurisdictional and comptroller.[1]

What is sought with the principle of transparency is that the organs of the State allow citizens to know why and how they act, and what decisions they adopt? Thus, it will be possible to directly evaluate and control whether the principle of probity is respected and, besides, participate in public management. (National Directorate of Civil Service, 2009, p. 23)

We have already pointed out how important transparency is for the Democratic Rule of Law. The existence of a "*culture of transparency*". In a society, it will generate the tendency to reduce occultism and secrecy to the maximum, thus making it familiar for public and some private actions of the authorities to be permanently exposed to the eyes and scrutiny of citizens and public opinion in general.

Definitely:

> The culture of transparency comprises a vast space of culture in a genre that consists of in-depth knowledge on the part of the ruler, of clarity, of the diaphanous, of the honest, of the excellent work, of the excellent work, of the delivery of results, of the rectitude of

1 In this sense, the right of access to public information must be impetrated concerning all State organs and not only before the State Administration.

> intention, to obtain a reasonable opinion and fame in favour of the public administration. (Cortés Ontiveros, 2005, p. 14)

According to the same author, all of the above "will be translated, by the governed, into broad citizen participation, respect for the established rules, trust in the institutions, a scenario that will gradually increase the improvement of its own culture of transparency". (Cortés Ontiveros, 2005, p. 14)

In short, the intimate and the secret that is perfectly valid in the private sphere of citizens, in the public sphere, where power is handled, and questions are decided based on the probability to affect us all, if it becomes a general rule, it is disastrous.

Closely linked to the principle of transparency and as an unavoidable consequence of it, it appears in the right of access to public information. "The right of access to government information is one of the sources of development and strengthening of representative democracy insofar as it allows citizens to analyze comprehensively, judge and evaluate the acts of their representatives and encourages transparency in government acts. and the Administration ". (Fuenmayor, 2004, pp. 9-20)

2. THE RIGHT OF ACCESS TO PUBLIC INFORMATION

2.1.- General ideas

Before developing the right of access to public information, we must take charge of a substantial question that supports us in this research: what is public information? Moreover, it is essential to do so because the right of access falls precisely on public information and not on private information and because on many occasions there may be important

information that can be classified as the public that is in the hands of individuals who will also have an obligation to deliver when it is required according to the legal system.

In general terms, we could say that public information is all that information that is available to public opinion, either due to its nature (the result of a match between Real Madrid and Barcelona) or due to acts carried out by private persons. With the express or tacit will that they are known by the rest of the community and by those made by the organs of the State and by the natural persons that integrate them in the exercise of their functions. However, this conceptual approach is not relevant to the objectives of this work.

The concept of public information for this research can be constructed in a broad and strict sense.

The concept of public information in a broad or broad sense accounts for the set of data produced or found within any State body, regardless of whether or not they were prepared or acquired in the exercise of their functions. It is the product of the public activity of the various organs of the State. Furthermore, the public information would cover all types of antecedents, whether or not those that are usually classified as reserved.

In a strict sense, public information is all that produced in the exercise of public function and that according to the respective legal system and the requirements of the democratic principle must be available to the entire community, individuals or the media, with the only exceptions established explicitly in the Constitution and the law.

> Therefore, any restriction to the right to information in the State of Law must be justified in principle by the protection of other assets and rights whose protection is required by those same rights, principles

> or constitutionally recognized rights. Thus, secrecy in some information is justified by the protection of the right to privacy or a prevailing public interest such as State security. (Balaguer Callejón, 2013, p. 9)

Also, as a starting point in the search for a concept of public information, we will point out that the extension that we must give to it should not be restricted but broad. Not understanding it this way could result in reducing too much the essential content of the right and with it its exercise. In this sense, of course, we have to point out that it is not correct to make the concept of public information synonymous with that of administrative documentation. "All the information in possession of a state office is public, which may or may not coincide with the administrative documentation, provided that its access is not prohibited by a limitation expressly established by law". (Lavalle Cobo, 2009, p. 9)

Nor does it correspond to make the concept of public information equivalent only to that which is in the power of the State administrative apparatus. Many laws on access to public information, including Chilean law, only recognize the right concerning the Administration and not concerning the other organs of the State.

We agree with Vial Solar (2010, p. 121) when he argues that the possible restrictive interpretations of the scope of the concept of public information should be rejected as inconsistent with the idea of a right of access to public information as a right of a constitutional nature within a democratic republic, which makes it inconceivable that the State, ab initio, except for justified reasons for reservation or secrecy, would argue that part of its activities is reserved.

It is also worth saying that the right of access to public information can be channelled in three ways, namely:

> The general systemic publication, individualized communication to those who may be interested, and communication in response to specific demand of the companies, including the possibility of reproducing the requested documents, with all appropriate guarantees of conservation of the source document, original or not. (Guachi Risso, 2012, p. 173)

For our research, we will stick with the third way of those mentioned above. That is, the right of access to information will be understood as a right that the whole legal system recognizes to every person to demand from any State body the delivery of information classified as public and to go before a competent court requesting the protection of its right when it has been unjustifiably denied by the body legally obliged to deliver it. In this sense, the legal obligation to deliver and release information corresponds to all organs of the State, even those that have constitutional recognition.

2.2.- On the legal nature of the right of access to public information

2.2.1.- The right of access to public information is part of freedom of expression

The right to freedom of expression can be considered from different perspectives. As a manifestation of the personal autonomy of the individual, from a collective point of view and the perspective of the recipients. In the latter sense:

> An alternative way of understanding freedom of expression is the one that considers that the protection of this right implies not only the protection of those who express themselves but also aims to ensure the recipients the possibility of appreciating the most diverse variety of points of view. possible around a specific topic, an objective that is pursued through the

protection of expression. (Saba, 2004, p. 153)

In its first aspect, freedom of expression corresponds to that fundamental right that each individual has by which he can express his ideas, opinions, points of view on different topics and in different ways. As can be seen from article 20 of the Spanish Constitution, we can consider that in broad sense freedom of expression would correspond to the so-called "rights of free communication", which although they are four different rights(Pérez Royo, 2005, p. 408), correspond to the actual content of this freedom of expression. It is about the right to express and disseminate thoughts freely, ideas and opinions through words, writing or any other means of reproduction; to literary, artistic, scientific and technical production and creation, to academic freedom and to freely communicate and receive truthful information by any means of dissemination.

Therefore, freedom of expression recognizes within its actual content, the so-called informational freedoms, within which the right of access to public information is contained. At the international level, the jurisprudence of the IACHR has established a doctrine that is practically not discussed in Latin America today.

The IACHR both in "*Claude Reyes and others against Chile*" As well as in "Gomes Lund and others against Brazil "has emphatically argued that according to the protection that the American Convention on Human Rights (ACHR) (2001) grants," freedom of thought and expression not only includes the right and the freedom to express their thoughts, but also the right and freedom to seek, receive and impart information and ideas of all kinds "and" like the American Convention, other international human rights instruments, such as the Universal Declaration of Rights Human Rights and the International Covenant on Civil and Political Rights, establish a positive right to seek and receive information ".

The IACHR has established that Article 13 of the ACHR (2001) by expressly stipulating the rights to seek and receive information, it protects the right of every person to request access to information under the control of the State, with the exceptions allowed under the restriction regime of the Convention.

> Consequently, said article protects the right of persons to receive said information and the positive obligation of the State to supply it, in such a way that the person can have access and know that information or receive a substantiated response when, for any reason permitted by the Convention, the State may limit access to it for the specific case. Said information must be delivered without the need to prove a direct interest to obtain it or personal involvement, except in cases where a legitimate restriction is applied. It is delivery to a person can, in turn, allow information to circulate in society so that they can know it, access it and value it. Thus, The right to freedom of thought and expression contemplates the protection of the right of access to information under the control of the State, which also clearly contains the two dimensions, individual and social, of the right to freedom of thought and freedom. expression, which must be guaranteed by the State simultaneously. (IACHR, 2010, p. 197)

2.2.2.- The right of access to public information is part of the fundamental right of petition

Although some authors consider that the right of access to public information is part of the fundamental right to petition[2], we consider that such a statement is not correct.

2 Lavalle Cobo (2009) says that "the right of access to public information is found in the right of petition and in those constitutions that expressly establish it, it is instituted as a refined, refined, modern and more democratic way, insofar as it limits and it implements a portion of it since

There is a notable difference between the right of access and the right of petition in that the latter, even when we understand it in a broad sense, does not recognize as part of its essential content the possibility of obtaining and seeing the respective request satisfied. Diez-Picazo (2005) points out that:

> The essential feature of the fundamental right to petition is that it is a right that is exhausted in the simple conduct of asking; That is, it does not involve the right to obtain any satisfaction, much less to have the request granted. (p. 400)

Notwithstanding the preceding, in a ruling of 2002, the Colombian Constitutional Court recognized, in light of the Fundamental Charter, that the right of access to information has an autonomous nature and that at the same time it is a concrete manifestation of the right to petition(Constitutional Court of Colombia, 2002). The Constitutional Court (2002) noted:

> Likewise, on repeated occasions, this Corporation has stated that although the right to access public documents is autonomous, it is also a concrete manifestation of the right to petition, as the primary purpose of these rights is to obtain information through a concrete answer.

The same Colombian Constitutional Court (2003) in the judgment T-1075-2003, when systematizing the constituent elements of the constitutional right to petition, understood that through these right other constitutional rights are guaranteed, such as the right to information, citizen political participation and freedom of expression.

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it establishes formal procedural channels for the presentation of requests for information when they are regulated by subsequent legislation ". (pp. 73-74)

We insist on the error of this position. The right of the petition does not recognize as part of its essential content the obtaining of a specific response, it only guarantees the possibility of addressing the authority, but not for it to respond, not even satisfactorily, instead of the right of access. The authority is obliged to release the requested information when there is no legal cause that authorizes its reservation or secrecy.

2.2.3.- The right of access to public information is an autonomous fundamental right and, in turn, the assumption for the exercise of other fundamental rights

2.2.3.1.- The autonomy of the fundamental right of access to public information

We consider that the right of access to public information is a fundamental right of an autonomous nature that derives from the democratic regime and the principles that comprise it. That is, without prejudice to the close relationships that exist between the right of access to public information and other fundamental rights, we believe that the right of access to information is a fundamental right that has its configuration with its particular characteristics and that is inserted within the requirement of democracy as the form of government most compatible with human dignity.

The Inter-American Juridical Committee (CJI) (2008) begins its catalogue of principles on the right of access to information by recognizing that this is "a fundamental human right that guarantees access to information controlled by public bodies, including, within a reasonable time, access to the historical archives".

The right of access to public information is not a mere derivation of other fundamental rights, although we cannot ignore that this doctrine has been instrumental in

achieving its recognition in those legal orders in which it is not expressly enshrined. For this reason, taking into consideration the undeniable vocation of those who exercise power to act under the shadow of secrecy, it has been necessary, not on a few occasions, to make intellectual efforts to build this right, primarily based on freedom of expression.

We propose that the right of access to public information is a fundamental right, not only essential for the construction of a democratic and participatory society but also the free development of the personality in front of the State and public powers.

> The human being has the right to know the actions of the powers, including the reasons for the decisions taken, and the use made of public funds. If the development of our own lives depends, as it is, on the democratic quality of the public powers - whose performance, we insist, directly or indirectly conditions our development - we have the right to know to what extent their performance is following the democratic mandate. (Piñar Mañas, 2015)

Now, the right of access to public information as an autonomous fundamental right can be directly configured as such by the constitutional order or be classified as an implicit fundamental right that emanates from the democratic system of government.

The implicit fundamental rights or also called "not listed" rights are those that, without being enshrined in explicit and direct terms in the complimentary national or international order, derive indisputably from human dignity or the democratic regime of government. Professor Nogueira Alcalá (2007) maintains, concerning the system for the defence of fundamental rights in America that these implicit or non-

enumerated rights are derived from Article 29 of the American Convention on Human Rights, literal c), which maintains that " no provision of the present Convention can be interpreted in the sense of excluding other rights and guarantees that are inherent to the human being, or that derive from the representative democratic form of government ". The rule of Article 29 of the American Convention in its literal c), "allows us to understand the binding effect of other rights that, even when they were not expressly included in international covenants or by the Constitution, they are implicitly guaranteed by the provision analyzed ". (p. 458)

2.2.3.2.- The right of access is essential for the exercise of the right of citizen participation

Citizen participation is a fundamental right that emanates from democracy as a form of government. We can define it as "that fundamental right through which people individually or collectively have a real and concrete possibility to participate in the adoption of major political, legal, economic and social decisions." This right of citizen participation is a right with a complex structure that is made up of several specific rights that aim to ensure the intervention of citizens in the exercise of political power. As Hoyos Vásquez (1997) maintains:

> Simplifying a lot, the discussions around participatory democracy highlight the following characteristics: it is the ultimate source of legitimacy insofar as it is the democratic genesis of the rule of law; it forms the pluralistic public space necessary for debate, learning and agreement; gives meaning to a policy of justice, equity, well-being and peace, committing each one of the citizens to a common destiny. (p. 84)

For example, the right to vote, the citizen's legal initiative, the referendum and other citizen consultations, and others. Indeed, citizen participation not only includes electoral rights but "also the possibility of getting involved in the processes that lead to decision-making on public policies, as well as control of the management of those responsible for executing them.". (Prats, 2011, p. 3)

Citizen participation can be understood "in an integrating sense consisting of "*Be part of*», That is, to receive benefits or have services" (Bañez Tello, 1999, p. 104) and in a much more active sense consisting of "to take part », which refers to the collective capacity to promote initiatives to stimulate social life, which implies a deepening of participatory practice ". (Bañez Tello, 1999, p. 104)

From the second of the indicated perspectives *supra* citizen participation must be present at least in the following manifestations of the exercise of power: i) processes in which the popular will is manifested at the polls; ii) control of the authorities whose positions are redirected directly or indirectly to the citizens and other career officials; and, iii) adoption of major social decisions. All these manifestations require a series of assumptions that must necessarily be present to speak of genuine citizen participation. The first assumption is, of course, democracy and the recognition of certain basic fundamental rights such as freedom of expression, the right of association, the right of assembly and demonstration, the right of petition and the right of access to public information that works in the power of the state apparatus.

Consequently, "the rights to information must be seen as essential parts of the basic rights of political participation, which they include but go beyond the right to freedom of expression". (Ackerman and Sandoval, 2005, p. 15). Without a doubt:

> The exercise of this right represents one of the highest values of democratic societies. In our times, an individual needs to have the knowledge that is more attached to the reality of what is happening in their environment since only in this way can they participate knowingly in the exercise of their political and civil rights. (Pérez Álvarez 2006, p. 612)

Citizen participation in the context of democracy is fundamental, especially for control over the exercise of power, therefore, for citizens, it should not only be conceived as a right or as a legitimate possibility but as an honourable duty.

2.2.3.3.- The right of access to public information as an assumption for the exercise of other fundamental rights

Without prejudice to understanding that the right of access to public information is a fundamental right that emanates from the democratic regime and whose owner is the people who develop their lives in it, we must not ignore that this right is a basic assumption for the exercise of others Fundamental rights.

In some way, we consider that the right of access to public information is configured as an essential assumption for the exercise of other fundamental rights, to the extent that "between the public power and the citizens, the generation of an important information flow that operates in a double direction: from citizens to public powers and from public powers to citizens". (Moretón Torquero, 2014, p. 7). The State manages essential flows of information that it obtains from citizens and civil society. Knowing the information that the State handles is essential for the development of the social life of people and their intermediate groups, both to maintain an area of protection of private life and to acquire tools for the exercise of rights that are related either to one's personality, freedom of expression or freedom of entrepreneurship among others.

About the flow that occurs from citizens to public powers, "it is found that the latter, in the exercise of their functions, handle a significant volume of information that is integrated, not only by what they produce but also by the one they collect from citizens". (Moretón Torquero, 2014, p. 7) in the exercise of their activities and functions. Now, concerning the flow that comes from the public sector to the citizens:

The transparency of public powers refers to their visibility, and not only affects their operation or way of proceeding but also, in its fullest form, reaches a good part of the content it produces, which, in turn, usually they incorporate part of the information collected from citizens. (Moretón Torquero, 2014, p. 7)

However, besides, this flow of information not only operates in the indicated double sense:

Nevertheless, also with third parties not directly affected but who participate in the public interest of the information whose obtaining is implemented, either through the publicity offered directly by the Administration or through the response to their information request. (Moretón Torquero, 2014, p. 7)

Just as an example of the close relationships that exist between the right of access to public information and the exercise of other fundamental rights, the IACHR has indicated that access to information is an essential assumption for the realization of the right to know the It is proper that it helps the relatives of victims of dictatorships. The IACHR (2010):

It has established that in cases of human rights violations, state authorities cannot rely on mechanisms such as state secrecy or confidentiality of information, or for reasons of public interest or national security, to stop providing the information required by the judicial or administrative authorities in charge of the pending investigation or process.

2.3.- Bases for adequate regulation of the right of access to public information

Despite the eventual constitutional recognition that is made of the right of access, either expressly or as an implicit category, it is essential to have a law on access to information that establishes with utter clarity everything related to its practical realization, establishing mainly the requirements that must be met for its exercise and above all the grounds that must concur in denying it, under the essential assumption that this right is not absolute.

In the following pages, we will refer to those minimum contents that a law on access to public information must have in order for it to be consistent with the principles on which it is based and with its ius fundamental nature.

2.3.1.- The principle of presumption of publicity and maximum disclosure

Any legislation that recognizes and regulates the right of access to public information must rest based on the principle of presumption of publicity. According to this, in principle, all information that has State bodies is public and therefore must be accessed by citizens.

The principle of full disclosure:

It presupposes that all information held by public entities must be subject to disclosure, a premise that can only be overcome when there is a greater risk of damage to a legitimate public or private interest; Under the preceding, for the doctrine the scope of this access must be as broad as the range of information and respective entities, as well as the individuals who may claim the right. (Sanz Salguero, 2016, p. 332)

The CJI (2008) expressly recognizes that all information is accessible in principle, therefore:

Access to information is a fundamental human right that establishes that everyone can access information in possession of public bodies, subject only to a limited regime of exceptions, consistent with a democratic society and proportional to the interest that justifies them.

Besides, we believe that the regulation of the right of access to public information should not ignore that not only the State has this type of information in its possession, but also private ones that provide public services or receive public financial resources. For example, an electric company or a private university that receives public funds.

For its part, the Office of the Special Rapporteur for Freedom of Expression (2009) indicates that "the principle of maximum disclosure orders the design of a legal regime in which transparency and the right of access to information are the general rules subject to strict and limited exceptions." In this sense, the Model Inter-American Law on Access to Information (2010) provides "that the right of access to information is based on the principle of maximum disclosure of information" and "that exception to the right of access to information must be clearly and specifically established by law".

Significant consequences arise from the principle of presumption of publicity and full disclosure. Thus (-) the right of access to information must be subject to a limited regime of exceptions, which must be interpreted in a restrictive way, in such a way that an adequate exercise of the right is favoured; (-) any adverse decision must be motivated and, in this sense, the State has the burden of proving that the information cannot be relieved; and (-) in the event of doubt or legal gap, the right of access must always prevail.

2.3.2.- A broad active legitimation

Regarding the active legitimacy to exercise the right of access to public information, there are several possibilities. In a restricted sense, the right is recognized to those citizens who demonstrate that they have a legitimate interest concerning the information requested; in a less broad sense, the right of access to any citizen can be recognized even if he or she does not have a legitimate interest that justifies him/her to know the required information; and, in a broad sense, it is understood that the active legitimacy to request public information belongs to any person, whether or not they are citizens and whether or not they have a legitimate and direct interest in the matter.

The Council of Europe Convention on Access to Public Documents also adheres to broad ownership of the right of access by stating in its article 2.1 that each State Party "shall guarantee the right of anyone, without discrimination of any kind, to access, upon request, to public documents in possession of public authorities".

> For its part, the GA / OEA (2008) has said that:
> In the case of access to information, everyone is the owner of it because it is a human right, regardless, for example, of their immigration status or any other distinction". This same breadth "requires that the applicant not be required to prove a direct interest or personal involvement to obtain the required information."

2.3.3.- Lack of motivation

Adequate regulation of the right of access to public information must recognize the absence of the need on the part of the citizen to motivate the access request. If we understand that access to information held by the state authority is a

fundamental right, its exercise does not have to be motivated. Moreover, the requirement of motivation could give rise to power of weight on the part of the authority in order to decide whether the information is delivered or not, in the sense that it could consider that the motivation used by the citizen is not sufficiently powerful enough to justify the requested delivery.

2.3.4.- Amplitude of the information that can be requested and not only that found in the State Administration

This point is of particular relevance to understanding the meaning and scope of the right of access since there are not few cases in which passive legitimation in this right only extends to the organs of the State Administration. It is more. The general rule is that the various legal systems that have legislated on the right of access to information, as is the Chilean case, only extend it, in its passive face, to the administrative function of the State. However, we consider that correct regulation of the law requires that it be extended to all State bodies and even to those private that manage public resources (for example, a private university) and provide public services (for example, an electricity company). The exercise of power is not only carried out by the State Administration, so it is not acceptable that only it is in principle, obliged to provide information at the request of the citizen.

Instead, the specialized doctrine is in favour of this broad passive legitimation. This is how the Office of the Special Rapporteur for Freedom of Expression of the OAS(2012) has been categorical in stating "that the right of access to information creates obligations for all public authorities of all branches of power and autonomous bodies, at all levels of government." However, besides this international body maintains that "this right also binds those who perform public functions, provide public services or execute, on behalf of the State, public resources." (OAS, 2012)

In this same direction, a few years ago the GA / OEA in the document called "Recommendations on Access to Information" (2008) pointed out that the passive legitimacy for the delivery of information must be broad and it:

It implies that the duty to provide the required information must encompass all types of public bodies and authorities. Besides, at this point, it should be taken into account that for the actual existence of a broad right of access to information also private companies, international organizations, intergovernmental and non-governmental organizations that provide public services, use public funds or handle information In the public interest they must respond to requests for information and make the principles of publicity and transparency a matter of course for their actions.

The Inter-American Juridical Committee in its "Principles on the Right of Access to Information" (2008) has indicated that:

The right of access to information extends to all public bodies at all levels of government, including those belonging to the executive, legislative and judicial powers, bodies created by the constitutions and other laws, property bodies or controlled by the government, and organizations that operate with public funds or carry out public functions.

We fully agree with what is expressed in the "Declaration of Atlanta and plan of action for the advancement of the right of access to information" where it is stated that the right of access to information "also applies to non-state actors: who receive public funds or benefits (directly or indirectly); carry out public functions, such as the provision of public services, exploit public resources, including natural resources ", even in this same instrument it is stated that" any person should have the right of access to information held by large

corporations for profit, when said information is necessary for the exercise or protection of any human right, following the Universal Declaration of Human Rights ".

2.3.5.- Access to copies in any medium

In strict relation to the principle of facilitating the delivery of public information, adequate regulation of the right of access to public information must be extended to any medium or format in which the information is contained, whether printed or electronic. Moreover, today with the incorporation of the media to the exercise of public function, it is becoming more and more common to find public information stored in databases that are in the hands of State bodies.

The Inter-American Juridical Committee (2008) declares that "the right of access to information refers to all significant information, whose definition must be broad, including all that is controlled and archived in any format or medium."

2.3.6.- A clear and precise procedure, with short deadlines. Absence of discrimination

The recognition of the right of access to public information must be carried out in light of the principle of facilitation, since in no case would it be tolerable to recognize the right and at the same time obstruct its exercise. Within this context, the procedure by which the citizen exercises his right must be reasonable, clear and precise and with short deadlines that do not make the right illusory. The Inter-American Law on Access to Public Information (2010), in its preamble, categorically indicates that "the process for requesting information should be governed by fair and non-discriminatory rules that establish clear and reasonable deadlines, that assist those who request the information, that ensure free access or with a cost that does not exceed the cost of reproduction of the documents and that

impose on public bodies the justification for the rejection of an access request, giving the specific reasons for the refusal ".

Within this same scheme, and also in light of the principle of facilitation that must inform any regulation made of the right of access to information "the burden of proof to justify any refusal of access to information must fall on the body to whom the information was requested". (CJI, 2008) and not in the citizen who requires the information.

2.3.7.- Taxation in the causes that allow denying the requested information

A regulation on access to public information must start from an intractable assumption: the general rule is advertising and that the exception is secrecy. Consequently, the norms that contemplate reasons for reservation or secrecy are of strict law, and concerning them, there is no analogy.

On this point the Court of Justice of the European Union (2012, fund. 66) has been categorical in indicating, regarding the delivery of the required information to the Commission of the European Communities, that it is appropriate:

Remember that exceptions in access to documents must be interpreted and applied restrictively so that the application of the general principle consisting of granting the public the maximum possible access to documents held by the Commission is not frustrating.

Also, the grounds for secrecy or secrecy must be exclusively handed over to the legislator (in this case the principle of the legal reserve must be strictly applied) or to the Constitution. Nevertheless, this requirement alone is not enough, since the grounds for reservation or secrecy established in the law must respond to specific reasons that prevent

legislating in order to restrict the exercise of the right. Indeed, the temptation to act protected under a cloak that prevents the visibility of actions will always be present in those who exercise power (possibly one of the direct consequences of the exercise of sovereignty). Therefore the reasons for secrecy or secrecy must be justified only in the democratic principle and in the rights of the people.

In strict accordance with what has been stated, the Council of Europe Convention on access to public documents in its article 3 establishes the possibility of placing limits on access to information to the extent that these limits are provided in the law, are necessary for a democratic society and pursue specific objectives such as national security, defence and international relations, public security, prevention, investigation and prosecution of criminal activities, disciplinary investigations, inspection, control and supervision by public authorities, privacy and other legitimate private interests, economic and commercial interests, state policies of currency exchange, monetary and economic, the equality of the parties in judicial procedures and the effective administration of justice, the environment or deliberations within or between public authorities regarding the examination of a matter. The GA / OAS in its "Recommendations on Access to Information" (2008) has stated that:

In this way, the strict requirements for the State to be able to prove a legitimate limitation represent a turning point to avoid the arbitrariness that implies in practice that the decisions of the reasons why the information is denied are in the hands of the State and of each one of the authorities that is resorted to in pursuit of the same.

2.3.8.- Effective sanctions for those who violate the right

The right of access to information is inserted, in most of the political-legal systems in which it operates, in a context of the almost natural rejection of transparency. Indeed, its consecration precisely seeks, among other purposes, to contribute to the establishment and strengthening of a culture that allows banishing secrecy in the exercise of public function. Therefore, the positivization of effective sanctions to officials who unjustifiably refuse to deliver the information duly requested becomes necessary for the effective operation of the right.

The Model Inter-American Law on Access to Public Information (2010) in its preamble establishes that "any person who intentionally denies or obstructs access to information by violating the rules established in this law must be subject to sanction."

Regarding the nature and magnitude of the sanctions, these will be determined by each particular legal system. However, they must be severe enough so that, on the one hand, a disincentive to the transgression of the right can be established and, another, the responsibility of the offending official is made effective in an efficient manner.

2.3.9.- Effective judicial recourse in the event of the refusal to deliver the information

Within the framework of a fair and rational procedure that must inform the due process, the existence of challenge mechanisms or appeals, whether in administrative or jurisdictional headquarters, also constitute an essential requirement of any regulation of the right of access to public information. If the final decision to deliver or not, the requested public information was delivered to the required public body. The law would be operationally bland. The preamble to the

Model Inter-American Law on Access to Public Information (2010) provides that "everyone must have the right to appeal any refusal or obstruction of access to information before an administrative body and to appeal the decisions of this administrative body before the courts of justice."

2.3.10.- Suitable monitoring mechanisms to verify compliance with the regulations that recognize the right of access to public information

Effective regulation of the right of access to information must provide mechanisms that allow the authority in charge of ensuring compliance with its regulations to monitor how the taxpayers of the same are acting concerning it.

This monitoring allows, among other things, to make effective the corresponding sanctions and responsibilities in the event of a possible violation of the respective legal provisions and, on the other hand, to achieve permanent feedback that allows the system of access to information to be improved and perfected, as well as to banish bad practices and socializing the good ones to make the exercise of the right more effective and to get closer and closer to installing a real culture of transparency.

The Model Inter-American Law on Access to Public Information (2010) requires the different public authorities subject to the law to submit to the body in charge of its implementation an annual report that must at least contain: the number of requests for information received, granted in whole or in part, and of the requests denied; which sections of the law were invoked to deny, in whole or in part, requests for information and how often they were invoked; Appeals filed against the refusal to communicate information; its activities aimed at publishing information; its activities aimed at document maintenance; the activities carried out to public officials in order to train them; information on the number of

requests answered within the legal deadlines; information on the number of requests answered outside the deadlines established by law, including statistics on any delay in answering; and any other information that is useful for the purposes of evaluating compliance with the law by public authorities.

On the other hand, the body in charge of ensuring compliance with the regulations on access to information, in the case of the Model Law (2010), the Information Commission, upholds article 63.2:

It must present annual reports on the operation of the Commission and the operation of the law. This report will include at least all information it receives from public authorities in compliance with the right of access, the number of appeals filed with the Commission, including a breakdown of the number of appeals from the various public authorities and the results and status of themselves.

2.3.11.- Existence of an autonomous and independent body in charge of ensuring compliance with the regulations on access to information

This requirement is fundamental in any political-legal system that wants to advance in these matters seriously. Without a body endowed with these characteristics, the right of access to information will ultimately end up being subjugated by political-partisan interests of the government in power.

The Model Inter-American Law on Access to Public Information (2010) proposes the creation of an "Information Commission" that will be in charge of "promoting the effective implementation of this law". This Commission "must have full legal personality, including powers to acquire and dispose of property and the power to sue and be sued", in addition to this body must be recognized "operational autonomy, budget

and decision" and will correspond to the Legislative Power "Approve the budget of the Information Commission, which should be sufficient for the Information Commission to be able to fulfil its powers adequately."

For their part, the members of this body must be designated transparently, with the intervention of both the executive and the legislature, in a process in which previously the instance is given to listening to civil and citizen organizations.

In order to increase public confidence in the institution, both the executive and the legislature should participate in the selection process; that any decision of the legislature is by a qualified majority sufficient to guarantee bipartisan or multiparty support (e.g., 60% or two-thirds); that the public has the opportunity to participate in the nomination process, and that the process is transparent. (Model Law, 2010)

Finally, the members of this body must receive a remuneration that allows them to dedicate themselves full time to this function, be immovable for political reasons and not eligible for another period as a guarantee of maintaining the necessary independence that a position of this nature requires.

2.4.- The reserve or secrecy as an exception to the general rule of access to public information

According to the Dictionary of the Royal Academy of the Spanish Language, the word secret has several meanings. Thus, she gives an account of "a thing that is carefully preserved and hidden", Of an attitude of" reserve or secrecy ", and so on. However, when we think of the word secret for this investigation, we are thinking of the information that within a democratic regime, it is legitimate to reserve to the State.

Transparency, publicity and access to public information must be understood in the context of the democratic system. In the words of the teacher Revenga Sánchez (1996) state secrets or in general (for this work) the grounds for secrecy or secrecy that legitimately allow not to deliver requested public information, "only pose problems that are not easy to solve in the context of companies that, for want of a better name, we can call it "open" and whose political systems respond to the minimum marks of democratic organizations". (p. 20)

However:

> Democracy, precisely insofar as it is situated in the sphere of politics, that is, of public affairs, would have as general rule transparency, the principle of publicity, and only exceptionally can secrecy be allowed. In contrast, secrecy it would be the rule in the order of the private. (De Lucas Martín, 1990, p. 134)
>
> Indeed, in democratic systems, the State secret must necessarily be considered as a "suspicious category, besieged by procedural precautions and where the burden of proof of the legitimate nature of the secret falls on the person who invokes it". (Revenga Sánchez, 1996, p. 20)

As it holds De Lucas Martín (1990):

> The conclusion seems obvious: there is no real representation, no possible representation, nor, ultimately, democratic legitimacy, without the principle of publicity, because, on the other hand, there is no control where there is no transparency, and without adequate control of power there is no room for democracy. (p. 134)

We can conclude that:

> The generality in a democracy is that access to information is free, but it is necessary to clarify that this access to sources may be exceptionally restricted in certain circumstances. Therefore, the right to information is configured as a non-absolute fundamental right. (Torres Ventosa 1998, p. 364)

The Chilean Constitutional Court has said (2012, cons. 26) that:

> The mysterious or secret nature of a matter is not something perverse, reprehensible or suspicious in itself. The Constitution contemplates the possibility that the law directly or the Administration, based on certain specific legal grounds, declare something as secret or reserved.

In other words, "it is not a question of disqualifying secrecy in the public sphere as something incompatible with democratic reason" says Professor Revenga Sánchez (1998, p. 60), for the same reason, both state secrets and Other grounds for reservation can only be tolerated when they concur "in strictly exceptional terms and linked to the defence of a manifest public interest." (Revenga Sánchez, 1998, p. 60)

The secret or reserved nature of an act, of a document, of a foundation, is not immunity or absence of control. There are other forms of control, such as the administrative procedure, administrative resources, the exercise of the powers of the Comptroller General of the Republic, the debate in the National Congress, and others. (Revenga Sánchez 1998, p. 60)

Along the same lines of argument, the warning that:

Revenga Sánchez (1998, p. 61) raises, on the occasion of the judicial control of State secrets within democratic societies, is enlightening and which is otherwise fully applicable to any cause of reservation or limit to the publicity of the acts of the State or the exercise of the right of access to public information, namely:

The State secret cannot be raised as a barrier that prevents the Judicial Power from looking into any area of the public space in the performance of its tasks. Whatever is said, the constitutional State is founded today on an increasingly internationalized reason of rights, against which the rule of law cannot be valid, however democratic it pretends to be, violating a minimum content of safeguards.

In any case, the same author is in charge of clarifying that behind the word «lean out», there is no invitation to go beyond the limits of the separation of functions of the State, but rather to verify that "secrecy is not invoked with spurious purposes, that is, diverted from the public interest for whose defence the possibility of invoking it is contemplated ". (Revenga Sánchez 1998, p. 61)

Also, the secret or reserved nature of an act can create a space to protect other legal rights that the Constitution considers as relevant as publicity. In the language of the Constitution, the rights of the people, the security of the Nation, the national interest, or the due fulfilment of the functions of the organs, are at this level. For this reason, they must be respected and considered. (Revenga Sánchez 1998, p. 61)

We agree in order to accept that the right of access to information is not absolute, but may be subject to some limitations. In any case, these limitations must respect at least specific requirements, adequately formulated by the IACHR, which are related to the fact that the reservation or secrecy

must consist of a real exception, must have a legal and never regulatory consecration, must set legitimate objectives, be necessary and strictly proportional. (IACHR, 2006)

The reserve or secrecy is a strict matter of legal reserve. The CJI (2008) has repeatedly argued that "exceptions to the right of access to information must be established by law, they must be clear and limited."

It seems to us that the guarantee of the legal reserve is essential to avoid any violation by public bodies and officials that have traditionally shown a deep reluctance to transparency and publicity of their actions.

2.5.- Final proposal of a concept of the right of access to public information

The right of access to public information can be considered in a broad sense, in a less broad sense and a restricted sense.

In a broad sense, the right of access can be understood as "the power of individuals and legal entities to request official documentation and information that is in the hands of the State, to consult it, become aware of it and obtain its reproduction.". (Lavalle Cobo, 2009, p. 33)

As can be seen, in the definition that we have just transcribed, public information can be requested in general terms from the State, that is, from the different bodies in charge of the various state functions, not only those that carry out the administrative function.

In a less broad sense, the right of access to public information recognizes the power to demand documentation and information, consult it and reproduce it from the executive body, especially the State Administration.

In a restricted sense, this right would refer to the power to demand access to administrative documents and not to any information that has the State Administration.

We consider that the right of access to public information should be considered from the first of the indicated perspectives, that is, in a broad sense, also highlighting its nature ius fundamental.

The right of access to public information implies the prerogative or faculty that a person has to access and know the information that is in the power of the State bodies and of the private persons that manage public resources or provide public services, with their exceptions that are exhaustively established by the Constitution or the law and that are necessary for the success of the democratic process or guarantee the fundamental rights of the people.

Behind the right of access to public information are fundamental objectives: to make the public function transparent and thereby reduce the scope of corruption and its adverse effects; strengthen confidence in the democratic political system and thereby protect democracy from political instabilities that can be used by people who want to achieve power; provide people, either individually or collectively, a useful tool to enhance the quality of their rights, especially political rights, and improve their quality of life.

Therefore, the right of access is a subjective right of a fundamental legal nature to the extent that it constitutes or should constitute part of the necessary legal status of every citizen as a consequence of its connection with the democratic principle. Its content can be formulated based on doctrinal constructions and approved international legal documents on the subject.

It is a right that, however, is not usually recognized at the constitutional level. Alternatively, if it is, it is partially due to its connection with other rights, but without acquiring the autonomy that corresponds to it due to the democratic nature of its justification. It means that as such a right (unless it is included in any other of those recognized constitutional rights) it does not have the guarantees of the subjective public rights expressly recognized in the constitutional texts, but only those included in the development legislation. In this sense, the fundamental right of access would not be a right of constitutional rank, but of legal rank.

CONCLUSIONS

In conclusion, the right of access to information held by State bodies or any entity that manages public resources and funds is a fundamental right that must be part of the legal status of a citizen in any democratic society, however, usually does not have constitutional status and therefore lacks the typical protection of these rights. It is usually recognized legal rank. Given the above, in the absence of the constitutional guarantees derived from respect for the actual content and its privileged jurisdictional protection, the legislator has a wide margin of manoeuvre in determining its content, scope, limits and protection, circumscribing most of it. Sometimes to an impenetrable right only concerning the State Administration and not of all public powers.

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At the eye of the pandemic hurricane: What have we learned about the control of the public administration in Brazil?

No turbilhão da pandemia: O que qprendemos sobre controle da administração no Brasil?

En el ojo del huracán pandémico: ¿Qué hemos aprendido sobre el control de la administración pública en Brasil?

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ABSTRACT: the scope of this essay is to analyze some decisions of the Brazilian federal administration concerning actions to minimize the current pandemic of COVID-19 to understand to which extent such discretionary decisions could be subject to a judicial review.

KEYWORDS: public administration, law, legal rule, judicial review of the administration, administrative court.

RESUMO: o objeto deste estudo é analisar algumas ações empreendidas pelo Estado brasileiro como resposta à atual pandemia de COVID-19 e verificar se haveria ou não para a atuação dos órgãos de controle sobre as escolhas discricionárias realizadas.

PALAVRAS-CHAVE: administração pública, direito, norma legal, revisão judicial da administração, tribunal administrativo.

RESUMEN: el alcance de este ensayo es analizar algunas decisiones de la administración federal brasileña sobre acciones para minimizar la actual pandemia de COVID-19 para comprender en qué medida tales decisiones discrecionales podrían estar sujetas a revisión judicial.

PALABRAS CLAVE: administración pública, ley, norma jurídica, control judicial de la administración, tribunal administrativo.

INTRODUCTION

The current situation of the pandemic of the new coronavirus is modifying innumerable paradigms of contemporary society is a complete cliché. At the level of integration that we have today in the world and with the dimensions that social relations have acquired (many of which even have a global reach), a period with so many restrictions on circulation and assembly was almost unimaginable. The consequences are not yet fully known and will, to a large extent, be quite profound.

In this research article, we do not intend to present great sociological reflections on the current moment - we are not even qualified to do so. However, a precise cutout seems to be very relevant to be made and analyzed: how to delineate the control of the Public Administration in discretionary acts that institute programs and public policies.

As it is a commonplace in several works on public law that have come to light in recent decades, the relationship of the legality of the Public Administration has changed. From a mechanism to protect the individual, intended to offer predictability from the authoritarian interventions of the State, legality started to embrace a more open vision of compatibility between a competence rule provided by law and the act produced by the Public Administration. The polysemy of the

term legality became even more flagrant than it was in its origin, as Charles Eisenmann (1982) states.

What is more: the constitutionalization of the legal system [1], resulting from specific changes in the content and purposes of contemporary constitutional texts, has also brought about a new challenge: the demarcation of the spaces of control of constitutionality and control of legality, insofar as the former control is no longer exclusively applicable to the verification of the compatibility of the content of an abstract legal rule (notably parliamentary law) with the Constitutional Text, and has *also* become the mark of direct control of the constitutionality of acts of the Public Administration. [2]

In other words, the classic structure of control of the Public Administration, created in the 19th century to test the adherence of an administrative act to the content previously determined by law, is today complemented by a series of means of control. In other words, in theory, it is no longer only the compatibility of the act with its legislative framework that is controlled, but also the compatibility of the act with the competencies of the public agent and with the contours given by the Constitutional text to certain rights of citizens concerning the State.

Furthermore, this expansion of the Public Administration scope is mainly due to the spectrum of administrative discretion. If, in the XIX Century, the law could

1 Here, the idea of constitutionalization of law is used to designate the fact that the root of the legal treatment of countless themes becomes constitutional instead of legal. Constitution starts to contemplate the fundamental precepts of almost every legal matrix of society, restricting the freedom of the infra-constitutional legislator and creating state bases that cannot be easily changed (Silva, 2008, p. 46-49).

