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Cortesía del estudiante fundador Dr. Alfredo Fuentes Roldán.

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QUITO, ECUADOR

2023

Centro de Publicaciones de la Pontificia Universidad Católica del Ecuador
Quito, Ecuador
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Declaración de Igualdad de Género

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

Gender equality declaration

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

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

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

Fratelli Tutti

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

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

Fratelli Tutti

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

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

Gustavo Calderón Schmidt, S.J
Provincial

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

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

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

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Responsabilidades

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

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

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

2) CONSEJO EDITORIAL

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

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Responsabilidades

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

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

Miembros Internacionales

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RESPONSABILIDADES DEL COMITÉ EDITORIAL Y DE LAS/LOS EVALUADORAS/ES Y/O EVALUADORAS/ES Y/O REVISORES/AS EXTERNAS/OS:

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

1. Rol de revisores/as o arbitraje

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

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

2. Conflicto de intereses

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

3. Confidencialidad

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

4. Retroalimentación

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

5. Modalidad de arbitraje

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

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

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

7. Competencia

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

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* Colaboradora principal de diseño y diagramación.

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

Antecedentes / estructura

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

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

Deberes y responsabilidades generales de los editores

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

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

2. Esforzarse para mejorar constantemente su revista;

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

4. Abogar por la libertad de expresión;

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

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

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

Las Mejores Prácticas para los editores incluirían las siguientes acciones:

- *Buscar activamente las opiniones de los autores, lectores, revisores y miembros del Consejo Editorial sobre cómo mejorar los procesos de la revista;*

- *Fomentar y conocer las investigaciones sobre la revisión por pares y publicar y reevaluar los procesos seguidos por la revista a la luz de estos nuevos hallazgos;*

- *Trabajar para persuadir al editor de la publicación para que proporcione los recursos apropiados, así como la orientación de expertos (por ejemplo, diseñadores, abogados);*

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

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

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

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

Relaciones con los lectores

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

Las Mejores Prácticas para los editores incluirían las siguientes acciones:

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

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

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

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

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

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

Relaciones con los autores

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

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

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

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

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

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

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

Las Mejores Prácticas para los editores incluirían las siguientes acciones:

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

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

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

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

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

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

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

Relaciones con los revisores

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

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

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

Las Mejores Prácticas para los editores incluirían las siguientes acciones:

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

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

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

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

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

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

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

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

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

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

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

EDITORIAL COMMITTEE

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EDITORIAL MANAGEMENT TEAM

RESPONSIBILITIES

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

a) The director/editor

b) The editorial coordinators

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

2) Editorial Board

Members

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Responsibilities

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

3) Editorial and External Evaluators Commitee:

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

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

1. Role of reviewers or arbitration

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

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

2. Conflict of interest

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

3. Confidentiality

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

4. Feedback

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

5. Arbitration modality

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

6. Responsibilities of the Editorial Committee and the External Evaluators

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

7. Competition

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

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COPE CODE OF CONDUCT AND BEST PRACTICES GUIDELINES FOR JOURNAL EDITORS

Background / structure

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

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

General duties and responsibilities of publishers

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

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

2. Strive to improve the journal continually;

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

4. Advocate for freedom of expression;

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

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

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

Best Practices for publishers would include the following actions:

- Actively seek the opinions of the authors, readers, reviewers and members of the Editorial Board on how to improve the journal processes;

- Promote and learn about research on peer review and publish and re-evaluate the processes followed by the journal in light of these new findings;

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

Relations with readers

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

Best Practices for publishers would include the following actions:

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

Relations with authors

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

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

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

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

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

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

Best Practices for publishers would include the following actions:

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

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

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

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

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

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

- Publish the delivery and acceptance dates of the articles.

Relations with reviewers

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

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

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

Best Practices for publishers would include the following actions:

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

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

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

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

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

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

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

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

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

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

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

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

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

AVISO LEGAL

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

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

CUOTA DE GÉNERO

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

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DESPEDIDA

Pese a su novel existencia temporal, la *Revista Facultad de Jurisprudencia* (RFJ) de la Pontificia Universidad Católica del Ecuador contribuye con la creación y difusión de conocimiento científico jurídico no solo a nivel nacional, sino muy especialmente, latinoamericano e internacional. En ella encuentran un espacio todas las áreas del Derecho, lo que le ha permitido un dinamismo que ya la caracteriza, marcado por su enfoque humanista, en total consonancia con la misión de la PUCE. Merece un reconocimiento el trabajo de su ex equipo editorial, que hasta la número doce se desarrolló bajo la guía de excelentes profesionales peruanos y colombianos. Este equipo que con constancia y rigurosidad brindó a la comunidad académica un producto de gran calidad. Este proceso de formación y consolidación, puede darse por cumplido con satisfacción para todos y todas aunque representa únicamente el inicio de un camino infinito, en el que día a día se va construyendo, colectivamente, el mejor de los futuros para este patrimonio de la PUCE. En ese sentido y como ahora ex integrante del Equipo Editorial nos despedimos y deseamos el mejor de los éxitos a quienes continuarán en la ardua labor editorial que la RFJ supone.

Dra. Catalina Salgado Ramírez, PhD
Docente Investigadora
Universidad Externado de Colombia

FAREWELL

Despite its novel temporary existence, the *Revista Facultad de Jurisprudencia* (RFJ) of the Pontifical Catholic University of Ecuador contributes to the creation and dissemination of legal scientific knowledge not only at the national level but especially at the Latin American and international levels. In it, all areas of Law find a space, which has allowed it a dynamism that already characterizes it, marked by its humanistic approach, according to PUCE´s mission and vision. The work of its former editorial team deserves recognition, which up to number twelve was developed under the guidance of excellent Peruvian and Colombian professionals. This team that with perseverance and rigor provided the academic community with a high-quality product. This process of formation and consolidation can be considered fulfilled with satisfaction for everyone. However, it represents only the beginning of an infinite path, in which day by day the best future for this heritage of the PUCE is being collectively built. Moreover, and as now former members of the Editorial Team, we say goodbye and wish the best of success to those who will continue in the hard editorial work that the RFJ entails.

Dr. Catalina Salgado Ramírez, PhD
Docente Investigadora
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EDITORIAL INTERNACIONAL

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

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

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

Por otra parte, desde su existencia, la RFJ ha aportado estudios de alto valor agregado como el análisis necesario a los aportes que ha hecho la Corte Suprema de Estados Unidos al estado actual de los derechos de la mujer y de su participación en las altas cortes. Esto cobra especial relevancia en este momen-

to al retomar las discusiones de la jueza Ruth Bader Ginsburg quien fue un artífice de los derechos de género en el tribunal estadounidense. En ese sentido, la RFJ y su equipo demuestra su abierto análisis sobre la incidencia directa que han tenido las luchas civiles sobre la construcción de las garantías y libertades individuales en Ecuador y América Latina.

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

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

Tatiana Dangond Aguancha

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

INTERNATIONAL EDITORIAL

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

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

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

On the other hand, since its existence, the RFJ has contributed studies of high added value, such as the necessary analysis of the contributions made by the Supreme Court of the United States to the current state of women's rights and their

participation in the high courts. This takes on special relevance currently by revisiting the discussions of Justice Ruth Bader Ginsburg who was an architect of gender rights in the U.S. court. In this sense, the RFJ and her team demonstrate their open analysis of the direct incidence that civil struggles have had on the construction of guarantees and individual liberties in Ecuador and Latin America.

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

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

Tatiana Dangond Aguancha

Lawyer from Universidad del Rosario de Colombia
Human Rights and Humanitarian International Rights specialist from Universidad Externado de Colombia.
Tirant Lo Blanch Colombia

EDITORIAL

La Revista Facultad de Jurisprudencia de la Pontificia Universidad Católica del Ecuador (RFJ), es una publicación científica continua y semestral (Enero-Junio) (Julio-Diciembre) patrocinada por el Centro de Publicaciones y bajo el auspicio de la Dirección de Investigación de la Universidad. La modalidad de publicación continua cierra el 30 de junio y el 31 de diciembre de cada año. Su énfasis es el ámbito de lo jurídico y su relación con otras disciplinas, saberes y ciencias. Puede utilizar el sistema de "especiales temáticos" en cualquiera de sus convocatorias.