2 A clear example here is the constitutional claims (Verfassungsbeschwerde) of German law, which consist of legal actions brought directly before the Constitutional Court to challenge a state act (including administrative acts) in the face of subjective public rights arising from fundamental rights (Pieroth y Schlink, 2009, p. 316).

foresee all the competencies of the Public Administration (or, at least, most of them), clearly delimiting its purposes and limits, the State of the XX Century became too complex to allow such a broad scope of the law, considering that other competencies for the Public Administration appeared, such as those concerning the fulfilment of social rights and the direct intervention in the economic domain. Thus, today, the legal system (not only parliamentary law, therefore) often endows public agents with powers, with the imposition of specific purposes, ensuring them a considerable margin of discretion.

This happens especially in the case of non-authoritarian actions of the Public Administration, such as, among others, those related to the fulfilment of social rights. In these cases, the legal system (usually preamble by the Constitution itself) creates rights for citizens without a precise circumscription of which public actions should be undertaken to ensure the effectiveness of the right constituted. There is an enormous amount of discretionary space to be filled.

Moreover, this is precisely the point of this very brief essay. As expressly stated in Articles 6 and 196 et seq. of the Federal Constitution of 1988, health is a right guaranteed to all citizens and an obligation of the State. There is a definition of the contours of the right to health, but without determining all the actions to be undertaken by the Government to guarantee it. Hence the question arises of what can be demanded and what can be controlled concerning discretionary powers by public officials.

The issue in Brazil is not new, nor did it arise with the pandemic of the new coronavirus. Since the promulgation of the Federal Constitution of 1988, there is constant litigation

about the guarantee of the right to health. However, this litigation focuses on the demand for personal benefits against the State, such as cases that refer to the right to receive a specific medicine or treatment not immediately available in the public health system.

There is constant litigation about the individual contours of the right to health. However, there is no record of a relevant case in which a *public policy* in the field of the right to health has been questioned, instituted by the Public Power within the margin of the discretion conferred upon it, that is, a state decision that gives concretion to a programmatic norm of the legal system. [3]

Nevertheless, the extreme situation currently experienced due to the pandemic of the new coronavirus has brought about some fascinating discussions, notably on the extent of discretionary power of public agents in the field of health and on the possibility of controlling allegedly erroneous state actions or omissions in the making of decisions that could put at risk the right to health of Brazilian citizens.

This is because the Brazilian Federal Government adopted - or failed to adopt - specific measures related to the fight against the pandemic, which leads to the discussion of how much interference of control is possible, given that, based on evident technical criteria, the right to health may not be realized. In other words, once again comes questioning the possibility of incidence and the eventual extension of the control of public actions based on programmatic norms and, therefore, with broad discretionary powers.

3 Here, public policy revolves around the notion of finalistic obligations created by the legal system from programmatic norms, which impose a particular purpose to be achieved, without a precise degree of binding as to the administrative decision to be taken in its fulfilment. It is a cutout of a much broader concept, but it seems to suffice for this paper.

In this context, to accomplish the proposed mission, we will follow the following path: (i) firstly, I will expose, with the maximum possible synthetic capacity, the contours of the right to health in Brazil; (ii) secondly, I will analyze three measures undertaken by the Federal Government as public policies to verify whether or not there are elements for their control; and (iii) thirdly, I will propose solutions that, in the light of the Federal Constitution of 1988, can be ventured for the case under analysis.

However, the issues addressed here are of enormous complexity, such that they would justify the existence of autonomous theses and dissertations. However, given the merely propositional nature of this article, we will not go into the details and underlying discussions that could make it impossible to conclude this article.

Finally, it is essential to emphasize that the measures chosen for exposition in this brief essay were based on the most significant possibility of discussion in the light of legal and technical criteria, disregarding discussions that might be based on personal disagreements with positions adopted by the Federal Government. [4]

1. THE RIGHT TO HEALTH

The right to health is one of the leading social rights emerging from the second half of the 20th century. In Alessandra Pioggia (2017) detailed lesson, the right to health is originally constituted from the binomial disease-health. Subsequently, the right to health comes to comprise a state of

4 Here, the Brazilian scenario of confrontation with the pandemic of COVID-19 is very complex. Due to certain decisions of the Federal Government, several more effective measures to combat the disease were taken at the level of local governments, which makes the analysis very complex and diffuse, mainly because it would also be necessary to analyze the federative conflicts brought before the Federal Supreme Court on the subject.

physical, psychological and social well-being, according to the act of Constitution of the World Health Organization (WHO), maintaining an evolutionary trajectory that takes the notion of the right to health from the exclusively individual sphere (i.e., the individual's state of health) to a collective sphere.[5]

In the case of Brazilian law, the right to health emerges as a universal social right with the advent of the Federal Constitution of 1988. In the first place, it is foreseen in the *heading of* article 6 as one of the fundamental social rights[6]Moreover, it is detailed in its universal content in the *heading of* article 196, also of the Federal Constitution. [7]

From the literalness of the provisions of Article 6, it is possible to identify the right to health in its most individual aspect, since there is the qualification of this right as a *fundamental right of positive status*, i.e., the one that generates in the citizen a *subjective public right*. On the other hand, in Article 196, the right to health acquires a collective tone, to the extent that there is mention of public policies that mitigate the risk of disease and ensure the promotion, protection, and recovery of health.

The central point of the right to health in Brazilian law rests on the provisions of Article 198, which provides for the creation of a *Unified Health System (SUS),* under which the

5 With particular emphasis, the following idea of the author should be highlighted: "the health of the person acquired a legal prominence only in the context of the protection of the health of the population and this translated into the subordination of the health of the individual to that of the collectivity and the possible sacrifice of the first in the name of a good considered as superior, as a community" (Pioggia, 2017, p. 19).

6 Article 6 of the Federal Constitution (1988) states: "Education, health, food, work, housing, transport, leisure, security, social security, protection of motherhood and childhood, and assistance to the destitute are social rights, in the form of this Constitution".

7 Article 196 of the Federal Constitution (1988) states: "Health is a right and a duty of the State, guaranteed through social and economic policies aimed at reducing the risk of disease and other problems and the universal and equal access to actions and services for its promotion, protection and recovery".

State must perform, in a coordinated and centralized manner, at all federative levels (i.e., Union, States, Federal District and Municipalities) the necessary actions for the promotion of the right to health.

The SUS was regulated by Federal Law No. 080 of September 19, 1990 (known as the Organic Law of the SUS), according to which activities inherent to promoting the right to health are the responsibility of all federative entities different types of action. The municipalities are responsible for the most direct actions related to health care for the population, especially concerning primary care. The states are responsible for regional coordination, assistance to municipalities, and provision of health services, especially in greater complexity, in a regionalized manner. Furthermore, the Union has managerial competence, formulating public policies and coordinating action plans, to be carried out in a decentralized manner.

Notwithstanding the richness and depth of the legislative treatment of the right to health and the SUS, the applicable legal provisions have a clear *framework law.*[8] Nature, since they foresee actions to be taken and purposes to be achieved, with the delegation to the different decision-making levels of the Public Administration of the competence to establish concrete measures to guarantee the right to health.

In light of this article, it is crucial to verify whether specific actions of the Federal Government in the establishment of public policies and guidelines to fight the pandemic can be configured as acceptable discretionary choices and taken within

8 According to the doctrine of Alexandre Santos de Aragão (2013): "Most of the current laws of Administrative Law are what the doctrine calls 'framework laws' or 'frame laws', i.e., they incorporate mentions of principles, purposes and values, without exhausting, by themselves, the detailing of the subject they address. (...) The law often only indicates the public interest purpose to be achieved; the means for doing so (including the necessary rules)" (p. 32-33).

a licit sphere of decision, or whether, on the contrary, they can be considered unlawful and, therefore, controlled.

2. SOME CASES OF PUBLIC POLICIES TO ADDRESS THE COVID-19 PANDEMIC

The current Federal Public Administration is marked by an always extremist discourse, polarizing, aggressive and challenging the canons of common sense. It is a political strategy headed by the President of the Republic to stay in power, as constantly noted by political analysts. In the specific case of confronting the pandemic, it was not (and has not been) different. Since the beginning, the rhetoric of the Head of the Executive Power and several actors of the first echelon of the Federal Public Administration has been in the sense of minimizing the pandemic and the number of fatal victims through numerous manifestations aimed at a specific political militancy.

However, as is evident, political rhetoric does not have critical legal effects for Administrative Law (although it may have them for Criminal Law). Therefore, we will not deal with deliberately negationist speeches or actions by the first level of the Public Administration. We will focus on acts of a legal nature that may be questioned through the lens of Administrative Law.

Furthermore, it seems relevant that three legal acts were issued in the specific field of administrative discretion regarding the right to health to verify if there would be means of control and their respective basis. They are the following: (i) the choice of the current minister of health; (ii) the inclusion in the SUS drug list of drugs that have no proven efficacy in the treatment against COVID-19; and (iii) the national strategies in the establishment of a national immunization policy against COVID-19.

2.1 The appointment of the Minister of Health

The formation of the cabinet of ministers is one of the most classic discretionary decisions of the Chief Executive. Persons trusted by the Chief Executive to implement his public policies are appointed as ministers of State. [9]In Brazil, it is no different: the appointment and dismissal of ministers of State is the exclusive competence of the President of the Republic (Article 84, item I of the Federal Constitution), based on discretionary criteria.

The National Congress determines the list of State Ministries through an ordinary law on the organization of the Public Administration, which is the exclusive responsibility of the President of the Republic. Once the law mentioned above of organization has been approved, the President has exclusive authority to appoint and dismiss the Ministers of State.

In the case at hand, however, the existence of the Ministry of Health is determined not only by the general law on the organization of the Public Administration but, primarily, by the Organic Law of SUS itself. Besides the standard function of all State Ministers to assist the President of the Republic at the top of the public administration, as provided in Article 1 of Decree-Law No. 200, of February 25, 1967, the Minister of Health exercises the function of commanding the SUS, and, therefore, the leadership of the entire public system to guarantee the right to health.

In this context, the question that arises is how much absolute discretion exists in the appointment of the Minister of State of Health, especially in a health emergency, as currently experienced. The central point of the discussion consists in the

9 As Aldo Sandulli (2005) rightly points out, it is inherent to the democratic system that the elected Government has the necessary instruments to put into practice the results of the electoral process. For this reason, there is a certain discretion, based on trust, for the Head of the Executive Power to appoint his ministers and direct advisors (p. 96).

fact that the Minister of Health currently in office (appointed through the Decree of June 02, 2020 [10]) is a general in the army, without any training in medicine or any branch close to public health and any experience related to the complex Brazilian health system.

It is evident, without any embargoes, that it is not necessary to have a degree in medicine or any other specific science to exercise the position of Minister of Health. So much so that there are precedents in which the occupant of the portfolio, an engineer, had his work expressly recognized by the WHO. However, there were clear justifications for the choice.

However, in a health emergency, would it be acceptable that the head of SUS and directly responsible for the formulation of public policies for confronting it could be a general who has never experienced the sector? Can the President of the Republic, under the pretext of managing a discretionary power, nominate a person without any knowledge of such a complex issue to lead the national efforts to face the current health crisis? Are there limits to this discretionary power?

Drugs included in the SUS list of medicaments.

Under the terms of item VI of Article 6 of the SUS Organic Law, it is within the scope of attributions and actions of the SUS to formulate a drug policy, whose dispensation will be free of charge, according to applicable medical protocols or under SUS therapeutic guidelines. The formulation of this list is discretionary, considering the public health conditions and the available budgets in light of the principles of proportionality and reasonableness.

10 As per press records, on June 02, 2020, Brazil recorded 31,309 deaths from COVID-19 and 558,237 confirmed cases of the disease. Precisely on this day, Brazil registered 1,262 deaths from COVID-19.

This is a clear case of[11]Since the formulation of the SUS drug list depends on complex medical, epidemiological and public health studies, technical discretion. According to studies that indicate the main demands and budgetary compatibility, medications are not included or excluded from this list on a whim or at will.

It happens that, throughout the pandemic, there was an intense movement by the Federal Public Administration to include two drugs on the SUS list as a therapeutic guideline for the treatment of COVID-19: hydroxychloroquine and ivermectin. [12]These are drugs that were speculated for the treatment of the new disease but were quickly discarded for not having had scientific proof of their efficacy in the treatment of COVID-19.

In the use of discretionary power (in the thesis), the Federal Public Administration modified the list of medicines dispensed by SUS, adding to the therapeutic guidelines approved by the Ministry of Health to use drugs without any scientific evidence of effectiveness. Moreover, such providence was taken to transmit a sense of security to the population, as if it were a cure against COVID-19, with flagrantly political-ideological bias. [13]

11 According to Sabino Cassese (2005), technical discretion is distinct from other discretion cases because the decision to be taken depends on applying specialized technical knowledge of other sciences. The assessment to be made by the administration rests on technical criteria of sciences other than law (such as chemistry, medicine, engineering, and others.) (p. 213).

12 The first official act of this inclusion is Informative Note nº 9/2020-SE/GAB/SE/MS, of May 20, 2020, and the most recent, still in the same sense, is Informative Note nº 17/2020-SE/GAB/SE/MS, of July 30, 2020.

13 Here the public policy adopted oversteps any limit of reasonableness. Although it is not a binding legal act, the Ministry of Health went so far as to organize publicity campaigns and even created a mobile phone application indicating the "early treatment" of COVID-19, based on the use of the mentioned drugs. In these media, there was an indication that patients should request the use of the drugs and, if there was a refusal on the part of the doctor in charge, they should request the substitution of the professional until they found one who was willing to guarantee such "early treatment".

In this context, one must ask whether the discretion of the Minister of Health in the composition of the list of drugs to be dispensed to the population through the SUS network can be used to include drugs without any scientific evidence, as a pretext for transmitting a false idea of tranquility to citizens.

2.2. The national immunization plan for the population

The last point that deserves attention is the set of actions and omissions of the Ministry of Health regarding establishing a national plan of immunization of the population against COVID-19. Again, we will not consider public manifestations of the President of the Republic against vaccination and that have put in doubt the efficacy and safety of vaccines. The focus will be formed by a set of government actions to verify whether or not there is a possibility of control.

As is notable, from the beginning of the second half of 2020, the world began to see considerable advances in the development of vaccines against COVID-19. At that time, most countries, directly or through the WHO, began to make agreements with pharmaceutical industry players to ensure the acquisition of vaccines in the shortest possible time. Furthermore, since it was still uncertain which vaccines would be effective and safe, it was common for most countries to reach agreements with a plurality of laboratories to ensure more than one possibility.

In a country with 210 million inhabitants, like Brazil, the theme becomes especially relevant since a vaccination plan should contemplate the acquisition of at least 450 million doses for immunization of the population. This is not speculation, but simple arithmetic, based on the need to control the spread of the coronavirus.

However, what happened in Brazil was completely

different. The Ministry of Health entered into a purchase agreement with only one laboratory, among several developed vaccines. Furthermore, the agreement did not contemplate a minimum number of doses to be supplied to Brazil, but only a commitment to transfer technology to the Oswaldo Cruz Foundation (a public laboratory owned by the Federal Government and very traditional) of vaccines in Brazil) for local production.

Moreover, by an unsubstantiated decision, it was determined the prohibition of the purchase, by SUS, of a vaccine developed by the Butantan Institute in conjunction with a Chinese pharmaceutical company. This institute is a public laboratory linked to the Government of the State of São Paulo, governed by a political rival of the President of the Republic.

In this scenario, what was expected occurred: several countries that entered into multiple purchase agreements were able to start their immunization plans much earlier than Brazil. When several countries already had immunization plans in course, Brazil did not even have plans to start its own, so that currently, there is an immunization plan in course, but at a too slow pace and without any prospect of being accelerated by the lack of vaccines in the international market.

It happens, however, that the issue of vaccination and immunization of the population is not foreign to the attributions of the Ministry of Health. Unlike what happens in other countries, where the immunization of the population is not a public policy, in Brazil, there is the Federal Law No. 6259 of October 30, 1975, which establishes the National Immunization Program, prepared and managed by the Ministry of Health. [14]

14 In the context of this programme, Brazil achieved very significant results over time, such as the complete control of diseases like measles, polio and tuberculosis. These results have been recognized several times by the WHO as a world example of population immunization.

Furthermore, the fact that demands some reflection is the possibility or not of controlling the omission of the Ministry of Health. In other words, could the Ministry of Health ostensibly fail to guarantee vaccine supply contracts for a population as large as Brazil's? Is this a legally relevant issue, especially in light of Federal Law 6.259/75?

3. ATTEMPTS TO ANSWER THE QUESTIONS POSED: WHAT LESSONS CAN WE LEARN?

The questions posed in the previous topic of this very brief essay discuss the control of the Public Administration in Brazil. Moreover, it is especially relevant that only the vaccination plan mentioned in sub-topic III.3 is somehow at the centre of a process of control of the Public Administration so that there was no attempt at corrective or repressive control of the actions mentioned in sub-topics III.1 and III.2.

Looking at the issue of control from a strictly theoretical point of view, it seems clear that there are two essential methods: *control of legality* and *control of legality*.

The *control of legality* is the most traditional and is even regarded by many as the origin of Administrative Law itself. In general, control of legality consists in the verification, by the competent control body, of the compatibility of an administrative act with the legal command that supports it. It departs very clearly from the idea of typicality, according to which the law determines the content of the act be produced if and when the hypothesis of incidence of the normative command occurs in the real world. This is a very objective relationship of acceptability of the administrative act: compatible or incompatible with the law, with content acceptable in light of the legal rule or incompatible.

Evidently, since the first lessons on the control of legality, which date back to the early nineteenth century, many developments have occurred in the form of its realization. However, its essence remains the same: the compatibility of the act with the parliamentary law that created the administrative power to act in the specific case.

On the other hand, the *control of legality* appears to be much more complex since it does not deal only with the collision of the administrative act with parliamentary law, but rather, the act with the legal system as a whole, initiated directly by the constitutional text. The scope of the controller's analysis is much broader and, therefore, allows for much more detailed scrutiny of the activities practiced. Furthermore, the result obtained is much more than a legal-illegal binomial. The administrative act may present different levels of compatibility with the legal system, from its simple conforming interpretation to its complete invalidity.

It is evident that the control of legality and the control of legality *coexist and are complementary*. In other words, it is not because an act is subject to legality control that it cannot also be subject to legality control: an act may be perfectly legal but unconstitutional.

In this step, adopting a term very well allocated by the young doctrinaire Marco Antônio Moraes Alberto, legality and the control of legality constitute distinct *semantics*. They are analyses of the compatibility of administrative acts, but with different methods and adopting different *systems*.

Well then. Putting Brazilian administrative actions into perspective, one sees that the control of legality is unacceptable, given that public agents practiced acts within their spheres of competence, observing an existing margin of discretion expressly granted by parliamentary law.

However, when the same acts are analyzed through the lens of *legality control*, it does seem that control is possible. Moreover, this statement stems from some considerations.

In the first place, the competence of the public agents under discussion is strictly bound by a purpose expressed in articles 6, 196 and 198 of the Federal Constitution and Article 2 of the Organic Law of SUS, even if discretionary as to the means. As much as there is freedom of content and definition of the moment to act, *the purpose of protecting the right to health must be guaranteed in all its aspects*. As a consequence, when it is possible to demonstrate that there has been a lack in the guarantee of the right to health as a direct result of conscious action or omission of the public agent, control may, of course, emerge.

In the second place, it does not seem adequate that the control of the Public Administration is performed by the same methods when analyzing cases of authoritarian intervention. It counts on stricter competence rules and a more significant typicity load, and when analyzing cases of the fulfilment of fundamental rights of *positive status,* given that the normative structure of the second case is much more finalistic and programmatic, purposely extending the discretion of the public agency to provide him with instruments better to reach the imposed purposes. *They are distinct methods, and it seems essential that legality never comes unaccompanied by legality, under penalty of having the control of the Public Administration restricted to a mere formal verification, without any actual dimension.*

In light of these placements, we would have the following view on the cases described in topic III of this article:

In the case of the appointment of the current Minister of Health, there is a vice. The discretion enjoyed by the President of the Republic is not infinite, nor is it uncontrollable.

Moreover, in the Constitutional Democratic State of Law, there is no unlimited discretion. All discretion must meet a purpose. Furthermore, in the case at hand, there is no connection whatsoever between the qualifications of the Minister of Health and the purposes imposed on the Ministry of Health. It is a capricious choice that potentially put at risk the right to health of the Brazilian people. The appointment under discussion would only be appropriate if it were possible to prove the minister's aptitude for the position, he occupies using detailed grounds for the act of appointment. However, this never occurred.

Similarly, including hydroxychloroquine and ivermectin in the list of medications dispensable by SUS in the case of COVID-19 as a therapeutic guideline is vitiated. Here, it is a case of *technical discretion in which* impositions of other sciences bind the choice of the public agent. Therefore, from the moment which medicine and other biological sciences prove the inexistence of efficacy of these drugs for the treatment of COVID-19, the presence of these drugs in the list of medications of SUS as a treatment therapy for COVID-19 is entirely unacceptable. The technical knowledge that could ground the management of discretion in the concrete case grounds a decision in diametrically the opposite direction: the impossibility of including the drugs in question on the SUS list.

Finally, the case of the national immunization plan does not reflect another reality. By not seeking to ensure the supply of vaccine doses necessary for the immunization of the population, there is a clear violation of the duties of reducing the risk of disease, protection and recovery mentioned in Article 196 of the Federal Constitution. Then, there is a clear case of *discretionary power reduced to zero* built on German Administrative Law, according to which:

> In certain concrete cases, a claim of an excellent discretionary decision may be replaced by a claim of a single specific discretionary decision, especially in the hypothesis where the conditions of the concrete case or other legally acceptable grounds for any other decision do not exist or where any other decision that would be taken would be unlawful in consideration of fundamental rights or European Union law. (Kluth, 2017, p. 359)

That is, in light of the provisions of Articles 6 and 196 of the Federal Constitution, the jurisdiction provided in Article 3 of Law 6.259/75 could not generate any other action by the Minister of Health that was not solely and exclusively the most excellent possible search for suppliers of vaccines with the potential to interrupt the contagion and spread of the new coronavirus. There is an omission that could be subject to control, through the imposition of an obligation to do so by the control organs (a mechanism that, by the way, is widely used in the sphere of control of the administration in other spheres, notably in the sphere of local Public Administrations).

Once again, of the three cases mentioned, only the third is the object of an act of control, namely ADPF. [15]No. 756-DF, currently in progress before the Supreme Court and proposed by political parties in the act of social control and not by the organs of control of the Public Administration. Analyzing the content of interlocutory decisions issued so far, it appears that the Constitutional Court limited itself to request information and request the submission of a vaccination plan, which seems very little given the factual impossibility of acquiring more doses of

15 ADPF is the Argument of Noncompliance with a Fundamental Precept, a constitutional action aimed at challenging, directly before the Supreme Court, the constitutionality of certain normative acts not subject to control by the Direct Action of Unconstitutionality or acts of the Executive Branch.

vaccine at this time. There is no imposition of any obligation to do or act of accountability of the public officials involved.

Against this backdrop, what lessons can we draw? One and simple: although much of Brazilian doctrine already accepts the control of legality as a method of control of the Public Administration, the control agencies - especially when it comes to controlling the federal public administration - are still very attached to the idea of *strict control of legality*, respecting a sphere of discretion that has very directed management in light of the Federal Constitution.

CONCLUSIONS

The strict control of legality is, once again, a valid and existing method. However, when the underlying normative framework is directive, finalistic and programmatic (framework norms), the control of legality is insufficient, opening a dangerous space for authoritarian excesses and suppressing control effectiveness.

Including, it should be mentioned that control by juridicity is already commonplace in individual conflicts that seek specific health benefits, as can be apprehended from the first instance and state court decisions. What is still missing is that this method is transplanted to the national sphere, in the analysis of broad public policies, in diffuse relations. There is still an inexplicable deference to administrative decisions in these cases, which end up not being subject to review based on the traditional idea of control of legality.

Thus, if the pandemic may have brought a lesson to Brazilian Administrative Law, it seems clear that it is a need for better tuning of methods (or semantics) between the control and the type of administrative action controlled. There are

points to be adjusted, under penalty of putting very dangerously at risk the survival of the Democratic State of Law.

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Importance of the elimination of corruption for the strengthening of Democracy

Importancia de la eliminación de la corrupción para el fortalecimiento de la Democracia

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ABSTRACT: The indexes of crimes against the good functioning of the public administration in Ecuador are alarming. Although every year, there is an increase in efforts to fight corruption, concussion and acts that threaten sovereignty and democracy. These efforts have not provided significant changes despite living a state of emergency worldwide due to the COVID-19 pandemic, which threatens people's health with a high mortality rate, since there are people who only aim at personal enrichment, leaving aside the general interest. These illegal acts generate transaction costs from anti-democratic actions and actions that go against the Ecuadorian positive law since they limit the investment of these resources in the growth of relevant sectors for the evolutionary development of the country, such as the area of health, education, the incentive to sport, the emergence of new technologies. Besides, it is essential to consider the investment to eliminate the crimes that attempt against protected legal assets so that these would be reduced every year, that cost would be destined to the positive evolution of the country. Therefore, this article aims to analyze the

importance of eliminating crimes against the proper functioning of public administration to eliminate the State transaction costs generated and thus strengthen democracy and legal security in the country.

KEYWORDS: illegal cooperations, transaction costs, democracy, crimes, undemocratic acts, legal certainty.

RESUMEN: Los índices de delitos contra la buena marcha de la administración pública en el Ecuador son alarmantes. Si bien cada año aumentan los esfuerzos por la lucha contra la corrupción, la concusión y actos que atentan contra la soberanía y democracia de un país, pero no han proporcionado grandes cambios a pesar de vivir un estado de emergencia a nivel mundial debido a la pandemia por COVID-19, que atenta contra la salud de las personas con un alto índice de mortalidad, ya que existen personas que solo tienen como objetivo el enriquecimiento personal, dejando de lado el interés general. Estos actos ilícitos generan costos de transacción a partir de las acciones antidemocráticas y acciones que van contra el derecho positivo ecuatoriano, puesto que limitan la inversión de esos recursos en el crecimiento de sectores relevantes para el desarrollo evolutivo del país como: el área de salud, la educación, el incentivo al deporte, el surgimiento de nuevas tecnologías; además, es importante considerar la inversión para eliminar los delitos que atentan contra bienes jurídicos protegidos, con el fin de que estos se redujeran cada año, ese costo sería destinado a la evolución positiva del país. Por lo cual, el objetivo del presente artículo es analizar la importancia de la eliminación de los delitos contra la correcta marcha de la administración pública, para eliminar los costos de transacción estatales que se generan, y así fortalecer la democracia y la seguridad jurídica del país.

PALABRAS CLAVE: concusión, costos de transacción, democracia, delitos, actos antidemocráticos, seguridad jurídica.

INTRODUCTION

According to the figures in the Corruption Perception Index of 180 countries published by Transparency International's NGO, Ecuador is in seventh place in Latin America in terms of corruption, with "38 points" (AFPRedacción, 2020).

This figure, considering the countries included in the study, is alarming. Countries such as Chile and Uruguay, with the most extensive territories and populations, occupy the lowest positions in the study, indicating that democracy and the fight against corruption in the country are not effective and are only generating transaction costs than the benefits.

Although the phenomenon noted may be inclined to a myriad of causes, because of the percentages, news items. The most recent jurisprudence, the high indices of corruption are linked to an erroneous application of the economic upsurge, believing that committing crimes such as concussion "the result of a tradition of criminalizing these crimes" (García, 1997, s. p.) will provide economic security that will tarnish the illicit act. This indicates that positive law gradually became a mechanism for evading legal and social responsibility since the norms were interpreted at the convenience of the citizens, regardless of how undemocratic and "transparent" their acts were.

Consequently, as Castro (1999) points out, "by not making available our human practices, the reference to a tradition of ideas or moral beliefs in force" (s. p.), the duty to be a good citizen will not be fulfilled. The people have a right to a dignified life, a right that as a sovereign must prevail over all events in life. The States must guarantee the fulfilment of the rights of the citizens in transparency and granting security to the positive right that governs us.

The complication is that, with time, the criteria and actions used when seeking compliance with the right to a dignified life will not be effective and will end with the hope of thousands of people and children who in a large percentage lose faith and hope in the democratic system, where transparency and commitment of authorities and citizens are supposed to prevail, in the search for social welfare supported by legislation as norms that regulate human behaviour, raising awareness about respect and nationalism for their country, so that in the future they do not violate their dignity, performing corrupt acts that increase the cost of the Ecuadorian legal system.

Therefore, this article will reflect on the importance that should be given to the fulfilment of social transparency to eliminate transaction costs generated by crimes against public administration that, in the future, would serve the evolutionary process of the country in productive sectors. For achieving this result, we will focus first on the transaction costs generated by cases of crimes that attempt against the protected good of the good functioning of the public administration in the country, especially the crime of concussion. Furthermore, we will analyze the Theory of the transaction costs so that finally, these references allow us to consider the criticisms that we must overcome to strengthen the democratic and transparent interest of the country.

1. Corruption

1.1. Limiting factors of democracy

The legal significance that the legal systems give to crimes against the proper functioning of public administration can be seen in different countries around the world from the moment they exalt it to the category of protected legal property

within a crime. As an example, concussion as a crime[1] They are perceived negatively by citizens due to the reprehensible abuse of office by public servants.

Furthermore, as we situate ourselves in a country that declares itself to be democratic, that its legislation supports it as a democratic country, but that has public servants who, instead of serving the country truthfully, dedicate themselves to serving it, affecting the will of the people.

It is worth mentioning that democracy is a form of government of the State, a political doctrine and a form of social organization, that in countries with a democratic form of government, they maintain that power lies with the sovereign and ruling people. According to Dahl (2004), professor of political science at Yale University, in his book "Democracy" he defines democracy as "government of the people" according to its etymological origin: "The etymological origins of the term democracy hint at certain urgent problems that go far beyond semantic issues. Whether to establish a government of the people or by the people - a popular government".

Democracy is derived from the "Greek demokrati, coined from demos ("people") and kratos ("government") in the middle of the 5th century B.C. to denote the political systems then existing in some Greek city-states" (Dahl, 2004, s. p.). Furthermore, in the preamble of the Constitution of the

1 The positive law of Ecuadorians highlights the title of the concussion. In this sense, the Constitution of the Republic of Ecuador (2008) in its article 129, establishes that "the National Assembly can proceed to a political prosecution for crimes of concussion to the principals". Article 281 of the Comprehensive Criminal Organic Code of Ecuador (2014) states that "Public servants and persons acting under a state authority in any of the state institutions, determined in the Constitution of the Republic, their agents or official dependents who, abusing their position or functions, by themselves or through third parties, order or demand the delivery of rights, quotas, contributions, income, interests, salaries or undue gratuities, shall be punished with a prison sentence of three to five years.".

Republic of Ecuador (2008) it is added that we are a "society that respects, in all its dimensions, the dignity of persons and collectivities; a democratic country, committed to Latin American integration - a dream of Bolivar and Alfaro - peace and solidarity with all the peoples of the earth".

Since it is clear that the Constitution establishes that we are a democratic country and that some public servants who work directly with the State commit crimes of concussion and take advantage of subordinates, it can be pointed out that this declaration of "democracy" is not entirely true. Instead, it incurs corruption that is defined as "the use of a public office for one's benefit or that of third parties and against the interests of the institution or community" (Soto, 2003, s. p.). Constitutional provisions are disregarded from the outset, which indicates that if these principles cannot be met, neither can they be met if they are stipulated in subsequent regulations.

In this sense, the commission of these crimes brutally attacks transparency and can generate individual costs that can destabilize the economy. Enforcement In the system, such as the legal protection that can define and follow guidelines for the protection, avoid the lousy follow-up of the guidelines in the competition policies.

For this reason, one solution may be to propose an improvement in the law for the control of the duties of public servants, which, although national legislation has this regulation in force, it is not applied nor is its content complied with, and despite promoting this "control of duties" it is useless to have ineffective rules that would only represent a high cost of regulation that does not provide for benefits and results.

Article 11 of the Constitution (2008) in its fifth paragraph, adds that:

> Public servants and persons acting under state power in any of the institutions of the State, determined in the Constitution of the Republic, their agents or official dependents who, abusing their position or functions, by themselves or through third parties, order or demand the delivery of rights, quotas, contributions, income, interests, salaries or undue gratuities, shall be punished with imprisonment of three to five years.
>
> If the conduct provided for in the preceding paragraph is carried out through violence or threats, the public servant shall be sentenced to five to seven years' imprisonment.

From this and once it has been established that concussion is a crime that limits the exercise of democracy in the country, forgetting the sovereign and executing actions in benefit of the individual favour, it can be maintained that it is preferable to observe long term results to fight corruption, it is necessary to train the personnel of the public sector from a perspective of the protection of legal assets that affect not only the State but also the citizens as relatives of the same servants, since as it has been established "the power lies in the people".

2. Concussion and the theory of transaction costs

The concussion, like other crimes, causes irreversible damage to society; this crime seeks to take advantage of people, extorting them, withholding their income for the appropriation of others by public servants who take advantage of the exercise of their office. Since this crime is contrary to democracy, as are so many other crimes defined by the COIP and the content of the grievances is an issue since, although they are primarily

linked to criminal law, the former derives from and is binding on the State, due to the transaction costs involved.

The Theory of Transaction Costs "is responsible for identifying the sources and dimensions of a transaction. It seeks to coordinate transactions more efficiently and to specify the mechanism of governance". (Salgado, 2003, s. p.) and when these transactions are coordinated in two ways, they generate a double cost to the State, the first transaction being the legal transaction of the resources:

> The set of rules that reduce opportunism in exchanges that extend mutual trust between subjects generating the long-term viability of the execution of contracts, which in the end can save transaction costs. (Arias and Caballero, 2003, p. 119)

Furthermore, the second transaction is the one in which the crime of concussion is committed. In the absence of regulation, or payments to cover up the second transaction mentioned, corruption is a complex task and "there is no general meaning to the term. Different societies generally have different moral, political, and administrative views on what practices are corrupt. (Soto, 2003) which has adverse effects and should be punished according to the level of involvement of the public administration.

However, the meaning indicated for this article is the concept of corruption as "the set of characteristics that characterize corruption is that the exchange is voluntary between both parties-corruptor and corrupt" (Soto, 2003), which increases with unregulated transaction costs.

Transaction costs "have profound implications on the allocation of resources and the structure of economic organization. (Ramirez, 2010) and can be defined as those

"economic sacrifices required to acquire or produce a good or service" (Silva-Culler, 2003, p. 3) and one of them is the regulatory costs that the State incurs in creating standards and the high costs in terms of approving inapplicable standards. It shows that transaction costs have broad implications, which, in the wrong hands, can have serious consequences.

Public servants are the ones who manage resources, according to the position and the state organ to which they correspond; these public servants have duties regulated by national regulations, one of these regulatory norms is the Organic Law of Public Service (LOSEP). This law establishes fundamental duties that public servants must comply with: "(a) To respect, comply with and enforce what the positive law establishes. Seeking the legal security of the country". (LOSEP, 2010)

Article 22 of LOSEP (2010) states that:

> The duties of public servants are a) To respect, comply with and enforce the Constitution of the Republic, laws, regulations and other provisions issued following the law; b) To personally comply with the obligations of their position, with solicitude, efficiency, warmth, solidarity and under the collective good, with the diligence they generally employ in the administration of their activities.

The standards seek to regulate and control the exercise of the functions of public servants, ensuring the transparency of the service, however, in Ecuador there are many cases of conflict that have generated commotion in society and fueled corruption:

> Series of corrupt actions. These include open theft, misappropriation of state funds or property, nepotism and obtaining favours from friends or family, and abuse of public authority to obtain personal payments or benefits. Harsch's definition can be extended to include influence peddling, insider trading, accepting gifts and donations, lobbying, and other activities to influence the political system for personal or interest group gain (Soto, 2003, n. p.)

Two highly cited cases were the case of the former Vice President of the Republic of Ecuador, Ms María Alejandra Vicuña Muñoz. As a public servant, she received more than "forty-three thousand dollars ($43,000) in her accounts from three of her former collaborators between 2011 and 2016, the period in which she served as a national assemblyman" (El Universo, 2020). Vicuña was brought to trial, but during this whole process, the State had to allocate economic resources.

The corruption generated by public officials generates a high transaction cost to the State, as in this case, the Ecuadorian State had to assume the waste of economic resources in the solution of this case, expenses such as the payment to the officials of the judicial function, who are the ones who solve these cases, expenses of effectiveness and time wasted in the solution of these crimes of concussion. Loss of social welfare, since citizens are disappointed with the social contract they have established. Also due to the loss of legal security, when they witness these cases of corruption that generate a cost for the State and civil society.

In Ecuador, the awareness of citizen transparency should be intensified, and a change in thinking should be made concerning serving the country, not using it. That could have been used in productive areas for the country. The transaction costs were affected by corruption, betraying the sovereignty of the people, through undemocratic acts.

The hierarchy or privilege that public servants have in this area is notorious, regarding the management of State funds; if they desire to obtain unjustified money sprouts in them, which should not happen as expressed by Pérez (2012): "Public positions and jobs cannot be a source of economic enrichment and profit, public subjects are due to the nation but not to the appetites and chrematistic greed of their impulses. If this principle of transparency and democracy were followed, the transaction costs generated by corruption in the country would be zero, which would represent a favourable economic and political balance for the country.

Likewise, based on transparency, the States should seek to reduce the expenses caused by corruption. In this sense, the International Organization of Supreme Audit Institutions states that:

> Transparency is a powerful force that, when applied consistently, can help fight corruption, improve governance, and promote accountability. The International Organization of Supreme Audit Institutions SAIs operates under different mandates and models. These principles may not apply equally to all SAIs, but they are intended to lead them towards a common goal of transparency and accountability. The notion of transparency refers to public information by the SAI, in a timely, reliable, transparent and relevant manner, on its status, competence, strategy, activities, financial management, performance and activities. It also includes the obligation to report on the results and conclusions of audits and to make information concerning the SAI accessible to the public. Accountability and transparency are two critical elements of good governance. Transparency is a powerful force that, when applied consistently, can help fight corruption, improve governance, and promote accountability. Accountability and transparency cannot be easily separated: they are both about the same

actions. (INTOSAI, 2010, n. p.)

The crime of concussion limits the transparency and fluidity of processes, especially in the public sector:

> It is noteworthy that these definitions of corruption involve only situations in which public servants and different groups or individuals in society interact. It would seem to deny that corruption exists in the private sector. It is not the case. (Soto, 2003)

If we do not have transparent servants, the transaction costs will be greater and greater, and the expenditure for the State will increase disproportionately. Democracy and transparency must be promoted, leaving aside the corruption that is the cancer of every society, which hurts the state economically and socially, taking years to regain the confidence of the sovereign in the State.

3. The Social Configuration: Eradicating Corruption and Empowering Democracy

3.1 The Good Living Regime and the reworking of economic institutions as a tool for social configuration. Consecration for the eradication of corruption and democratic growth of the country.

In Ecuador, since 2008, without prejudice, Good Living (Buen Vivir) was proposed as the central axis of the Constitution, and this premise was echoed throughout the country:

> Good Living (Buen Vivir) as a structuring principle of the new Constitution implies the recognition of the concepts of sustainability and respect for nature promoted by indigenous societies. More than a constitutional declaration, it is an opportunity to collectively build a new development regime based on

> an economy of solidarity. It means moving away from an over-determined economy determined by mercantile relations, promoting a dynamic and constructive relationship between market, state, and society. Good Living (Buen Vivir) is a utopia of a joint life project to be executed by the action of the citizenry. (Acosta, 2008, n. p.)

The third article, paragraph 5 of the Constitution of the Republic of Ecuador (2008) states: "To plan national development, eradicate poverty, promote sustainable development and the equitable redistribution of resources and wealth, in order to access the good life". Consequently, Article 14 states that: "The right of the population to live in a healthy and ecologically balanced environment that guarantees sustainability and good living, sumak kawsay, is recognized" (CRE, 2008).

Under the terms of the Organic Code of Planning and Finance (COPFP) (2010), article 9 establishes:

> Development planning - Development planning is oriented towards the fulfilment of constitutional rights, the development regime and the regime of good living, and guarantees territorial ordering. The exercise of public powers must be framed in development planning that will incorporate the approaches of equity, plurinationality and interculturality.

These norms and theories lead us to understand that the social configuration must have the Good Living (Buen Vivir) as a basis for its construction. This is important to look for stability, fluidity and commitment in the areas where we develop; these characteristics will be impregnated in people's subconscious, which will become subjective characteristics to them, which favours the State since it will lead to a change in the Sovereign's thinking. This change of thought would help

in all the productive and social sectors of the country, such as education, health, economy, and others.

If society changes from an unprogressive way of thinking to an entrepreneurial way of thinking, which seeks to achieve remarkable goals, without becoming detached from honesty, transparency and rectitude, the costs or losses that the State faces every day due to corruption will be significantly diminished. This percentage reduction of investment by the State in confronting cases of corruption, concussion and embezzlement from the State will generate net income for the innovation of technological tools that will empower the country.