Es una publicación dedicada al análisis crítico de la problemática nacional e internacional del Derecho en todas sus áreas. Incluye artículos de científico-jurídicos, revisiones, análisis de actualidad, investigaciones, recensiones de libros, notas de investigación, notas de revisión, informes, miscelánea y traducciones originales. La propuesta editorial de la RFJ se encuentra en el marco de la misión de la Pontificia Universidad Católica del Ecuador - PUCE, y busca contribuir de un modo riguroso y crítico, a la tutela y desarrollo del Estado de Derecho, la dignidad humana y de la herencia cultural, mediante la investigación, la docencia y los diversos servicios ofrecidos a las comunidades locales, nacionales e internacionales.

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

Dr. Rubén Carlos Braulio Méndez Reátegui, PhD - DSc

Director

EDITORIAL

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

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

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

Dr. Rubén Carlos Braulio Méndez Reátegui, PhD - DSc

Director

A la Pontificia Universidad Católica del Ecuador

AGRADECIMIENTO Y PRESENTACIÓN

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

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

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

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

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

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

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

ARTÍCULOS

JOURNAL SUMMARY

DOI 10.26807/rfj.vi.465

Settlements v. Judgements: A Prospect Theory Analysis

Acuerdos versus sentencias: Un análisis de la teoría prospectiva

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City: Buenos Aires
Country: Argentina

Original Article (research note)
RFJ, No. 13, 2023, pp. 73 - 88, ISSN 2588-0837

ABSTRACT: When the Rational Choice model reveals itself insufficient to explain why parties in judicialized Labor disputes in the Provincia de Buenos Aires prefer to settle over waiting for a final decision, the Prospect Theory provides a sound explanation: as Labor Law and Procedural Rules become applicable, they produce a visible cost-shift to the employer, so parties expect judges to decide in favor of the workers. In this scenario, the employer's perception of what is to be considered a cost and a benefit become altered, incentivizing her risk-aversion and leading her to bargain settlements that she wouldn't even consider otherwise.

KEYWORDS: Labor Law; Labor Procedure; Settlements and Decisions; Prospect Theory; Cost-Benefit Analysis.

RESUMEN: Cuando el modelo de Decisión Racional resulta insuficiente para explicar por qué las partes de un conflicto laboral judicializado en la Provincia de Buenos Aires prefieren acordar antes que esperar una decisión judicial, la Prospect Theory nos brinda una buena explicación: cuando las leyes

laborales y las normas procesales laborales resultan aplicables, se produce una traslación de costos hacia el empleador, por lo cual las partes esperan que los jueces resuelvan favoreciendo a los trabajadores. En este escenario, la percepción del empleador acerca de qué debe considerar como costo y como beneficio se ve alterada, incentivando su aversión al riesgo y llevándolo a negociar acuerdos que, de otro modo, no hubiera considerado.

PALABRAS CLAVE: Derecho del Trabajo; Derecho Procesal del Trabajo; Acuerdos y Sentencias; Prospect Theory; Análisis Costo-Beneficio.

JEL CODE: J23, J81.

INTRODUCTION

In 2014, the Suprema Corte de Justicia de la Provincia de Buenos Aires' decided to propose a change in Labor Procedural Rules. Their decision was based solely on the Justices´ perception of a problem: parties decide to settle their disputes 80% of the time. As they expressed, their concern was that a decision such as that could only have the explanation that Labor judges are lazy.

The Justices assumed that those who go to Court to end their conflict do so because they couldn't settle it before. For this reason, it troubled them that, once the courts intervened, both parties preferred a settlement, which seemed irrational in their view. For this, it was self-evident that the courts´ intervention was the cause for this sudden change in parties' revealed preferences before filing the lawsuit. For this reason, Suprema Corte's argument seemed irrefutable: the intervention of the Judiciary caused the preferences' change.

First, we compared the most laborious courts' statistical data - in this case, those that issue more judgments than others - with the average. Not shockingly, the *workaholic* courts kept a very similar proportion of a 75% preference for a settlement. If the Supreme Court hypothesis was any helpful at all, it could only explain some odd marginal cases but not the sheer preference. There was another explanation.