Seeking a general Good Life, which goes beyond development:

> Decades ago, development was conceived as continuous economic growth, mediated especially by exports and investment, which would generate effects that would benefit the rest of society. From this perspective, human welfare is reduced to material consumption, and nature must be intensely exploited. (Gudynas, 2011, n. p.)

Based on the provisions of the cited fragment, it is clear that the Good Living is not an alternative mode of life, but the primary mode; and it should be accessed as a configuration tool, as long as its basis is factual in principles of transparency, and is not used as a double-edged sword; while the sovereign believes in the Good Living, a minority group uses it as a mechanism of irregular individual enrichment.

Buen Vivir should not be used as a base for some movement or political party with dubious aims. It should be used as a reminder of social reconstruction, of positive changes, which can only be generated by us as citizens. By increasing

Good Living, we must know how to live well as the ideal of each people, using primary resources as the basis for strengthening their industry, controlling possible damage to nature, allocating funds for studies that allow for more excellent product performance, with less social and environmental impact.

The investment to live well is not low cost. However, suppose we observe its long-term benefit. In that case, we will have a positive balance for the economy, as Cortez (2011) rightly states "The "good living" is the life paradigm towards which "development" should be oriented in order to seek sustainable development in a society we must seek to live well, which implies "a general reordering of what the modern term "development" had intended to express" (Cortez, 2011).

In the era of globalization and development in which the world finds itself, it should not be challenging to find ways of social reconstruction, taking by the hand the waves of modernity that haunt the world "most of the current discussions about the process of globalization are about the increasing intensity and speed with which various networks of social action enable and constrain the capacity for sovereign action" (Iranzo, 1999) if, with the intensity and speed with which we face the world and the conflicts that beset societies, we manage to insert social reconstruction by leaving aside specific historical thoughts, which sought the individualization of resources, the exploitation of the less advantaged "of a rising number of individuals on an ever-increasing geographical scale. " (Iranzo, 1999), the utopia of total social reconstruction could come close to fulfilment.

The referred author adds that:

> The emotions would be "di positional variations" of the neural and hormonal systems, and consequently, also of the motor, respiratory and circulatory systems,

> by the effect of a "judgment" on the condition of the body itself, in itself or related to the situation of the environment. Emotions are immediate, holistic bodily reactions to the current state of the body-in-world. Potentially, there are as many emotional variations as there are subjects, physiological states and situations to which they react. However, the "basic universal emotions" characterized by the activation of specific neural and hormonal reactions and processes appear to be five: Joy, Sadness, Anger, Fear and Disgust. (Iranzo, 1999)

The criterion that has been analyzed in the social group by Professor Cruz (2012):

> Emotions are not detached from the interpretative frameworks of social movements and in the same way from collective actions; and that on the contrary, collective action could not be understood without accounting for the underlying emotionalities. Emotions enter the spiral of reason, and contribute to the process of reasoning rather than disturb it. Emotions have a direction towards an object. This object has at the same time an intentional description, these two characteristics make emotions not body impulses, but linked to cultural and social frameworks and directly contribute to decision making and influence the argumentative and deliberative processes of social and political action of human beings[2].

Consequently, the correct handling of emotions contributes to collective actions from reason, intuiting the process of reasoning. If the politicians or rulers start from this premise not only to get to power or to obtain votes, to reach the presidential podium, the prosecution of the masses for social reconstruction would be a resounding success.

2 The reason for the emotions social, political and cultural formation of the emotions (Cruz, 2012).

Thus, the reconstruction of a society accustomed to corruption, crimes of a concussion that impoverish the dignity of people and enrich the pockets of the corrupt. Consequently, it will leave in the past the disturbing emotions that delay the process of social change.

In Ecuador, numerous cases afflict the country's democracy, the transparency of the State and the actions of its officials. Some of these events, such as influence-peddling in the Ecuadorian Institute of Social Security (EISS):

> In 2012, the IESS Board of Directors, chaired by Ramiro González, recommended the award of the hospital cleaning contract to the company Super Clean, for an amount of USD 2,991,363. The Comptroller's Office found irregularities in the award and the Prosecutor's Office, based on the report, opened an investigation.
>
> On February 28, 2020, the Criminal Court of Pichincha found Carlos Carrión and Wilmer Veloz guilty of the crime of influence peddling, as accomplices to the crime. They will have to serve a six-month prison sentence and pay a fine of USD 459,675.93. (González, 2020, n. p.)

Regarding the Sabatini's case: "in this process, a possible bribe is judged, and one of the judges is the former Secretary of Communication, Fernando Alvarado, one of the strong political cadres of Correa and who is currently on the run" (González, 2020, s. p.).

The public debt, Ina Papers, mismanagement of funds in the Ministry of Public Health during the Pandemic (overpricing of medical supplies):

> All the hospitals in Quito are being investigated. All of them are going to be audited". That was the announcement made yesterday by the Minister of

> Health, Juan Carlos Zevallos, at a time when the country is experiencing a series of complaints, investigations and audits for alleged acts of corruption, in the midst of the health crisis by COVID-19, in hospitals run by the Ministry of Public Health (MSP) and the Ecuadorian Institute of Social Security (IESS).
>
> According to Zevallos, for some time now, they have been collecting information on cases of irregularity, including information given by doctors that suggest issues to be evaluated.
>
> The General Comptroller of the State informed, last Monday, that about the Ecuadorian capital, he is conducting special exams on hiring processes at the Baca Ortiz children's hospital and the Eugenio Espejo hospital. (El Universo, 2020)

Collection of Tithes by the Former Vice President of the Republic María Alejandra Vicuña (sentenced for the crime of concussion):

> Former Ecuadorian Vice President María Alejandra Vicuña was found guilty of concussion in the Diezmos Case. For the crime, she will have to serve one year in prison.
>
> The Criminal Court of the National Court decided that Vicuña will also have to pay a fine of US$173,180 and the confiscation of a property. This was formed by judges Marco Rodríguez, Daniella Camacho and Wilmer Terán.
>
> Vicuña, an assemblyman for the Alianza PAIS party, was accused of demanding money from two of her collaborators, Angel Sagbay and Carla Obando. They claim to have made deposits into the former vice president's account.

> In the case, the Prosecutor's Office argued that Vicuña received bank transfers from three of her advisors for amounts of $23,300, $14,650 and $5,345, respectively, and accused her of being the author of the crime of concussion. (República, 2020, n. p.)

The contracts with the company ODEBRECHT (where an encrypted system "MyWebDay" was used for the payment of bribes):

> The construction company used My Web Day and Drousys software to cover up its bribes in 12 countries, including Ecuador. These software programs encrypted communications to avoid justice and kept details of payments by state, work, amount, and beneficiaries. This is how their executives and four supposed intermediaries in the country were identified. (El Telégrafo, 2017, n. p.)

The surcharges for the construction of the Pacific Refinery (PETROECUADOR):

> For five strategic projects that started in the government of former president Rafael Correa, USD 4.9 billion were paid, when they should have cost half as much. These are the Esmeraldas and Pacific refineries; the Monteverde maritime terminal; the Pascuales-Cuenca pipeline and the Bajo Alto natural gas plant. The conclusion reached by the audit carried out with the support of the United Nations and announced on the night of January 3, 2019, by President Lenin Moreno, on a national channel. The technical evaluation of these projects was carried out by a Spanish company, one from the USA and one from the UK, contracted under a tender cost of USD 3.3 million. (El Comercio, 2019, n. p.)

The crime of Concussion by Former President Rafael Correa Delgado "Officially, as of April 2020, the Attorney General's Office is keeping open against Rafael Correa 25 previous investigations for crimes such as embezzlement, procedural fraud, fraud, murder, influence peddling, robbery, organized crime, attempted murder, homicide" (El Universo, 2020), misuse of presidential planes (covered routes to tax havens):

> The former president of the Republic, Rafael Correa, adds a new process against him, this time promoted by the General Comptroller of the State. This Thursday, September 12, 2019, the leader of the so-called Citizen's Revolution confirmed that he was notified with a gloss of USD 9 million for the use of the presidential planes. (García, 2019)

A never-ending list of corruption "corruption, which is often reflected in acts of bribery, is a general term that encompasses the misuse of authority derived from considerations of personal benefit that does not necessarily translate into monetary gain" (Soto, 2003).

Also, corruption always seeks "the diversion of public funds to private purposes" (Soto, 2003). Then, the crimes of concussion by public servants or better known as bureaucrats "corrupt bureaucrat such as the one who uses his public office as a platform to obtain illegal income" (Soto, 2003). These bureaucrats were and are dedicated to using the State. These events and many more that have not been detailed above means a near future in Ecuadorian society, creating a society assiduous with the regulations in force, with minimal hope of regaining confidence in governments.

As far as the evaluation of Ecuadorian society is concerned, it shows a desire for change, tarnished by false leaders, who seek to fill their pockets by impoverishing those

of the sovereign, disrespecting their leaders, and forgetting the principles of transparency and Good Living.

Economic institutions are critical to the social configuration and Good Living. If the economic institutions are restructured, the system of capital management is changed, the transaction costs are modified, and the costs and benefits that each economic institution brings can be analyzed again. With the ABC (Analysis of Costs and Benefits), we will have a much more beneficial decision-making capacity in the economic and personal, legal, social or cultural fields.

With this cost-benefit analysis, we will know which is the best alternative we can choose within the range of possibilities routinely presented to us; if within an economic action the benefit is going to be greater than the cost is the right action, but if the cost is greater than the benefit we will have to discard that possibility in our choices. If the state makes a correct analysis of the cost and benefit of the norms or economic institutions, the monetary waste will be reduced and reinvested as part of a social reconfiguration. One recommendation to revive social development hand in hand with Good Living is "the patient reworking of the institutions that govern the behaviour and relationships between individuals in their daily activities, within companies and the state apparatus. (La Economía de Mercado: virtudes e inconveniences, 2020)

CONCLUSIONS

The importance that the legal systems recognize the duties of citizens and those who work as public servants is evident from the moment they attribute the category of duties. Duties that, from the perspective of the Democracy of the Republic of Ecuador, correspond to the "demos" (people): the people have to respect the processes that strengthen the democracy of the country.

In Ecuador, having a democratic government, there are advantages in hiring professional services for the welfare and satisfaction of the needs of citizens, such as the availability of professionals who attend to the different areas that fall under the jurisdiction of the State, public welfare, efficiency and effectiveness in the various State agencies. Unfortunately, these advantages are overshadowed by corruption in the alteration of contracts, in influence peddling, corruption in the self-assignment of a percentage of a subordinate's salary for placement in a professional service position (competing in the crime of concussion, violating the principles of integrity, transparency, efficiency and effectiveness.

If we want to reach a deep social reconstruction, we must be clear that corruption is "cancer" that afflicts us as a society and must be mitigated at its root; the elimination of corruption:

> Corruption can be interpreted as a failure in the institutional structure of society, particularly in its capacity for governance. If the institutional structure were effective, acts of corruption would be detected and punished as a general rule, while the norms would be adapted expeditiously to inhibit acts of corruption. (Soto, 2003)

It is vital to strengthen democracy, to eliminate corruption; if a country does not have transparency in its transactions, actions, decisions, the future is not enlightening. To reconcile us as a society, "You can say that transparency is more "sustainable" than corruption. Good employment practices are more "sustainable" than exploitative jobs. Philanthropy can contribute to the 'sustainability' of a society". (Porter and Kramer, 2006). With democracy, we must start from necessary actions such as: respecting traffic signs, respecting the order of the lines, paying taxes to the Internal Revenue Service (without making up the income), not having contractual relations with alterations, analyzing the costs of the law, making transaction costs viable, and strengthening citizens' trust in the current legal system.

Honesty and transparency should be subjective characteristics of individuals so that when these subjects of law create companies and give life to legal persons, these characteristics are transferred.

If citizens understand that democracy is born from home, respecting the rules imposed by the heads of household, without evading or deceiving those who impose them. Then, citizens will understand the political system that we have embraced as a country, the Democratic System, which tirelessly seeks to defend the sovereignty of its leaders. The deterioration that frequently afflicts democracy is corruption, hence the importance of eradicating it to strengthen the exercise of democracy in Ecuador. To eradicate democracy in the country may sound utopian; only if we, the citizens, decide with conviction to change the way we make decisions in our lives and the country will we achieve a total social reconstruction, eliminate transaction costs and save millions of dollars that are currently destined to the fight against corruption.

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The extensive interpretation of the criminal nature of trafficking in scheduled substances subject to control: The case N° 18282-2018-00726

La extensiva interpretación del tipo penal de tráfico de sustancias catalogadas sujetas a fiscalización: el caso N° 18282-2018-00726

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ABSTRACT: The author analyzing the penal type prescribed in article 220 of the COIP, because he considers their interpretation is extensive. To verify this assertion is necessary to evaluate the international legal context for the illegal use of narcotic and psychotropic substances, in line with the old Narcotics Law that was invalidation until the enactment of the COIP in 2014. Additionally, the paradigm shift has drawn up as a result of the entry into force of the National Constitution of 2008, which stops the consumer of prohibited substances as a criminal from receiving treatment for victims. Finally, the author analyzes to correctly interpret the aforementioned criminal type and consequently proposes an interpretation criterion reflected in the analysis of a judicial case that occurred in one of the Ecuadorian courts, thus concluding that in the Ecuadorian criminal legal system simple drug possession is atypical.

KEYWORDS: Criminal law, interpretation, crime, drug trafficking, criminal sanction.

RESUMEN: El autor se encarga de analizar con exhaustividad el tipo penal prescrito en el artículo 220 del Código Orgánico Integral Penal (COIP), pues a su forma de ver las cosas se lo ha venido interpretando de forma extensiva. Para comprobar esta aseveración, se evalúa el contexto jurídico internacional referente al uso ilegal de sustancias estupefacientes y psicotrópicas, en consonancia con la vieja Ley de estupefacientes que estuvo vigente hasta la promulgación del COIP en el año 2014. Además, se resalta el cambio de paradigma trazado a raíz de la entrada en vigencia de la Constitución Nacional de 2008, en el que deja de verse al consumidor de sustancias prohibidas como un delincuente para darle el tratamiento de víctima. Finalmente, el autor hace un análisis dogmático para interpretar correctamente el tipo penal aludido y consecuentemente propone un criterio hermenéutico que luego lo plasma en el análisis de un caso judicial acaecido en uno de los juzgados del Ecuador, concluyendo así que en el ordenamiento jurídico-penal ecuatoriano es atípica la tenencia simple de droga.

PALABRAS CLAVES: Derecho penal, interpretación, crimen, tráfico de estupefacientes, sanción penal.

INTRODUCTION

Since the entry into force of the National Constitution of the Republic of Ecuador in 2008, the Legislative Branch has been urged to adopt the infra-constitutional regulations following the parameters established in the constitution and international treaties. Then, the state of the question on the criminalization of drugs was subject to a positive reassessment, and this would be reflected in the publication of the Organic Comprehensive Criminal Code (from now on, COIP) in 2014. In this norm, a different treatment is given to the issue of drugs concerning how it was done in the ancient Law of Narcotic and Psychotropic Substances.

Despite the paradigm shift in the COIP, at the jurisdictional level, an erroneous and extensive interpretation has been made of the type of illicit drug trafficking embodied in art. 220, since individuals have been criminalized for the sole possession of non-trafficking drugs when that conduct in light of any interpretation turns out to be atypical. Therefore, we would be facing a severe violation of human rights of institutional origin.

In this sense and to give foundation to the assertion, in the development of the work, the following will be analyzed: constitutional norm and international conventions; Narcotic and Psychotropic Substances Law as a legislative antecedent; the COIP in its pertinent articles; a study will be carried out from the light of the legal-criminal dogmatics on the criminal type of illicit traffic of substances subject to the control of art. 220; Also, an executed condemnatory sentence will be analyzed, which will confirm the proposed thesis; and, finally, advancing the conclusion, the erroneous and unconstitutional judicial interpretation of the type stated will be corroborated, which will account for the enormous crisis in the administration of criminal justice.

1. CONSTITUTIONAL AND CONVENTIONAL CONSIDERATIONS

During 2007, as a result of the maximum expression of the democratic will of a State, a Constituent Assembly was installed in the Montecristi canton, and it was there that the Constitution of the Republic of Ecuador (from now on CRE) was signed, which would be published in 2008. Due to its content, the constitution has been praised by the international community on repeated occasions; *prima facie* it is coherent, guarantor, inclusive and was also the first to endow nature with an ecocentric vision. Therefore, we would say that we

are facing a norm of the highest hierarchy, which allows the free development of personality and recognizes rights and guarantees to any human being. Of course, a constitution with the described characteristics, in no way, could stigmatize and criminalize subjects who consume prohibited drugs, but rather, would urge that they are treated as individuals who require state aid for being victims of addiction.

In this sense, from article 364 of the CRE (2008) it follows:

> Addictions are a public health problem. The State will be responsible for developing coordinated information, prevention, and control programs for the consumption of alcohol, tobacco, and narcotic and psychotropic substances; as well as offering treatment and rehabilitation to occasional, habitual and problematic consumers. In no case will their criminalization be permitted, or their constitutional rights be violated. The State will control and regulate the advertising of alcohol and tobacco.

In addition to this, Ecuador defines itself according to the first article of the CRE as a constitutional State of Rights and Justice, and this can only mean that the entire infra-constitutional legal system must conform to the principles, provisions and respect for established rights by the first letter. For this reason, article 424 states: "The Constitution is the supreme norm and prevails over any other of the legal system. The norms and acts of the public power must maintain conformity with the constitutional provisions; otherwise, they will lack legal effectiveness". (CRE, 2008, art. 424)

Despite all that has been said, it is well known to those with legal training that a legislative adaptation of this nature to an incoming Constitution requires a significant period in order to achieve this objective. In criminal matters, only in

2014, the legislator published a new code that was called to meet constitutional expectations; and, consequently, the Law on Narcotic and Psychotropic Substances that regulated illicit behaviour linked to the drug problem was repealed, and the COIP assumed said power.

It should be noted that, regarding the COIP, the Ecuadorian legislator followed the position that criminal law must be aimed at strict protection of legal assets, and this can be corroborated in article 22, which refers to criminally relevant conduct, and also in article 29 inherent in unlawfulness (COIP, 2014); which, for the conception of the undersigned, is a correct and majority position in the doctrine despite all the objections that could be made to it. Consequently, in Ecuadorian criminal law, only conduct that endangers or injures protected legal assets is typified and criminalized.

In keeping with what has been stated, in the Third Chapter of the COIP (2014) that refers to the "Crimes Against the Rights of Good Living", it typifies in its Third Section the "Crimes Against the Right to Health". Therefore, health will be the legal asset protected by criminal law in illicit acts related to psychotropic and narcotic drugs. About the right to health, the constitutional norm includes it in articles 32 and 359 and describes them as follows:

> Health is a right guaranteed by the State, whose realization is linked to the exercise of other rights, among them the right to water, food, education, physical culture, work, social security, healthy environments and others that they support good living.
>
> The State will guarantee this right through economic, social, cultural, educational and environmental policies; and permanent, timely and without exclusion access to programs, actions and services for the promotion and comprehensive care of health, sexual

> health and reproductive health. The provision of health services will be governed by the principles of equity, universality, solidarity, interculturality, quality, efficiency, effectiveness, precaution and bioethics, with a gender and generational focus. (CRE, 2008, art. 32)
>
> The national health system will comprise the institutions, programs, policies, resources, actions and actors in health; it will cover all dimensions of the right to health; it will guarantee promotion, prevention, recovery and rehabilitation at all levels; and will promote citizen participation and social control. (CRE, 2008, art. 359)

That said, from a look at international law, Ecuador has acceded to the 1961 Single Convention on Narcotic Drugs, which in turn was amended by the 1972 Protocol signed by the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988. In this regard, in Article 33 of the 1961 Single Convention on Narcotic Drugs (1988), it has been stated that the parties will only allow the possession of narcotic drugs with legal authorization; and, among other things, the following has been prescribed:

> FIGHT AGAINST ILLICIT TRAFFIC. - Taking due account of their constitutional, legal and administrative regimes, the Parties:
>
> a) They will ensure coordination of preventive and repressive action against illicit trafficking on the national level; for this, they may designate an appropriate service to be in charge of said coordination;
>
> b) Help each other in the fight against illicit drug trafficking;
>
> c) Cooperate closely with each other and with the competent international organizations of which they

are members to maintain a coordinated fight against illicit trafficking;

d) They shall ensure that the international cooperation of the appropriate services is carried out expeditiously;

e) Take care that, when the documents for judicial action are transmitted from one country to another, the transmission is carried out in an expedited manner to the bodies designated by the Parties; This requirement does not prejudge the right of a Party to require that the auto parts be sent to it through diplomatic channels;

f) Provide, if they deem it appropriate, in addition to the information provided in article 18, to the Board and the Commission through the Secretary-General, the information regarding illicit drug activities within their borders, including the reference to cultivation, illicit production, manufacture, trafficking and use of narcotic drugs.

g) To the extent possible, they will provide the information referred to in the previous section in the manner and on the date that the Board requests; If requested by a Party, the Board may offer its advice in its task of providing information and trying to reduce illicit drug activities within the Party's borders. (Single Convention on Narcotic Drugs, 1961, art. 35)

MEASURES AGAINST THE IMPROPER USE OF NARCOTIC DRUGS:

1. The Parties shall pay special attention to the prevention of drug abuse and the prompt identification, treatment, education, post-treatment, rehabilitation and social rehabilitation of the affected persons, shall take all possible measures to that end and coordinate their efforts in that regard.

> 2. The Parties shall promote, to the extent possible, the training of personnel for the treatment, post-treatment, rehabilitation and social rehabilitation of those who abuse drugs.
>
> 3. The Parties shall endeavour to assist persons whose work so requires so that they may become aware of the problems of drug abuse and its prevention and shall also promote such knowledge among the general public if there is a danger that it will spread. the abuse of narcotic drugs. (Single Convention on Narcotic Drugs, 1961, art. 38)

Concerning the three cited articles of the Single Convention on Narcotic Drugs, it is worth making a few brief observations that are highly pertinent: article 33, referring to the possession, ordered to define any type of possession that does not have prior authorization and that is why, in Ecuador, the repealed Law on Narcotic and Psychotropic Substances did so broadly and expressly. However, it has already been said that the legal assessment of drug possession behaviour fluctuated as a result of the entry into force of the COIP, due to its adaptation to the 2008 CRE criteria.

Regarding Article 35, entitled "Fight Against Illicit Traffic", it is too essential to highlight the express recognition that the convention makes to the superiority of the constitutional norm, internal laws and regulations. Besides, the article shows a clear intention to combat illicit trafficking, which in the eyes of the writer turns out to be the real conflict and that is why, in article 38, which refers to the measures to be taken for the improper use of narcotic drugs, the intention of treating, rehabilitating and socially readapting the affected people is embodied, because it is understood - rightly - that the misuse does not make the individual a criminal and instead, is a vulnerable subject that requires special attention due to their addiction.

However, regarding the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988) the following has been agreed:

> CRIMES AND PENALTIES
>
> 1. Each of the Parties shall adopt the measures that are necessary to define as criminal offences in its domestic law when they are intentionally committed:
>
> i) The production, manufacture, extraction, preparation, offer, offer for sale, distribution, sale, delivery under any conditions, brokerage, shipping, transit shipment, transportation, import or export of any narcotic drug or psychotropic substance contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention;
>
> (ii) The cultivation of opium poppy, coca bush, or cannabis plant to produce narcotic drugs contrary to the provisions of the 1961 Convention and the 1961 Convention as amended;
>
> iii) Possession or acquisition of any narcotic drug or psychotropic substance in order to carry out any of the activities listed in section i) above;
>
> iv) The manufacture, transportation or distribution of equipment, materials or substances listed by Table I and Table II, knowing that they will be used in the illicit cultivation, production or manufacture of narcotic drugs or psychotropic substances or for such purposes;
>
> v) The organization, management or financing of any of the crimes listed in the preceding sections i), ii), iii) or iv);
>
> 2. Subject to its constitutional principles and the fundamental concepts of its legal system, each of the Parties shall adopt the measures that are necessary to

> define as criminal offences under their domestic law, when they are intentionally committed, possession, acquisition or the cultivation of narcotic drugs or psychotropic substances for personal consumption contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or 1971. Convention (United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988, article 3)

In the first paragraph of the article mentioned above, there is no doubt that the conduct that is intended to be prohibited is the illicit trafficking of narcotic substances. Concerning the second numeral, the pre-eminence of the constitutional and legal norms of the internal legal order is again expressly subscribed to over the agreements of the convention, which although they recommend typifying crimes of possession, that has not been reflected by The COIP, since faithfully following the constitutional principles in force, the possession or possession of scheduled substances subject to non-trafficking control has not been criminalized, and this will be demonstrated in greater detail in the development of the investigation.

2. LAW OF NARCOTIC AND PSYCHOTROPIC SUBSTANCES: LEGISLATIVE BACKGROUND TO THE COIP

At the moment it has been put on the table that the Law on Narcotic and Psychotropic Substances had no constitutional impediment to incorporate the recommendations made by the international conventions mentioned in the previous chapter, and that is why it openly typified possession, possession and of course illicit trafficking in narcotic and psychotropic substances. However, as it has already been said, this normative situation fluctuated in the COIP for the forceful reason that the new National Constitution revalued those behaviours in a

much more rational and up-to-date sense when feeling social and scientific.

When saying of the ancient Law of Narcotic and Psychotropic Substances, this had as an objective in its art. 1 the following: "This Law aims to combat and eradicate the production, supply, misuse and illicit trafficking of narcotic and psychotropic substances, to protect the community from the dangers arising from these activities." (Law on Narcotic and Psychotropic Substances, 2004, art. 1)

In turn, Article 3 indicated allusion to the following:

> Scope of the law. This Law covers everything related to The possession, possession, acquisition and use of controlled substances, raw materials, inputs, components, precursors or other specific chemical products intended to manufacture or produce them, their derivatives or preparations, and the machinery, equipment or goods used to produce or maintain them. (Law of Narcotic and Psychotropic Substances, 2004, art. 3)

As it is easy to see, there is an absolute acceptance of the ancient Law on Narcotic and Psychotropic Substances to the conventions that were cited, since possession and position without trafficking purposes were considered criminally relevant conduct there. Moreover, as it has already been said, that would not have to generate astonishment, since the non-existent constitutional contention of that time allowed it. Continuing with the analysis of the Law, the third title refers to the improper use of substances subject to control and the rehabilitation of affected persons, and article 27 prescribes that: "Of the improper use of substances subject to control. - Abuse of controlled substances is understood to mean anyone who is not therapeutic." (Narcotic and Psychotropic Substances Act, 2004, art. 27), while article 38 maintained the following:

> Possession of substances subject to control. - No one may, without legal authorization or prior dispensing of a medical prescription, keep on their person, clothes, suitcases, housing, workplace or any other place any quantity of the substances subject to control, nor have them, in any way, for traffic unlawful of them. (Law of Narcotic and Psychotropic Substances, 2004, art. 38)

Consequently, article 27 of the Law makes it clear that the use of substances subject to control without therapeutic purpose is improper and therefore punishable; Helping with this, Article 38 establishes a wide variety of commission forms in which it includes possession and illicit trafficking. Therefore, whether from a systematic, a literal (syntactic, semantic) or a teleological interpretation, in any case, would lead to the conclusion that in the Law of Narcotic and Psychotropic Substances any type of possession of controlled substances was typified with the only exception of therapeutic use.

3. CURRENT TREATMENT OF THE PROBLEMS RELATED TO NARCOTIC AND PSYCHOTROPIC SUBSTANCES

At this point, the COIP prescribes in the Second Section of the Third Chapter referring to "Crimes Against the Rights of Good Living", all the offences and provisions related to listed substances subject to control, from "production" to "actions of bad faith to involve in crimes". However, as it has already been said, the legislator does not classify the simple or non-traffic possession as if the old Law of Narcotic and Psychotropic Substances did. Therefore, from now on, the article 220 of the COIP that refers to illicit trafficking and the provision of article 228 that refers to the acceptable amount for personal use or consumption will be exclusively analyzed, since these articles are usually used as Reason for wrongly criminalizing simple tenure:

> The illicit trafficking of scheduled substances subject to control. - The person who directly or indirectly without authorization and requirements provided in the corresponding regulations:
>
> 1. Offer, store, broker, distribute, buy, sell, send, transport, market, import, export, possess, possess or generally carry out illicit traffic in narcotic and psychotropic substances or preparations containing them, in the quantities indicated in the scales provided in the corresponding regulations, will be punished with the custodial sentence as follows:
>
> a) Minimum scale of one to three years.
>
> b) Medium-scale of three to five years.
>
> c) A large scale of five to seven years.
>
> d) A large scale of ten to thirteen years.
>
> The final paragraph of article 220
>
> The possession or possession of narcotics or psychotropic substances for personal use or consumption in the amounts established by the corresponding regulations, will not be punishable. (COIP, 2014, art. 220)

First, as a preliminary clarification, due to being impertinent for the investigation, the decision was taken not to cite the second numeral of article 220 of the COIP that refers to the illicit trafficking of chemical precursors, and the penultimate clause of the article that refers to an aggravating circumstance. Now, it is valid to emphasize at the outset that a literal (syntactic, semantic) and constitutional interpretation of article 220 makes it clear that the only intention is to criminalize the illicit trafficking of scheduled substances subject to control and chemical precursors. However, the topic of the

interpretation of the penal type will receive a more significant dogmatic treatment in the fourth chapter of the investigation.

Now, to have a comprehensive vision of current regulations, an extract from Resolution No. 001 of September 9, 2015, published in the Second Supplement of Official Registry No. 586 of December 14, will be cited below. September 2015 issued by the National Council for the Control of Narcotic and Psychotropic Substances (from now on, CONSEP), which establishes the punishable amounts concerning illicit trafficking.

Article 1, Ratify the tables of narcotic and psychotropic substances to sanction the illicit traffic of minimum, medium, high and large scale, provided for in article 220 of the COIP, approved by Resolution No. 001 CONSEPCD- 2015, of September 9, 2015, published in the Second Supplement of the Official Registry No. 586 of September 14, 2015, and its errata faith published in the Official Registry No. 597 of September 29, 2015, the amounts of which are:

Annexe 1

NARCOTIC SUBSTANCES								
Scale (grams) Net weight	**Heroine**		**Cocaine base paste**		**Cocaine hydrochloride**		**Marijuana**	
	Minimum	Maximum	Minimum	Maximum	Minimum	Maximum	Minimum	Maximum
Minimum scale	>0	0,1	>0	2	>0	1	>0	20
Medium scale	>0,1	0,2	>2	50	>1	50	>20	300
High scale	>0,2	20	>50	2.000	>50	5.000	>300	10.000
Large scale	>20		>2.000		>5.000		>10.000	

Source: CONSEP (2015)

Annexe 2

PSYCHOTROPIC SUBSTANCES						
Scale (grams) Net weight	**Amphetamines**		**Metilendioxifenetilamina (MDA)**		**Ecstasy (MDMA)**	
	Minimum	Maximum	Minimum	Maximum	Minimum	Maximum
Minimum scale	>0	0,090	>0	0,090	>0	0,090
Medium scale	>0,090	2,5	>0,090	2,5	>0,090	2,5
High scale	>2,5	12,5	>2,5	12,5	> 2,5	12,5
Large scale	>12,5		>12,5		>12,5	

Source: CONSEP (2015)

The final subsection of article 220 has also been cited, where the existence of a regulation that details the quantity of drug admissible for use for personal consumption is established; Along the same lines, article 228 prescribes the following: "Allowable quantity for personal use or consumption. - The possession or possession of narcotics, psychotropic substances or preparations containing them, for personal consumption, will be regulated by the corresponding regulations". (COIP, 2014, art. 228)

Therefore, in order to inform the appropriate amount for personal use, CONSEP (2013) in resolution No. 001 -CD- 2013 has said the following:

Considering:

That article 364 of the Constitution of the Republic of Ecuador says: "Addictions are a public health problem. The State will be responsible for developing coordinated information, prevention, and control programs for the consumption of alcohol, tobacco, and narcotic and psychotropic substances as well as offering treatment and rehabilitation to occasional, habitual and problematic consumers. In no case will their criminalization be permitted or their constitutional rights be violated ... ";

Solve:

Article 1.- To accept the toxicity analysis, psychological, biological and other studies necessary on the possession of narcotics and psychotropic substances for personal consumption prepared by the Ministry of Public Health, as well as the proposal of maximum admissible amounts of possession for consumption personnel raised by the Minister of Health, in which the following amounts are recommended as maximum admissible for tenure:

Annexe 3

SUBSTANCES	QUANTITIES (GRAMS, NET WEIGHT)
1 MARIJUANA	10
2 COCAINE BASE PASTE	2
3 COCAINE CHLORHIORATE	1
4 HEROIN	0.1
5 MDA -N-ethyl-a-methyl-3. methylphenolxyphenethylamine	0.015
6 MDA -N-a-dimethyl-3. methyl-phenolxyphenethylamine	0,015
7 AMPHETAMINS	0.040

Sources: CONSEP (2013)

Finally, with this normative framework and to direct the dogmatic analysis that continues, from now on it will be decided to change the perspective of abstract analysis, to a specific assumption that allows corroborating the objective set out in the research. In this sense, the extensive catalogue of substances subject to control will be exemplified only with marijuana, and the guiding verbs of article 220 will be analyzed in depth.

4. DOGMATIC ANALYSIS OF THE CRIME OF ILLICIT TRAFFICKING OF CATALOGED SUBSTANCES SUBJECT TO AUDIT IN THE COIP

Muñoz Conde and García Arán (2010) teach that the interpretation of the norms can be carried out on different levels, namely: the authentic interpretation is primal and is carried out by politicians in their legislative work; Judicial interpretation is carried out by the judges in their jurisdictional

tasks and, naturally, doctrinal interpretation is in charge of the jurists and professors of criminal law. Now, it is nothing new to assert that, the legislative technique is usually insufficient in order to comply with the maximum taxability mandate that is characteristic of the principle of legality. Therefore, the interpretive task of judges and jurists are necessary and complementary to reach a maximum of rationality in the administration of justice. Consequently, in future lines, the aforementioned legal institutions will be characterized:

4.1. Principle of legality

Liberal criminal law has as its letter of introduction the Principle of Legality. Because of this, it is said that any interpretation of the norm can never exceed the limits set by the legislator, but this rigorous interpretation has nothing to do with the irrational and ancient formalism, thus having the possibility of using various techniques. From interpretation provided, they do not go beyond the normative prescriptions. Therefore, to achieve a maximum of certainty in the application of criminal law, it is legitimate to make systematic, literal (syntactic, semantic) or teleological interpretations, in order to find the true meaning that the legislator intended to give to the rule.

4.2. Interpretation of the Criminal Law

4.2.1. Systematic interpretation of article 220 of the COIP

About this, Muñoz Conde and García Arán (2010) teach the following:

> The logical-systematic interpretation of the norm seeks the meaning of the legal terms based on their location within the Law and their relationship with other precepts, from the perspective of the necessary coherence of the legal system. Although the legislator

> sometimes forgets the systematic order and incurs contradictions, the legal terms cannot be interpreted in isolation but concerning the context in which they are used. (p. 126)

In this intelligence, the systematic interpretation of the norms starts from the idea that a legal system is a set of norms and when in doubt about the scope of the norms, the most recommendable thing would be to resort to the "spirit of the system" (Bobbio, 1991, p. 241); Besides, what is stated has logical support, under pain that the legislator admits the existence of normative chaos. The systematic interpretation suggests that the penal norm be analyzed from its location in the legal body since it is not a product of chance but comes from a conscious decision of the legislator.

In this sense, article 220 of the COIP (2014) which has the title: "Illicit traffic of scheduled substances subject to control", is part of the Second Section that reads as follows: "Crimes for the production or illegal traffic of listed substances subject to inspection ". Therefore, in any light, it appears that the legislative intent was to criminalize drug trafficking and other activities such as production, and nothing more than that.

Consequently, the regulatory context prevents an interpretation of the rule of article 220 to be aimed at criminalizing possession or possession without the purpose of trafficking; and, therefore, it is feasible to infer that the COIP in full harmony with constitutional imperatives, is not aimed at criminalizing consumers. Also, common sense indicates that for there to be consumers, they previously had to have or possess drugs without the purpose of trafficking, and that is one of the reasons why the Ecuadorian legal-criminal system does not typify simple possession.

4.2.2. Literal interpretation of article 220

The same Spanish authors, that is, Muñoz Conde and García Arán (2010) have said about the literal interpretation that in these cases: "it is intended to establish the meaning of the rules based on the meaning and order of the words contained in them". (p. 126). Consequently, the title of the provision of article 220 of the COIP, when it reads as follows: "Illicit traffic of scheduled substances subject to control"; hints that the content of the prohibition of the criminal law can only be conduct related to illicit drug trafficking. Likewise, the Royal Spanish Academy (2014) defines the action of trafficking as: "trade, negotiate with money and merchandise"; "Do non-legal business".

Now, in the context of article 220, a series of guiding criminally relevant verbs have been captured. In this regard, the legislator provides that, when a person: "Bid, store, broker, distribute, buy, sell, send, transport, market, import, export, have, possess ..." (thus far the legislator prescribes various typical behaviours, and some of them have a similar meaning to trafficking, such as marketing, in such circumstances, these behaviours are typical in themselves since they exhaust the content of the prohibition with their mere staging. However, the other behaviours such for example, possession, will only have criminal relevance as long as it is directed to illicit drug trafficking). The article continues saying "or in general carry out illicit traffic in narcotic and psychotropic substances" (The words "or in general" are obviously a way of encompassing all the previous actions and also indicate that any other action that has the purpose of illicit drug trafficking will also be criminalized).

Then, the important thing is to highlight that the legislator never had in mind to give the governing verb "have" or "possess" autonomous criminal relevance, but only to the

extent that they are aimed at trafficking in substances subject to control would they be relevant. Article 220 also states the following: "The possession or possession of narcotics or psychotropic substances for personal use or consumption in the amounts established by the corresponding regulations, will not be punishable." Therefore, in what follows, a specific analysis will be proposed to clarify better the interpretation that should be given to this criminal type, and marijuana will be used for this.

It can be seen in Annex N ° 1 that the minimum scale prescribed in article 220 sanctions a person deprived of liberty of 1 to 3 years for having for traffic purposes the quantity of 0 to 20 grams of marijuana. However, CONSEP (2013) resolution No. 001 -CD- 2013 that was cited in previous pages, accepting the constitutional budgets for non-criminalization of individuals who consume substances subject to control, has provided the following: "To accept the toxicity analysis (...) As well as the proposal of maximum admissible amounts of possession for personal consumption (...) The following amounts are recommended as maximum admissible for possession ".

Furthermore, the amount that the norm declares possession for personal consumption is 10 grams, as can be seen in Annex N ° 3, which supposes that exceeding that amount, at most would make the possession inadmissible, but in no way converts the possession of marijuana in traffic, for the categorical reason that responsibility in criminal law is eminently subjective, and therefore, if an individual does not have the purpose of trafficking in the substance in his possession, despite being higher than the admissible, does not make it per se typical in the eyes of article 220.

To clarify, let us say we have the following factual assumption: an individual who uses marijuana, moves from his home to a sector of the city where he acquires the substance, but this sector turns out to be distant and socially known as dangerous, and that is why that the individual could not move smoothly and prefers in each of his visits to acquire enough to consume for a couple of weeks. Specifically, the subject acquires 40 grams of marijuana, and during the return to his home, he is intercepted by the gendarmerie, and they find the substance. Following the line drawn, the individual has carried an inadmissible amount for personal consumption, but since it has no purpose of trafficking (marketing) with that substance, his conduct would not be appropriate to the criminal type of article 220 of the COIP.

Despite the preceding, what is worrying is that in judicial practice, the administrators of justice presume iure et de iure that, the fact of "having" a quantity more significant than the admissible one automatically becomes possession for traffic without practising sufficient evidence that proves such purpose. Alternatively, in turn, they misinterpret the guiding verbs that make up the criminal type, and it is thought that each guiding verb has autonomy by itself and therefore, having or possessing marijuana above the acceptable amount even without the purpose of trafficking turns out to be typical. This serious flaw in the interpretation of article 220 has empirical proof and will be evidenced in the following lines.

4.2.3. Teleological interpretation of article 220

a) Regarding the teleological interpretation, Muñoz Conde and García Arán (2010) have indicated that it is one that "meets the purpose pursued by the norm" (p. 126) and that the indications to discover this purpose may be: the location of the precept criminal (previously

analyzed in the systematic interpretation) and the legal asset to be protected. Then, since the objective is to know the prohibitive purpose of article 220 of the COIP, the following illuminating arguments will be necessary:

b) Drug trafficking is a scourge worldwide, and there is an absolute consensus on this. Recognized this problem, Ecuador allows the criminalization of any subject that is part of this complex network of criminality, with the apparent exception of the victims (consumers). Likewise, the Ecuadorian Constitution expressly prevents the criminalization of consumers of controlled substances; ergo, the COIP does not intend to criminalize the mere possession without the purpose of trafficking, for the forceful reason that those who have drugs without that purpose would-be consumers.

c) Article 66, paragraph 4 of the CRE (2008), recognizes the right to formal, material equality and non-discrimination. In this logic, one might ask: Why would the COIP prohibit the mere possession of narcotic drugs or psychotropic drugs for consumption and not so alcohol or tobacco for the same purpose? Keep in mind that, number 5 of the articulated pre-named, recognizes the right to the free development of the personality without more limitations than the rights of others. Therefore, if a person's goal is to use marijuana or tobacco without disturbing or endangering the legal property of third parties, in no way could he be criminalized. Consequently, this is another argument to assert that article 220 of the COIP is not aimed at prohibiting the simple or non-purpose possession of traffic.

d) It is said that the legal asset protected in the second section of the COIP is public health. For this reason, the only way to endanger "public health" is for the subject's activity to be directed to trafficking the substance classified as control, contrary sensu, if the subject intends to use the substance for its consumption, in full enjoyment of his constitutional right to freedom and the free development of personality, he would not put public health at risk, even in the abstract, and for this reason, this It is another argument to maintain that the COIP does not criminalize simple tenure.

e) Finally, it seems that some significant criminal and constitutional principles are not taken as seriously as they should be. The rule of law is such, because each criterion, norm, principle or guarantee goes beyond its simple enunciation and becomes fully operational. Therefore, when saying about this, if the justice operators applied principles such as that of lesividad, ultimo ratio, state economy of violence, rationality, and others, there would be no doubt that the purposeless or straightforward possession of drug trafficking would be out of the question about the scope of punitive power.

4.3. Characteristics of the criminal law and classification of criminal types: a distinctive look at article 220 of the COIP

Without going into the subject, as it is unnecessary, a complete criminal law has a factual assumption and a legal consequence. For its part, the factual assumption that it complies with the parameters of legality must make clear the prohibited conduct or the due conduct, depending on whether it is a crime of activity or omission. (Zaffaroni, Slokar and Alagia, 2002, p. 112 et seq.)

Now, when the criminal type only requires the performance of action without expecting any result, we are facing a crime of mere activity, but there are crimes that are not exhausted in the performance of the guiding verb, but instead require a destructive result; these types of crimes, in turn, admit the type of injury or danger and a clear example of the latter would be article 220 of the COIP.

Muñoz Conde and García Arán (2010) classify outcome crimes as compound and straightforward, depending on whether they include one or more behaviours. In turn, compound crimes are divided into complex and mixed, and must be understood as follows:

> Complex crimes are characterized by the concurrence of two or more actions, each constituting an autonomous crime, but from whose union a different autonomous crime arises (for example, Article 237 typifies robbery with violence or intimidation of people, means that in themselves are already constitutive of coercion or threats, but that, when integrated into theft, are part of a sophisticated autonomous crime). In mixed crimes, the type contains, under the same criminal injunction, various forms of conduct, it is sufficient for one of them to be carried out for the type to be constituted (thus, in trespassing, art. 202.1, enter or remain in someone else's dwelling, or in the bribery of article 419, the official who receives or requests the improper benefit). (pp. 260 and 261)

In this way, the conduct typified in article 220 of the COIP (2014) would be a crime of mixed result of danger and, consequently, the execution of any modality that is part of the criminal type would be punishable in cases where the conduct itself exhausts the prohibition of the norm, for example: being that the commercialization would be the modality and the traffic the conglobate contamination; to the commercialization

modality it is not required to verify anything more than its execution since it has an identical value content to the act of trafficking. However, the same does not happen with the modality of possession or possession, since in these cases their activity is not sufficient per se since they will only have criminal relevance when the purpose of the traffic is proven.

4.4. The subjective element of the criminal type of traffic in scheduled substances subject to control

Hans Welzel (1956), was the precursor of the idea that carrying out a behaviour necessarily requires knowledge about it and a willingness to do it; therefore, its significant contribution to the theory of crime was to transfer part of the subjective element of conduct from the category of guilt to the category of typicality and, therefore, in the dominant doctrine of today, typicality has an objective face and another subjective.

The aforementioned is pertinent insofar as a malicious crime typified in the COIP, can only be imputed to the subject when he has adapted his conduct to the objective elements of the criminal type and has also contributed to the knowledge and the will to have done so. In the case examine, the purpose that is required to impute the possession or possession of drugs does not turn out to be a subjective element other than fraud but is a constituent element of the subjective element of the criminal type of article 220 of the COIP.

Under this intelligence, the analysis of conduct that possibly has criminal relevance should be carried out in a stratified way, that is to say, that, in the case of possession of narcotic drugs or psychotropic drugs without trafficking purposes, it would not even exceed the stage of criminality, or it is the same, it would be atypical behaviour.

5. ANALYSIS OF THE JUDGMENT CALLED BY THE NUMBER 18282-2018-00726

As announced in the introduction to the investigation, at this point an erroneous condemnatory sentence for possession of marijuana without trafficking will be analyzed, this has been issued by one of the judges of the Criminal Judicial Unit of the city of Ambato, in the Republic of Ecuador, dated June 25, 2018, and was fully signed on October 2 of the same year.

The judicial case is signed with the number 18282-2018-00726 and can be located and reviewed in the "consultation of causes" section of the website of the Council of the Judiciary. The sentence to be analyzed has a considerable length, and for this reason, the main events that occurred and the legal considerations adopted by the judge will be transcribed with some criticism from the writer. Of course, the reader is told that the sentence has a series of typing errors and some inconsistencies in the identity and quantity of the prohibited substance for which it is criminalized; In such circumstances, it is recommended to read it in its entirety to understand its content entirely.

Facts:

1.- On Wednesday, May 02, 2018, at approximately 5:00 p.m., in the streets Av. Bolivariana and Av. Galo Vela of the canton Ambato, the anti-drug police officers Sgos. Ivan Guamangallo, Cbop. Walther Chillagana and Cbos. Klever Chicaiza have apprehended the citizen Patricio José López Tobar, in circumstances that minutes before have come to know that in this sector a subject would be carrying out activities to sell scheduled substances subject to control, so when they went to the sector they found that a subject with similar characteristics to those reported, was on Av. Galo Vela at the height of

> Parque Troya, so they have approached him identifying themselves as police members in order to have proceeded to carry out a body search, finding him in his right pocket from his pants, six transparent plastic covers containing a greenish vegetable substance, presumably drugs, thus making him aware of his constitutional rights. (Court case No. 18282-2018-00726, 2018, p. 1)

What is prescribed corresponds to the main event that occurred, but it is essential to highlight the existence of a second fact, which is that, once the subject was apprehended, he allegedly would have given consent to the police officers to enter his home, and in that place a second quantity of marijuana. In this regard, the judge said the following:

> 2.- In this scenario, since it is a person apprehended whose apprehension indicates one of the apprehending police officers to have occurred on the street and who would have been informed of his constitutional rights, which are located in Article 77, paragraph 4 of the Constitution (2008), namely: "At the time of the arrest, the agent or agent will inform the detained person of their right to remain silent, to request the assistance of a lawyer, or to a human rights defender. public in case you could not designate it by yourself, and to communicate with a family member or with any person you indicate. ", allows us to warn that for the entrance to the address in question, a court order was required, since the information obtained was from of the apprehension of the current defendant, who in an inexorable and evident way was already coerced by the very presence of the police element and therefore no questioning could be carried out, which means that the second quantity of substance found in a total gross weight of 300 grams, as stated in the drug verification and weighing act, lacks legal efficacy, since said evidence (300 gr.) has been obtained in violation of the due process rules , specifically that provided for in

> our constitutional framework in Article 76, numeral 7, literal e) of the Supreme Charter of the State: "No one may be questioned, even for investigative purposes, by the State Attorney General's Office, by an authority police or any other, without the presence of a private attorney or a public defender, or outside of the premises authorized for this purpose." (CRE, 2008) 7.8.- This jurisdictional criterion has also been upheld by the Honorable Specialized Chamber of Criminal Matters of the National Court of Justice, considering that: "23.- In conclusion: a.- That the arresters have subjected the detainee to interrogation without technical assistance and without having been previously brought before a judge of guarantees, makes it possible to distinguish between the evidence she provided at the time of her arrest (...), and that found as a result of the unlawful interrogation, leaving her defenceless according to the previous numerals. (Court case No. 18282-2018-00726, 2018, pp. 9-10)

Then, according to what the judge said, noting that was found in the home could be taken into consideration when solving the case because it was obtained illegally and unconstitutionally; and, therefore, to act differently would be to break provisions of the highest hierarchy. Therefore, the trial will only deal with the six marijuana cases found in Patricio López's pants and which have been described in the first act. Continuing with the facts:

> 3.- The statement with the oath of the expert AUGUSTO XAVIER CAJAS ROCAFUERTE, who stated that on May 3, 2018, two pieces of evidence of the case of Mr Patricio José López Tobar were delivered to him in order to carry out the diligence of weighing and chemical analysis of the A substance identified by an M1 sample as consisting of six transparent plastic covers of a greenish vegetable substance that tested positive for MARIHUANA with a gross weight of 42.18

> grams and a gross weight of 39.95 grams. (Court case No. 18282-2018-00726, 2018, p. 14)
>
> 4.- For his part, the defendant as a means of defence in light of Art. 507 numeral 1 of the COIP, declared WITHOUT OATH, who is Ecuadorian, 28 years old, who had his domicile on the streets Av. Galo Vela and he currently resides with his parents in the parish Augusto N. Martínez, who was at his home on May 2, 2018 and that he left for lunch, returning later, which also later came out again and when he took about five steps some gentlemen voted for him against the wall saying that they had a complaint against him for stealing phones, that they proceeded to search him and that's where they found him (referring to the M1 evidence that today is known to be marijuana), that they also found his money in the sum of 350 dollars and his cell phone, that in January they voted him something and he got strange, that there they told him if he had more or not (referring to the substance found), who pointed out that this (green vegetable substance) is its use pe rsonal, that the police threatened that the GOE would come to his house to knock on the door and that in this situation he let them in and a chubby policeman was the one who took their money from which he made a loan and there he bent down and handed them the cover black that is in the photos, that in the nightstand had jewels and these were lost since criminalistics never took and took him to Ficoa. (Court case No. 18282-2018-00726, 2018, p. 16)

On the testimony of the expert who analyzed the substance that the defendant had, he indicated beyond the typing error that his net weight was 39.95 grams. For his part, the defendant who was allowed to give his testimony on the facts indicated that the substance found was for his personal consumption. So, up to here and according to the analysis that was made in the previous chapters, the quantity that Patricio had for his consumption should be considered inadmissible

in the eyes of the Law, in reason of exceeding the 10 grams allowed according to the CONSEP resolution, but This does not automatically convert it into traffic, being the unavoidable responsibility of the prosecution to verify that purpose during the trial hearing.

Well, so far, the primary and pertinent facts of the case have been transcribed. From now on, the legal foundations issued by the judge will be reflected in the operative part of the judgment. The judge said the following:

> EIGHTH: [FACTICAL, LEGAL AND JUDICIAL PROTECTION REASONING]
>
> 1.- Referring to the budding case, Criminal Law as part of the legal system has an eminently protective function of legal assets; In the case at hand, the protected legal asset is the right to health, since the substances catalogued are narcotic or psychotropic, threaten the health of all the associates within the constitutional state of rights and justice that prevails in Ecuador and is the that the standard seeks to protect. (Court case No. 18282-2018-00726, 2018, p. 12)

In this first extract, the judge makes it clear that the COIP follows a trend of exclusive protection of legal assets, expressly moving away from any functionalist concept. The legal asset protected in article 220 is the right to health; In this sense, the conduct of having 39.95 grams of marijuana on the part of Patricio López, should only acquire criminal relevance if it was aimed at trafficking, since only in that case would the health of "all the associates within the state be endangered constitutional rights and justice that governs Ecuador "as indicated by the judge, otherwise, Patricio's right to the free development of his personality would prevent any punitive intervention.

> 2.- On the other hand, the doctrine when referring to this type of infractions, classifies them as crimes of abstract danger that are consummated with the creation of a small danger for the protected legal good, that is to say, that it can be conceived as a simple probability of injury and the active situation of danger is not expressly required, but the reason for their punishment is that they usually pose a danger. (Court case No. 18282-2018-00726, 2018, p. 12)

Regarding this, although the argument put forward by the judge is valid, it should be emphasized that not any conduct is dangerous or relevant to criminal law, and this has been demonstrated in the fourth chapter of the investigation, by saying that the legislator signed the guiding verbs of article 220 with the purpose of drug trafficking and that possession or possession is not typical but are aimed at that purpose.

> 3.- Thus, the public health legal asset, analyzed in the context of the illicit possession and possession of narcotics and psychotropic substances, denotes the intention of the legislator to protect the plural holders of that asset (society), from the alleged conduct dangerous fork. (Court case No. 18282-2018-00726, 2018, p. 12)

Here, the judge makes it clear that illegal possession and possession endangers society and for this reason, the legislator criminalizes that conduct. What the judge seems to ignore or ignore is that, for the possession or possession of drugs to endanger society, it must be aimed at trafficking or commercialization, since only there would it become dangerous for third parties.

> 4.- Thus, the prosecution has accused the accused Patricio José López Tobar of having adapted his conduct to the criminal type contained in numeral 1, literal c) of Art. 220 of the Organic Comprehensive Criminal

> Code, but more in kind the prosecutor Dra. Mabel Díaz imputed her alleged participation for the same criminal type but literal b) that deals with the illicit traffic of scheduled substances subject to medium-scale control and is in turn typically described in Article 220, numeral 1. (Court case No. 18282-2018-00726, 2018, pp. 12-13)

This part establishes that the prosecution had initially accused Patricio López of marijuana trafficking in the high-scale quantity. However, when the substance found in the home was ruled unconstitutional, she ended up reformulating her accusation to the medium-scale quantity. Also, the judge recognizes that article 220 typifies illicit trafficking, so it is suggestive that the evidentiary activity should be directed in that direction.

> 5.- As can be seen from the description of the criminal type supra cited, there are several guiding verbs, being that the prosecution has attributed to the accused the possession (at the time of registration) and possession (at the time of registration of the address) of a narcotic substance such as COCAINE BASE. (Court case No. 18282-2018-00726, 2018, p. 13)

First of all, it is necessary to clarify that at the end of the extract a confusion of substance is committed when referring to cocaine, but in subsequent pages, it is made clear that it was a typing error and that the alluded substance never existed, but rather, He intended to refer to 39.95 grams of marijuana. Well, having clarified this point, the judge acknowledges that article 220 is made up of several guiding verbs and that the prosecution accused him of possession, due to the marijuana found against Patricio López. That said, prima facie it is concluded that both the prosecution and the judge understand that the guiding verbs of article 220 of the COIP are autonomous and reach criminal relevance without any purpose. Therefore, they only require

checking their mere staging, what which, can not be less than an aberration in the exegesis of the norm.

> 6.- What happens in the present case, being that the executive conduct has managed to cross the barriers of protection of the legal good, which leads to establishing that the person accused is deserving of the judgment of criminal reproach as the third dogmatic category of crime when the guiding verb of "having" a narcotic substance in his possession (body) has been complied with, in contravention of the criminal type of abstract danger and common risk, since the conduct he attends hangs over as a threatening health risk public since here the danger is not an element of the type, but the reason or motive that led the legislator to incriminate the conduct [illicit trafficking], so that when faced with a dangerous course of action, the legislator, without other requirements, sanctions its performance with a penalty; therefore, this crime is formal or of mere activity. (Court case No. 18282-2018-00726, 2018, p. 18)

The prescribed extract is the most important in order to corroborate the premise of the research. The judge expressly says that Patricio López deserves the trial of criminal reproach for having fulfilled the guiding verb of "having" a substance in his possession. It appears that all the evidence acted by the prosecution was aimed at verifying that Patricio had the substance. However, at no time was the purpose of the traffic even mentioned, let alone anybody of evidence to that effect. Once again corroborating that, for both the prosecution and the judge, the guiding verb "have", which is part of the criminal type of illicit trafficking, enjoys autonomy and does not require any other verification.

Not enough with that hermeneutical aberration, at the end of the extract, it is said by the judge that the criminal type of article 220 was a crime of mere activity when previous lines had indicated that it is a crime of danger. Regarding this, it has been made clear in the fourth chapter of this investigation that the crime of mere activity is entirely different from the crime of danger, and that has different consequences in the analysis of the criminal charge. Nevertheless, well, without wishing to delve into the subject in order to exceed the purpose of the investigation, it is essential to highlight the existence of a dangerous ignorance of criminal law at the head of the judge.

> 7.- In this order of ideas, the crime in examines sanctions the action that entails the execution of the verb "to have", narcotic substances without due legal authorization; therefore, the legislator does not establish as part of the constituent elements of its typology any quantitative consideration for the execution of said verbs, that is, the criminal hypothesis abstractly formulated in the legislation referred to by the legislator does not consider the number of illegal substances that they are "held", but to the fact that this action is carried out, with express or tacit consent without any legal authorization, since the amounts found will serve to adjust the sentence to be adopted. Note, therefore, that the aforementioned legal norm Arts. 220 numeral 1, of the COIP- establishes as one of the fundamental assumptions of the typical and unlawful conduct of this class of crimes, the possession of the narcotic substance, whether in the body, in things, in furniture or real estate that one owner or have any title. This has been pointed out by the National Court of Justice in one of its multiple rulings (Judicial Gazette. Year CIX-CX Series XVIII, No. 7. Page 2436. March 16, 2009). (Court case No. 18282-2018-00726, 2018, pp. 18-19)

Again, the judge makes it clear that Patricio López is criminalized for flat and straightforward possession of 39.95 grams of marijuana, conduct that is atypical in the COIP as has been shown in the investigation. Another argument to understand this hermeneutical aberration is that in the head of the prosecutor and the judge, the possession more significant than 10 grams that the Law for personal consumption allows automatically turns it into trafficking, implying that fraud and the category of guilt are criteria optional to take into account and that they prefer to impute and sanction for mere presumptions. If they take their role in the administration of justice seriously, they should know that having more than 10 grams of marijuana makes possession only inadmissible. However, in order to be typical in light of article 220 referring to trafficking, it must be shown more beyond any reasonable doubt that the subject intended to market the substance, which has been ignored in the present case.

At the end of the extract, the judge cites a 2009 ruling issued by the National Court of Justice and indicates that the grounds of his sentence are following the record set by the Court. In this part, not only is evidence of ignorance on the part of the judge, but also, complete negligence in giving rationality to his sentence; Since it is real that the National Court issued an analysis of the problem with that content, but it did so taking as a starting point the Law on Narcotic and Psychotropic Substances (repealed in 2014) that expressly admitted the simple possession of drugs. Then, the judge never found out about the existence of article 364 of the CRE and was not aware of the revaluation of the state of the drug issue in the COIP.

> 8.- From the supra singular tests, the elements of the criminally relevant conduct described in Art. 220, numeral 1, literal b) of the COIP have been adequately justified, since the typical action has been executed in

> a manner directly, without authorization as required by the legal norm, having complied with one of its guiding verbs which is "to have" narcotic substances, in contravention of the criminal type. (Court case No. 18282-2018-00726, 2018, p. 19)

The judge says that the test carried out led to the conclusion beyond a reasonable doubt that Patricio López had narcotic substances and therefore he violated article 220 of the COIP. Therefore, it is once again corroborated that it was never proven, and it was not even intended to prove the purpose of trafficking in tenure and that the mere staging of the guiding verb "have", turns Patricio into a trafficker.

> 9- "ADMINISTERING JUSTICE ON BEHALF OF THE SOVEREIGN PEOPLE OF ECUADOR AND BY AUTHORITY OF THE CONSTITUTION AND THE LAWS OF THE REPUBLIC", I resolve: 9.1.- TO DECLARE, the guilt of Patricio José López Tobar, Ecuadorian, single, with citizenship card number 1804619227, 28 years old, domiciled in the streets Av. Galo Vela in front of the Guayaquil school in the canton Ambato, province of Tungurahua and currently residing with his parents in the Augusto N. Martínez parish, as the direct author of the typical, unlawful conduct and guilty as provided for in Article 220, numeral 1, literal b) of the Organic Comprehensive Criminal Code [ILLICIT TRAFFIC OF SUBSTANCES CATALOGED SUBJECT TO AUDIT ON A MEDIUM SCALE. 9.2.- IMPOSE, the citizen Patricio José López Tobar, the custodial sentence of THREE YEARS OF PRISON to be served at the Ambato Social Rehabilitation Center. (Court case No. 18282-2018-00726, 2018, pp. 24-25)

As expected, the judge found Patricio López guilty and sentenced him to 3 years in prison, and while his sentence allowed conditional suspension under article 630 of the COIP, his lawyer filed said action. Now, the article mentioned above requires four

conditions for the request for suspension of the sentence to be admitted, and the judge made the following analysis:

Regarding the first requirement, he stated: "On this point, it is clear that given the criminal type with a sentence of three to five years in prison, which complies with this budget." (Court case No. 18282-2018-00726, 2018, p. 21)

About the second requirement, it was said:

> In this regard, sufficient documents have been presented, such as the certification obtained from the Council of the Judiciary through the computer system that is publicly available on the web, thus justifying not having a ruling or process in force beyond the current one, nor that he has been benefited with an alternative solution in another case, which means that the sentence imposed on the active subject Patricio José López Tobar is the first, thus revealing the low level of danger of the individual. (Court case No. 18282-2018-00726, 2018, p. 21)

Regarding the fourth requirement, it was said: "That it is not about crimes against sexual and reproductive integrity, violence against women or members of the family nucleus, which is not the case." (Court case No. 18282-2018-00726, 2018, p. 21)

So far, for the judge's perspective, the requirements of the conditional suspension of the sentence were met, but regarding the third requirement that includes two budget, he said the following:

On the first budget of the third requirement (the personal, social and family history of the sentenced person):

> At this point, more than the certificates that do not record a personal history has been presented, as well as several certificates of honorability, recognized signature and heading, as well as a birth certificate of a minor between the accused and the Belgian citizen Yolanda Manobanda Chuquicondor, who provides food as stated in the corresponding web form through family process No. 18202-2015-01199, also counting on the affidavit given by Marlo Roberto Granda López as soon as he, in the Eighth Notary of the canton Ambato, has indicated to be the person who agrees to provide work to the sentenced from the request for conditional suspension of sentence. (Court case No. 18282-2018-00726, 2018, pp. 21-22)

Regarding the second budget of the third requirement (the modality and severity of the conduct are indicative that there is no need for the execution of the sentence), he said that: "... the THEME OF DRUGS is considered a crime against humanity due to its harmful effects that it produces in PUBLIC HEALTH... "(Court case No. 18282-2018-00726, 2018, p. 23). Furthermore, the following was said:'

> ... Official Registry No.319 of November 12, 2010, and even in judgment 001-12-SCN-CC of January 5, 2012, it is noted that: "on the subject of drug trafficking crimes that, due to its negative connotations, have been classified as crimes against humanity. (Court case No. 18282-2018-00726, 2018, p. 23)

> Therefore, we should not fail to note that in the case in process, the defendant was additionally found to have another quantity of the same substance (288.33 grams of marijuana in his home), which under the application of the exclusion rule for being violative of constitutional rights was expelled from the judicial assessment as a result of the ineffective police action, but which in itself, therefore allows us to warn, according to the evidence practised in the oral trial, that the quantity

> of 39.95 grams of marijuana found in the power of the defendant at the time of his body registration in the Av. Galo Vela and Av. Bolivariana of this canton Ambato correspond to a modality of his conduct that merits his internment in a social rehabilitation centre in order to fulfil the proper purpose of the penalty to the extent that Article 52 of the COIP establishes it, because "... society requires a civilized coexistence where people mutually respect their rights so that there is permanent, an entirely harmonious and peaceful social coexistence continues; however not all people assume the social commitment of this coexistence and with their acts they break the harmony in these cases when people cross the field of legality thus committing offences... "(Court case No. 18282-2018-00726, 2018, pp. 23-24)

Well, even although the conditional suspension of the sentence escapes the academic interests of the investigation, it is unavoidable to highlight the last significant aberration of the judge at the time of sentencing. Here it is stated that the requirements: first, second, fourth and the first budget of the third requirement have been demonstrated.

Nevertheless, in the judge's eyes, the problem lies in the second budget of the third requirement of article 630 of the COIP, that is, that the modality and seriousness of the conduct are indicators that it is not necessary to execute the sentence; So, first, the judge says that the "drug issue" is considered a crime against humanity; and here it is pronounced with an astonishing generality since in this line of thought it turns out that possession of 39.95 turns out to be a crime against humanity.

Then he cites a resolution of the National Court in which it is indicated with greater wisdom that drug trafficking is a listed crime against humanity. However, then, not any "drug issue" is considered a crime against humanity, but only

drug trafficking. At this point, the Royal Academy of Language (2014) defines drug trafficking as "large-scale toxic drug trade". In this sense, the non-trafficking possession of 39.95 grams of marijuana (minimal amount) is not at all drug trafficking and even less can serve as a legitimate argument to reject the conditional suspension of the sentence.

Moreover, the trigger point of maximum irrationality in the sentence is found in the last extract that was cited; here it is based on an inadmissible prejudice, because verbatim the judge says: "we must not fail to note that in the case in process, the defendant was found additionally another quantity of the same substance (288.33 grams of marijuana at his home)." (Court case No. 18282-2018-00726, 2018) When the judge himself had initially stated that in no way will events after the arrest of Patricio López be taken into account due to the constitutional violation committed by the police officers in the collection of evidence.

CONCLUSIONS

Article 364 of the Constitution of the Republic of Ecuador expressly prohibits the criminalization of consumers of scheduled substances subject to control.

The Organic Comprehensive Criminal Code prescribes in article 220 the trafficking of scheduled substances subject to control. Therefore, the guiding verbs that are part of the article and that do not exhaust the prohibition of the rule with its mere stagings, such as possession or possession, will only be punishable when the purpose of trafficking or beyond a reasonable doubt is verified.

Having more than 10 grams of marijuana makes possession "inadmissible", but this does not mean that

inadmissible possession becomes full-fledged traffic, but instead that the prosecution must reliably demonstrate that the substance was destined to be marketed.

The inadmissible possession of marijuana at most serves as a sign of trafficking; however, proof remains through sufficient and reasonable evidentiary exercise.

The inadmissible possession of marijuana without trafficking purposes does not endanger the legal health, and since the crime prescribed in Art. 220 of the COIP results from danger. In no way would it meet the injurious requirement for its punishability.

Simple possession of marijuana is atypical in the Ecuadorian legal system.

Patricio López was illegitimately sentenced to 3 years in prison in cash compliance.

An exhaustive search will show that, like this case, there are many more in which Ecuadorian and foreign citizens have been sentenced for the conduct of inadmissible possession of drugs without the purpose of trafficking, constituting a monumental legal aberration and a severe violation of human rights of institutional origin.

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Preventive detention in flagrante delicto in the Metropolitan District of Quito during the second half of 2019

La prisión preventiva en el delito flagrante en el Distrito Metropolitano de Quito durante el segundo semestre de 2019

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ABSTRACT: Precautionary measures are mechanisms of criminal procedural assurance established by the State in order to protect the rights of the victim and the effectiveness of the process. They imply strict respect for principles and normative parameters because they constitute restrictions on the rights of a person being prosecuted, before being recognized as guilty. Given the complexity of the topic, in this paper has been intended to identify the form of application of pre-trial detention in the Flagrancy Units of Quito Metropolitan District in the second semester of 2019. Therefore, analytical and deductive research methods and field and documentary investigative techniques have been used, mainly related to jurisprudence, doctrine, legislation, interviews and files of the Flagrancy Units. As a result, it has been concluded that the application of pre-trial detention, in practice, does not have an exceptional character. It is imposed indiscriminately, without respecting the principles of proportionality nor the proper guarantees of motivation, and it generates a reversal of the burden of proof

that directly undermines the right to legal certainty enshrined in the Constitution.

KEY WORDS: Criminal Law, prison, criminal sanction, precautionary measures, pre-trial detention detention.

RESUMEN: Las medidas cautelares son mecanismos de aseguramiento procesal penal, establecidos por el Estado con la finalidad de resguardar los derechos de la víctima y la eficacia del proceso. Requieren del estricto respeto de principios y parámetros normativos porque constituyen restricciones de derechos del sujeto procesado, antes que sea reconocido como culpable. Dada la complejidad del tema, en el presente artículo de investigación se ha pretendido identificar la forma de aplicación de prisión preventiva en las Unidades de Flagrancia del Distrito Metropolitano de Quito durante el segundo semestre de 2019. Para ello, se han utilizado los métodos de investigación analítico y deductivo, y las técnicas investigativas documentales y de campo, relacionadas principalmente con jurisprudencia, doctrina, legislación, entrevistas y expedientes de las Unidades de Flagrancia mencionadas. Como resultado, se ha concluido que la aplicación de prisión preventiva, en la práctica, no tiene carácter excepcional. Además, es impuesta indistintamente sin respetar los principios de proporcionalidad ni las debidas garantías de motivación, y genera una inversión de la carga probatoria que menoscaba directamente el derecho a la seguridad jurídica consagrado en la Constitución.

PALABRAS CLAVE: Derecho Penal, prisión, sanción penal, medidas cautelares, prisión preventiva.

INTRODUCTION

At the national level, criminal legislation provides mechanisms aimed at ensuring the proper development of the process and the optimal enforcement of the sentence through the principle of immediacy. These mechanisms are known as precautionary measures and can be of two types: personal and real, depending on the subject or objects on which they fall, respectively.

The imposition of precautionary measures is requested by the prosecutor to the judge, as they are mechanisms that imply limitations of rights. They can only be ordered after a careful analysis that leads the justice operator to order them. Thus, at the legislative level, legal parameters authorise their application and provide for their inadmissibility.

This research work analyses both the regulatory background and the practical situation of applying precautionary measures, specifically those of a personal nature, and among them, pre-trial detention. In particular, due to its exceptional nature, it represents the imprisonment of a person who has not yet been recognised as guilty through a sentence issued by the competent jurisdictional body. Given that pre-trial detention can be ordered for any publicly actionable offence, among other requirements, provided that it carries a custodial sentence of more than one year, its scope of application is comprehensive. Consequently, its study is limited to flagrante delicto, a crime that occurs in the presence of one or more persons or is discovered as soon as it is committed.

Whether in flagrante delicto or not, it is essential to be clear that, normatively, personal precautionary measures other than pre-trial detention should always be prioritised, under Article 77, numeral 11 of the Constitution of Ecuador (CRE) and Article 534, numeral 3 of the Comprehensive Organic

Criminal Code (COIP), which emphasise the exceptional nature of the deprivation of liberty and the adequacy of alternative measures to safeguard the process and ensure the appearance of the person being prosecuted.

However, in the investigation carried out in the Flagrancy Units of the Metropolitan District of Quito, it would seem that pre-trial detention is the first option to be considered, before the prohibition to leave the country, house arrest, the obligation to report periodically to an authority or the electronic monitoring device. In addition, a problem of justification of its necessity, suitability and proportionality has been reflected. In other words, it is not common practice for the prosecutor to justify his or her request for pre-trial detention and for the judge to argue his or her decision to impose it. In this context, one could speak of a routine, massive and indiscriminate application of pre-trial detention, which does not respect the purposes, characteristics and principles of pre-trial detention but is ordered formally.

Intending to provide a clear answer as to whether or not its application amounts to a systematic violation of the right to the legal security of the accused, this study focuses on identifying how this precautionary measure is used in the Flagrancy Units. Therefore, it is a doctrinal, empirical and interdisciplinary investigation in which a considerable number of prosecutorial files are analysed to determine common elements embodied in the jurisdictional decisions of pre-trial detention, closely related to Criminal and Constitutional Law.

In the development of this article, analytical and deductive research methods are applied, as concepts, principles, and general laws are analysed in the specific area of pre-trial detention in flagrante delicto. Additionally, this research is developed under a mixed and explanatory approach

because through the analysis and collection of quantitative and qualitative data. It is possible to expose the reality of the application of pre-trial detention. The research methods used are dogmatic legal and normative legal due to the reference to doctrine, principles and laws. The research techniques used are documentary and field-based, based mainly on jurisprudence, doctrine, legislation and files from the Flagrancy Units in Quito.

Finally, this research is divided into three main chapters. The first chapter studies pre-trial detention and flagrante delicto. On the one hand, it offers an overview of the precautionary measures provided for in Ecuadorian legislation, developing their characteristics, principles and purposes, and delving into the legal nature of pre-trial detention and its legal requirements. On the other hand, it also covers the particularities of flagrante delicto and its process in the Flagrancy Units created for this purpose.

The second chapter develops the results of a field investigation carried out in the Flagrancy Units of Quito (Quitumbe and Mariscal) regarding the reality of requests and orders for pre-trial detention between July and December 2019. In order to assess compliance with constitutional and legal requirements, four specific variables are analysed: proportionality variable, to determine whether the pre-trial detention ordered respects the necessary suitability, necessity and proportionality; variable of the existence of a procedural danger of absconding, which the prosecutor must accredit; variable of social roots, as sometimes the burden of proof of the procedural danger of absconding is reversed and it is the prosecuted subject who must demonstrate their willingness to appear at the trial; and variable of sufficient evidence of the existence of a crime of public prosecution.

Finally, the third chapter is devoted to the most important conclusions of the whole research work. The abuse of pre-trial detention must be immediately addressed because it produces undesirable consequences in several respects, including in detention centres. In Ecuador, it is already a significant reason for prison overcrowding.

1. PRE-TRIAL DETENTION IN FLAGRANTE DELICTO

1.1 Precautionary measures

1.1.1 Generalities of interim measures

1.1.1.1 Concept

The very nature of criminal law, which offers as a potential option the deprivation of liberty in prisons, motivates different reactions on the part of citizens who have committed offences. While some are freely willing - or resigned - to submit to the state's ius puniendi, others are entirely willing to evade or circumvent it. However, the state, which needs to demand that its justice is ideally carried out, does not want to be uncertain about the prosecuted subject's attitude. Precisely from this need, precautionary measures are born.

At the doctrinal level, precautionary measures are:

> Legal authorisations can be used in criminal proceedings to limit or restrict rights, generally of the accused, and concerning third parties, with the sole objective of guaranteeing the discovery of the absolute truth and applying the criminal law in the specific case. (Clariá Olmedo, 1998, 476) According to the criteria of Gimeno Sendra, Cortéz and Moreno (1996), precautionary measures are understood as follows:

The reasoned decisions of the court, which may be adopted against the alleged perpetrator of the criminal action, as a consequence, on the one hand, of the emergence of his status as a defendant and, on the other, of the well-founded probability of his personal or financial concealment in the course of criminal proceedings, by which his freedom or the free disposal of his assets is provisionally limited in order to guarantee the effects, criminal and civil, of the sentence. (390) Finally, José Maza Martín (2007), argues that:

> Precautionary measures are those jurisdictional actions carried out within the proceedings, restricting certain rights of those allegedly responsible for the facts under investigation or prosecution, which seek to ensure the correct holding of the trial and the effectiveness of the final decision. (17)

Under all the definitions mentioned above, it is proposed that precautionary measures are properly motivated jurisdictional provisions, addressed to the prosecuted subject to temporarily restrict his rights, whose primary function is to ensure the correct resolution of the criminal proceedings, without being frustrated by the possible absence of the passive subject of the punitive power of the State.

1.1.1.2 Preconditions for interim measures

Considering that precautionary measures constitute an undeniable invasion of the public power in the personal dimension of the passive subjects of criminal proceedings, before the existence of a jurisdictional resolution that determines their responsibility, the doctrine has developed two assumptions that must be satisfied in order to enable their imposition.

1.1.1.3 Fumus boni iuris, fumus delicti commisi or appearance of good law

"It is the first presupposition for the adoption of any precautionary measure" (Gutiérrez de Cabiedes, 2004, 125). It is accredited in criminal proceedings through solid indications that become rational and sufficient elements of conviction of the commission of criminal conduct (Rifá Soler, Richard González and Riaño Brun, 2006).

That is to say, the appearance of good law represents the adjustability of the object of criminal proceedings under the figure of an offence for which an individual is potentially responsible.

1.1.1.4. Periculum in mora or danger in delay

It is the legal basis for any precautionary measure. It requires accrediting a concrete danger that may affect the correct development of the administration of justice, either because the subject of the process will try to flee, hide, eliminate or alter evidence; or commit new criminal acts (Gascón, 2019).

In other words, periculum in mora requires a real and dangerous possibility of affecting the optimal development of the criminal process through undesirable conduct on the part of the accused.

In short, it is not possible to dictate any precautionary measure unless the commission of conduct is qualified as criminal, the individual being prosecuted appears as a real passive subject of the ius puniendi of the State (as a potential perpetrator), and some indications allow us to deduce that he/she will refuse to collaborate or allow the optimal development of the criminal process. Otherwise, the imposition of these measures would be arbitrary.

1.1.1.5 Legal nature, characteristics and principles

Precautionary measures also called provisional measures of precaution or conservation, and provisional security measures, are mechanisms of a preventive nature, ordered by a jurisdictional body before the issuance of the final judgment that condemns or ratifies the innocence of the person being prosecuted because there is a proven danger of non-compliance with the jurisdictional decision (Martínez Botos, 1994).

The very precautionary nature of these procedural measures is evident in the possibility they offer of anticipating specific effects of a conviction (such as the deprivation of liberty of the defendant) to safeguard the process. Thus, they are designed to protect and prevent the smooth running of criminal proceedings.

On the one hand, the characteristics of interim measures are:

a) Temporariness

They have a specific, determined and reasonable duration. For no reason can they be extended beyond the duration of the criminal proceedings? They are revoked, modified or altered by jurisdictional decision, either because the circumstances that led to their imposition have changed, or because the requirements for their substitution have been met (Escuela Nacional de la Judicatura de la República Dominicana, 2007).

b) Restrictiveness and exceptionality

Precautionary measures can only be requested and ordered in crimes with a custodial sentence of more than one year (COIP, 2014, art. 534) and only when they are necessarily necessary to guarantee the defendant's appearance.

c) Jurisdiction

Precautionary measures, being resolutions that restrict individual rights, can only be ordered by competent justice operators, as they are the ones who hold the public power to judge and enforce what has been judged. No other authority has the power to order them. It should be clarified that the judge does not have the power to order precautionary measures ex officio, but requires a prior, substantiated and reasoned request from the prosecutor (COIP, 2014).

d) Instrumentality or accessoriness

All precautionary measures are dependent on a process. That is to say, only within the process is it possible to order specific security mechanisms that do not have an end in themselves but are means to achieve procedural ends and neutralise the dangers that may disturb them (Cafferata Nores, 1992).

Having already reviewed the characteristics of precautionary measures, on the other hand, the principles governing their imposition are:

e) Principle of speed

It provides for the diligent processing of the process within the established timeframe to achieve an efficient jurisdictional resolution (Garzón, 2008). It constitutes an incentive to resolve the conflict in the best possible way while having the appropriate mechanisms that facilitate its resolution and guarantee compliance with the decision.

f) Principle of legality

It prohibits the imposition of precautionary measures other than those expressly stipulated in the law (COIP, 2014). Consequently, only the measures provided for in the legal

system can be applied, in a conventional manner, under the indicated requirements and the expressly stipulated conditions.

g) Immediacy principle

It entails a direct bilateral communication of the judge: on the one hand, with the evidence that allows him/her to reach a decision and, on the other hand, with the procedural parties (Garzón, 2008a). In national law, the existence of the principle of immediacy is justified to the extent that the procedural system is understood as a means for the realisation of justice, in which the judge requires the presence of the parties to the proceedings in order to hold the hearing, examine the existing evidence and carry out the other necessary procedural acts (COIP, 2014, art. 5 num.17).

h) Principle of proportionality

It seeks a congruence between the ends of the process and the means used to achieve them. In other words, it seeks a balance between the measure ordered, its degree of violence and its precautionary nature. It also seeks to avoid, as far as possible, affecting the fundamental rights and guarantees of the defendant, precisely for this reason: because he or she is still being prosecuted and cannot receive a measure that is more severe than the criminal sanction itself (Garzón, 2008a).

The principle of proportionality is closely related to the principle of innocence. It provides that every person accused of a crime has the right to be presumed innocent until proven guilty in a trial that provides all the basic guarantees for their defence (San Martín Castro, 2004). Consequently, it places the burden of proving both the guilt of the accused and the need for precautionary measures to ensure a correct resolution of the criminal proceedings on the state.

Finally, in addition to all the legal principles already mentioned, the importance of the procedural legal principle of due process should also be recalled. This is materialised in the actions of the judge, the prosecutor and the defendant's defence, creating a kind of tripartite responsibility between them to guarantee a fair trial that respects all the rights of the procedural parties (Gozaíni, 2002) and prevents the existence of problems related to arbitrariness or excessive use of these mechanisms.

1.1.1.6 Types of interim measures and the purposes for which they are used

On the one hand, precautionary measures can be of two well-defined types, according to their effect on the defendant's assets (objective precautionary measures) or his or her liberty (personal precautionary measures). However, in this research article, only personal precautionary measures will be dealt with in-depth, specifically pre-trial detention, as this is the main topic to be developed.

Personal precautionary measures, which are aimed exclusively at natural persons, tend to ensure the accused's presence in the entire criminal case and compliance with the sentence and full reparation for the victim, based on the principle of immediacy described above. National legislation, through the COIP, contemplates the following types of personal precautionary measures, which will only be mentioned here as the main focus of this article is pre-trial detention:

1. Ban on leaving the country
2. Obligation to report periodically to a specified authority
3. House arrest
4. Use of an electronic monitoring device

5. Detention
6. Remand in custody

On the other hand, the purposes to which precautionary measures respond also delimit their legitimate application, which is why, in addition to verifying respect for their principles and assumptions, it is crucial to verify that the purposes behind them are legitimate and congruent with their precautionary nature.