Both parties of the employment relationship know, at least superficially, their fundamental rights, duties, and obligations arising from its celebration, its execution, and its termination. Although that knowledge may be imperfect, both employer and employee are somehow aware of what they can expect from labor legislation. Thus, with well-defined property rights and low transaction costs, both parties can bargain a solution that would lead to the most efficient resource allocation[1] when a conflict strikes. But when bargaining is impossible or unproductive, the Labor courts' intervention introduces two new variables: litigation costs' particular distributive scheme, and a fair deal of uncertainty about how the judges will decide.

As we will show, this distributive pattern transfers litigation costs to the employer, leading to a societal perception that workers always win, and employers always lose in Labor courts. This belief shows that the initial uncertainty about what the judges will do is not that strong after all.

Considering all these elements, the classical rational decision model proved insufficient to explain the cause of these changing preferences. Aware of the classical model's limitations when analyzing flesh and blood human beings' behavior and

1 I'm referring to informal agreements since judicial or administrative intervention curtails the parties' bargaining power because it requires courts to analyze if the settlement is a fair deal.

accounting for empirical evidence, we considered a different variable: the likelihood that this scheme not only affects costs but also creates a framing effect on both parties, which alters their perception of what they consider as a gain and a loss.

With the last statement in mind, we inquired if the belief that judges favor workers and disfavor employers may be one of the reasons why the parties prefer to settle 80% of the time. Our focus addresses wrongful termination disputes since the motivations to settle may differ[2] in worker's compensation conflicts.

We start by briefly explaining the classical rational choice model's limitations in this regard. Then, we show how the substantive and adjective rules alter the procedural costs' distribution scheme, which creates the belief that the judges favor workers and disfavor employers. Finally, applying Behavioral Economics' add-ons, we explain the conclusion.

1. RATIONAL CHOICE MODEL

It is still surprising how the Law, so closely linked to behavior, lacks models to analyze how legal norms influence it. If we were to determine from the Legal Science what leads the inhabitants of any State to comply or not as the norms provide, we would soon realize that we don't have suitable tools for this essential kind of work. On the other hand, Economic Science has models that predict and explain how changes in the relative prices of products produce changes in suppliers' and buyers' behavior. Based on their assumed rationality, which leads them

2 In the case of legal and judicially assessed obligations, there are no rational reasons to deviate from the legal formula once the parties have the necessary parameters to calculate the benefits - salary, degree of disability, and age of the worker at the time of the claim or the first disabling manifestation -.

to try to obtain the best result or benefit from their actions, one of those models is the ancient Homo Economicus, today known as the Rational Choice model.

If we simplify any legal system, we can argue that it ties punishments and rewards to certain behaviors. Furthermore, we can consider these punishments as prices and these rewards as benefits. For this reason, if we assume that laws produce changes in human action´s relative prices and benefits associated with them, we will find how logical it is to apply economic reasoning to legal questions. This is what Ronald Coase and Guido Calabresi had in mind while elaborating the seminal works of the Economic Analysis of Law.

Many academics addressed the question of why people sue or settle using Economics tools. As a matter of fact, and despite being almost 40 years old, any scholar – including me – addressing questions like the one presented here appeals to the model that Steve Shavell (1982) developed in "*Suit, Settlement, and Trial: A theoretical Analysis under alternative Methods for the Allocation of Legal Costs*". In his work, *Shavell* used a basic sequential game, according to which, when faced with a conflict, the parties make the following decisions: a) the plaintiff to *sue*, or *not to sue* (case in which the conflict ends); b) the defendant to *settle* (actually, proposes an agreement because the model assumes that the plaintiff will accept it), or *not to settle* (in which case the procedure continues until the court issues a final judgment).

The Rational Choice model uses a simple Cost-Benefit Analysis to predict both decisions: a) when expected costs of litigation outstand its expected benefits, the plaintiff does not judicialize the conflict; otherwise, the plaintiff sues; b)

when expected costs of a trial outstand the expected costs of a settlement, the defendant proposes a settlement; otherwise, the defendant waits for a final decision.