In general terms, precautionary mechanisms are legally envisaged to protect victims' rights, guaranteeing the proper conduct of criminal proceedings, holding the trial, and the effectiveness of the sentence handed down (Flors, 2010). Hence, they are measures that restrict the defendant's rights, mainly linked to their free disposal of property or freedom of movement.

In the international framework, the Rome Statute of the International Criminal Court (1998) authorises the provision of the necessary measures to avoid the disruption of the proceedings, whether through the adequate collection and preservation of evidence, the impossibility of the defendant's escape, or other mechanisms. Likewise, the Statute of the International Court of Justice (1945) contemplates the jurisdictional power to order provisional measures for the sole purpose of safeguarding the rights of the parties.

In the national framework, there is harmony with international provisions. The special criminal legislation embodied in the COIP (2014) clearly states the purposes foreseen for the application of precautionary measures (art. 519):

1. Protecting the rights of victims and other participants in criminal proceedings
2. Guaranteeing the presence of the defendant in criminal proceedings, the serving of sentences and full reparations
3. Preventing the destruction or obstruction of evidence that would lead to the disappearance of elements of conviction
4. Guaranteeing full reparation to victims

Moreover, precautionary measures allow for the permanent linking of the defendant and the effective enforcement of a sentence that aims to compensate the victim comprehensively, trying, as far as possible, to return things to the state they were in before the offence. To better understand the dimension of pre-trial detention, the following sub-chapter analyses the specificities of this precautionary measure, which is the most serious one to be applied by the state court.

1.1.2 Particularities of pre-trial detention as a personal precautionary measure

1.1.2.1 Concept

In the doctrinal sphere, authors such as Roxin (2000) have pointed out that pre-trial detention is the deprivation of liberty of the person charged or prosecuted, intending to guarantee that the process of knowledge or the execution of the sentence, and the investigation of the facts can be carried out in the best possible way.

In the same vein, pre-trial detention has also been defined as a unique precautionary mechanism that can only be used through a reasoned jurisdictional decision that justifies the inexistence of other, less burdensome alternative measures

to protect the purposes of the criminal proceedings (Escuela Nacional de la Judicatura de la República Dominicana, 2007a).

In short, pre-trial detention is a mechanism of procedural security, which is ordered as a means of effectively developing the proceedings and as a guarantee of the real enforcement of the sentence. Due to its specific characteristics, which are immediately analysed, it cannot be dictated indiscriminately but is subject to specific requirements or presuppositions containing the state's punitive power.

1.1.3.2 Characteristics and principles

The personal criminal precautionary measure that most affects the rights of the subject on whom it falls is mainly:

a) *ultima ratio and exceptional*

Because of the peculiarity of pre-trial detention and the direct effect it produces, it should only be used in strictly necessary situations. According to Maier (2004), the exceptional nature of pre-trial detention has its raison d'être in the absence of a previous regular process that would produce a final sentence imposing such a penalty.

In the international framework, the Tokyo Rules (1990) emphasise the need to apply this measure as a last resort, giving priority to alternative measures. They even impose an obligation on States to introduce non-custodial measures in their legal systems, which allow the judge to handle various options and reduce the application of imprisonment.

In addition to this, the Inter-American Court of Human Rights (IACtHR) has stressed that "pre-trial detention is the most severe measure that can be applied to the accused of a crime, which is why its application should be exceptional" (Case of Tibi v. Ecuador, Series C No. 114, 2004, para. 106).

The excessive use of this personal precautionary measure contravenes the very purpose of the State: the protection of rights, which in no way is respected if there are arbitrary and disproportionate detention orders.

In the national framework, temporary deprivation of liberty has the same legal treatment as international. The Constitution of the Republic of Ecuador (2008), within the fundamental guarantees of a trial, provides judges' obligation to apply, as a priority, alternative precautionary measures. It also makes it clear that deprivation of liberty is never the rule but the exception.

Therefore, the exceptional nature of pre-trial detention is evident and entails its use as a measure of last resort to not illegitimately affect the right to freedom of movement of the person being prosecuted.

b) Temporary

Pre-trial detention is strictly temporary, and, doctrinally, the reasonableness of the time a person is affected by this precautionary measure is evaluated concerning the fact for which he is being detained (La Rosa, n. d.).

At the international level, the IACHR has pointed out that time limits on pre-trial detention are essential to restrict the State's powers to ensure the purposes of the process through this precautionary measure (Case of Barreto Leiva v. Venezuela, Series C No. 206, 2009, para. 119). Mainly, if preventive detention were permanent, the State's punitive power would overflow without limit, since the adequate justifications regarding the need for the personal precautionary mechanism would disappear due to the excess of time and turn it into an arbitrary and illegitimate measure.

At the national level, pre-trial detention has a precise duration depending on the custodial sentence foreseen for the crimes: if the sanction is from 1 to 5 years, the precautionary measure lasts for a maximum of 6 months; and if it is extended, it lasts for one year. The time limit for the expiry of this measure is counted from the date on which the preventive detention order became effective, which, once expired, is without effect, and the judge must order the immediate release of the defendant (COIP, 2014).

Following the temporary nature of the precautionary measure, it should be emphasised that pre-trial detention should not necessarily be extended for the entire legally established period but should be limited to the strict need to obtain evidence, for example, if the person detained could endanger the gathering of evidence. Furthermore, since pre-trial detention is not indefinite, it can be revoked, substituted and suspended in specific situations. In other words, it also enjoys the characteristic of variability.

Pre-trial detention may be revoked, in addition to expiry, if the evidence or elements of conviction that motivated its application no longer exist, if the subject on whom it was applied has been confirmed innocent or dismissed, or if there is any declaration of nullity that affects him or her (COIP, 2014, art. 535).

Likewise, it can be substituted by alternative precautionary measures, as long as they have not been ordered in a crime punishable by a prison sentence of more than five years, under the condition that they are rescinded in case of non-compliance (COIP, 2014, art. 536).

Finally, the precautionary measure understudy can be suspended if the defendant provides security (COIP, 2014, art. 538). Suppose he/she hands over money or assets of his/her

own or a guarantor to certify his/her presence at the trial. In case of absence of the defendant at the trial hearing, the bail given is executed, and the judge orders preventive detention against him/her (COIP, 2014, art. 547).

c) Restrictive

Pre-trial detention can only be ordered for specific procedural purposes and is subject to a restrictive interpretation since the provisions of the criminal law, following the principle above legality, cannot be extended beyond what is mentioned in the law.

In this regard, pre-trial detention

is only admissible following the grounds laid down by law and following the procedure laid down therein (International Covenant on Civil and Political Rights, 1966)? Conceptual or analogical extensions in the criminal field, specifically in pre-trial detention, are not possible because they violate the principle of legality and unjustly affect the exercise of rights.

Having analysed the characteristics of pre-trial detention, it is now essential to examine in more detail the cross-cutting principle of this precautionary measure: the principle of proportionality. The principle of proportionality encompasses three sub-principles at the same time:

d) Adequacy

Pre-trial detention must be the objectively most suitable mechanism to assist the legitimate purpose of the proceedings and to counteract most effectively the procedural danger or risk that is being sought to be avoided (Sánchez, 1997). Therefore, this sub-principle complements the fundamental characteristic

of instrumentality or accessoriness of precautionary measures, analysed previously, related to the satisfactory fulfilment of the procedural purpose.

e) Need

Pre-trial detention can only be imposed insofar as it is indispensable to satisfy the legally established objectives, being the only means to ensure the process (la Rosa, n.d.). Therefore, it requires a preliminary search for less burdensome mechanisms that allow for the optimal development of the criminal process without necessarily affecting the fundamental right to freedom of movement (González, 2013). In other words, it requires the prior verification of the insufficiency of the different alternatives offered - or should be offered - by the legal system in order to be applied finally.

1.1.3.3 Proportionality per se or prohibition on excess

This sub-principle should be understood as "the equivalence between the intensity of the coercive measure and the magnitude of the procedural danger" (Oré, 2006) or between the rights of the procedural parties and the ends pursued in the process.

It requires consideration and analysis of the seriousness of the possible criminal consequence of the specific case, in such a way that the anticipated loss of liberty - resulting from the imposition of pre-trial detention - is only possible if a prison sentence is foreseeable (Sánchez, 1997). Otherwise, this precautionary mechanism would be excessive and unjustifiable because it would imply the early imprisonment of a person who would not deserve such a sanction even if guilty.

Finally, because of the above, it can be concluded that the rule to be applied in criminal proceedings is liberty. In other words, defendants should be able to defend themselves in the entire exercise of their right to freedom of movement and, exceptionally, they should be temporarily deprived of it to safeguard the effectiveness of the jurisdictional decision.

In order to properly understand the criteria under which it is possible, suitable and appropriate to request, order and accept pre-trial detention of a person without a conviction, the following section is devoted exclusively to a detailed analysis of this issue.

1.1.3 Presuppositions enabling preventive deprivation of liberty

On the one hand, judges of criminal guarantees should not forget that the risk presented by a prison, in all senses, should only be experienced by those who still enjoy their presumption of innocence, only when the presupposition of the existence of a risk of flight or concealment of evidence of other crimes is met (Beccaria, 2015).

Doctrinally, the existence of a risk of absconding a certain intensity is essential to allow the judge to order pre-trial detention (Rojo, 2016). In other words, only a comprehensive assessment of the particular circumstances of the case, which encourage the defendant to be absent during the judicial proceedings, can lead to the defendant not having the possibility of defending himself at liberty.

According to Pérez (2014), the accreditation of the procedural danger of absconding should not focus on subjective considerations but concrete and proven aspects of the case.

The starting point for assessing the procedural risk are the indications (provided by the prosecutor) that constitute fully demonstrable facts that justify the pre-trial detention order and support the (sufficiently probable) danger of absconding of the defendant (Krauth, 2018).

Even though, theoretically, it is up to the Prosecutor's Office to prove the admissibility of pre-trial detention, in judicial practice, the legal ghost of social roots weakens this burden of proof (Krauth, 2019). Completely contravening the principle of legality, the danger of absconding is not accredited. However, instead, it is distorted by the defendant's defence, through documents that attempt to demonstrate the existence of permanent links between the accused and the community, to guarantee - or pretend to guarantee - that there is no danger of evasion of justice and that, therefore, the defendant will behave in a responsible way so that there is a certainty that he or she will appear throughout the criminal proceedings against him or her (Monroy, 2016).

On the other hand, in order to have more normative assumptions that indicate the analysis that must be carried out for a preventive detention measure to be considered timely and legitimate, in addition to the risk of flight, the criminal act must have been proven in the world of phenomena, the sanction foreseen for the criminal type must be more significant than one year and the person linked to the crime must be a perpetrator or accomplice (Ramírez, 2014).

All these assumptions, which are entirely applicable to the Ecuadorian legal reality, will be analysed in detail under the consideration that the national legal framework establishes a kind of distinction, not always perceived, between

the assumptions for requesting and proceeding with pre-trial detention. The former corresponds to the prosecutor and the latter to the judge.

1.1.4 Requirements for an application for pre-trial detention

Article 534 of the Comprehensive Organic Criminal Code (2014) establishes the legal requirements for pre-trial detention to be adequately requested and to fulfil the purposes for which it was intended. Below, the requirements set out in the law are outlined, and a descriptive analysis of each of them is made.

1. Sufficient evidence of the existence of an offence of public prosecution.

It is the equivalent of the analysed fumus boni iuris or appearance of good law. The prosecutor must effectively demonstrate that a publicly actionable offence has been committed.

2. Clear and precise elements of conviction that the defendant is the perpetrator or accomplice of the offence The prosecutor must present sufficient elements to enable the judge to have a precise conviction that the person who is to be remanded in custody is the one who committed the offence or who collaborated in the commission of the offence.

3. Evidence showing that non-custodial pre-trial measures are insufficient and that pre-trial detention is necessary to ensure their presence at trial or the serving of sentence

This is the equivalent of the periculum as mentioned above in mora or danger in delay. The prosecutor is obliged to present elements that allow the judge to

believe that the person being prosecuted will absent himself from the process unless he is kept in detention. That is to say, for example, he must present evidence that the electronic surveillance device (which allows us to know where the person is at all times) will be insufficient, together with the house arrest and the prohibition to leave the country, to ensure the procedural principle of immediacy.

4. The offence is punishable by a custodial sentence of more than one year.

This requirement is the easiest to comply with since the prosecutor only has to refer to the corresponding legislation, which is the COIP, and indicate the custodial sentence imposed for the offence for which he or she intends to prosecute a person. If it is longer than one year, the requirement is automatically fulfilled.

In addition to complying with all these requirements, it is essential that the request is duly substantiated, in which the prosecutor must explain all the facts of the case that will allow the judge to deduce the lawfulness of the personal precautionary measure being processed and enable it to proceed.

It should be borne in mind that the prosecutor's obligation to state reasons mirrors that of the judicial operator. If, on the one hand, the prosecution must present all the facts that allow a specific legal conclusion to be drawn, the court or single judge must also give reasons why he or she considers pre-trial detention to be a proportional, necessary, appropriate and suitable measure. Only in this way are the guarantees of due process respected.

1.1.5. Whether pre-trial detention is appropriate

Although the national legal system does not include the same list of requirements for an appropriate pre-trial detention order, it is understood that the judge will verify compliance with all the requirements in the prosecutor's request, and then must apply the principles governing precautionary measures, with particular emphasis on the principle of proportionality, in order for the ordered measure to be legitimate. Above all, because the principles operate as basic parameters that, by guiding the development of the judicial process and the actions of the procedural subjects (Giacomette Ferrer, 2003), avoid an overflow of the state's ius puniendi, materialised in arbitrariness and abuses in the decisions of jurisdictional bodies.

According to domestic legislation, before imposing pre-trial detention, the judicial operator must also evaluate non-compliance or compliance with alternative measures if they have been previously granted (COIP, 2014). If they were ordered by the judge and not complied with by the defendant, they could not be used again.

The Comprehensive Organic Criminal Code provides for situations in which pre-trial detention is inappropriate, according to which pre-trial detention is inappropriate in crimes of private prosecution, misdemeanours and crimes with sentences of less than one year's imprisonment. This is justified to the extent that the balance between the imputed act and the state violence exercised as a means of coercion would never be justified in these cases (Rojo, 2016), as it is disproportionate and excessive.

In addition, the accreditation of social roots is also occasionally understood as a ground for the inadmissibility of pre-trial detention in Ecuador. This figure, which contravenes the principle of legality, is particularly relevant in the area

of flagrant crimes, where there is minimal time to obtain documents that allow its accreditation, among others, due to the speed with which the hearing that resolves the legal situation of the apprehended person must be held (Krauth, 2018). Therefore, this is the area where there may be the most significant violations of due process.

In order to comprehensively understand the handling of the application of pre-trial detention in flagrante delicto, the following sub-chapter is devoted to it.

2. FLAGRANTE DELICTO

2.1 Particularities of flagrante delicto

At the doctrinal level, flagrante delicto has three fundamental constituent characteristics. Firstly, in order for it to exist, it must be consummated. In other words, the punishable action or omission must have been objectively manifested in reality as an effect of the perpetrator's intention (Maier, 2011).

Doctrinally, the mere attempt is not sufficient for a person to be apprehended under the criterion of flagrante delicto. It is worth mentioning, however, that on this point, there is a discordance with domestic legislation and practice since, in this area, the consummation of the act is not necessary, which is why crimes committed in the form of an attempt are also processed in flagrante delicto proceedings, without there being an actual visible result of the criminal offence (COIP, 2014).

Secondly, in flagrante delicto, direct or indirect identification of the perpetrator is essential, which means recognising the individual who committed the offence

moments before. It is a direct identification of the person who has apprehended the perpetrator has observed with his senses the commission of the crime, and it is an indirect identification if the perpetrator can be identified through the version of the people who witnessed the crime (Ortega, 2013).

Thirdly, flagrante delicto requires that the offence was committed in the presence of one or more persons and that the perpetrator was discovered immediately. Immediacy presupposes a brief period, which, if not complied with, means that the offence does not qualify as such (Donna, 2011) mainly because it erases the traces of the offence and consequently produces an incomplete certainty in the judge (Albán, 2003) that makes him consider the apprehended person as a suspect and not as the perpetrator.

The criminal procedure doctrine distinguishes between temporal and personal immediacy. The former implies the commission of the crime at the exact moment or moments before, pursuing and finding the perpetrator immediately after the commission of the offence (Espinoza, 2016). The second refers to the fact that the active subject of the punishable conduct must be found at the scene of the crime or, at least, nearby so that it is possible to infer his or her participation (Palomino, 2008).

Because of this distinction of immediacy, criminal procedure doctrine proposes three types of flagrancy:

a) Flagrancy in the strict sense

It is configured if the subject is caught in the commission of the crime (Manzini, 1996). The temporal and personal immediacy are precise and current.

b) Improper flagrante delicto or quasi-flagrante delicto

It exists while the perpetrator of the offence is being pursued from the scene by the person who observed him committing the offence (Clariá Olmedo, 1998). It can be said that the subject is found just after having committed the offence so that the temporal and personal immediacy is "immediately subsequent".

c) Presumption of flagrancy

The subject has not been found committing the offence or fleeing from the place where it was committed. However, he has evidence (objects, traces) that allow us to infer the recent commission of the prohibited conduct and his link to the action (Clariá Olmedo, 1998). Therefore, it is possible to consider him as a participant in the criminal act even without current temporal or personal immediacy.

Finally, because the COIP (2014) understands that a person is in flagrancia if

Commits the offence in the presence of one or more persons or when discovered immediately after its alleged commission, provided that there is an uninterrupted pursuit from the time of the alleged commission until the apprehension, also when found with weapons, instruments, the proceeds of the offence, traces or documents relating to the offence just committed. (Art.527)

The concept of flagrante delicto and flagrante delicto provided for in Ecuadorian law includes the three types of flagrante delicto analysed and corresponds to all of the above, except for the duly stated exceptions.

2. 2 In flagrante delicto proceedings in the Ecuadorian criminal procedure system

At the national level, the Comprehensive Organic Criminal Code (2014) provides that in cases of flagrant offences, an oral hearing must be held before a competent judge within 24 hours of the subject's apprehension to determine the legality of the apprehension. In this same hearing, the corresponding process is determined, and, if necessary, the prosecutor formulates charges and requests the relevant precautionary measures.

Consequently, criminal proceedings for flagrante delicto begin with a flagrante delicto hearing. In this hearing, a judge of criminal guarantees verifies several aspects: that the act committed that motivated the apprehension is typified in the law as an offence, that the apprehension has been carried out within the established 24 hours, that no more than 24 hours have passed from the detention of the subject until the hearing, that the detainee has been informed of his rights and that he has not been the victim of cruel, inhuman or degrading treatment during his apprehension (Haro, 2015). If all these circumstances are not proven, the judge orders the detainee's release, without prejudice, to the continuation of the process through ordinary channels.

Subsequently, once the flagrancy and legality of the arrest have been established, the prosecutor presents the case based on the Report made by the national police officers, which details the circumstances of the apprehension and the evidence found in possession of the apprehended person to justify the initiation of the prosecutor's investigation. If necessary, the representative of the Public Prosecutor's Office requests

precautionary measures, following all the legal rules (explained above) and the judge rules on them, after hearing the victim (if it is present), the police officers (if deemed necessary) and the detainee directly or through the public or private defence counsel (Haro, 2015). Finally, the hearing concludes, and the parties to the proceedings are notified.

In any flagrant offence, the prosecutorial investigation lasts 30 days, a maximum of 60 days if there is a link to the investigation or reformulation of charges (COIP, 2014, art. 592 num.2).

Flagrante delicto is processed exclusively in Flagrancy Units, which operate full-time, under a fast and expeditious system that applies special procedures and alternative solutions to the criminal conflict to speed up jurisdictional decisions (Touma, 2017). Their primary purpose is to avoid the expiration of the detention of persons apprehended in flagrante delicto, mainly through direct and abbreviated procedures that prioritise the principles of judicial efficiency and speed, since the State intends to respond, to a large extent, to the social conception of the effectiveness of the criminal system, directly dependent on the immediacy of the penalty (Zalamea, 2012).

In the case of flagrante delicto, by its very nature, it seems possible to speak of a tendency to presume the guilt of the accused and requirements and presuppositions - automatically fulfilled - which motivate the use of, among all the precautionary measures, pre-trial detention. According to Llobet (2001), in practice, it is expected that as soon as criminal proceedings are initiated against a person, the presumption of innocence changes to a presumption of guilt and, consequently, the State orders preliminary deprivations of liberty to ensure that justice is done.

However, dogmatically and normatively, even the subject caught in flagrante delicto is legally innocent until a final judgment contradicts him (Llobet, 2001). Therefore, it is indisputable that in the Flagrante delicto Units, justice operators must be conscientious so that the prioritised principles are achieved, but without abusively sacrificing the rights of the accused.

Otherwise, the general predilection for pre-trial detention would produce disproportionate, illegitimate and unnecessary pretrial detention orders, whereby several people would be in prison, in the words of Zaffaroni (2014), "for nothing and nothing". (3)

In order to understand what happens in Ecuadorian judicial practice, the following chapter carries out field research in the Flagrancy Units of the Metropolitan District of Quito.

3. THE APPLICATION OF PRE-TRIAL DETENTION IN FLAGRANTE DELICTO IN THE PERIOD JULY-DECEMBER 2019, IN THE METROPOLITAN DISTRICT OF QUITO.

In order to understand the practical application of pre-trial detention, in this specific part of the research, a quantitative and qualitative study is carried out through a statistical analysis of the existing processes in the Flagrancy Units of Quito (both in Quitumbe and La Mariscal) in the period from July to December 2019, and the results it yields.

In order to achieve this purpose, four study variables have been established: the proportionality variable, the procedural danger of absconding variable, the social roots variable and the sufficiency of evidence variable.

Before explaining each of the variables mentioned, it should be noted that according to the Flagrancy System of the National Directorate of Legal Studies (DNEJEJ, 2020), 799 cases were filed in flagrante delicto during the period mentioned above. In all of these, precautionary measures were imposed without exception, and, specifically in 415 cases, pre-trial detention was ordered.

The selection criteria to be applied in order to carry out the aforementioned statistical study are as follows:

1. Cases filed in the Flagrancy Units of Quito (La Mariscal and Quitumbe).

2. Cases in which precautionary measures were issued in the period from July to December 2019.

3. Cases in which pre-trial detention was ordered in the period July to December 2019.

After applying the selection criteria to the entire study universe, the population is reduced to 415 cases. Subsequently, to perform the relevant statistical analysis, the following mathematical equation is applied to determine population proportions:

Then, the resulting sample size is 94 cases, which will be chosen under the random selection method. The confidence level of the results will be 92%, and the margin of error 8%.

The analysis results on the statistical sample determined will be beneficial to know with certainty the form of application of pre-trial detention and the similarity or difference between the provisions of the legal body (COIP) and judicial practice. Each of the study mentioned above variables is developed below:

Proportionality variable

The purpose of this variable is to determine respect for the principle of proportionality, a fundamental pillar that should guide the imposition of pre-trial detention. It, therefore, evaluates three specific parameters: the appropriateness, necessity and proportionality of the most personal severe precautionary measure imposed by the judge in each specific case. Thus, this variable makes it possible to study the existence of a balance between the rights of the parties and the ends of the proceedings and the strict necessity of this measure - and no other alternative - to achieve the end sought.

Variable for the existence of a danger of absconding from the proceedings

This variable studies the demonstration of the possibility that the prosecuted individual will not attend criminal proceedings. It is closely linked to the length of the custodial sentence to be received for the offence committed; therefore, the explanation for this is already given in analysing the proportionality variable. The purpose of this section is to analyse whether or not the requirement of demonstrating the danger of absconding has been met, which is in the hands of the State, specifically of

Prosecutor's Office

The accreditation of this procedural danger represents one of the requirements of the request for pre-trial detention, which must necessarily be fulfilled in order to enable the imposition of the precautionary measure by the justice operator, among others because no alternative precautionary measure could ensure the appearance of the subject involved in the process.

Social embeddedness variable

Arraigo social is closely linked to the danger of absconding. However, it is not accredited by the State (which will deprive a citizen of a fundamental right: freedom), but by the defendant himself, as a kind of mechanism to avoid the imposition of pre-trial detention to motivate the judge to order alternative measures. This variable studies whether the social roots, that accumulation of permanent links between the accused and the community, has been demonstrated in order to ensure that the person will appear for the whole of the criminal proceedings against him/her.

Sufficiency of evidence variable

This variable identifies the existence of sufficient, clear and precise elements of conviction, provided by the Prosecutor's Office, to allow the judge to be sure of the accused's authorship or complicity. In particular, because without such evidence, it would not be legitimate to impose any precautionary measure, especially pre-trial detention.

3.1 Main findings from the practical application of pre-trial detention for flagrante delicto offences

In the context of the effectiveness and suitability of pre-trial detention, the analysis of cases carried out in the Flagrancia Units in Quito has shown that prosecutors, judicial officers and even prison officers play a significant role in the correct application and effectiveness of this precautionary measure. The following are the main situations produced by these actors, which lead to the violation of rights.

Non-compliance with the principles and elements of pre-trial detention

The principle of proportionality between the offence committed and the precautionary measure granted governs the application of pre-trial detention, the distinctive feature of which is the exceptional nature of its imposition due to the deprivation of liberty it causes in a subject who has not yet been recognised as guilty. However, according to the case study results, pre-trial detention was imposed in more than half of all cases initiated in flagrante delicto. Indeed, out of the total of 799 cases of flagrante delicto, only 384 were ordered alternatives to pre-trial detention, such as a ban on leaving the country, the obligation to report periodically to the competent authority, electronic surveillance and house arrest.

Pre-trial detention was imposed in 415 cases and, in at least 96% of these, the parameters of proportionality were not met, mainly because in flagrante delicto, most of the cases filed are for robbery, a custodial sentence of around two years is imposed, and, in the abstract, the defendant can request a conditional suspension of his sentence. In this sense, given the possibility that the person does not have to be deprived of liberty (even if he is recognised as guilty), it would be disproportionate to imprison him before knowing his involvement in the criminal conduct. Alternative measures would be sufficient.

Consequently, even though, on the one hand, Article 534 of the COIP establishes the requirements that the prosecutor must meet in order to request pre-trial detention: to prove sufficient evidence to support the existence of a crime and the perpetration or complicity of the accused, that the offence is punishable by more than one year of imprisonment

and that there are indications of insufficient alternative measures to ensure the prosecution. On the other hand, it is the operator of justice who must supervise compliance with all these requirements, in addition to assessing the grounds for the inappropriateness of pretrial detention, its exceptional nature, its necessity, proportionality and suitability, concerning the specific case (COIP, 2014, art. 520 num.4). In practice, the first option to be considered and imposed is always pre-trial detention.

Likewise, despite the constitutional provision (CRE, 2008, art.76), which requires both the prosecutor and the judge to substantiate the request and the ruling ordering pre-trial detention, respectively, it is expected that in flagrante delicto hearings, the judicial operator considers legal requirements to be satisfactorily fulfilled which are not adequately substantiated by the prosecutor. This practise is so common that 91% of the pre-trial detentions imposed are based on simple normative statements, without any additional explanation or justification that would allow the defendant for having the necessary means to understand why he cannot defend himself in freedom.

3.2 Reversal of the burden of proof

In criminal procedural law, the burden of proof does not represent an obligation that, when not complied with, entails a sanction but instead allows the parties to present all the evidence and arguments that they believe they have in order to exercise their right to defence in optimal conditions (Herrera, 2012).

The burden of proof rests on the person pursuing specific legal effects that he intends to satisfy through the facts on which his claim is based since the fundamental general rule

is that he who asserts must prove it (Zalamea, 2012). In this sense, on the specific issue of pre-trial detention, the burden of proof of the concurrence of all the legal requirements for requesting the application of the most severe personal precautionary measure falls on the Prosecutor's Office (COIP, 2014, art.5 num.13).

Thus, the prosecutor is assisted by the reasons or grounds from which the need for this precautionary mechanism arises, and it is the information and facts of the specific case that must support his or her request.

At the international level, the Inter-American Court of Human Rights has established that the State must substantiate and accredit, in a clear and reasoned manner, in the specific case, the existence of all the valid requirements for pre-trial detention (Case of Usón Ramírez v. Venezuela, Series C No. 207, 2009, para. 144).

At the national level, Article 534 of the COIP (2014) also provides for this. However, from the field study carried out, it has been concluded that there is a severe lack of prosecutorial diligence since, occasionally, there is a reversal of the burden of proof of the third requirement of the article in question, referring to the indications of insufficiency of non-custodial precautionary measures.

In this sense, although the national law is clear in stating that it is the prosecutor who has this burden of proof, in the Flagrancy Units analysed, the defendant is given this obligation on certain occasions. Consequently, to avoid the burden of a pre-trial detention order, at least 19% of the individuals prosecuted present documents for justifying their

future appearance. However, there is no foreseeable judicial opinion on the assessment of these documents.

Precisely, the lack of uniformity in the validity given to social roots generates violations of rights. However, the Constitution of Ecuador includes the principle of equality before the law in Article 11, which provides for the same rights and opportunities for all, in practice, the vast degree of discretion and subjectivity that exists concerning "arraigo social" places those subject to prosecution in a situation of total inequality before the law. For this reason, a person's freedom of movement is respected or restricted, not according to the established rules, but according to the judge's criteria regarding the validity of social roots.

As a result, the constitutional right to legal certainty, provided for in Article 82 of the same body of law, which provides for the existence of prior rules and respect for constitutional provisions, is also violated. The practical application of the "arraigo social" produces legal uncertainty on both sides of the proceedings, both for the victim and the defendant, as it prevents the existence of foreseeable rulings on the grounds for the imposition of pre-trial detention.

3.3 Ineffectiveness of pre-trial detention

It should not be forgotten that one of the most severe problems faced by pre-trial detention orders is the uselessness that they reflect in some cases. Mainly because they fail to achieve the purpose they are intended to safeguard the criminal process by ensuring the defendant's appearance.

In 6% of the cases analysed in the second chapter, it was found that prison officers, who should be responsible for

transporting the detainee to all the respective hearings, failed to do so despite being adequately notified.

Consequently, on the one hand, they violate the rights of the individual being prosecuted, who is forced to remain in prison - longer than necessary - to resolve his or her legal situation, without any basis whatsoever and due to a simple act of negligence in the fulfilment of his or her duties. On the other hand, they also violate the victim's rights, who do not receive a prompt or timely response from the State, but rather justice is postponed and delayed, with unnecessary and unjustifiable delays.

Before concluding, it should be made clear that the problem of the indiscriminate application of pre-trial detention does not end with its use, but that in addition to generating rights violations, it is also a direct cause of prison overcrowding.

In Ecuador, more than a third of persons deprived of liberty does not have a conviction. That is, they are being prosecuted and cannot defend themselves in freedom, even though statistics show that the majority of human beings do not manage to emerge victorious from the system and that the negative consequences that it produces anchor them decisively to a stigmatised lifestyle (Rojo, 2016).

The national service for the comprehensive care of adults deprived of their liberty and adolescent offenders (SNAI) has published the following statistics in this regard:

Table 1: Average monthly prison population 2020

Reporting month	Average ppl sentenced	Average ppl processed	Average ppl per offence	Average ppl total	Effective installed capacity	Missing places	% Overcrowding
January	23.449	14.370	37.819	39.180	29.463	29.463	32,98%
February	23.553	14.554	38.107	39.526	29.463	9.667	34,16%
March	23.777	14.786	38.563	39.778	29.463	9.668	35,01%
April	23.552	14.947	38.498	39.087	29.463	9.665	32,66%
May	23.332	14.386	37.718	38.102	29.463	9.659	29,32%
Annual Average	**23.533**	**14.625**	**38.158**	**39.132**	**29.463**	**9.668**	**32,82%**

Elaboration: Directorate of Planning, Investment, Monitoring, Plans, Programmes and Projects - Statistics Unit.

Source: Administrative registers of the centres of deprivation of liberty.

According to the table above, of the total number of persons deprived of liberty for crimes, up to May 2020, which were 37,718 (100%), at least 14,386 (38%) did not have a conviction but were deprived of liberty due to a pre-trial detention order, which contributed to the 29.32% of existing prison overcrowding. Precisely because, according to the Report on the Use of Pretrial Detention in the Americas (IACHR, 2013), prison overcrowding is due, among others, to the massification of the application of this personal precautionary measure and increases due to judicial delay in resolving cases within a reasonable time which, as stated above, can occur due to the non-transfer of the processed subjects to the hearing that allows their legal situation to be resolved.

4. CONCLUSIONS

Precautionary measures are mechanisms for securing criminal proceedings that limit the persons allegedly responsible for the criminal conduct. Their primary purpose is to avoid procedural risks that could frustrate the process and the effectiveness of the jurisdictional resolution. They can only be imposed if two conditions are duly accredited: fumus boni iuris and periculum in mora. The former refers to the appropriateness of the conduct carried out under the offence, and the latter concerns the existence of a substantial danger that prevents the correct development of the criminal proceedings.

These procedural safeguards are measures of a strictly precautionary nature. They apply to a legally innocent person (as there is not yet a conviction against him/her) for the sole purpose of safeguarding the proceedings. They are also temporary, restrictive, exceptional and instrumental, which means that they only operate within a certain period, subject to compliance with the relevant legal requirements and that they do not have an end in themselves, but are a means to ensure the effectiveness of the criminal proceedings. In addition, they must always be imposed by a competent judicial officer as they represent limitations on the person's rights to whom they apply. Thus, they are mechanisms of state interference that are limited and sustained under the principles of legality, immediacy, celerity and proportionality.

There are two types of precautionary measures: real and personal. The former applies to the assets of the defendant, and the latter applies directly to the defendant. Given that the object of the present investigation falls within the second class of measures, it should be pointed out that, at the legislative level, six

different personal precautionary mechanisms can be imposed to guarantee efficient and effective criminal proceedings. Their fundamental purpose is to protect the victim's rights, the process and the serving of the sentence, primarily by ensuring the defendant's presence, the preservation and collection of evidence and a guarantee of full reparation.

The intensity with which personal precautionary measures diminish rights is different in each of them, especially if one compares the prohibition to leave the country, the obligation to report periodically to an authority, house arrest and the electronic monitoring device pre-trial detention.

Precisely, concerning the central theme of this research, pre-trial detention consists of the anticipated deprivation of liberty of a legally innocent person and is, therefore, the most severe personal precautionary measure. For this reason, it must be applied exceptionally, as a measure of ultima ratio, for a specifically determined period and exclusively in the situations provided for by law, obeying the principle of proportionality and the sub principles of appropriateness, necessity and proportionality in the strict sense, indispensable in order primarily not to excessively or illegitimately affect the fundamental right to liberty of the subject on whom it is applied.

The risk of absconding is one of the conditions for the imposition of pre-trial detention and must be accredited by the Public Prosecutor's Office in the request to apply this precautionary measure. The burden of proof rests with the Prosecutor's Office since it is the entity that asserts the need for pre-trial detention and the insufficiency of alternative measures to achieve the same end. Prosecutors must present

sufficient arguments and grounds to support their request and that, subsequently, the operators of justice must provide adequate motivation in the judicial order that provides for this precautionary mechanism.

While it is true that pre-trial detention can be imposed, in general terms, in any publicly actionable offence with a penalty of more than one year's imprisonment, this article has focused primarily on flagrante delicto. This allows for the immediate arrest of the person who has committed the criminal conduct because he has been discovered while executing it or immediately afterwards. Consequently, there is a tendency to think that the requirements to enable the most severe precautionary mechanism are satisfactorily fulfilled in flagrante delicto.

It is important to emphasise that, in the country, flagrante delicto is processed only in Flagrancy Units, institutions that work 24 hours a day, every day of the year, to avoid exceeding the maximum time the detained person can be held without trial (24 hours). The process begins with a hearing to qualify the flagrante delicto and the legality of the detention, to corroborate, among other things, that it is indeed a flagrante delicto and that the subject has not been detained for more than 24 hours. In this same hearing, the issue of precautionary measures is dealt with and, due to the principles of judicial efficiency and speed, special procedures can be applied.

In practice, in the Flagrancy Units of the Metropolitan District of Quito, the personal precautionary measure of pre-trial detention is imposed in more than half of all cases, making it clear that day-to-day basis, it is not a measure of last resort. From the analysis of procedural cases in the second period of 2019, it has been concluded that the prosecutor rarely

demonstrates the risk of absconding and that, on occasions, it is the defendant who is - incorrectly - given the burden of proof of his or her permanence and future appearance at trial. Consequently, in practice, the absence of documents proving social roots is automatically understood, by some of the public officials involved, as a factor that enables the judge to impose pre-trial detention.

Likewise, it is mainly evident that the precautionary measure is useless on certain occasions because the person deprived of liberty is not transferred to the hearings. Furthermore, there is no adequate justification for the request and the order of this precautionary mechanism, but simply a textual reference to the specific article of the relevant legal body.

Because of the above, it is clear that the current application of pre-trial detention is far from the legal mandates and does not receive exceptional treatment. In addition to violating the right to legal security, by demanding obligations that do not exist in law (social roots) which place the defendant in total uncertainty and do not allow him/her to expect a predictable ruling, mainly because each judge evaluates the documents of social roots at his/her discretion; it also violates the right of the victim to prompt and timely justice, under unjustified absences of the defendant deprived of liberty, which is due to a lack of control of the centres where he/she is being detained.

The social arraigo should be used, but not in the way it is currently used: by inverting the burden of proof, violating the principle of legality and the right to defence and legal security of the accused. Only through an impartial body, materialised in

the form of a Pre-Trial Services Unit, for example, which does not provide inputs to the prosecution in order to massively imprison pre-trial detainees, nor which collaborates with the defence to encourage escape and impunity, but instead verifies the information obtained and can also supervise compliance with alternative measures in cases where they have been imposed, is it possible to better guarantee their accurate compliance, encourage their application and reduce the use of pre-trial detention. Through this Unit and properly trained judges, prosecutors and public defenders, the problem of pre-trial detention could be significantly reduced.

It should always be borne in mind that the possibility of defending oneself at liberty is the rule in all criminal proceedings and that, therefore, the precautionary mechanisms that limit the rights of the individual being prosecuted to a lesser degree should be given priority over those that limit them to a greater degree, because deprivation of liberty is the exception. It is not possible in daily practice to deprive a person of liberty to know whether they should be deprived of liberty. In other words, the request for pre-trial detention cannot be spontaneous but must be sensible, reasonable and well-founded, as must the order for its imposition. Otherwise, rights are violated, and the use of the most severe precautionary mechanism becomes disproportionate and unnecessary, as has already been exemplified throughout this research article.

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Jurisdiction of paternity: pending task in the protection of labour rights

Fuero de paternidad: tarea pendiente en la tutela de derechos laborales

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ABSTRACT: The growing interest in developing guarantees for protecting labour rights, both nationally and internationally, has led different countries to include paternity license within their legal systems, some of them even contemplating the so-called paternity jurisdiction. This article aims to establish the need to guarantee safeguarding work and the consequent protection of the worker's family nucleus, the parental jurisdiction. A study of national and comparative legislation was then carried out to verify the real scope of this jurisdiction and how it should be regulated in Ecuador, identifying the specific features that define its characteristic features in each of the countries subject to analysis. Additionally, concepts such as equality and discrimination have been developed, based on agreements adopted by the International Labour Organization. All the elements mentioned above have served as a basis to determine the weaknesses that the current national regulatory framework presents, serving for the subsequent formulation of conclusions, which show the situation of inequality and lack of protection in which the workers are and the possible strengths that would

bring the inclusion of this legal figure to achieve much broader protection of the rights of the working class.

KEYWORDS: social equality, legal systems, discrimination, law enforcement, labour law.

RESUMEN: El creciente interés por desarrollar garantías para la protección de derechos laborales, tanto a nivel nacional como internacional, ha llevado a diferentes países a incluir dentro de sus ordenamientos legales la licencia por paternidad, llegando algunos de ellos a contemplar el denominado fuero de paternidad. El presente artículo pretende establecer la necesidad de incluir como una garantía para la salvaguarda del trabajo y consecuente protección del núcleo familiar del trabajador, al fuero de paternidad. Para lograr tal finalidad, se realizó el estudio de legislación nacional y comparada, a efectos de constatar el real alcance de este fuero y la forma en que el mismo debería regularse en el Ecuador, identificando las particularidades propias que definen sus rasgos característicos en cada uno de los países materia de análisis. Adicionalmente, se han desarrollado conceptos tales como igualdad y discriminación, tomando como base lo preceptuado en convenios adoptados por la Organización Internacional del Trabajo. Todos los elementos antes mencionados han servido de fundamento para determinar las debilidades que presenta el actual marco regulatorio nacional, sirviendo para la posterior formulación de conclusiones, mismas que evidencian la situación de desigualdad y desprotección en la que se encuentran los trabajadores y las posibles fortalezas que traería la inclusión de esta figura jurídica para lograr una tutela mucho más amplia de los derechos de la clase trabajadora.