As Shavell (2004, p. 401) explained, a conflict is settled when both parties formed the same beliefs about what the trial outcome could be, which looks somehow self-explaining. But, taking this argument from the Rational Choice perspective, if both expected the same outcome, why would they go to trial in the first place? Why did not the parties settle the conflict before when it was cheaper? Pushing this argument, a little further, if both parties decided to judicialize their conflict, is because, at least initially, they did not have the same belief about the outcome. Then, their belief changed as soon as they got to court, and in this regard, the Rational Choice Model proves useless to answer why.

But we know that as soon as they judicialize the conflict Labor Law and Labor Procedure rules come into play.

2. DESIGNING A REGULATORY REGIME

When designing a regulatory regime, lawmakers must choose between a default set of rules or an imperative set of rules. Argentinian lawmakers considered that imperative rules were the most suitable design to regulate labor relations. They assumed that the employer's market power would influence the bargain, harming the worker´s rights. For this reason, Argentinian Labor laws are imperative, exhaustive, and noticeably worker protective.

Due to the protectionist tinge imposed by article 14 bis of the Constitution, Argentine labor legislation considers the worker very differently from the employer, up to the point

that the Federal Supreme Court of Justice has defined him as a *subject of preferential constitutional protection*.

Substantive labor legislation is built on this tutelary ideal, translated into a protective principle, which constitutes its conceptual framework. This principle turns operational through a set of tools, consisting of rules of interpretation in cases of controversy that can arise during the bargaining, execution, and termination of the employment contract, as well as during a judicial procedure. Within this set of tools, the rule of the most beneficial condition, the regime of irrevocability of labor rights[3], the rule of doubt - in its two meanings -, and the procedural benefit of poverty[4] arise. For this reason, the protective imprint of the substantive legislation inevitably extends to judicial processes.

From this set of rules, it turns out that, ultimately, the cost of Buenos Aire's labor judicial process is transferred, in the first instance, to the employer and, in the second instance, to the society.

Accordingly, the worker can obtain all the benefits of litigation and impose all its costs on third parties. As so, he has every incentive to prosecute any claim, even the ones with a negative expected value, as an *ex-ante*, he is indifferent about the outcome.

3 Related to the former, the irrevocability of rights and substitution of contractual clauses limits the parties' freedom of bargaining to agreements that exceed the minimum rights provided by legislation or collective agreements. If parties break the floor, those clauses are automatically replaced by the former.

4 To guarantee the exercise of the worker's rights, federal Labor legislation grants the worker and its heirs a benefit of gratuity in judicial and administrative processes. In turn, the Provincia de Buenos Aires procedural rules grant a broader benefit, generally called - to distinguish it from that - of poverty. In the case the worker loses, the employer must pay all experts´ and his own lawyers´ fees.

As can be seen, the main characteristic of the legislation applicable to the Labor judicial procedures reduces the cost for the worker of proving the controversial facts, assigning probative value to some manifestations or omissions, and forces judges to provide a favorable interpretation of the claims made by the employees. But this reduction in the cost of proving is only possible because, on the contrary, that same legislation increases the probative cost of the employer.

The worker files a lawsuit with a substantial advantage over his employer: his day in court is guaranteed even when he does not have the economic means to bear the cost, and he can enforce legal contractual clauses for his benefit even when they were different from those agreed upon and will have a favorable interpretation of his claim even in the existence of reasonable doubt, and the employer would not be able to defend himself presenting agreements or waivers of rights as evidence. No doubt he feels like a "winner."

For this reason, the ones that must pay feel that, at least in his case, Justice has failed: even in the case of acquittal, the sense of injustice overwhelms the employer, because he will also have to pay the fees of the experts and lawyers who represented him in the unjustified process. These situations help build that belief, which has become a quasi-certainty, that employers lose in all lawsuits, regardless of the fairness or unfairness of the worker's claim.

But that's not all.

3. RATIONAL CHOICE MODEL FAILURE

We pointed out before that, although generally useful to predict and explain behavior, the Rational Choice model

fails to predict and explain it in this situation. I must say now that human rationality is quite distant from the unmistakable logic of the Vulcan Mr. Spock, whom the model seems to replicate. We, humans, act many times in ways that the model will consider *irrational*. But many of these *irrational* behaviors are reproduced in most of us, and as such, they cannot be attributed to mere failures in the logic of a given John or a Mabel. Hundreds of studies have shown regular people like you, and we act with our rationality, will, and self-interest limited by heuristics and biases that affect our decisions. Through the heuristic procedure, our mind develops solutions to questions using mental shortcuts, consciously or unconsciously based on the information it has, answers that may or may not be correct. The latter constitute cognitive biases.