PALABRAS CLAVE: igualdad social, sistemas jurídicos, discriminación, aplicación de la ley, derecho laboral.

INTRODUCTION

The Constitution of the Republic prepared by the National Constituent Assembly, approved by the Ecuadorian people in a referendum and published in Official Gazette No. 449 of October 20, 2008, brought a qualitative change regarding the treatment and exercise of rights, especially labour rights.

Although the defunct Constitution of 1998 established as an obligation of the State to ensure respect for women's labour and reproductive rights in the workplace and, in turn, guaranteed the right of people to decide on the number of children who can procreate, adopt, support and educate. (CPE, 1998, art. 36) Therefore, there was not even thought about the possibility that such circumstances could generate new rights for workers, as in effect, would happen later.

Thus, in the current constitutional text where the right to paternity leave for workers is recognised for the first time, it served as the basis for implementing a series of modifications in the legislation to develop it, especially in the Labour Code. This circumstance would only materialise after almost seven years of the approval of the Constitution of the Republic.

As the International Labour Organization (ILO) has indicated, maternity protection is a fundamental labour right and has been enshrined in fundamental universal human rights treaties. In this context, the study carried out in 185 countries regarding compliance with ILO Convention 183 shows that 98 countries comply with the minimum time of leave of 14 weeks; 42 meet or exceed the proposed 18-week leave; 60, including Ecuador, grant a leave of between 12 and 13 weeks and only

27 recognise less than 12 weeks (ILO, "Maternity and paternity at work: Legislation and practice in the world"). However, the reality changes when it comes to paternity leave:

The importance of access to paternity leave is that this legal exemption allows the worker to establish a bond with the new-born that, according to studies carried out, produces positive effects on the development and health of the child (ILO, Maternity, Paternity and Work). In the same sense, Octavio Salazar points out that: "The incorporation of men into private spaces must entail, in addition to the assumption of domestic and care co-responsibility, a progressive change in the conception of fatherhood." (Salazar, 2013, p. 331)

If this is added that the greater participation of men in domestic tasks allows women to balance professional priorities better, undoubtedly, we are faced with the need for a paradigm shift regarding the role that each member has to play in the workplace. Family and labour field, a purpose to whose achievement a generalised recognition of this right in international legislation would substantially contribute. Despite this, it should be noted that according to the study carried out by Pedro Romero-Balsas, the use of paternity leave may favour the inclusion of men in domestic tasks, although its effects are not sufficiently clear and indisputable. (Romero-Balsas, 2015, p. 105)

Although the benefits that the recognition of maternity and paternity leave at work entails are still a fundamental aspect in the family order, their exercise by working people brings with it a series of practical difficulties that go further Beyond justifying their absence from work, these circumstances become sufficient reasons for the employer to choose to dismiss workers immersed in this casuistry.

Until before 2015, in the non-consensual event of an untimely dismissal of the mother, she did not have the possibility of returning to her workplace, so she did not enjoy proper stability, since, if she were to leave, he could barely request compensation for the loss of his job. After the reforms incorporated in April of that year, the mother's right and, even more so, as an obligation of the labour judge, her reinstatement to work was included as a right to safeguard her right to stability.

In the same text of the reforms mentioned above, the exercise of paternity leave was regulated; However, by including the guarantee of stability for the workers, it was overlooked to contemplate it for the parents, until now there is a kind of unjustified vacuum in terms of the protection of the permanence in work for the parents who work concerning dependence.

1. METHODOLOGICAL THOUGHTS

For the development of this work, the analytical-comparative methodology has been used, pointing out from an exegetical study of national and international regulations, the multiple edges that the subject in question raises in the face of the proposed problem. Similarly, an inductive method has been applied as a mechanism through which specific elements and cases have been specified that have served as the basis for the formulation of generic rules and a proposed solution to the focused casuistry.

The Political Constitution of the Republic of 1998 -in due course- conceived Ecuador as a social state of law, representing this category a substantial advance compared to the characterisation that it had in the past only as sovereign, independent, democratic and unitary (CPE, 1979, art. 1). Assuming this form meant understanding that the model in force

until then had been exhausted, being insufficient to achieve real social justice, eliminating the social imbalances originated by a liberal State focused on the submission of power to law, centred on state abstentionism and extreme individualism. (Álvarez, 2008, p. 19)

A decade later, with the approval of the Constitution of the Republic in 2008, the definition contemplated in the constitutional text of 1998 was surpassed, giving a qualitative leap towards what we have currently known as the constitutional State of rights and justice, which in words of Ramiro Ávila consists of:

> On the one hand, 1. the State; and 2. the right from which it emanates is subject to the rights of individuals and communities. This means that our parliamentary representatives are not free to shape the law but are closely bound by rights. (Ávila, 2009, p. 409)

From this point of view, the human being is placed at the centre of state action and a series of rights are recognised to whose development and respect the State has committed, finding itself in the obligation to formally and materially adapt the legal system to the contents constitutional; For the fulfilment of this purpose, the different bodies that hold normative power, in the exercise of their prerogatives, will have to accept and observe said constitutional precepts. As can be seen, the raison d'être of the State is precisely the guardianship and protection of the human being.

In this context, when the Constitution speaks of the reproductive rights of working people, it mentions some elements that comprise them, among which we can find access and stability in employment without limitations due to pregnancy or the number of children, the right to maternity

and breastfeeding, as well as the right to paternity leave. (CRE, 2008, art. 332)

Concomitantly, in the Labour Code (2005) it was established since 2015 that the father ordinarily has the right to paid leave for ten days for the birth of his daughter or son when the birth is due to standard delivery. Then some circumstances are specified that give rise to the increase in days:

a) Five days in those cases of multiple births or by caesarean section.
b) Eight days when the daughter or son was born prematurely or in special care conditions.
c) Twenty-five days of paid leave if the daughter or son was born with a degenerative, terminal or irreversible disease, or with a degree of severe disability.[1] (art. 152)

It is essential to clarify that in the mother's death during childbirth or while she is on maternity leave.[2]The father can use all or the part that remains of the leave period that would have corresponded to the mother had he not died.

According to the ILO, paternity leave, in general, consists of a short period granted to the father immediately after birth, to care for the new-born and the mother. (ILO, "Maternity and paternity at work: Law and practice in the world")

1 It is not unnecessary to point out that, regarding this last leave, it was reiterated in the third unnumbered article added after article 152 and extended to the mother, when it speaks of the "Leave with pay to female workers and workers for the medical treatment of daughters or sons suffering from a degenerative disease ". Despite the above, it is considered that it leaves the scope of both maternity leave and paternity leave and acquires its autonomy having a unique and differentiated treatment.

2 The same article establishes that the working woman has the right to a paid leave of twelve weeks for the birth of her daughter or son, extending for ten additional days in the case of multiple births. The absence from work must be justified with the presentation of a medical certificate issued by a physician of the Ecuadorian Institute of Social Security or another professional; document in which the probable date of delivery or the date on which such event occurred must be stated.

As noted in previous lines, our Constitution guarantees access and stability in employment without limitations due to pregnancy. As a complement to maternity leave, conceived as the "Right that the working mother has to leave the workplace, due to labour justifiably..." (Guevara & Ortega, 2019, p. 317), has contemplated what doctrinally is known as maternity jurisdiction or maternal jurisdiction, that is, the right of the worker to full stability, that is, to remain indefinitely in her workplace unless there is a legal cause that justifies her separation.

Now, how has the right to full stability been guaranteed at the national level? With the approval of the Organic Law for Labour Justice and Recognition of Work at Home (LOJLRTH, 2015, art. 195.1), the action for ineffective dismissal was instituted in order to protect the right of workers in a state of pregnancy or associated with their condition of pregnancy or maternity, to remain in their jobs.[3]This action, which has a very summary procedure, allows the untimely dismissed person to act before the competent judge to request his return to the workplace or, failing that, to opt for the termination of the employment relationship with the right to receive unique and additional compensation to the general ones established by law, which is equivalent to twelve months of the last remuneration received.

As can be seen, the legislator left the workers outside a guarantee of tenure to assist them in the circumstances similar to those mentioned for the mother. This legislative omission could be because certain gender stereotypes have traditionally been internalised that prevent women. People consider the possibility that a particular legal construction could discriminate against those who have historically been

3 Although it is not the reason for this analysis, it should be noted that ineffective dismissal also protects union leaders and parents, even adoptive mothers. (Ortega, 2016, p. 100)

attributed to the role of resource provider, with characteristics such as independence, power, physical strength, among others. (Martínez, 2011, p. 66)

From the previous, it can be understood as a jurisdiction of paternity that legal institute that tends to guarantee, through the legally established mechanisms, the stability of people in their workplace, due to or as a consequence of pregnancy or birth (even adoption) of his son or daughter, whose ultimate purpose is to safeguard the sources of income for the support of the worker and those people who directly or indirectly depend on him.

ILO Convention 156, approved in 1981 and ratified by Ecuador on February 8, 2013, aims to protect workers with family responsibilities. In said instrument, several provisions were established aimed at achieving effective equality of opportunities and treatment between male and female workers; For this purpose, the obligation was established for the Member States to include among the objectives of their national policy the allowing people with family responsibilities to exercise their right to work without being discriminated against, leaving aside any possible conflict between their responsibilities. Family and professionals.

In article 8 of the instrument mentioned above, it is stated that family responsibility should not in itself constitute a justified cause to end the employment relationship (Convention 156, 1981, art. 8). The ILO itself has recognised that men are also discriminated against and penalised if they assume responsibility for their children's care, and these behaviours may manifest themselves in a reduction in their wages or a reduction in their status at work. (ILO, "Maternity, Paternity and Work")

Is it then possible to speak of discrimination against workers because they are in a situation of paternity? To clarify the question posed, it is necessary to clarify the term discrimination's meaning and scope.

When referring to applying rights principles, the Constitution establishes that all people are equal and enjoy the same rights, duties, and opportunities. It further adds that:

> No one may be discriminated against for reasons of ethnicity, place of birth, age, sex, gender identity, cultural identity, marital status, language, religion, ideology, political affiliation, judicial past, socio-economic status, immigration status, sexual orientation, health status, carrying HIV, disability, physical difference; nor by any other distinction, personal or collective, temporary or permanent, whose purpose or result is to impair or nullify the recognition, enjoyment or exercise of rights. (CRE, 2008, art. 11)

In the field of Labour Law, the ILO, in Convention 111 (1958), states the following:

1. For this Convention, the term discrimination includes:
(a) any distinction, exclusion or preference based on race, colour, sex, religion, political opinion, national ancestry or social origin that has the effect of nullifying or altering equal opportunities or treatment in employment and occupation.
(b) Any other distinction, exclusion or preference that has the effect of nullifying or altering equal opportunities or treatment in employment or occupation may be specified by the Member concerned after consultation with employers and workers' representative organisations when such organisations exist other appropriate agencies.
2. Distinctions, exclusions or preferences based on the qualifications required for a particular job will not be considered discrimination.

3. For this Convention, the term's employment and occupation include access to vocational training and admission to employment and various occupations and working conditions. (art. 1)

From the proposed perspective, discrimination in the labour field can be understood as any conduct that translates into differentiated and unjustified treatment that seeks to marginalise, limit or impede the exercise of the rights that legitimately assist one or more workers, generating a hostile environment and threatening to the dignity of these.

In Recommendation 165, the ILO states that all measures compatible with national conditions and possibilities should be adopted so that workers with family responsibilities can integrate and remain in the workforce and reintegrate into it after an absence due to said responsibilities. It is further added that the marital status, family situation or family responsibilities should not in themselves constitute justified causes to deny a worker a job or to terminate the employment relationship. (Recommendation 165, 1981, No. 12)

In these circumstances, it is not strange to speak of discrimination against workers because of their paternity, when within the federal regulatory framework guarantees of tenure are contemplated for workers in a state of pregnancy or whose condition is associated with maternity, leaving aside actions aimed at safeguarding the stability of parents in the workplace, in similar situations in which workers have been protected.

A similar situation would arise in the unfortunate event of the mother's death, either at the time of delivery or while on leave: although the father would have the right to access the time that he would have had for maternity leave. Corresponding to the deceased person, once the twelve weeks referred to in

article 152 of the Labour Code have been exhausted, the parent would be prevented from exercising the right to breastfeeding leave. Then, when mentioned in the third paragraph of article 155, the nursing Mother's Day will last six hours during the twelve months after delivery, according to the beneficiary's needs, a wording that would make it impossible for the worker to exercise this right.

Furthermore, Yolanda Maneiro (2019), points out that:

> "(...) in no way, the father may be the holder of the right when the mother decides to enjoy it in its entirety or lacks it, which will happen when she does not have the status of a worker employed, and the applicable collective agreement does not contain a more favourable regulation than the legal one. The same consequence, that is, the impossibility of the father to enjoy breastfeeding leave, will proceed in the case of a widowed father with a child under nine months of age or when he is divorced or separated, since, unlike Regarding what happens with maternity leave, there is no express regulation in this regard "(p. 4).

On this matter, Miguel Carbonell highlights the difference between the principle of equality in the application of the law and the principle of equality before the law, when he indicates the following:

> The first consists of the mandate of equal treatment referred to the authorities in charge of applying the law, that is, this mandate is directed fundamentally to the executive and judicial powers. For its part, the principle of equality before the law is a mandate directed to the legislator not to establish unreasonable or unjustified differences in legal texts for people in the same situation or regulate in the same way unjustifiably to people unequal circumstances. (Carbonell, 2011, p. 203)

Given the lack of the proposed rule, we are facing a non-observance of the principle of equality before the law, since only one of the parents (pregnant worker or in a situation related to maternity) has been provided with the legal mechanisms to safeguard their stability at work, leaving out workers who are in a context, to say the least, similar.

In this same sense, Luigi Ferrajoli states that "The sex difference should justify differentiated treatments on all occasions in which equal treatment penalises the female gender in contrast to the self-determination rights of women and with specific interests linked to a female identity. ". (Ferrajoli, 2009, p. 90)

Although the maternity jurisdiction is translated into a measure that avoids discriminatory treatment against women due to their pregnancy, it is worth noting that this mechanism has the ultimate goal of protecting the unborn child, taking into account their vulnerability situation.

The maternity and paternity leave was created to ensure that the father and mother guarantee adequate care for their children within the framework of realising the principle of the child's best interests. The Convention on the Rights of the Child prescribes the following:

> 1. States Parties shall use their best endeavours to ensure recognition of the principle that both parents have everyday obligations regarding the child's upbringing and development. The child's upbringing and development's primary responsibility will rest with the parents or, where appropriate, the legal representatives. A primary concern will be the best interests of the child. (Convention on the rights of the child, 1989, art. 18.1)

This instrument also recognises every child's right to an adequate standard of living for their integral development, with parents being the main obligated to provide, within their possibilities, the necessary living conditions to fulfil this objective. It should also be noted that the States Parties to this convention must adopt appropriate measures to help parents or other persons responsible for the child to affect these rights.

In this context, as established by the organic code of childhood and adolescence, the best interests of the child are a principle aimed at satisfying the effective exercise of all the rights of children and adolescents (CONA, 2003, art 11), consequently, if broad and sufficient protection is to be achieved for this priority care group, national legislation should contemplate the jurisdiction of paternity for the protection of workers' labour rights.

It is worth mentioning that the guarantee of immobility of the jurisdiction to which we refer does not empower the worker to breach his labour obligations unjustifiably. This assertion has been ratified by Adriana Camacho-Ramírez and María Catalina Romero Ramos when they state the following:

> The new paternity jurisdiction and maternity jurisdiction do not per se imply the freezing of the employment relationship, since the certified worker may be terminated from his / her employment if a just cause for termination of the employment contract and prior authorisation from the Ministry is established. (Camacho-Ramírez & Ramos, 2018, p. 74)

Consequently, if a worker were to abuse his jurisdiction and incurs improper conduct, the employer has full powers to initiate an action before the labour inspector for any of the grounds for approval provided in the Labour Code (CT, 2005,

art. 172), in order to terminate the employment relationship in a justified manner and without the payment of compensation for this fact.

To examine into the proposed analysis and delimit the defining characteristics of paternity jurisdiction, we will briefly study below some legislations that contemplate this institute as a guarantee of stability for parents, relating them to national regulations.

2. Bolivia, Colombia, Chile, Venezuela, Ecuador and Spain: Brief analysis

2.1. Bolivia

The case of Bolivia is fascinating since, at the constitutional level, the immobility of the parents has been established for up to one year:

> Women may not be discriminated against or fired because of their marital status, pregnancy status, age, physical characteristics or number of daughters or sons. The job tenure is guaranteed for women in a state of pregnancy, and their parents, until the daughter or son reaches one year of age. (Constitution of Bolivia, 2009, art. 48.VI)

Through Supreme Decree 0012, the conditions of labour immobility of the mother and father who work in public or private sector were regulated, where their right to enjoy stability is ratified regardless of their marital status, from gestation until the son or daughter turns one year old. Consequently, the employer is prevented from firing them, affecting their salary level or their job location.

In administrative proceedings, the Ministry of Labour, Employment and Social Welfare have the authority to order - after verification - the reinstatement of dismissed workers with pay and other social rights for the duration of the employment relationship's suspension. (Supreme Decree No. 0012, 2009, arts. 2-6)

2.2. Colombia

There has been a remarkable development in the rights regime in this country due to the Constitutional Court's essential work. Regarding the constitutional control of a norm by relative legislative omission, we will refer to the case proposed by citizen Wadys Tejada Flórez, who requested the constitutional control body of that country, in the exercise of the public action of unconstitutionality provided for in article 241 of the Political Constitution of that country, which declares the conditional constitutionality of numeral 1 of article 239 and numeral 1 of article 240 of Decree-Law 2663 of 1950, Substantive Labour Code. (Constitutional Court of Colombia, January 18, 2017)

The plaintiff stated that the provisions mentioned above of the Substantive Labour Code violate articles 11, 13, 42, 43, 44, 48 and 53 of the Political Constitution and paragraph 2 of article 12 of the Convention on eliminating all forms of discrimination against women.

This is because these regulations guarantee assistance and protection only for pregnant working women, by prohibiting their dismissal during the period of pregnancy or breastfeeding and requiring leave for their dismissal. However, this protection is not guaranteed for non-working women financially dependent on their partner.

In this scenario, the Constitutional Court of Colombia, through the judgment pronounced in this case, declared enforceability (constitutionality) conditional numeral 1 of article 239 and numeral 1 of article 240 of Decree-Law 2663 of 1950. According to Manuel Fernando Quinche Ramírez (2015):

> To declare conditional constitutionality, the Corporation has used various linguistic formulas. Among the most used are those of declaring enforceability "Only on the understanding that ...", or "(...) following the reasons outlined in the motive part of this judgment", or "Under the condition that (...) ", or similar. (p. 161)

In this way, the prohibition of dismissal and the requirement of permission to carry it out was extended to the worker who has the condition of a spouse, permanent partner or partner of the woman in the period of pregnancy or lactation, who is the beneficiary of that, generating a particular jurisdiction for these people, with the consequent impossibility of dismissing them untimely.

For this reason, in Colombia, it is usually called the protection of paternity, as extended maternity leave. (Camacho-Ramírez & Ramos, 2018, p. 63)

2.3. Chile

The Chilean Labour Code indicates that the father has the right to a paid leave of 5 days for the birth of a child, a period that can be occupied from the moment of the delivery or distributed within a month from the date of birth (CT, 2002, art. 195). As for postnatal leave, which for the mother is recognised as a right whose exercise is imperative, for the father its use is optional since only if the worker avails himself of this permit, the enjoyment of labour jurisdiction is recognised for a period

equivalent to double of the duration of the same, which is counted from the ten days before the beginning of its use.

In these circumstances, the employer cannot terminate the employment contract to those who are covered by this jurisdiction, unless it has judicial authorisation that could be granted in cases of expiration of the contract term, the conclusion of the work or service subject to the contractual relationship, as well as causes that constitute a breach of obligations by the worker. Without prejudice, it should be mentioned that the father's jurisdiction, for no reason.

If the parent uses the parental postnatal leave, they must notify their employer through a registered letter sent, at least ten days in advance of the date they will exercise said leave, with a copy to the Labour Inspectorate. A copy of said communication must be sent within the same period to the worker's employer.

2.4. Venezuela

The Organic Law of Labour, Workers and Workers provides that people have the right to a paid paternity leave of fourteen successive days, counted from their child's birth or from the date it is given or given. In family placement by the authority with competence in matters of children and adolescents.

It is also added that they enjoy superior protection from job security during the pregnancy of their partner up to two years after delivery, a guarantee extended to the father during the two years following the family placement of children under three years of age.

It should be noted that the law in question includes the right to full stability of the people in their workplace, which would empower the dismissed worker to request reinstatement to their activities in the face of an unjustified termination of the employment relationship:

> Stability guarantee
>
> Every worker has the right to guarantee permanence in his or her job if there are no causes that justify the employment relationship's termination. When a worker has been dismissed without incurring any justifying causes, they may request reinstatement to their job following this law's provisions. (LOT., 2012, art. 86)

2.5. Spain

Article 48 of the Law of the Workers' Statute contemplates the suspension of the employment contract with reservation of position. It indicates that the employment contract of the parent other than the biological mother is suspended due to the fact of birth for 16 weeks, of which the six uninterrupted weeks immediately after delivery are mandatory, which must be enjoyed full-time, for the fulfilment of care duties. Once the legal causes for the suspension cease, the worker has the right to return to the reserved job.

Regarding dismissal, it can be classified as appropriate, inappropriate or null. Regarding null dismissal, the regulations in question provide:

> Article 55. Form and effects of the disciplinary dismissal.
>
> (...)

Dismissal will also be null in the following cases:

a) That of workers during the periods of suspension of the employment contract due to birth, adoption, custody for adoption, foster care, risk during pregnancy or risk during breastfeeding referred to in article 45.1.d) and e), or due to diseases caused by pregnancy, childbirth or natural lactation, or the one notified on such a date that the period of notice granted ends within said periods.

(...)

c) After returning to work at the end of the suspension period of the contract due to birth, adoption, guardianship for adoption or foster care purposes, referred to in article 45.1.d), provided that no more than twelve months from the date of birth, adoption, custody for adoption or foster care. (LET, 2015)

In this order of ideas, the null dismissal will affect the worker's immediate reinstatement, with payment of the wages not received, a provision applicable to the case of termination of the employment relationship while the suspension operates with reservation of position for the parent.

2.6. Ecuador

From the preliminary analysis carried out on the Ecuadorian regulations, it can be deduced that as of 2008, workers' right to have paternity leave was incorporated at the constitutional level developed in 2015 with the reforming law of the Labour Code.

At this point it is essential to specify that for the exercise of this dispensation by the workers it is required to prove the birth of the son or daughter, which must be justified with the birth certificate, this fact enables the worker to remain out of their workplace days established by law.

However, it should be emphasised that for those days in which the person remains absent from work, the jurisdiction of paternity has not been recognised in the current legal system, a circumstance in which the employer would not be prevented from dismissing the worker untimely; In the event of such a situation, the parent should be compensated according to the general rules, according to the time worked and according to the last remuneration received. (CT, 2005, art. 188)

Once the respective paternity leave has been exhausted, the possibility has been foreseen for the worker (or the worker) to request from his employer a voluntary leave without pay (whose duration can be a maximum of nine months), the situation in which the person does He would have the right to initiate an action for ineffective dismissal, as long as the following conditions are met: i) That the untimely dismissal occurs due to the exercise of the leave by the worker; and, ii) That the separation takes place after the use of the same.

Exclusively in the case described above, the worker would be invested with a reduced paternity jurisdiction, which would not be activated if the father decides not to make use of this leave, which generates an apparent legal vacuum: the worker who agrees to exercise of paternity leave is exposed to the latent threat that his employer will dissociate him from his workplace, without having the possibility of requesting his reinstatement and, even less, demanding compensation items in addition to those provided in the labour code for workers in general.

Thus, including the action for ineffective dismissal as a defence mechanism for the parent against a unilateral and unjustified termination of the employment relationship, in the same circumstances that it has been recognised for the workers, would guarantee the worker's immobility and its consequent

stability in the workplace, which would result in benefits for the father and for those economically depend on their income.

Furthermore, recognising the action for ineffective dismissal for the worker should begin from the moment the worker justifies her state of pregnancy with the corresponding medical certificate. The state of pregnancy should be notified by the worker with the respective document, for the protection of the purpose to the parent's stability begins.

The coverage of the jurisdiction of paternity would cover the same time recognised for the worker: pregnancy, childbirth and even one year after this event, a period within which, if the parent so requires, they could take advantage of a voluntary leave without remuneration. In adoption cases, the protection of this jurisdiction would begin from when their son or daughter was delivered, with equal protection for male and female workers.

Only the establishment of this extraordinary jurisdiction will achieve the ultimate purpose that was intended at the time of including the maternity jurisdiction: to protect the weak party of the labour relationship and, in this way, those who in one way or another would be directly affected faced with an unjustified dismissal of the worker.

CONCLUSIONS

The advancement of labour rights has taken place progressively, mainly - though not exclusively - from the international field through the adoption of international conventions through the International Labour Organization, a tripartite body that, through minimal consensus among the parties involved, has collected and developed various rights

and guarantees in a multiplicity of international instruments, making successive recommendations for their implementation according to the reality of each member state.

In recent years there has been the consolidation of one of the most necessary guarantees in the workplace in almost all the countries, which is known as maternity leave, despite this there remains a significant gap in terms of the number of countries that have not yet been inclined towards the decision to include the so-called jurisdiction of paternity in their respective legal systems, a part of them limiting only to recognise a leave for this fact.

The inclusion of this jurisdiction in our legislation would bring benefits not only for the worker who is in paternity situation nonetheless mainly to those close to him and directly dependent on his income for their subsistence, especially his sons or daughters, who would be those who directly benefit from this unique guarantee of tenure.

The jurisdiction of paternity, more than a right, is a guarantee of a transversal nature, since, although its recognition must operate in the field of labour law, it finds its ultimate ratio in the principle of the best interests of the child, as a necessary institute of attention and protection to this segment of priority attention by the State.

Advancing towards the recognition of the jurisdiction of paternity would depend on a legal reform that includes - as has been done with the jurisdiction of maternity - the father as a legitimate asset of the action for ineffective dismissal, if it occurs her untimely dismissal, in the same terms that this action has been enshrined in favour of the workers with the maternity jurisdiction and of the union leaders with the union jurisdiction.

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¿Alguien lee la letra pequeña? Medición de la atención del consumidor a los contratos de formato estándar

Does anyone read the fine print? Measuring Consumer Attention to Standard Format Contracts

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RESUMEN: Una piedra angular del enfoque legal y económico de los contratos de forma estándar es la hipótesis de la "minoría informada": en los mercados competitivos, una minoría de compradores conscientes de los términos es suficiente para disciplinar a los vendedores de usar términos repetitivos desfavorables. Este argumento se invoca a menudo para limitar la intervención o regular las transacciones de los consumidores, pero ha habido poca investigación empírica sobre su validez. Realizamos un seguimiento del comportamiento de navegación

en Internet de 48.154 visitantes mensuales de 90 empresas de software en línea para estudiar hasta qué punto los compradores potenciales acceden al contrato de formulario estándar asociado, el acuerdo de licencia de usuario final. Descubrimos que solo uno o dos de cada mil compradores de software minorista eligen acceder al acuerdo de licencia, y la mayoría de los que lo acceden pasan muy poco tiempo para leer más que una pequeña parte del texto.

PALABRAS CLAVE: normas jurídicas, consumidor, protección del consumidor, comercio, mercado.

ABSTRACT: A cornerstone of the legal and economic approach to standard form contracts is the "informed minority" hypothesis: in competitive markets, a minority of term-conscious buyers is sufficient to discipline sellers from using unfavorable repetitive terms. This argument is often invoked to limit intervention or regulate consumer transactions, but there has been little empirical research on its validity. We tracked the Internet browsing behavior of 48,154 monthly visitors from 90 online software companies to study the extent to which potential buyers access the associated standard form contract, the end-user license agreement. We found that only one or two out of every thousand retail software buyers choose to access the license agreement, and most of those who do access it spend very little time reading more than a small portion of the text.

KEYWORDS: legal standards, consumer, consumer protection, trade, market.

INTRODUCCIÓN[1*]

Los contratos de forma estándar, a menudo denominados "letra pequeña" o "repetitivo", son el tipo más común de contrato económico. Se aplican a incontables miles de millones de transacciones comerciales por año. En un escenario típico, un comprador compra un bien o servicio y se le presenta un contrato de forma preimpresa con términos relacionados con la resolución de disputas, remedios por fallas del producto y garantías, entre otros, con pocas oportunidades para negociar los términos. Los ejemplos aparecen en cualquier lugar, desde las exenciones de responsabilidad de seguridad anotadas en la parte posterior de las entradas deportivas, las garantías empaquetadas con los bienes de consumo, las políticas de privacidad y los términos de uso en los sitios web y las restricciones de fotocopias que aparecen en la portada de esta revista. Cada lector de este artículo ha celebrado miles de contratos de formulario estándar, a veces sin saberlo.

1 *Esta investigación fue apoyada con una subvención del NET Institute (www.NETinst.org). Los autores agradecen los comentarios recibidos por Barry Adler, Jennifer Arlen, Oren Bar-Gill, Shmuel Becher, Omri Ben-Shahr, Kevin Davis, Clayton Gillette, Michael Levine, Ronald Mann, Yoram Margoliath, Jacob Nussim, Jeffrey Wurgler, y los participantes en la Conferencia sobre Derecho y Emprendimiento de 2008, el Taller de Economía de los Sistemas de Información (WISE), la Conferencia Harvard-Texas sobre Realidades del Derecho Mercantil, el Coloquio de Derecho y Economía de la Universidad de Nueva York, el Taller de Estudios Jurídicos de la Facultad de Derecho de la Universidad de Virginia, la conferencia GMU-Microsoft sobre "Innovación": Mercados en línea vs. Mercados tradicionales", la Facultad de Derecho de la Universidad de Kansas, la conferencia de la Universidad Hebrea sobre "Derecho contractual": Perspectivas Interdisciplinarias", el Taller de Derecho y Economía del Centro de Derecho de la Universidad de Georgetown, la Serie de Coloquios de la Facultad de Derecho de la Universidad de Alabama, la Conferencia de 2009 sobre Estudios Jurídicos Empíricos, el Taller de la Facultad de Derecho de la Universidad de Fordham, el Taller de Derecho y Economía de ETH Zurich, y las Reuniones de 2010 de la Asociación Americana de Derecho y Economía. Dennis E. Hermreck, Daniel Priest, Robert Taylor, Michael Tonkinson y Joel Willcher prestaron una excelente asistencia en materia de investigación. Esta nota de investigación fue originalmente publicada en: http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.671.8119&rep=rep1&type=pdf

Los académicos, los tribunales y los formuladores de políticas han debatido durante mucho tiempo el grado en que se deben hacer cumplir los contratos de forma estándar y si se debe regular su contenido o divulgación. Todas las partes en este debate se dan cuenta de que, en muchas circunstancias, la mayoría de los compradores no lee la letra pequeña. Es demasiado largo, difícil de entender o aparentemente sin importancia tomarse el tiempo para leer y dar un asentimiento significativo. La cuestión económica central es si el hecho de que la mayoría de los compradores suscriban contratos de forma estándar con esta información imperfecta da como resultado una falla del mercado: si los compradores no tienen en cuenta los términos del contrato en sus decisiones de compra, los vendedores carecen de incentivos para proporcionar algo más que lo mínimo requerido. protecciones legales minimas requeridas.[2]

Los defensores de la libertad contractual generalmente han rechazado la intervención basándose en limitaciones de reputación y en el argumento de la "minoría informada". En este artículo nos centramos en este último argumento, que se deriva de algunas contribuciones clásicas del derecho y la economía. La articulación de Schwartz y Wilde (1979) del argumento de la minoría informada en este contexto es una aplicación específica del trabajo sobre información imperfecta de Spence (1977) en el contexto de la responsabilidad del producto y de Salop y Stiglitz (1977) en el contexto de la dispersión de precios y su búsqueda. Schwartz y Wilde argumentan que los vendedores no necesariamente ofrecerán términos unilaterales incluso cuando la mayoría de los compradores no lean los contratos estándar. En su modelo, los compradores que no leen se benefician de una minoría informada cuya disposición a pagar por el producto es suficientemente sensible a la calidad de los términos estándar.

2 Para una revisión completa de los factores que pueden contribuir a los problemas de información al consumidor y las fallas del mercado subsiguientes, ver Howard Beales, Richard Craswell y Steven C. Salop (1981). Véase también Steven C. Salop (1976).

Cuando todos los compradores tienen el mismo gusto por la calidad y los vendedores no pueden discriminar entre compradores lectores y no lectores, los vendedores ofrecerán los términos preferidos por todos los compradores. Este tipo de lógica de mercados competitivos se ha utilizado ampliamente para resistir la regulación y para defender reglas que solo facilitan la búsqueda de aquellos consumidores que aspiran a unirse a la minoría informada.[3]

Aunque el argumento de la minoría informada ha tenido influencia en la literatura jurídica y económica, no ha habido un análisis empírico sistemático de su validez. Si bien se acepta ampliamente que los lectores de contratos de formularios estándar son una minoría, la literatura no ofrece evidencia de si esta minoría sigue siendo lo suficientemente grande como para hacer cumplir de manera plausible términos eficientes, como suponen algunos teóricos y tribunales, o más bien si es tan minúsculo como para ser prácticamente irrelevante. De hecho, no existen estudios sistemáticos que exploren hasta qué punto los consumidores se informan sobre los términos del contrato. En este artículo presentamos amplia evidencia sobre la medida en que los compradores realmente leen los contratos de formulario estándar en un entorno específico e identifican los factores que afectan la probabilidad de lectura y considramos si esta probabilidad está limitada por costos de búsqueda o de comprensión.

Específicamente, examinamos hasta qué punto los compradores potenciales de software leen los Acuerdos de licencia de usuario final (EULA), que son contratos que rigen el uso de productos de software. Para obtener una muestra de empresas de software que ofrecen sus productos en línea, utilizamos la información del flujo de clics de los compradores potenciales para estudiar sus "lectores" del EULA. Realizamos

3 Por ejemplo, lo establecido por Douglas Baird (2006), Clayton Gillette(2005) y Beales, Craswell y Salop (1981).

un seguimiento de 48154 visitantes de 90 empresas de software durante un período de un mes, registrando su comportamiento de navegación detallado. Para cada uno de estos usuarios, observamos la secuencia exacta de páginas web (URL) a las que se accede en una visita en particular y el tiempo que pasa en cada página. Los datos también incluyen características demográficas detalladas de cada usuario, como edad, sexo, ingresos y ubicación geográfica. Nuestro principal hallazgo es que, independientemente de cuán estrictamente definamos a un "comprador".

Si bien no podemos realizar una prueba directa de la hipótesis de la minoría informada sin controles adicionales, un número tan pequeño de lectores por contrato hace que sea poco probable que los lectores informados trabajen en este contexto para monitorear la letra pequeña. Además, el hecho de que el costo de estar informado en línea es bajo en comparación con otros mercados hace que este sea el escenario ideal para explorar la validez de la hipótesis de Schwartz y Wilde. Si los lectores informados no existen en este contexto, es posible que no existan en un conjunto más amplio de circunstancias, lo que sugiere límites al mecanismo de manera más general.

Para poner nuestros hallazgos en perspectiva, realizamos un simple ejercicio de calibración. Calculamos la fracción de compradores informados necesaria para inducir a los vendedores a ofrecer "buenos" términos en el mercado del software. Estimamos el costo marginal de proporcionar un término favorable al comprador, mantenimiento y soporte, y encontramos que a los vendedores les resultaría más rentable perder a todos los compradores informados (es decir, asumiendo de manera conservadora que cada uno se negaría a comprar si el término dado no es ' t ofrecido) que ofrecer este plazo. Es probable que esta conclusión persista para una fracción de los compradores informados, entre 1 y 2 órdenes de magnitud superior al 0,2%.

Luego nos enfocamos en los factores que afectan la probabilidad de que se acceda a un EULA. Descubrimos que es más probable que los compradores accedan a los EULA de empresas más pequeñas o empresas que ofrecen ex ante productos algo sospechosos, como el software gratuito. Los pocos compradores que opten por informarse podrían estar decidiendo racionalmente ignorar los EULA de empresas más grandes y establecidas, confiando en cambio en la reputación o familiaridad de la empresa. También encontramos que los compradores mayores y de mayores ingresos tienen más probabilidades de acceder a los EULA; esto puede deberse a que estos consumidores tienen menores costos de búsqueda y lectura, por ejemplo, porque tienen un menor costo de oportunidad por su tiempo o porque están más educados y, por lo tanto, les resulta más fácil leer los términos del contrato.

Nuestra principal contribución es el primer estudio de muestra grande que mide hasta qué punto los consumidores se informan realmente sobre derechos y obligaciones importantes antes de firmar un contrato de forma estándar. Descubrimos que la fracción de consumidores que lee los contratos de forma estándar es tan pequeña que es poco probable que una minoría informada por sí sola esté dando forma a los términos de los contratos de forma estándar en nuestro entorno.

Sin embargo, hacemos hincapié en que la ausencia de una minoría informada no implica inmediatamente que los términos del EULA estén sesgados de manera ineficaz a favor de los vendedores. Algunos vendedores, al menos los muy destacados, podrían ser disciplinados por otros mecanismos, por ejemplo, la preocupación por su reputación si eventualmente se descubrieran términos onerosos. Además, los compradores pueden asumir que no importa lo que establezcan los términos del EULA, estarán protegidos por los tribunales y, por lo tanto, elegirán racionalmente no ser informados sobre los términos del

EULA. Además, no podemos determinar fácilmente si la calidad de los términos se refleja en los precios observados, debido a los muchos determinantes de precios de primer orden que no podemos controlar. Nuestras pruebas no sugieren un gran efecto de los términos en los precios, pero nuestras pruebas no son poderosas.

Si bien otros factores pueden disciplinar a los vendedores para que no ofrezcan términos de EULA adversos en nuestro entorno, mostramos que la hipótesis de la minoría informada, que es el argumento más ampliamente aplicado para la eficiencia de los términos de contrato de forma estándar, no parece convincente en este contexto. Nuestros hallazgos ponen en tela de juicio la eficacia de las políticas para mejorar las posibles fallas del mercado al exigir una divulgación mayor u obligatoria, particularmente en un entorno donde es más probable que surja la minoría informada.[4] El trabajo empírico futuro debería centrarse en los lectores en otros contextos para establecer si podría existir una minoría informada, así como la validez potencial de los mecanismos alternativos para disciplinar a los vendedores en nuestro contexto.

La sección 2 ofrece antecedentes teóricos y empíricos sobre la hipótesis de la minoría informada. La sección 3 explica nuestra metodología. La sección 4 presenta nuestros datos. La sección 5 analiza los resultados. La sección 6 concluye.

1. FORMULAR CONTRATOS Y COMPETENCIA PARA COMPRADORES INFORMADOS: ANTECEDENTES

A pesar de los beneficios de reducción de costos de transacción asociados con el uso de contratos formales, como la reducción de los costos de redacción y negociación, los

4 Para un análisis de si una mayor divulgación de contratos está asociada con un mayor número de lectores, es necesario revisar lo que menciona Florencia Marotta-Wurgler (2012), también Omri Ben-Shahar y Carl Schneider (2011)

académicos y los formuladores de políticas han debatido sobre su imparcialidad y la conveniencia de su cumplimiento. La preocupación por el bienestar del consumidor ha dado lugar a numerosos artículos, leyes e iniciativas para regular estos contratos. Por ejemplo, además de las doctrinas de derecho contractual existentes para proteger a los compradores de términos abusivos, como la falta de conciencia y las sorpresas injustas, varias leyes estatales del consumidor prohíben el uso de cláusulas de selección de foro y renuncias de garantías implícitas en los contratos del consumidor.[5] Las leyes federales como la Ley de Veracidad en los Préstamos y la Ley de Garantía Magnuson-Moss buscan disminuir los costos de lectura y búsqueda al requerir la divulgación estandarizada de los términos obligatorios.[6] Más recientemente, ha habido un acalorado debate sobre si los contratos en línea, como los términos de uso, las políticas de privacidad y los acuerdos de licencia de software, deben ser ejecutables o estar sujetos a reglas de divulgación obligatorias o contener disposiciones obligatorias.[7]

1.1. La hipótesis de la minoría informada

La preocupación de que los contratos de forma estándar probablemente estén sesgados hacia los redactores se deriva de la opinión de que, debido a que muchos compradores no leen o no comprenden los términos del contrato, los vendedores impondrán términos injustos y unilaterales. Salop y Stiglitz (1977) exploran las condiciones bajo las cuales un mercado con consumidores heterogéneos en su disposición y capacidad para informarse sobre los precios de los productos puede alcanzar un equilibrio de precios perfectamente competitivo y

5 Por ejemplo, Gatton v. T-Mobile USA, Inc., 152 Cal. App. 4th 571, 585 (Cal. App. 1st Dist. 2007); Fidelity & Deposit Co. contra Gainesville Iron Works, Inc., 125 Ga. App. 829 (Ga. Ct. App. 1972); Código de Idaho § 29-110; NCGS § 22B-3; Mont. Código 36 § 18-1-403.

6 Ese es el caso de 15 USC §§ 2301-2312 (1976); 15 USC § 1601.

7 Por ejemplo, Mark Lemley (2006).

encontrar que incluso en presencia de muchos consumidores desinformados, un mercado puede generar un equilibrio competitivo si suficientes consumidores informados compran al precio más bajo.[8]

Schwartz y Wilde (1979) extienden este argumento a entornos en los que los consumidores varían en su capacidad para informarse acerca de los términos del contrato en forma estándar. Muestran que si se informa a un número suficiente de compradores sobre el precio y los términos del contrato de un producto dado, los vendedores que no pueden discriminar entre los tipos de compradores ofrecerán el producto con términos eficientes a un precio competitivo para todos los compradores, como el costo para el vendedor de perder una masa crítica de consumidores informados supera los beneficios de ofrecer condiciones inferiores a los consumidores inframarginales desinformados. Concluyen que la información imperfecta por sí sola no es suficiente para justificar una intervención en el mercado. Esta conclusión se ha convertido en la piedra angular de la visión jurídica y económica de los contratos de forma estándar.

Schwartz y Wilde (1979) afirman que "[en general], hay un número significativo de consumidores informados en cualquier mercado antes de la intervención legal" (s. p.). aunque la evidencia que citan para respaldar esta afirmación no parecería ser tan general o concluyente.[9]El principal problema

8 Salop y Stiglitz (1977) señalan: "E aquí hay una externalidad informativa en el trabajo entre recolectores de información eficientes e ineficientes. Los agentes que se informan dan una economía externa a los desinformados; el peso de su búsqueda mantiene los precios más bajos. De hecho, si hay suficientes agentes informados, el precio de mercado se establecerá en el precio perfectamente competitivo " (s. p.).

9 Los autores citan un estudio que examina el efecto de la Ley de Veracidad en los Préstamos sobre el conocimiento de los consumidores sobre las tasas de interés cobradas por sus prestamistas. Encuentran que antes de la aprobación de la Ley, aproximadamente el 14% de las familias de la muestra estimaban con precisión las tasas de interés que pagaban por sus préstamos y el 33% de las familias no conocían sus verdaderas tasas

para ellos es si estos consumidores pueden acceder a la información adecuada a un costo razonable. Cuanto más barato sea hacerlo, más grande y, por tanto, más influyente será esta minoría informada. La determinación de la proporción exacta de consumidores informados necesaria para producir un equilibrio competitivo es un ejercicio complicado.[10] Sin embargo, muchos académicos, como Priest (1981) y Baird (2006), se han basado repetidamente en el argumento de la "minoría informada" para apoyar la libertad de contrato.

Esta suposición de que un número crítico de lectores puede conducir a términos de vendedor más eficientes ha guiado a los tribunales sobre si deben hacer cumplir los acuerdos con los consumidores que involucran términos estándar. Los tribunales se basan en varias doctrinas del derecho contractual que enfatizan, entre otras cosas, que los consumidores deben tener una "oportunidad de leer" significativa.[11] Para muchos

de interés sobre sus préstamos. Después de la aprobación de la Ley, el porcentaje de familias con estimaciones precisas aumentó al 21% (una diferencia estadísticamente significativa) y el porcentaje de familias con estimaciones inexactas de sus costos de intereses disminuyó a 25%. Mandell (1971). Si bien el estudio muestra que la Ley de Veracidad en los Préstamos fue modestamente eficaz para ayudar a los consumidores a comprender la verdadera tasa de interés de sus préstamos existentes, no dice nada en cuanto a si los consumidores fueron informados sobre el menú de precios o los términos del contrato disponibles para ellos cuando estaban comprando entre acreedores. Además, de todos los términos del contrato, es probable que el precio (la tasa de interés) sea el más destacado; la medida en que la comprensión de la letra pequeña de estos contratos aumentó en presumiblemente aún más modesto.

10 Schwartz y Wilde proporcionan un ejemplo numérico donde la presencia de un tercio de consumidores informados generaría un equilibrio competitivo con respecto al precio. Sin embargo, cambiar los costos relativos requeriría un porcentaje diferente de consumidores informados. Los autores esperan que haya menos consumidores informados sobre los términos en un mercado dado porque comprar términos es más costoso que comprar por precio, pero sostienen que si el 33% de esos compradores conocedores de precios también conocen los términos, podría resultar en un equilibrio competitivo. Para una crítica de esta ilustración, se debe estudiar a Cruz y Hinck (1995) o a Bar-Gill y Warren (2008).

11 Véase Specht v. Netscape Communications Corp., 306 F.3d 17 (2nd Cir.2002) (se niega a hacer cumplir un arbitraje acuerdo disponible a través de un paquete de navegación algunas pantallas hacia abajo porque

comentaristas, como Hillman (2006), una oportunidad significativa para leer preserva la autonomía individual y reduce el costo de estar informado.

Los tribunales actualmente no están de acuerdo sobre cuántas oportunidades se deben brindar. Por ejemplo, algunos tribunales permiten el cumplimiento de los shrinkwraps y los contratos de "pago ahora, condiciones después" (donde los términos solo están disponibles después de la compra), mientras que otros tribunales no.[12] Además, los tribunales se basan en la doctrina de las "expectativas razonables" para negar el cumplimiento de cláusulas que son difíciles de entender o leer, haciendo cumplir en cambio derechos y obligaciones que un consumidor razonable anticiparía.[13]

Recientemente se han presentado propuestas para aumentar la protección al consumidor en las transacciones del mercado masivo, especialmente las que se realizan a través de Internet, en el contexto de este estudio, buscando facilitar el acceso a los contratos y aumentar la oportunidad de lectura. Algunas de las propuestas más polémicas involucran software y otros bienes de información. Por ejemplo, el American Law Institute (ALI) ha aprobado nuevos Principios de contratos de software para armonizar y aumentar la certeza de las leyes que rigen las transacciones de software en línea. Uno de sus

no proporcionó suficiente aviso). Pero mira Hubbert v. Dell Corp., 359 Ill. App.3d 976, 835 NE2d 113 (5th Dist.2005) (cumplimiento de los términos en el contrato porque el hipervínculo era lo suficientemente conspicuo como para proporcionar suficiente notic); Ticketmaster Corp. v. Tickets. com, Inc. 2000 WL 1887522 (CD Cal.2000) (hacer cumplir el acuerdo de navegación por envoltura porque el demandado conocimiento de los términos después de repetidas visitas al sitio)

12 Por ejemplo, ProCD v. Zeidenberg. 86 F.3d 1447 (7th Cir., 1996) (ejecución de un contrato de envoltura retráctil); Step-Saver Data Systems, Inc. contra Wyse Technology, 939 F.2d 91 (3.er Cir. 1991) (se niega a hacer cumplir un contrato de envoltura retráctil).Marotta-Wurgler (2009).

13 En este caso, Ben-Shahar (2009) y Restatement (Second) of Contract § 211 hace mención a los tribunales también se basan en la doctrina de la falta de conciencia para negarse a hacer cumplir términos onerosos. Código Uniforme de Comercio (UCC) § 2-302.

principales objetivos es "promover la lectura y la oportunidad de leer términos" como una forma de paliar las fallas del mercado.[14]Los redactores postulan que la reducción del costo de acceso al contrato podría aumentar el número de consumidores informados a un número suficiente para constituir una minoría informada de compradores.

Otros estudiosos expresan dudas de que los mercados de términos de forma estándar funcionen bien si se basan en la creación o la existencia de una minoría informada. Katz (1990) propone que la falta de lectura es racional dada la baja probabilidad de que los eventos adversos desencadenen cláusulas contractuales. Eisenberg (1995), Goldberg (1997) y Ben-Shahar (2009) desafían el argumento de la minoría informada en sus propios términos, señalando que a los consumidores les resultará irracional participar en la búsqueda y deliberación de términos en letra pequeña y que, en condiciones razonables, los vendedores le resultará más rentable aprovechar los no lectores que atender a los lectores. Ben-Shahar afirma que debido a que nadie lee letra pequeña, independientemente de los costos de lectura reducidos en entornos como Internet, las reglas que se centran en aumentar la divulgación de contratos son inútiles, si no peligrosas.

Bar-Gill (2004) y Gabaix y Laibson (2006) postulan que los prejuicios y limitaciones psicológicos de los consumidores podrían impedirles leer o comprender los términos, volviéndolos nuevamente susceptibles a la manipulación del vendedor. Gillette (2004) reconoce las limitaciones de la minoría informada, pero sostiene que los contratos de forma estándar deberían ser ejecutables siempre que los intereses de esos compradores desinformados estén efectivamente representados con precisión por la minoría informada. Hillman y Rachlinski (2002) concluyen que, aunque es probable que el bajo costo de estar informado

14 Principios ALI de la Ley de Contratos de Software [en adelante, Principios ALI] en 117.

en Internet aumente el número de consumidores informados, es probable que el problema del aprovechamiento gratuito introducido por esos consumidores desinformados resulte en una subproducción de compradores informados.

Si bien este artículo limita su alcance a evaluar si los niveles de lectores son consistentes con la hipótesis de la minoría informada, es importante señalar que los académicos del derecho y la economía también han propuesto otros mecanismos que inducirían a los mercados a comportarse de manera competitiva cuando los consumidores están mal informados. Por ejemplo, cuando los vendedores están limitados por la reputación o la amenaza de un litigio, encontrarán que les conviene ofrecer los términos preferidos por los compradores. Tal mecanismo podría sustituir a la minoría informada. Los vendedores también pueden ofrecer términos unilaterales a todos los consumidores, solo para luego relajarlos y dar cabida a las quejas razonables de los compradores. De manera similar, en el caso de bienes de experiencia o compras repetidas, los compradores que no leen los términos pueden finalmente familiarizarse con el contenido del texto estándar de los vendedores. Nuestros datos no son propicios para evaluar si estos mecanismos están en funcionamiento, lo que potencialmente hace que sea racional que el mecanismo de la minoría informada no surja en el mercado que estudiamos.

1.2. Evidencia previa

A pesar de la importancia teórica de la minoría informada, ha habido poca investigación empírica de su validez, presumiblemente porque es difícil observar a los "lectores". Hay algunas pruebas de encuestas relacionadas.

Hillman (2006) encuesta a 92 estudiantes contratados en la Facultad de Derecho de Cornell y encuentra que solo el cuatro por ciento de los que compraron productos en línea afirman leer los contratos de formulario estándar "como un asunto general". Becher y Unger-Aviram (2009) encuestan a 147 estudiantes de derecho y otras áreas y preguntan sobre la probabilidad de que los encuestados lean términos estándar en diferentes escenarios. El sesenta por ciento de los encuestados afirman que hojean o leen partes de un contrato de forma estándar antes de realizar una transacción. Bartlett y Plaut (2009) encuestan a 182 estudiantes de pregrado y descubren que alrededor del 80% de los encuestados afirman no leer contratos y gran parte del resto afirma leerlos. Estas encuestas son sugerentes pero algo limitadas en lo que pueden demostrar. Se basan en comportamientos autoinformados o escenarios comerciales hipotéticos y los sujetos encuestados no son representativos.

Otros estudios muestran que los términos de los contratos de forma estándar son menos unilaterales a favor de los vendedores de lo que sería posible si los compradores estuvieran completamente desinformados y, por lo tanto, son consistentes con la existencia de la minoría informada, así como con otros mecanismos disciplinarios. En un estudio de 62 garantías de una variedad de bienes de consumo duraderos, Priest (1981) sostiene que las garantías no están sesgadas hacia los vendedores, sino que reflejan la capacidad relativa de compradores y vendedores para prevenir y asegurarse contra pérdidas. Marotta-Wurgler (2007, 2008) analiza los términos de 647 EULA en línea y muestra que, si bien casi todos son más restrictivos que las reglas predeterminadas relevantes, no todos convergen al mínimo legal. En un estudio de las prácticas de contratación de los minoristas en línea, Mann y Siebeneicher (2008) encuentran que pocos vendedores ofrecen contratos excesivamente unilaterales.

2. MARCO DE INVESTIGACIÓN

En este artículo exploramos la presencia de una minoría informada de compradores mediante el estudio del comportamiento de navegación y compra de los consumidores en línea. En particular, rastreamos el comportamiento de los visitantes de Internet a 90 empresas de software y examinamos la velocidad a la que los compradores eligen informarse sobre los EULA que rigen el software presentado.

Las compras de software en línea proporcionan un entorno adecuado para buscar a la minoría informada. En primer lugar, si bien las características no relacionadas con el precio, como los derechos y restricciones contractuales asociados, son importantes para todo tipo de productos, es una consideración particularmente importante para los bienes de información como el software porque los términos forman parte integral de la forma en que el producto es o puede ser usado. En segundo lugar, algunos de los términos de los EULA han sido objeto de litigio en la última década.[15]Por ejemplo, dado que los usuarios finales dependen cada vez más del software para realizar una variedad de tareas rutinarias y funciones críticas, los daños por fallas del software pueden ser significativos. En tercer lugar, comprar productos de la competencia y los términos que los rigen es barato y fácil en línea en comparación con la mayoría de los entornos comerciales. Los costos de búsqueda son bajos (Bakos, 2001). En la medida en que exista la minoría informada, esta es una de las configuraciones en las que es relativamente probable que la encontremos, especialmente dado nuestro acceso a los datos del flujo de clics. Finalmente, varios debates recientes sobre la reforma legal en los contratos de forma estándar se centran en los contratos electrónicos en general y los contratos de software en particular. Nuestro estudio de la

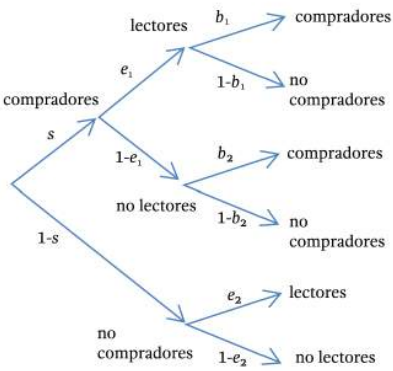
15 Por ejemplo, MA Mortenson Co. contra Timberline Software Corp., 998 P.2d 305 (Wash. 2000); Davidson & Assoc. v. Internet Gateway, 344 F. Supp. 2d 1164, 1178 (D. Mo. 2004); Altera Corp. contra Clear Logic, Inc. 424 F.3d 1079 (noveno cir. 2005); Blizzard contra BDNet, 422 F.3d 630 (8º Cir. 2005).

minoría informada en los mercados de software en línea nos coloca en el centro de estos debates.

Para investigar empíricamente la presencia y el tamaño de la minoría informada, clasificamos a los visitantes de los sitios web de las empresas de nuestra muestra, que se describen a continuación, en compradores potenciales y aquellos que visitan por otros motivos, como buscar foros de usuarios o información de solución de problemas. Denotamos por s la fracción de compradores potenciales ("compradores"); los no compradores constituyen la fracción restante $1-s$. Denotamos por e_1 la fracción de compradores y por e_2 la fracción de no compradores que leen los EULA en línea. Finalmente, denotamos por b_1 la fracción que compra el producto ("compradores") entre los compradores que leen el EULA y por b_2 la fracción de compradores entre los compradores que no leen el EULA. Este marco se muestra en la Figura 1. En este escenario, la minoría informada corresponde a la fracción e_1 de compradores que leen el CLUF en línea.[16]

16 Es posible que para algunos compradores acceder al EULA no afecte su probabilidad de comprar el producto. Por ejemplo, es posible que algunos compradores no sepan qué es un EULA, o descubran después de acceder al EULA que no son capaces de comprender su idioma, o pueden acceder a él accidentalmente o por curiosidad. En la medida en que tales accesos al EULA no hagan que un comprador forme parte de la "minoría informada", e_1 sobrestimará la fracción minoritaria informada de compradores. Podemos explorar la importancia de esto hasta cierto punto al estudiar el tiempo que pasan en la página EULA aquellos que acceden a ella. Por otro lado, debido a que no consideramos otras formas en las que los compradores podrían informarse sobre los términos (por ejemplo, el boca a boca o las compras repetidas), existe la posibilidad de que e_1 subestimará el tamaño de la minoría informada. Comentamos sobre la posible importancia de este efecto en la Sección 5.

Figura 1: Marco empírico
Elaboración propia

Tipos de visitantes	Fracción de visitantes
	se_1b_1
	$se_1(1-b_1)$
	$s(1-e_1)b_2$
	$s(1-e_1)(1-b_2)$
	$(1-s)e_2$
	$(1-s)(1-e_2)$

A continuación, estimamos el número de visitantes en nuestra muestra para cada una de las seis categorías de la Figura 1. Estimamos el número de lectores y no lectores entre los visitantes clasificados como compradores, compradores y no compradores. Usamos el acceso a una página de EULA durante más de un segundo para identificar a los lectores. Esto sesga al alza nuestra estimación de los lectores verdaderamente informados en el sentido de que algunos accesos son accidentales, intrascendentes para la decisión de compra, accedidos tan brevemente que se podría haber captado o leído poco contenido, pero no entendido. Usamos el inicio de un proceso de pago seguro para identificar a los compradores y otra información contextual para distinguir a los compradores de los no compradores.

Podemos dividir a los lectores en se_1b_1 lectores que compran y $se_1(1-b_1)$ lectores que no compran. Adicionalmente, $s(1-e_1)b_2$ los compradores no son lectores, y $s(1-e_1)(1-b_2)$

los compradores no leen ni compran. A priori, esperamos que pocos no compradores lean EULA y, por lo tanto, esperamos $(1-s)e_2$ ser pequeño. Por último, la fracción de no compradores que no leen EULA es $(1-s)(1-e_2)$, que, como se esperaba y como confirmamos, es grande. Con estas entradas, podemos estimar la fracción e_1 de compradores que constituyen la minoría informada, escribiendo esta fracción como

$$e_1 = \frac{se_1b_1 + se_1(1-b_1)}{se_1b_1 + se_1(1-b_1) + s(1-e_1)b_2 + s(1-e_1)(1-b_2)}.$$

Luego, analizamos la elección del vendedor de qué términos ofrecer para evaluar si nuestras estimaciones son plausiblemente consistentes con un equilibrio minoritario informado.

3. DATOS

Nuestro conjunto de datos de flujo de clics representa el comportamiento de navegación de 92,411 hogares de EE. UU. En enero de 2007. Este conjunto de datos nos lo facilitó una importante empresa de investigación en línea, que reclutó un panel representativo de hogares de EE. UU. que aceptaron instalar en sus computadoras una recopilación de datos complemento que registra la dirección URL de cada página web visitada. Los datos recopilados incluyen la secuencia exacta de las páginas web visitadas y la cantidad de tiempo dedicado a cada página. En forma cruda, este es un conjunto de datos de tamaño significativo.[17]

El panel de hogares fue seleccionado por estar equilibrado demográfica y geográficamente y ser representativo de la población de hogares estadounidenses con acceso a

17 Se recopiló información para 6.355.922 sesiones de usuario en enero de 2007, con 461.027.284 visitas a la página web correspondientes.

Internet.[18]La información capturada para cada página web visitada por un panelista en los datos sin procesar se codifica con un identificador de usuario que identifica de forma anónima pero única a cada panelista y un identificador de sesión que delimita la navegación web de cada panelista en "sesiones" separadas. La información adicional capturada incluye la URL de cada página visitada, la hora a la que se accedió a la página web, el tiempo pasado en esa página, si esa página estaba dentro de una conexión segura (es decir, cifrada), el servidor web que entrega la página web y una identificador de la empresa o división propietaria de ese servidor web. Las vistas de página registradas comprenden la mayor parte de los datos, pero se nos proporcionaron archivos adicionales útiles que incluían información demográfica no identificable personalmente sobre los panelistas y una jerarquía corporativa que identifica a los padres, si corresponde.

3.1. Construcción de muestra

Dentro de estos datos, consideramos un mercado importante y un contrato importante dentro de ese mercado. Específicamente, estudiamos las visitas de los usuarios a las empresas de software que venden o distribuyen sus productos a través de sus sitios web corporativos y ponemos sus EULA a disposición en su sitio para que los usuarios los examinen a su elección, antes de cualquier decisión de compra. Utilizamos

18 El panel de este proveedor de datos se considera una de las muestras de investigación de medios representativas más grandes que existen. La muestra de participantes se define utilizando los principios de marcación de dígitos aleatorios: la empresa selecciona un conjunto aleatorio de números de teléfono de todos los números residenciales disponibles en los EE. UU. E intenta reclutar a cada uno como máximo 15 veces en diferentes momentos del día y en diferentes días. El panel también incluye estudiantes universitarios y personas en el lugar de trabajo. La empresa actualiza su información demográfica con regularidad, ha implementado varios procedimientos para mantener actualizado el panel y garantiza que el seguimiento sea discreto para evitar distorsiones en el comportamiento. Finalmente, cada enero, el panel se compara con los datos de la Oficina del Censo de EE. UU. Para mantener su representatividad, por lo que elegimos enero para nuestro análisis (esta opción, sin embargo,

la clasificación de mercados del proveedor de datos para identificar visitas solo a empresas de software. Posteriormente identificamos en nuestros datos dos tipos de empresas de software que hacen que sus productos estén disponibles para su compra o descarga en línea: minoristas y proveedores de software gratuito. Los minoristas licencian su software por un precio a través de su sitio web corporativo. Los proveedores de software gratuito ofrecen su software de forma gratuita a cualquiera que desee descargarlo. Los ejemplos incluyen barras de herramientas del navegador, complementos y navegadores.[19] Nos interesa observar la propensión de los usuarios a informarse sobre los términos de estos dos tipos de software.

Con el fin de contar con una muestra suficientemente homogénea de vendedores, excluimos subcategorías como los proveedores que no ofrecen sus productos para su compra o descarga en línea, proveedores de software de igual a igual y empresas de alojamiento web. Excluimos empresas con menos de 50 visitantes únicos que vieron al menos dos páginas durante su visita; nuestro interés está en los usuarios con intención o potencial de compra, o "compradores", y es menos probable que los usuarios que ven una sola página tengan esa intención. Identificamos 197 empresas que cumplían las condiciones anteriores.

Para cada una de estas empresas, obtuvimos las direcciones de las páginas web (URL) de todos los EULA disponibles en el sitio web de la empresa. Para encontrarlos, visitamos el sitio web de cada empresa y utilizamos la navegación manual, búsquedas de Google dentro del sitio web y, si están disponibles, búsquedas en el sitio web proporcionado por la empresa. Además, buscamos todas las visitas a la página

19 Clasificamos a una empresa como minorista si ofrece su núcleo o gran parte de su software a la venta, incluso si también ofrece software de forma gratuita. Por ejemplo, Adobe ofrece varios complementos gratuitos, como Shockwave y un lector de PDF, pero lo clasificamos como minorista.

en los datos de flujo de clics correspondientes a estas empresas para identificar posibles páginas de EULA (por ejemplo, páginas cuya dirección web contenía "EULA" o "legales" o "términos"), que luego investigamos manualmente.

Algunos EULA se presentaron como envoltorios de navegación, es decir, se publicaron como hipervínculos en algún lugar del sitio web del vendedor. Incluimos todas estas empresas porque podemos medir fácilmente si los usuarios hicieron clic voluntariamente en el hipervínculo EULA.[20]Una minoría de empresas presentó sus EULA como envolturas de clics. Este modo de presentación requiere que los consumidores hagan clic en un botón "Acepto" reconociendo los términos del EULA antes de que puedan comprar un producto. Hay dos tipos de sitios clickwrap. Un tipo de sitios clickwrap presentan los términos del CLUF mediante un hipervínculo adyacente al botón "Acepto" y, por lo tanto, requieren un clic adicional para acceder al CLUF; en este caso, mientras que todos los compradores se ven obligados a reconocer los EULA, podemos medir qué fracción da el paso adicional y realmente hace clic en el enlace del contrato, que es un paso necesario para estar informado sobre los términos. El otro tipo de sitios clickwrap presentan los términos en un cuadro de texto desplazable sobre el botón "Acepto"; eliminamos las empresas que utilizan este tipo de envoltura de clics de nuestro conjunto de datos

20 Una posible preocupación es que estos contratos no son lo suficientemente prominentes como para ser vinculantes. Como se señaló en la Sección 2.1, los tribunales se han mostrado reacios a hacer cumplir los navegadores. Sin embargo, este modo de presentación del contrato no es demasiado problemático en el mercado de software en línea porque la mayoría de los vendedores también presentan el EULA de manera destacada después de la compra, en el momento de la instalación del software. La mayoría de los tribunales han sostenido que este modo de presentación del contrato, o contrato de "pago ahora, términos más tarde", es válido. A pesar de que el contrato está disponible después de la compra, los consumidores que aspiran a convertirse en miembros de la minoría informada tendrían un incentivo para verificar los términos del contrato antes de comprar porque es menos costoso comparar precios de esta manera que comprar y devolver software solo para ver los términos de la licencia.

porque no tenemos una forma de medir si los compradores leen los términos. Si bien desplazarse y leer los términos del EULA probablemente aumentaría el tiempo total dedicado a las páginas de pago correspondientes, lo que podemos observar, hay varias otras acciones que los usuarios generalmente deben realizar en las mismas páginas. Como resultado, las medidas basadas en el tiempo total pasado en la página de pago donde se presentan los términos fueron demasiado ruidosas para ser útiles para este tipo de empresas. Finalmente, eliminamos de nuestro conjunto de datos las empresas que no pusieron sus EULA disponibles en línea. Hay varias otras acciones que los usuarios normalmente deben realizar en las mismas páginas. Como resultado, las medidas basadas en el tiempo total pasado en la página de pago donde se presentan los términos fueron demasiado ruidosas para ser útiles para este tipo de empresas. Finalmente, eliminamos de nuestro conjunto de datos las empresas que no pusieron sus EULA disponibles en línea. Hay varias otras acciones que los usuarios normalmente deben realizar en las mismas páginas. Como resultado, las medidas basadas en el tiempo total pasado en la página de pago donde se presentan los términos fueron demasiado ruidosas para ser útiles para este tipo de empresas. Finalmente, eliminamos de nuestro conjunto de datos las empresas que no pusieron sus EULA disponibles en línea.

Después de excluir las empresas para las que no tenemos suficientes datos o que son inapropiadas para nuestras pruebas, llegamos a una muestra final de 78 empresas minoristas y 12 de software gratuito. No vemos ninguna razón para creer que nuestros resultados o conclusiones básicos cambiarían significativamente si ampliamos el número de empresas en la muestra o la ventana de tiempo que se siguió a los panelistas. Además, el tamaño de nuestra muestra probablemente se caracterice de manera más útil en términos de las decenas de miles de visitas a la empresa que rastreamos,

descritas brevemente, porque cada una de ellas representa una oportunidad para acceder a un EULA y, por lo tanto, es la unidad esencial de observación.

3.2. Empresa y características del producto

En igualdad de condiciones, es posible que los consumidores sientan menos necesidad de examinar los términos de los EULA de empresas grandes o antiguas porque asumen que estas empresas son más fiables y justas. Para probar esta hipótesis, obtenemos información sobre los ingresos anuales de cada empresa, el año de constitución y el estado público o privado. Estos datos se obtuvieron de Hoovers.com, Yahoo! Finanzas, o mediante comunicaciones directas con las empresas de la muestra.

Tabla 1: Características de la empresa y el producto

Elaboración propia

	N	Media (Dakota del Sur)	Minima	Mediana	Máxima
Panel A. Características de la empresa					
Al por menor					
Ingresos (Millones $)	78	1,560 (6,980)	0,1	5.2	51,100
Ingresos promedio por producto (Millones de $)	78	99,3 (406)	0,004	0,99	2.550
Años de edad)	78	15,84 (10,10)	3	14,5	56
Compañía publica	78	0,27 (0,45)	0	0	1

Freeware					
Ingresos (Millones $)	12	1.160 (4.010)	0,1	0,1	13,900
Número de productos ofrecidos	12	9,25 (28,58)	1	1	100
Ingresos promedio por producto (Millones de $)	12	12,5 (39,8)	0,1	0,1	139
Años de edad)	12	9,08 (6,72)	3	6.5	27
Compañía publica	12	0,08 (0,29)	0	0	1
Panel B. Características del producto					
Al por menor					
Producto de consumo	78	0,68 (0,47)	0	1	1
Número de productos ofrecidos	78	14,78 (25,02)	1	6	150
Precio ($)	78	407,95 (1.042,92)	9,97	65.12	5.295
Precio medio ($)	78	364,84 (1.032,23)	1	49	5,000
Prueba (producto destacado)	78	0,83 (0,38)	0	1	1
Prueba (la mayoría de productos)	78	0. 78 (0,42)	0	1	1

Freeware					
Producto de consumo	12	0,83 (0,39)	0	1	1

El panel A en la Tabla 1 reporta estadísticas resumidas para las características de la empresa para los dos tipos de empresas analizadas. Para las empresas minoristas, los ingresos promedio son de $ 1,56 mil millones con una desviación estándar de $ 6,98 mil millones, un número obviamente impulsado por algunas grandes empresas. Los ingresos medios para esta categoría son $ 5.2 millones. La edad media de estas empresas, medida restando su año de constitución de 2009, es de 15,8 años (la mediana es de 14,5). El veintisiete por ciento de las empresas de esta categoría cotizan en bolsa. Por el contrario, la edad media de las empresas de software gratuito es de 9,08 años (la mediana es de 6,5) y solo el 8% de estas empresas cotizan en bolsa. Para cada empresa, anotamos la cantidad de productos que ofrece (contando cada producto con un nombre distinto como un producto separado), lo que nos permite calcular el ingreso promedio por producto.

También recopilamos varias características del producto y registramos un producto "insignia". Muchas pequeñas y medianas empresas comercializan un producto principal, en cuyo caso seleccionamos ese producto como insignia. Para las empresas más grandes, seleccionamos el producto que representa la mayor fracción de las ventas o, cuando esta información no estaba disponible, el producto que aparece de manera más destacada en el sitio web, ya que estos podrían ser los productos que más interesan a los consumidores.[21]Por

21 Usamos un producto estrella para recopilar estadísticas relacionadas con el producto, ya que nuestro conjunto de datos no nos permitió identificar el producto real considerado por la mayoría de los compradores y no pudimos obtener datos detallados de ventas por producto que pudiéramos usar para sopesar el productos ofrecidos por diferentes vendedores.

supuesto, los consumidores pueden estar menos inclinados a leer los EULA de los productos más populares (o emblemáticos), ya que es probable que hayan establecido una reputación más sólida. Aún así, la elección del producto estrella no debería afectar nuestros hallazgos generales, ya que las métricas de lectores y visitas que informamos son para todos los productos, no solo para los productos estrella.

Es posible que los usuarios estén más inclinados a informarse sobre los términos del CLUF de los productos con precios más altos, por lo que registramos el precio del producto estrella, así como el precio medio de todos los productos disponibles en el sitio web de esa empresa. Registramos si el producto es una licencia de un solo uso o de usos múltiples, ya que es probable que las licencias de varios puestos tengan precios más altos y si el producto se ofrece a los desarrolladores. Observamos si la compañía ofrece una versión de prueba del producto insignia y también de la mayoría de sus productos porque eso también puede afectar la propensión de los usuarios a leer los términos.[22]También notamos si el producto está orientado a usuarios comerciales o al público en general. Finalmente, clasificamos cada producto en una de las 150 categorías de productos de software, por ejemplo, antivirus o procesamiento de texto, según las caracterizaciones de los productos de software disponibles en Amazon.com.

El Panel B reporta estadísticas resumidas para las características de los productos estrella. El número medio de productos por empresa es 15 (la mediana es 6). El precio medio del producto para las empresas minoristas es de $ 408 y la mediana es de $ 65. Para cada empresa, calculamos el precio medio de todos los productos de software enumerados en el

22 Las versiones de prueba se ofrecen generalmente con funcionalidades limitadas durante un período de tiempo limitado. Marotta-Wurgler (2007) encontró que la mayoría de las licencias de prueba son notablemente diferentes de las licencias del producto (por ejemplo, la licencia de prueba dice "Licencia de prueba" y generalmente es más corta que la licencia del producto), por lo que un usuario no las consideraría sustitutos.

sitio web, y la media de esas medianas es $ 365; la mediana de la mediana es $ 49. Una fracción del 68% de los productos minoristas y el 83% del software gratuito parece estar dirigido a los consumidores en lugar de a las empresas. Finalmente, el 83% de los sitios minoristas ofrecen una versión de prueba de su producto destacado o del producto que seleccionamos como insignia, y el 78% ofrece versiones de prueba para la mayoría de sus productos.

3.3. Características del contrato

Queremos medir la fracción de compradores que se informa sobre los términos del EULA. Por lo tanto, recopilamos todas las URL de EULA que están disponibles en el sitio web de una empresa. Como se señaló anteriormente, muchas empresas solo venden un producto y, por lo tanto, solo ponen a disposición en línea el EULA que rige el uso de ese producto. Otras empresas venden muchos productos que se rigen por un único EULA publicado en su sitio web, y otras publican diferentes EULA para diferentes productos. Finalmente, algunas empresas publican los EULA para todas sus versiones actuales y pasadas de todos sus productos. Encontramos 240 URL únicas correspondientes a EULA para nuestras empresas de muestra.

3.4. Definición de compradores y visitas de compras

Entre los panelistas de nuestros datos que visitan el sitio web de una empresa determinada, debemos definir "compradores", es decir, visitantes con cierto potencial de compra, ya que una fracción potencialmente grande de visitantes puede estar navegando sin ninguna intención de comprar. Definimos una "visita de usuario" como todas las visitas a páginas (accesos a URL) desde el sitio web de una empresa dentro de una "sesión" de un solo usuario.

La primera definición de "visita del usuario" identifica a los compradores al examinar la intensidad de una visita al sitio web de una empresa. Es probable que un usuario con intención de comprar vea varias páginas en el lado minorista del sitio web de la empresa. Seguimos a Moe & Fader (2004) y Catledge & Pitkow (1995) y definimos nuestra definición más amplia de visita de compras como aquella con al menos dos visitas a dichas páginas. Una segunda definición más restrictiva incluye todas las visitas de los usuarios que accedieron al menos a cinco páginas en el sitio web de una empresa determinada. Bucklin y Sismeiro (2003) encuentran que es cada vez más probable que esto excluya a los navegadores casuales.

En el otro extremo, un visitante que ha seleccionado un producto e iniciado un proceso de pago o pago ha demostrado su intención de compra. Por lo tanto, utilizamos el inicio del proceso de pago como el criterio más estricto para identificar las visitas con intención de compra. Identificamos dichos eventos identificando para las 90 empresas de nuestra muestra las direcciones de las páginas web a las que se accedería solo durante el proceso de pago y reconociendo posteriormente las visitas que acceden a dichas páginas. Si bien saber que un usuario inició un proceso de pago no proporciona garantía de que la transacción se haya completado, indica una alta probabilidad de que al menos se haya contemplado una transacción. Es probable que esta definición de visita de compras sea demasiado restrictiva, ya que excluye las visitas que no dan como resultado el inicio de un proceso de pago.[23]

En resumen, las tres medidas descritas anteriormente establecen la intención de compra de una sesión con creciente rigor. A medida que nuestras definiciones de visita de compras se vuelven más estrictas, esperamos que las estimaciones de la minoría informada se vuelvan más conservadoras, y es probable

23 Dadas las bajas tasas de conversión en el comercio electrónico, es probable que estas visitas representen la mayoría de las visitas de compras.

que el número real se encuentre en algún lugar entre las tres estimaciones que proporciona nuestra metodología.

3.5. Definición de visitas de compras: sesiones individuales frente a agregados mensuales

Para definir una visita de compras, adoptamos los dos enfoques que son estándar en la literatura utilizando datos de flujo de clics. La primera, tal como la utiliza nuestro proveedor de datos y la industria en general, define las sesiones de usuario como períodos de actividad de navegación web separados por al menos 30 minutos de inactividad. Bajo esta definición, como se resume en Moe & Fader (2004), un usuario puede tener múltiples visitas a una empresa determinada en un día, una semana o un mes.

El segundo enfoque reconoce que la actividad de compra de un usuario en una empresa determinada puede durar varios días o incluso semanas dado el bajo costo de acceso. Johnson et al (2004) encuentran que las visitas repetidas a una empresa dentro de un mes normalmente corresponden al mismo ciclo de compras. Por lo tanto, agregamos las visitas a una empresa única en un mes determinado y presentamos estas sesiones agregadas como una medida alternativa de las visitas a la empresa con intención de compra.[24]

24 Una posibilidad aquí es que, para algunos usuarios, podríamos combinar varias visitas de compras en una sola, por lo que se subestima el número de visitas de compras (y, a la inversa, se contabiliza en exceso la fracción con visitas de EULA). Por otro lado, esta medida puede permitirnos incluir visitas breves repetidas a una determinada empresa que quedarían excluidas de las medidas alternativas de visita. Como se señaló anteriormente, esperamos que las visitas de compras reales se encuentren en algún punto intermedio. En cualquier caso, los resultados para las distintas definiciones de visitas son similares.

3.6. Datos demográficos y geográficos

Utilizamos información personal sobre nuestros panelistas para identificar las características de los compradores y los hogares de compras que afectan su probabilidad de recibir información sobre los términos estándar. Nuestro conjunto de datos incluye la edad y el sexo del jefe de hogar, los ingresos del hogar, el tamaño del hogar y si hay niños presentes en el hogar. En la Tabla 2 informamos las estadísticas de resumen correspondientes.

Tabla 2: Características del usuario

Elaboración propia

Panel A. Usuarios que acceden al menos a 2 páginas en al menos una empresa de muestra					
	N	**Media (Dakota del Sur)**	**Mínimo**	**Mediana**	**Máximo**
Años de edad)	48,154	46,22 (13,78)	18	46	99
Sexo (1 = Masculino)	48,154	0,50 (0,50)	0	0	1
Ingresos ($)	48,154	60.502 (39.704)	12,500	37,500	150.000+
Tamaño del hogar	48,154	2,78 (1,27)	1	3	5+
Presencia de niños (1 = Sí)	48,154	0,41 (0,49)	0	0	1
Panel B. Usuarios que acceden al menos a 5 páginas en al menos una empresa de muestra					
Años de edad)	33.655	46,37 (13,70)	18	46	99
Sexo (1 = Masculino)	33.655	0,50 (0,50)	0	1	1
Ingresos ($)	33.655	60,612 (39,782)	12,500	37,500	150.000+
Tamaño del hogar	33.655	2,79 (1,27)	1	3	5+
Presencia de niños (1 = Sí)	33.655	0,41 (0,49)	0	0	1

Panel C. Usuarios que inician el pago en al menos una empresa de muestra					
Años de edad)	2.831	47,39 (14,03)	18	47	99
Sexo (1 = Masculino)	2.831	0,52 (0,50)	0	1	1
Ingresos ($)	2.831	63,008 (41,373)	12,500	75.000	150.000+
Tamaño del hogar	2.831	2,77 (1,23)	1	3	5+
Presencia de niños (1 = Sí)	2.831	0,40 (0,49)	0	0	1

El panel A incluye visitantes que accedieron a un mínimo de dos páginas en al menos una de las empresas de la muestra durante una única sesión ininterrumpida. La muestra está compuesta por 48.154 visitantes únicos. La edad promedio de los usuarios de este grupo es de 46 años y, según se informa, el rango es de 18 a 99. El ingreso promedio de los jefes de hogar es de $ 60.502 con una desviación estándar de $ 39.704. Los ingresos (y quizás la edad) están codificados por arriba; el ingreso medio ($ 37,500) describe mejor la muestra. Aproximadamente la mitad de los jefes de hogar son hombres. El número medio de miembros del hogar es 2,8. Hay niños en el 41% de estos hogares.

Los paneles B y C informan estadísticas resumidas para la muestra de visitantes que accedieron a un mínimo de cinco visitas a la página en al menos una empresa y para visitantes únicos que seleccionaron un producto para la compra y comenzaron el proceso de pago, respectivamente.

4. RESULTADOS

Nuestro análisis aquí se basa en visitas de empresa / compras en las que el usuario accedió a un EULA. Identificamos estas visitas haciendo coincidir las URL correspondientes a todos los EULA que recopilamos con el flujo de clics de las URL a las que acceden los usuarios durante sus visitas a la empresa. Calculamos estadísticas descriptivas de visitas a empresas y accesos EULA bajo definiciones alternativas de visita con intención de compra. Finalmente, presentamos regresiones para estudiar los determinantes de la probabilidad (que resulta, baja) de que se acceda a un EULA.

4.1. Visitas a la empresa y accesos al CLUF

Tabla 3. Visitas a empresas y EULA. Visitas medidas como sesiones ininterrumpidas.