Then, heuristics and biases affect rationality and, therefore, the behavior that the Homo Economicus model associates with it. In this way, we humans decide in ways that the Rational Choice model cannot explain. Hence the need to use a different one that considers its impact on human behavior. This is the realm of Behavioral Economics.

Insofar as it applies to legal issues, Behavioral Economics departs from the hypothetical behavior of the ideal model and looks up to one of real human behavior.

One of these models called the Prospect Theory[5], is helpful to explain the parties´ irrational change of perception about the outcome of their dispute.

One scenario plagued with inconsistencies between natural man´s behavior and the ideal model´s predictions is one of the decisions under uncertainty or risk. This is related to the

5 Developed by Daniel Kahneman and Amos Tversky.

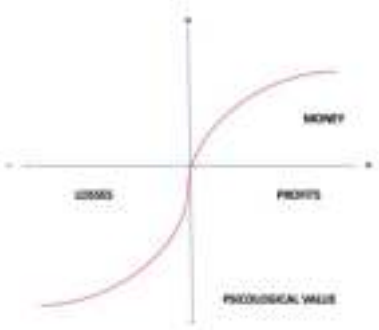
ability to make decisions that maximize utility, according to the Swiss mathematician Daniel Bernoulli´s expected utility model.

Kahneman and Tversky published 1979 a study in the *Econometric Magazine* called "*Prospect Theory: An Analysis of Decision Under Risk*." They proposed a low-risk decision-making model, an alternative to Bernoulli´s.

In their theory, the authors explain that the certainty effect influences subjects' decisions in situations that offer them a high probability of obtaining profits - exploiting their aversion to risk - And, on the contrary, the reflection effect influences the ones of those who face situations of a high probability of suffering losses - exploiting their attraction or love for risk -. This theory assumes that the discomfort that results from a loss is more significant than the well-being obtained from a gain, contradicting the traditional idea about the equivalence of values of profits and losses. On the other hand, there is a framing effect, which occurs individually and sets a different reference point or status quo from which every person evaluates their alternatives.

In theory, the expected utility has a concave function in the upper right quadrant (profit area) and a convex function in the lower left quadrant (loss area). This characteristic is usually represented as follows:

Figure 1: Prospect Theory



Own Elaboration

We stated before that from the Rational Choice Perspective, a settlement is possible when both parties to a conflict form the same beliefs about what the trial outcome could be. But the mere existence of a judicial procedure - even with Labor Law and Labor Procedure Law's cost-shifting scheme -, is self-evident that parties do not evaluate the outcome in the same way.

Applying the Prospect Theory, the result seems to be the same: being a zero-sum game whereby one of the parties is a winner to the same extent as the other is a loser, an agreement between them seems impossible since the defendant presumably will prefer to assume the risk of an eventual conviction to the certainty of a loss that settlement will produce. Are we missing anything? The extent of Labor Law and Labor Procedure's rules influence the reference point.

It is logical to assume that the setting, the legal norms, the degree of wealth, and even emotions constantly alter the status quo. In this regard, references tend to be shifted, altering the frame. In fact, in both collaborative and non-collaborative

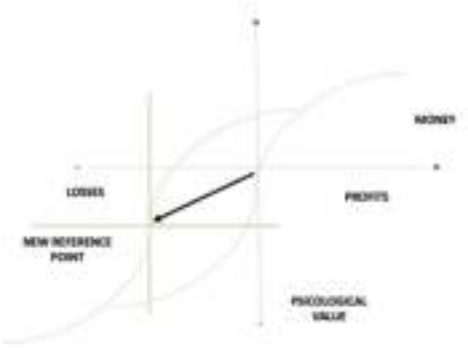
situations, it is easy to figure out that each party starts from a different status quo.

From this perspective, the concepts of what is a loss and what is a profit become blurry. So, we need to analyze them relative to the new reference points the Labor legislation created for both parties.