Elaboración propia

	N de visitas a empresas	N promedio de pg. clics por visita a la empresa (Dakota del Sur)	Mediana N de pág. clics por visita a la empresa	Duración media de la visita a la empresa en segundos (Dakota del Sur)	Duración media de la visita a la empresa en segundos	N de visitas de EULA (% de visitas a empresas)	N promedio de pg. visto antes del acceso al EULA (Dakota del Sur)	Mediana N de pág. visto antes del acceso al EULA	Media; Duración media del acceso al EULA en segundos (Dakota del Sur)	Porcentaje de accesos EULA que duran menos de 30 segundos; 2 minutos
Panel A. Se accede al menos a 2 páginas durante la visita										
Al por menor	131,729	12,1 (26,7)	5	303,4 (698,4)	101	63 (0,05%)	19,1 (62,3)	7	59,4; 34 (91,7)	46%; 92%
Free-ware	28,663	13,4 (36,5)	4	164,3 (616,3)	43	44 (0,15%)	6,9 (14,8)	2	99,1; 33,5 (227,3)	50%; 86%
Panel B. Se accede al menos a 5 páginas durante la visita										
Al por menor	72,282	19,8 (34)	10	436,8 (891,6)	183	57 (0,08%)	20,9 (65,3)	8	59,6; 30 (96,3)	49%; 91%
Free-ware	13,715	25 (50,3)	12	241 (855,2)	68	30 (0,22%)	9,5 (17,4)	4	60,6; 20,5 (104,5)	57%; 93%
Panel C.Al menos 1 página de pago seguro a la que se accede durante la visita										
Al por menor	4.866	13,1 (30,7)	5	568,9 (1.861,8)	207,5	7 (0,14%)	15,7 (15,9)	7	166,3; 60 (234,6)	0%; 71%

Tabla 4. Visitas a empresas y EULA. Visitas medidas como agregados mensuales de sesiones ininterrumpidas.

Elaboración propia

Empresa	N de visitas a empresas	N promedio de pg. clics por visita a la empresa (Dakota del Sur)	Mediana N de pág. clics por visita a la empresa	Duración media de la visita a la empresa en segundos (Dakota del Sur)	Duración media de la visita a la empresa en segundos	N de visitas de EULA (% de visitas a empresas)	N promedio de pg. visto antes del acceso al EULA (Dakota del Sur)	Mediana N de pág. visto antes del acceso al EULA	Media; Duración media del acceso al EULA en segundos (Dakota del Sur)	Porcentaje de accesos EULA que duran menos de 30 segundos; 2 minutos
Panel A. Se accede al menos a 2 páginas durante la visita										
Al por menor	69,372	23 (77,6)	7	576,1 (2.278)	152	61 (0,09%)	30,1 (73,8)	10	63,4; 42 (93,2)	44%; 90%
Freeware	11,323	35,1 (288,8)	4	416 (2.781,7)	76	46 (0,41%)	10,2 (21,2)	3	101,7; 33,5 (225)	49%; 85%
Panel B. Se accede al menos a 5 páginas durante la visita										
Al por menor	43,708	34,9 (95,8)	14	829,2 (3.470,8)	286	56 (0,13%)	32,7 (76,6)	11	62,7; 32 (96,8)	46%; 91%
Freeware	5.509	69,4 (411,4)	11	741,3 (3.956,7)	150	36 (0,65%)	12,6 (23,5)	4	107,8; 33,5 (244,2)	49%; 84%
Panel C.Al menos 1 página de pago seguro a la que se accede durante la visita										
Al por menor	2,991	37,1 (88,6)	11	1.456,8 (4.657,5)	457	9 (0,30%)	20,7 (20,9)	12	160,4; 106 (203,2)	0%; 67%

Queremos medir la fracción de compradores que busca informarse sobre los términos del EULA para decidir si comprar y, como se señaló, hemos definido la muestra para incluir solo aquellos sitios web de la empresa donde el acceso al EULA es posible pero opcional. Las Tablas 3 y 4 resumen las características de las visitas a dichas empresas, medidas ya sea como sesiones ininterrumpidas (Tabla 3) o visitas de usuarios únicos, agregando todas las sesiones mensuales por usuarios individuales (Tabla 4). En cada caso, los datos se presentan para cada definición de visita de empresa / compra. Separamos las visitas de acuerdo con el tipo de empresa visitada, señalando que solo las visitas de minoristas incluyen visitas a la página de pago seguro; no es necesario un proceso de pago seguro para un producto gratuito. Además del número de visitas a la empresa en cada definición, las mitades izquierdas de estas tablas muestran el número de páginas vistas durante dichas visitas y la duración de las visitas en segundos. En las mitades de la derecha, tabulamos el subconjunto de estas visitas que incluyeron un acceso al CLUF, la cantidad de páginas vistas antes del primer acceso al CLUF y el tiempo dedicado a ver los CLUF en las visitas en las que se accedió a uno. Estas dos últimas medidas nos dan alguna indicación del nivel de atención o intención de los compradores al acceder a las páginas de EULA. Para simplificar, informamos la definición de visita a la empresa de rigor intermedio (cinco páginas vistas) para las sesiones ininterrumpidas en la Tabla 3, pero el lector puede explorar definiciones alternativas en las Tablas 3 y 4 y ver que nuestros resultados son robustos a definiciones alternativas de comprador. y visita de compras. En las mitades de la derecha, tabulamos el subconjunto de estas visitas que incluyeron un acceso al CLUF, la cantidad de páginas vistas antes del primer acceso al CLUF y el tiempo dedicado a ver los CLUF en las visitas en las que se accedió a uno. Estas dos últimas medidas nos dan alguna indicación del nivel de atención o intención de los compradores al acceder a las páginas de EULA. Para simplificar, informamos la definición de visita a la empresa

de rigor intermedio (cinco páginas vistas) para las sesiones ininterrumpidas en la Tabla 3, pero el lector puede explorar definiciones alternativas en las Tablas 3 y 4 y ver que nuestros resultados son robustos a definiciones alternativas de comprador. y visita de compras. En las mitades de la derecha, tabulamos el subconjunto de estas visitas que incluyeron un acceso al CLUF, la cantidad de páginas vistas antes del primer acceso al CLUF y el tiempo dedicado a ver los CLUF en las visitas en las que se accedió a uno. Estas dos últimas medidas nos dan alguna indicación del nivel de atención o intención de los compradores al acceder a las páginas de EULA. Para simplificar, informamos la definición de visita a la empresa de rigor intermedio (cinco páginas vistas) para las sesiones ininterrumpidas en la Tabla 3, pero el lector puede explorar definiciones alternativas en las Tablas 3 y 4 y ver que nuestros resultados son robustos a definiciones alternativas de comprador. y visita de compras. y el tiempo dedicado a ver EULA en visitas en las que se accedió a uno. Estas dos últimas medidas nos dan alguna indicación del nivel de atención o intención de los compradores al acceder a las páginas de EULA. Para simplificar, informamos la definición de visita a la empresa de rigor intermedio (cinco páginas vistas) para las sesiones ininterrumpidas en la Tabla 3, pero el lector puede explorar definiciones alternativas en las Tablas 3 y 4 y ver que nuestros resultados son robustos a definiciones alternativas de comprador. y visita de compras. y el tiempo dedicado a ver EULA en visitas en las que se accedió a uno. Estas dos últimas medidas nos dan alguna indicación del nivel de atención o intención de los compradores al acceder a las páginas de EULA. Para simplificar, informamos la definición de visita a la empresa de rigor intermedio (cinco páginas vistas) para las sesiones ininterrumpidas en la Tabla 3, pero el lector puede explorar definiciones alternativas en las Tablas 3 y 4 y ver que nuestros resultados son robustos a definiciones alternativas de comprador. y visita de compras.

Cuando se define que una visita requiere el acceso a cinco o más páginas en la empresa visitada, hay 72.282 sesiones / visitas ininterrumpidas a minoristas de software y 13.715 a empresas de software gratuito. El número medio de páginas vistas en una visita determinada a un minorista es ahora de 10 páginas y la duración media es de 183 segundos (3,05 minutos). Las distribuciones de las visitas a la página y la duración están sesgadas. Se accedió a los EULA 57 veces entre los minoristas de software (0,08%) y 30 visitas entre las empresas de software gratuito (0,22%). La mediana de páginas vistas antes de acceder a un EULA fue de 8 para los minoristas y 4 para los proveedores de software gratuito. Estas cifras ya son reveladoras, pero otra consideración es si los compradores que acceden al EULA realmente lo leen. Para los usuarios de este grupo, el tiempo medio en la página EULA fue de 62,7 segundos y el tiempo medio fue de 32 segundos.

Para dar a estos números algo de contexto, el número promedio de palabras de EULA para productos minoristas en la muestra (no reportado) es 2277 con una mediana de 2187 palabras y una desviación estándar de 1148 palabras. El tiempo dedicado a los EULA en relación con su extensión indica que la mayoría de los lectores no leyeron los términos en su totalidad, especialmente porque generalmente están escritos en una jerga legal compleja y dado que es poco probable que los consumidores conozcan las reglas predeterminadas, incluso si los EULA lo explican bien. algunos términos en un lenguaje claro, todavía existe la posibilidad de malentendidos. Bailey y Bailey (1999) encuentran que la tasa de lectura promedio de los adultos estadounidenses es de 250 a 300 palabras por minuto, por lo que una lectura completa del EULA típico requeriría de 8 a 10 minutos, en lugar de menos de un minuto. En otras palabras, incluso el pequeño número de EULA a los que se accede en nuestra muestra es probable que sea una sobreestimación, probablemente una sobreestimación sustancial, del número de

lectores informados de manera eficaz. Por otro lado, el pequeño número de personas que leen EULA puede no ser representativo del lector promedio y puede haber desarrollado la capacidad de "hojear" rápidamente la información esencial.

Dado que nuestros resultados podrían haber estado sesgados si las empresas con relativamente pocas visitas en nuestra muestra fueran sistemáticamente diferentes en términos de la probabilidad de que se accediera a sus EULA (por ejemplo, porque era menos probable que los visitantes estuvieran familiarizados ex ante con los términos ofrecidos por dichas empresas) , recalculamos la frecuencia de accesos al CLUF utilizando ponderaciones de frecuencia para ajustar nuestros datos por la inversa del número total de visitas a cada vendedor. Esto resultó en tasas más bajas de acceso al EULA en todas las definiciones y, por lo tanto, abordó cualquier inquietud de que la menor frecuencia de visitas a ciertos tipos de empresas en nuestra muestra podría estar sesgando nuestras tasas de acceso EULA observadas hacia abajo.

La agregación de todas las sesiones mensuales de un usuario individual en una visita mensual (que se muestra en la Tabla 4) conduce a resultados similares. Sin embargo, los resultados generales indican que las impresiones de la Tabla 3 son sólidas para la definición precisa de visitas a la empresa. En última instancia, la fracción más alta de lectores entre los compradores minoristas en todas las definiciones de compradores y sesiones es del 0,65%, lo que significa que hay alrededor de seis lectores por cada mil compradores.

4.2. Interpretación de los resultados: ¿Puede ser esto ¿Un equilibrio minoritario informado?

Volviendo al marco empírico de la Figura 1, los visitantes de los sitios web de las empresas de nuestra muestra se pueden clasificar en compradores potenciales o usuarios que

visitan por otras razones. Medimos el número total de páginas vistas durante cada visita, así como si un Se accedió al EULA y si se inició una sesión de pago segura. Estos datos, informados para sesiones individuales en la Tabla 3 y para los visitantes mensuales en la Tabla 4, nos permiten estimar el número de lectores, compradores y compradores usando el acceso a una página de EULA como un proxy para la lectura, iniciando el proceso de pago como un proxy. para la compra, visitas con 5 o más páginas vistas como un proxy para identificar a los compradores y visitas entre 2 y 5 páginas vistas como un proxy para identificar a los no compradores. Según los datos de la Tabla 4, los se_1b_1 lectores que compran y los $se_1(1-b_1)$ lectores que no compran son 9 y 47, respectivamente. Existen $s(1-e_1)b_2$ o 2.982 compradores que no son lectores, y $s(1-e_1)(1-b_2)$ o 40.670 compradores que ni leen ni compran. Se esperaría que pocos no compradores leyeran EULA, por lo que no es sorprendente que $(1-s)(1-e_2)$es pequeño; en nuestra muestra es igual a 5 (de 25,664 visitas). Por último, la gran mayoría de los no compradores no leen EULA; este número es $(1-s)(1-e_2)$ o 25,661 basado en los poderes anteriores. Llegamos así a una estimación de e_1, la fracción de compradores que constituye la minoría informada de

$$\frac{se_1b_1 + se_1(1-b_1)}{se_1b_1 + se_1(1-b_1) + s(1-e_1)b_2 + s(1-e_1)(1-b_2)} = \frac{56}{43,708} = 0.13\%$$

Es posible que considerar a todos los visitantes con 5 o más páginas vistas como compradores sobrestime el número de compradores. Se podría obtener una estimación alternativa asumiendo que entre los compradores reales, la "tasa de conversión" para iniciar una sesión de pago entre los no lectores es la misma que la de los lectores con 9/56 = 16,1% (que es más alta que las tasas de conversión de compra de 2-5% citado en la literatura de marketing, pero razonable si no todas las sesiones de pago que capturamos dan como resultado compras

reales). En ese caso, la fracción minoritaria informada para todos los compradores sería la misma que la fracción para los compradores, es decir, 9/2991 = 0,30%.[25,26]

La conclusión es que la fracción de visitantes que acceden a los EULA es muy pequeña, del orden del 0,1%. Si bien se pueden calcular varias estimaciones alternativas, estas estimaciones apuntan a que esa fracción está muy por debajo del 1%. Suponiendo que no haya otros mecanismos de disciplina en juego, ¿es concebible que una minoría tan pequeña informada pueda proteger a todos los compradores y disciplinar a los vendedores para que proporcionen términos de contrato eficientes, evitando así una falla del mercado. La literatura ofrece pocas sugerencias significativas sobre el tamaño que debe tener la minoría informada, y estas se proporcionan normalmente en el contexto de ejemplos ilustrativos. Schwartz y Wilde ofrecen un ejemplo en el que la minoría informada debe ser del 20% al 30% para ser eficaz. Nuestras estimaciones aquí son imperfectas, pero son dos órdenes de magnitud más pequeñas.[27]

25 La mayoría de los modelos de la minoría informada predicen que el índice de conversión para los no lectores sería igual o superior al índice de conversión para los lectores, ya que estos últimos tendrán menos probabilidades de comprar el producto si no están satisfechos con los términos del EULA. . Se puede obtener un límite superior del tamaño de la minoría informada si asumimos que $b_2 = 100\%$ es decir, que el 100% de los no lectores proceda a adquirir el producto. En ese caso, la minoría informada sería 56 / (2991 + 47) = 1,84% del número total de compradores.

26 Si asumimos que los compradores "reales" comprarán a algún comerciante (aunque pueden visitar a muchos), y que entre estos compradores, los que constituyen la minoría informada tienen la misma probabilidad de acceder a un EULA en cualquiera de los comerciantes que visitan, entonces el El comportamiento de los visitantes de nuestra muestra que inician una sesión de pago es representativo de los compradores en su conjunto, y su probabilidad de acceder a los EULA (0,30%) proporciona una estimación del tamaño de la minoría informada entre estos compradores más determinados.

27 Las estimaciones presentadas anteriormente se basan en visitas mensuales como se informa en la Tabla 4. Esto es conservador en el sentido de que el uso de visitas definidas como sesiones individuales resultaría en estimaciones más bajas para el tamaño de la pequeña minoría. Específicamente, el uso de datos de sesión de la Tabla 3 daría como resultado 7 lectores que compran, 50 lectores que no compran, 4859 compradores que no

Teóricamente, el tamaño de la minoría informada que se requiere para inducir a los vendedores a ofrecer buenos términos depende de la compensación entre la ganancia bruta de vender a compradores informados (determinada a partir del costo marginal del producto) y el costo de proporcionar mejores términos contractuales. Específicamente, considere un vendedor que puede ofrecer términos contractuales estándar que son más o menos favorables para los compradores, a los que llamaremos términos "buenos" y "malos", respectivamente. La fracción r de compradores que se informan sobre los términos refleja el costo de encontrar y leer el contrato de forma estándar y el beneficio esperado de hacerlo, y se determina en función de las características del entorno (por ejemplo, en función de las estrategias de búsqueda de compradores como en (Schwartz y Wilde 1979). En nuestra muestra, esto corresponde a la fracción e_1 de compradores que se encuentran en la minoría informada. Los compradores valoran los derechos y restricciones incorporados en el contrato de forma estándar (por ejemplo, términos de garantía, la capacidad de transferir el producto, etc.); y así los buenos términos se valoran más que los malos términos. Pero los buenos términos son naturalmente más costosos para el vendedor que los malos términos, lo que resulta en los correspondientes costos del producto de c_g y c_b, con $c_g > c_b \geq 0$. Modificando nuestra notación anterior, los compradores informados compran con probabilidad b_1 si los términos son buenos y b_3 si los términos son malos $(b_1 > b_3)$, y los compradores desinformados siguen comprando con probabilidad b_2. Los valores exactos de b_1, b_2 y b_3 se determinan en función de las características del entorno, pero es natural

son lectores y 67,366 compradores que ni leen ni compran, y 59,447 no compradores que incluyen solo 6 lectores. La fracción e_1 de compradores en la minoría informada sería 57/72282 = 0.079%. La fracción de lectores que inician sesiones de pago sería 7/57 = 12,3%, y asumiendo la misma tasa de conversión para los no lectores daría 7/4866 = 0,14% como minoría informada. Una tasa de conversión del 100% para los no lectores daría un límite superior para la minoría informada de 57 / (4866 + 50) = 1,16%.

considerar $b_1 > b_2 > b_3$. El vendedor ofrece buenos términos si la recompensa esperada de hacerlo es mayor que en malos términos:

$$(rb_1 + (1-r)b_2)(p - c_g) \geq (rb_3 + (1-r)b_2)(p - c_b).$$

De manera equivalente, la fracción de lectores requerida para inducir a ofrecer buenos términos es:

$$r \geq \frac{c_g - c_b}{\left(1 - \frac{b_1}{b_2}\right)(c_g - c_b) + \frac{b_1 - b_3}{b_2}(p - c_b)}.$$ [34]

Esta fracción se vuelve más pequeña a medida que disminuye el costo incremental de proporcionar buenos términos y aumenta la probabilidad de que los compradores que se informan acerca de los términos abandonen si ven malos términos.

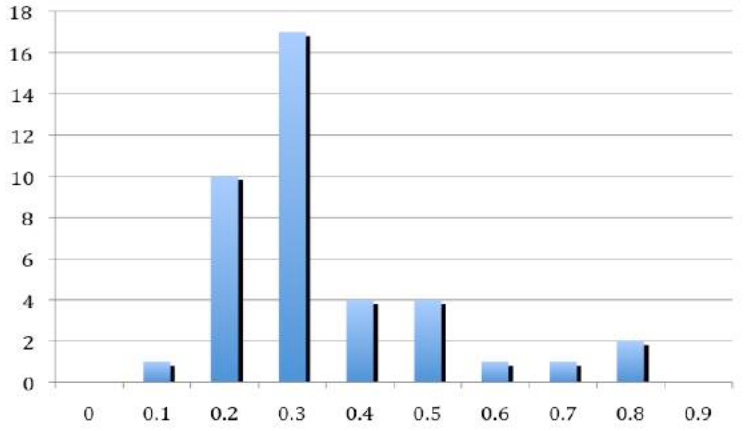
Esta conclusión teórica general es bastante inútil por sí misma, ya que dados ciertos valores para estos parámetros desconocidos, cualquier fracción de compradores informados podría apoyar un equilibrio minoritario informado. Sin embargo, el mercado de soporte y mantenimiento de software ("M&S") se puede utilizar para derivar estimaciones muy aproximadas del rango probable de uno de estos parámetros, el costo marginal de los términos "buenos", y poner en perspectiva nuestra fracción observada de lectores. M&S es un término clave en los EULA de software,[28] y, por lo tanto, el costo de suministrar M&S debe ser una aproximación del orden de magnitud del costo de ofrecer buenos términos de EULA.

28 Marotta-Wurgler (2007) identifica y mide 23 términos importantes y comunes que asignan derechos y riesgos entre compradores y vendedores de software y M&S es uno de estos términos.

Para estimar el costo de los términos de M&S, obtuvimos el precio del producto y el precio anual de M&S para 520 productos de software de las 42 compañías de software en la muestra de Marotta-Wurgler (2007) que proporcionaron M&S por separado de forma periódica (es decir, no cobraron por incidente). En promedio, los M&S tenían un precio del 26% del precio del producto (sin incluir M&S). La mediana es 20% y la desviación estándar es 22%. Dado que había una alta correlación entre empresas, nos centramos en los medios de la empresa. La Figura 2 muestra la distribución para las 40 empresas restantes después de eliminar dos valores atípicos con razones demasiado altas, que tiene una media de 0,29, una mediana de 0,24 y una desviación estándar de 0,16.

Figura 2: Relación anual entre mantenimiento y precio del producto, cuarenta empresas

Elaboración propia



Así, un año de M&S para productos de software[29]tiene un precio promedio del 25-30% del precio del producto. Dado que los costos de M&S son principalmente costos variables

29 Como se mencionó anteriormente, un año fue lo más común, así como la duración media, de M&S gratuito para las empresas que proporcionaron dicho período de M&S gratis.

(mano de obra), si el mercado de M&S fuera perfectamente competitivo, esto proporcionaría alguna indicación del costo marginal de M&S y, por lo tanto, un piso en el costo marginal de los términos del EULA pro-consumidor. Hay varias razones por las que el 25-30% del precio del producto puede ser una estimación demasiado alta: es más probable que los consumidores compren M&S al vendedor del software y, por lo tanto, las empresas de software pueden fijar el precio como una tarifa de dos partes, con una tarifa menor. precio por la compra inicial (el producto de software) y un precio más alto por la compra posterior (M&S); los consumidores que compran M&S probablemente tengan costos de M&S más altos debido a una selección adversa y / o riesgo moral; Las empresas de software pueden tener un poder de mercado sustancial en el suministro de M & S debido a las barreras de entrada para competidores que no están tan familiarizados con su producto o la propensión de los consumidores a comprar M&S al vendedor del software original. Todos los factores anteriores resultarían en una relación de M&S a precio del producto más alta que el costo de proporcionar M&S. Por otro lado, M&S es solo uno de los 23 términos clave de EULA, que incluyen varios otros tipos de garantías y permisos para copiar o distribuir el software que pueden imponer costos de oportunidad. Además, los precios de M&S son similares en los mercados de software empresarial, donde existe una competencia significativa de proveedores de M&S externos y la compra de contratos de M&S es casi universal. Todos los factores anteriores resultarían en una relación de M&S a precio del producto más alta que el costo de proporcionar M&S. Por otro lado, M&S es solo uno de los 23 términos clave de EULA, que incluyen varios otros tipos de garantías y permisos para copiar o distribuir el software que pueden imponer costos de oportunidad. Además, los precios de M&S son similares en los mercados de software empresarial, donde existe una competencia significativa de proveedores

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A fin de cuentas, es razonable suponer que el costo de este nivel de M&S es alrededor del 20% del precio del producto, o 0.2p en la notación de la sección 3.1. Dividiendo el numerador y el denominador de la fracción de compradores informados necesaria para inducir al vendedor a ofrecer buenos términos por p obtenemos

$$r \geq \frac{(c_g - c_b)/p}{\left(1 - \frac{b_1}{b_2}\right)\frac{c_g - c_b}{p} + \frac{b_1 - b_3}{b_2}\left(1 - \frac{c_b}{p}\right)}.$$

Si $(b_1 - b_3)/b_2 \leq 1$, que sería el caso si los lectores compran con al menos la misma probabilidad $b_1 \geq b_2$ que los no lectores cuando descubren buenos términos, pero los malos términos reducen o eliminan esta probabilidad, y por lo tanto $1 - b_1/b_2 \leq 0$ y $c_b \geq 0$ y por lo tanto $1 - c_b/p \leq 1$, obtenemos $r \geq (c_g - c_b)/p$ o $r \geq 0.2$. En otras palabras, si el costo de proporcionar buenos términos es 0.2*p* y las tres suposiciones razonables en la oración anterior se mantienen, como es el caso en nuestros datos, entonces uno requeriría $r \geq 0.2$ con el fin de apoyar un equilibrio minoritario informado. Esto es 200 veces mayor que el valor de $r \approx 0.001$ (o 0,1%) que observamos en los datos. Alternativamente, nuestros datos sugieren que para que los compradores informados induzcan al vendedor a ofrecer buenos términos, el costo incremental de estos términos tendría que

ser casi insignificante por debajo del 0,1% del precio de venta.[30] En cualquier caso, es poco probable que nuestros datos sean consistentes con un equilibrio minoritario informado.

Un enfoque similar y tal vez más simple para determinar si podríamos estar observando un equilibrio minoritario informado es observar el cálculo del vendedor para los visitantes que inician una sesión de pago. En un equilibrio minoritario informado, los vendedores estarían ofreciendo buenos términos y, de acuerdo con la Tabla 4, se accede a los EULA en 6 de las 3534 visitas con sesiones de pago. Dado que iniciar una sesión de pago es un requisito para completar una compra, si los vendedores ofrecieran malos términos, podrían perder hasta el 100% de estos lectores. Por lo tanto, si los vendedores están intercambiando los ingresos netos de las ventas a los 6 lectores por el costo de proporcionar buenos términos a los 3528 no lectores, como sería el caso si estuviéramos observando un equilibrio minoritario informado, los vendedores seguirían ofreciendo buenos términos si el costo de hacerlo fue inferior al 0,17% del precio de venta.

4.3. Comprobaciones de solidez: ¿Informarse sin leer?

En esta sección exploramos formas alternativas en las que los consumidores pueden informarse. Algunos consumidores pueden informarse sobre los EULA consultando otros sitios web en lugar de leer el contrato. Internet contiene varios sitios de reseñas de productos de consumo, publicaciones de blogs con peroratas sobre la calidad del producto y medios de noticias especializados que quizás podrían discutir el contenido de los términos del contrato de forma estándar.

30 Por supuesto, se podría argumentar que ofrecer una cláusula de resolución de disputas a favor del comprador podría costarle al vendedor el 0,1% del precio. Aunque en teoría es posible, nos parece poco probable que los vendedores cambien esta cláusula a en respuesta a la amenaza de perder uno de cada mil compradores. Más importante aún, los términos que más importan a los consumidores (como M&S y garantías) se encuentran entre los más costosos.

Desde el sitio web www.alexa.com obtuvimos una lista de 25 de los sitios con más tráfico que probablemente tengan información sobre los términos del EULA, información sobre la calidad del producto y las prácticas de los vendedores. Luego, medimos la tasa a la que los compradores accedieron a estos sitios. Muy pocos sitios se centran exclusivamente en software y términos de EULA. Otros sitios que ocasionalmente discuten los términos del EULA son sitios de noticias relacionadas con la tecnología, como Wired News y Ars Techica, sitios que ofrecen noticias generales de protección al consumidor y quejas sobre prácticas abusivas por parte de vendedores como The Consumerist y BoingBoing, y noticias de tecnología general como PC. Revista. Por último, hay informes generales de consumidores que no se centran en el software, sino que contienen reseñas de productos de software, como Consumer Reports.

Revisamos las páginas particulares a las que acceden los compradores en cada URL de estos 25 sitios para asegurarnos de que las páginas a las que acceden contienen información sobre los EULA. Descubrimos que de las 131,729 sesiones con al menos dos páginas accedidas, solo tres compradores accedieron a páginas con información de EULA en sitios de reseñas de consumidores.[31]A nivel mensual de agregación, 11.657 (16,8%) de las visitas accedieron al menos a uno de los 25 sitios de consumidores, pero ni un solo aspecto de esa actividad estaba relacionado con EULA. De este grupo, solo 69 compradores accedieron a páginas con reseñas de productos de software particulares o información como páginas de reseñas de software de impuestos en ese mes.[32]Un total de 84 compradores accedieron a páginas de noticias o información

31 Dos compradores descargaron el software EULAlyzer de Javacool Software para obtener una revisión de un EULA en particular. El tercero accedió a una referencia a un EULA simulado.

32 La mayoría de estos compradores accedieron a reseñas de epinions, Consumer Research y Consumer Reports sobre software de contabilidad, preparación de impuestos y edición de fotografías.

general sobre software, como por ejemplo, cómo obtener ciertos complementos gratuitos. Las visitas restantes fueron a páginas no relacionadas con el software o los términos del EULA. Por lo tanto, no parece ser el caso de que los consumidores estén siendo informados por estos medios alternativos.

También es posible que la calidad de los términos se refleje en el precio del vendedor y, por lo tanto, los compradores no necesitan estar informados sobre estos términos. Sin embargo, como es el principio de la hipótesis de la minoría informada, para que los términos se reflejen en los precios observados, se debe informar a un número suficiente de consumidores acerca de los términos cuando comparan las condiciones (a menos que todos los vendedores ofrezcan los peores términos exigibles y los consumidores lo sepan). y por lo tanto no tienen ningún incentivo para informarse sobre los términos). Marotta-Wurgler (2007) encuentra que la mayoría de los vendedores ofrecen términos peores que los proporcionados por las reglas predeterminadas, pero no tan mal como para que no se pueda obtener información al estar informado sobre estos términos. Nuestros resultados son consistentes con esto, aunque no podemos sacar ninguna conclusión sobre la eficiencia económica de este resultado.

Marotta-Wurgler (2007) es particularmente relevante aquí, ya que analizó específicamente la relación entre el sesgo de término del EULA y el precio y no encontró casi ninguna relación estadísticamente detectable entre ellos. Las estimaciones puntuales también fueron económicamente pequeñas. Es posible que esto se deba a que los términos para los productos de software preempaquetados son un componente relativamente pequeño del precio, y es difícil capturar la relación plazo / precio empíricamente sin controlar los muchos otros atributos del producto que afectan el precio. Sin embargo, este hallazgo también es consistente con nuestros resultados, ya que los vendedores tendrían pocos incentivos para ajustar sus

precios para reflejar la calidad de los términos del EULA si los consumidores no se informan y, por lo tanto, comparan,

Además, aunque se podría esperar que los consumidores tuvieran incentivos más fuertes para informarse sobre productos de mayor precio, el efecto del precio sobre la propensión a leer términos no fue estadísticamente significativo. Sin embargo, nos abstendríamos de interpretar esta evidencia con demasiada fuerza, porque nuestra investigación de por qué los consumidores leen o no leen es limitada, en comparación con lo que podemos explorar directamente, es decir, la predicción de que leen en absoluto.

Otra posibilidad es que el grado de divulgación de los términos del EULA (por ejemplo, la prominencia con la que se muestran) indique su calidad. Por ejemplo, puede surgir un equilibrio en el que los buenos términos se muestren de forma destacada mientras que los malos términos se hacen más difíciles de encontrar o inaccesibles. Nuestros resultados muestran que tal equilibrio, si existe en nuestro medio, no se mantiene en base a una minoría informada. Además, Marotta-Wurgler (2009) descubrió que los contratos clickwrap divulgados de manera destacada tenían aproximadamente la misma unilateralidad que los contratos sin clickwrap que requerían más esfuerzo para ser descubiertos. Esto sugiere que las empresas no están utilizando la forma de divulgación para señalar la calidad de los términos. No parece que utilicen clickwraps para aumentar el conocimiento de los buenos términos y, de forma similar, no parecen estar utilizando los navegadores para ocultar los malos términos.

4.4. Determinantes de las visitas de EULA

Aunque pocos compradores potenciales de nuestra muestra hacen clic en el EULA, examinamos qué características de la empresa, el producto, el usuario y el sitio web distinguen a los lectores (o, más precisamente, los "usuarios de clics") de

los no lectores. La Tabla 5 informa las regresiones logit con la variable dependiente como ficticia si se accedió a un EULA durante una visita a la empresa en particular.

Tabla 5: Regresiones logit de los determinantes de las visitas de EULA

Elaboración propia

Variable dependiente: acceso EULA						
	Sesiones ininterrumpidas			Sesiones agregadas mensuales		
	Al menos 2 páginas	Al menos 5 páginas	Al menos 1 CP seguro	Al menos 2 páginas	Al menos 5 páginas	Al menos 1 CP seguro
	(1)	(2)	(3)	(4)	(5)	(6)
Maniquí de freeware	1.06 (0,75)	0,71 (0,81)	-	2,05 *** (0,75)	1,95 ** (0,79)	-
Ln Med. Precio	-0,004 (0,13)	-0,02 (0,14)	0,38 (0,39)	0,07 (0,14)	0,06 (0,14)	0,07 (0,41)
Ln Ingresos por producto	-0,52 *** (0,05)	-0,55 *** (0,06)	-0,32 (0,21)	-0,52 *** (0,05)	-0,54 *** (0,06)	-0,36 ** (0,14)
Público	2,28 *** (0,35)	2,57 *** (0,43)	0,29 (1,16)	1,85 *** (0,35)	2,13 *** (0,39)	1. 08 (0.89)
N Pgs. Visto	0,06 *** (0,01)	0,03 ** (0,01)	0,13 *** (0,04)	0,07 *** (0,01)	0,04 *** (0,01)	0,12 *** (0,03)
Género	-0,39 * (0,22)	-0,30 (0,24)	-1,23 (0,94)	-0,35 * (0,20)	-0,36 * (0,22)	-0,48 (0,71)
Ingresos Ln	0,11 (0,15)	0,21 (0,17)	-0,23 (0,43)	0,13 (0,14)	0,21 (0,15)	-0,21 (0,42)
Edad Ln	0,40 (0,35)	0,14 (0,39)	1,45 (1,31)	0,30 (0,33)	0,19 (0,36)	-0,49 (1,38)
norte	160,392	85.997	4.866	80,695	49,217	2,991
Pseudo-R2	0,11	0,11	0,20	0,13	0,13	0,15

Nota:* = denota significancia al nivel 0.1, ** al 0.05 y *** al 0.01. Los errores estándar se agrupan por visitante.

El dummy de software gratuito es positivo y generalmente significativo, como se esperaba dados los resultados anteriores. Algunos consumidores pueden temer que haya una "trampa" en los productos que se ofrecen de forma gratuita. El coeficiente para el precio medio del producto no es significativo, lo que indica que la falta de propensión a leer está presente independientemente del precio del producto.

Es menos probable que los consumidores accedan a los EULA para productos que conocen y, por lo tanto, en los que pueden confiar, y esta confianza puede ser representada por los ingresos promedio del producto, ya que es probable que indiquen un mayor grado de familiaridad entre los compradores potenciales. Por tanto, consideramos como regresor el logaritmo natural de los ingresos de una empresa (como un proxy del tamaño) dividido por el número de productos; El coeficiente de ingresos por productos es significativamente negativo como cabría esperar, lo que respalda la hipótesis de "familiaridad con el producto" o reputación.

Las visitas extensas con una gran cantidad de páginas vistas pueden tener una mayor probabilidad de incluir un acceso al EULA, ya que, por ejemplo, es más probable que representen a compradores serios que probablemente accedan al EULA como parte de su debida diligencia sobre su posible compra, por lo que incluimos el número de páginas (no EULA) a las que se accede como regresor. Esto tiene un efecto generalmente positivo en la probabilidad de acceder a una página de EULA. La Tabla 5 también informa el papel de las características demográficas en la probabilidad de acceder a los EULA, todos los cuales carecen de significación estadística.

En regresiones no informadas, examinamos si la opción de descargar la versión de prueba de un producto afecta la propensión del usuario a acceder al EULA. Como se indica en la Tabla 1, una gran parte de los vendedores ofrecen versiones

de prueba. Una hipótesis plausible es que los usuarios que se familiaricen con la versión de prueba de un producto podrían estar menos inclinados a leer el EULA de la versión comercial, quizás debido a una mayor familiaridad y comodidad con el producto. Por ejemplo, estos usuarios pueden haber concluido que no necesitarán el soporte del proveedor o pueden haber investigado la disponibilidad y los términos de dicho soporte. Descubrimos que prácticamente no existe una relación entre la presencia de versiones de prueba y la probabilidad de que los usuarios accedan a los EULA para las definiciones más amplias de visitas, pero cuando las visitas se definen como el inicio del proceso de pago, el coeficiente de esta variable es negativo y muy significativo. También estudiamos si es menos probable que los compradores lean los EULA de los productos que tienen más probabilidades de ser utilizados durante largos períodos de tiempo e implican compras repetidas (por ejemplo, debido a actualizaciones). Los usuarios que se familiaricen con un producto que se actualiza continuamente, como Microsoft Office, pueden sentir menos necesidad de preocuparse por el EULA, ya que pueden estar familiarizados con los términos del uso anterior. Es menos probable que se compren repetidamente otros productos, como el software de preparación de pruebas. Por otro lado, los productos caracterizados por un uso prolongado pueden ser más importantes para sus usuarios y, por lo tanto, pueden inducirlos a leer los términos del EULA. Creamos una variable ficticia que captura si la empresa comercializa productos que, a nuestro juicio, es probable que sean compras repetidas.[33]

33 Dado que la baja probabilidad de acceso al EULA podría sesgar las estimaciones de los parámetros obtenidas mediante regresiones logit, intentamos corregir estas estimaciones utilizando la metodología relogit descrita en King & Zeng (2001). Esto proporcionó estimaciones de parámetros corregidas para los modelos (1), (2), (4) y (5) en la Tabla 5, pero los valores corregidos fueron esencialmente idénticos a los de la Tabla. Además, para ver si las diferencias sistemáticas en las empresas que tuvieron relativamente pocas visitas en nuestra muestra sesgaron la probabilidad predicha de acceso al EULA, también estimamos regresiones logit con ponderaciones de frecuencia; estos resultaron uniformemente en probabilidades predichas más bajas, lo que muestra que cualquier sesgo de frecuencia en

El resultado principal de esta sección es que el término más importante de la regresión es el término constante: rara vez se accede a los EULA y, por lo tanto, nadie los lee.

5. DISCUSIÓN E IMPLICACIONES

El acceso de los consumidores a los términos de los contratos de forma estándar ha estado en el centro de un debate legal y de políticas, y una pregunta importante ha sido si la divulgación de los términos en los contratos de forma estándar que rigen las transacciones de los consumidores debe regularse. Un debate relacionado se ha centrado en la aplicabilidad de los términos y la posible necesidad de regular la divulgación del software en general y del software comprado en línea en particular. Un tema central en estos debates es la validez de la hipótesis de la minoría informada: la opinión de que los compradores de comparación de términos estándar ayudan a mantener equilibrios eficientes en la provisión de esos términos. En este documento investigamos hasta qué punto los consumidores acceden realmente a los términos de ciertos contratos en línea de formulario estándar: intentamos medir directamente la "minoría informada". Nuestra corriente principal de información nos permite medir este aspecto del comportamiento del consumidor con una precisión razonable.

Encontramos muy pocos consumidores optan por informarse sobre los contratos en línea de forma estándar. En particular, estimamos la fracción de compradores de software minorista que accede a EULA entre el 0,05% y el 0,22%, y los pocos compradores que acceden a él, en promedio, no pasan suficiente tiempo en él para haber asimilado más de una fracción de su contenido. También documentamos que los compradores rara vez acceden a otras fuentes de información

nuestros resultados dará como resultado una sobreestimación de la probabilidad de acceso al EULA.

sustitutas, como reseñas de productos de consumo o sitios de noticias relevantes, para conocer los términos del CLUF. Incluso bajo suposiciones generosas, es difícil imaginar que la probabilidad de que los EULA se lean y comprendan, crezca incluso hasta el 1%. Nuestras estimaciones del tamaño de la minoría informada en este mercado son uno o dos órdenes de magnitud más pequeños que los ejemplos ofrecidos en la literatura para el tamaño requerido para sostener un equilibrio minoritario informado.

Es posible que los compradores en el mercado de software en línea crean que otros factores disciplinarán a los vendedores en términos de los términos de EULA que ofrecen y, por lo tanto, decidan racionalmente no informarse y crear una minoría informada en este mercado. Aún así, el mercado que estudiamos ofrece el mejor escenario para buscar una minoría informada de compradores debido a los bajos costos de acceder a contratos y compras entre firmas y al surgimiento de firmas nuevas y desconocidas que aún tienen que establecer una reputación.

CONCLUSIONS

Si bien nuestros resultados se aplican directamente solo a un contexto de formulario estándar, el hecho de que la comparación de compras en línea sea tan barata y fácil plantea dudas sobre si los mecanismos de minorías informadas podrían tener consecuencias en contextos más generales donde la comparación de compras es más difícil y costosa. Además, si ese fuera el caso, un enfoque similar al nuestro debería resultar en niveles de lectores sustancialmente más altos de lo que observamos en nuestro entorno. Evaluar la presencia de otros factores que disciplinan a los vendedores en el mercado de software en línea, así como si los niveles de lectores son adecuados para respaldar el mecanismo de la minoría informada

en otros mercados, es una dirección prometedora para futuras investigaciones empíricas sobre la hipótesis de la minoría informada.

El escaso número de lectores de los términos del contrato, incluso para aquellos EULA donde los consumidores deben reconocer la lectura y estar de acuerdo con estos términos antes de comprar un producto y los términos son accesibles de manera prominente, sugiere que es el costo de leer y evaluar estos términos, más que el costo de encontrarlos, que desalienta a los consumidores. Una posible implicación de estos hallazgos es que la regulación que aspira a promover el surgimiento de una fracción informada de consumidores que posteriormente pueda afectar las condiciones ofrecidas por los vendedores puede ser demasiado ambiciosa. En particular, es probable que exigir una mayor divulgación de los términos del contrato en este entorno sea ineficaz; si el objetivo es alcanzable, será necesario que los términos del contrato sean más fáciles de leer, evaluar y comparar.

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