Returning to the hypothesis for a moment: the labor legislation, insofar as it transfers costs towards the employer, creates the perception that he will lose no matter what because he will be forced to pay at least all the expenses.

This shift of costs towards the employer produces an undoubted displacement of its reference point towards the area of losses and creates a new framework. Thus, a sued employer is likely to view as profit any sum that he can save from what he expects to close in the lawsuit. Hence, since it represents less than what he expects to pay if convicted, it feels like profit from his new reference point. Now, his risk aversion gets a hold and forces him to propose a settlement.

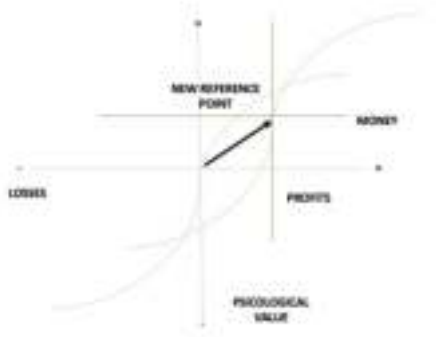
Figure 2: Labor legislation



Own Elaboration

But the belief affects the worker too: being in a situation of the near certainty of success, affected by an endowment effect, and influenced by his risk aversion, he will most likely agree to the proposed agreement.

Figure 3: New reference point



Own Elaboration

Later, parties are more likely to agree because, according to the individual reference points Labor Law created for them, and because of their increased risk aversion, they both perceive the settlement as a gain.

CONCLUSIONS

Throughout this work, we have analyzed the reasons that lead the parties to a judicial process to prefer to settle rather than wait for a court decision. For this, I decided to ignore the consideration of the Suprema Corte that judges' laziness produces this phenomenon.

Using Prospective Theory, we found an explanation. Although it has been handy to explain human behavior, the classical model of rational decision has presented some shortcomings. For this reason, without abandoning it altogether,

sometimes it is necessary to twist it to replicate actual human behavior.

The theory developed by Kahneman and Tversky has proven to be a helpful tool for analyzing human behavior. But it is common to overlook the influence that some external factors - such as legislation - can have on the parties' status quo.

Finding an explanation for seemingly irrational behavior can be tricky. A hasty conclusion about its origin can lead to wrong decisions or actions. In this case, it was proven that the legislation and not the judges - as the Buenos Aires Supreme Court held - cause this behavior. Then the Supreme Court, prey to its own biases, proposed changes in the legislation to force judges to step away from their laziness. Guess what? No changes were made to the set of tools that cause this abnormal situation. My prognosis is not good: if things change, they will change for the worse.

Being impatient, not giving the situation second thought, and looking for culprits, the Supreme Court could not see that the only real problem was its hasty conclusion.

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Market Failures and Economic Regulation

Las Fallas de Mercado y la Regulación Económica

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ABSTRACT: A country's economic dream is to build ideal markets where suppliers and demanders honestly and efficiently meet their needs with fair and balanced prices.

However, in reality, these types of markets are almost nil, since, with the existence of Information asymmetries, the perspective changes and from ideal markets, it changes to markets with failures, since when there are gaps in data, figures, and others, the participants in these markets do not synchronize with their parts. Consequently, there is no perfection in their transactions, and therefore, their activity and performance would not reach the most convenient standards in the commercialization of their goods or services since their decisions will not be the most optimal. With market failures, the State, through its control bodies, creates market rules and applies regulatory norms to appeal to any type of failure committed in the market.

KEYWORDS: Legal system, economic theory, market failure, regulation.

RESUMEN: El sueño económico de un país, es lograr construir mercados ideales, donde los oferentes y demandantes de manera honesta y eficiente satisfagan sus necesidades con precios justos y equilibrados, sin embargo, la realidad de cumplir con este tipo de mercado ideal es muy difícil, ya que con la existencia de simetrías de información, la perspectiva sobre los mercados ideales cambia dando como resultado a los mercados con fallas, por la presencia de datos vacíos, cifras alteradas, entre otros, los partícipes de estos mercados no sincronizan con sus partes y como secuela de esto no existe perfección en sus transacciones y por ende su actividad y desempeño no alcanzaría los estándares más convenientes en la comercialización de sus bienes o servicios ya que sus decisiones no serán las "óptimas". Con la existencia de fallas en los mercados, el Estado por medio de sus órganos de control crea reglas de mercado y aplica normas regulatorias, para aplacar cualquier tipo de falla que se sete cometiendo en el mercado.

PALABRAS CLAVE: Sistema jurídico, teoría económica, fallos del mercado, regulación.

JEL CODE: K, K0

INTRODUCTION

As a theoretical approach to building models aimed at facilitating analysis and economic governance, abstractions have been proposed to capture the main characteristics of social scenarios to contribute to the process of "social optimization". This type of engineering and social constructivism exercise, for example, can be used to evaluate specific moments such as *commercial* and *economic exchange* and, in a critical sense, to reflect on how to make them happen as efficiently as possible. It can lead to the study of the optimal allocation of resources, inspired by the objective of satisfying human needs and contribute to the theoretical construction of an ideal market, where supply and demand are "proportional", and no waste is generated.

Furthermore, reflecting on this ideal market lucubration will imply that the information necessary to carry out economic exchanges is freely accessible. In other words, there should be no exclusion, to the extent that both the consumer and the producer "possess" the exact quantities and possibilities of acquiring or sharing information and that the market process itself is responsible for self-regulation to reach what is known as the "equilibrium price".

However, all these characterizations and assertions of a perfect context of exchange or price system, without defects, are based on ideas that could also be considered unrealistic. Therefore, in the following lines, we will allude to other concepts

such as the failures in the market (market failures) and ideas that inform the recipe book of regulations or state intervention either of a reactive type, proactive or interventionist.

It aims to promote "good practices" and a suitable environment for socio-economic interaction and the generation of incentives or disincentives for market agents in a dynamic context of permanent change and adjustment.

1. MARKET FAILURES AND ECONOMIC REGULATION

When referring to the market, it is necessary to explain the relationship between law and economics and how these disciplines influence the market and its dynamics. When referring to the law, understood as a mechanism that generates agreements, compliance and coercive mandates within a given territory. It alludes to the fact that it also manifests itself through negotiation, processes of conflict resolution generated by some conflict of interests (public or private). Among the participating economic agents, whether in the purchase or sale of a good or service, the law is primarily based on the premise of self-composition (collaborative and cooperative alternative) and heater composition ("confronted" agents who were unable to reach an agreement among themselves).

Concerning "economic law" or "market law", its scope lies in the use of the understanding of the mechanisms of the facts to promote economic activity, and in turn also as a control entity, regulating activities of consumption, distribution, planning, creation, among others, of the wealth existing in society.

On the other hand, an example of the relationship between law and economics is what happens with market failures, which cause the market not to function optimally and,

consequently, give rise to the introduction of "regulations" to prevent significant adverse effects. In short, law and economics are two indispensable sciences in managing the market, which is visibly linked to each other, maintaining a solid interaction.

Proof of this can be found in the Constitution of the Republic of Ecuador in the section referring to economic exchanges and fair trade, which establishes the role of the State in commercial activities:

> Art. 335.- The State shall regulate, control and intervene, when necessary, in economic exchanges and transactions; and shall sanction exploitation, usury, hoarding, simulation, speculative intermediation of goods and services, as well as any form of prejudice to economic rights and public and collective goods.
>
> The State will define a pricing policy to protect national production and establish sanction mechanisms to prevent any private monopoly or oligopoly practice or abuse of market dominance and other unfair competition practices. (CRE, 2008, art. 335)

Furthermore, the economic activity of a market is closely subject to the correct performance of all the economic actors involved in commercial transactions. However, when these actors are not efficient or honest or do not have precise information, the consequences will be negative and will influence the costs of transferring ownership of a good or service.

Therefore, the so-called "market failures" or lack of harmony among market agents or economic operators affect their ability to achieve profits and prevent the "level playing field" understood as an implicit circumstance that falls on them.

In addition, it introduces disincentives and even uncertainty, potentially violating the (property) rights of those who act following the parameters established in the legal system.

Based on the above, market failures are usually defined as "situations in which the market fails to achieve efficiency because the individual behaviour of each person trying to maximize his or her benefits than the assumption of the best outcome in social terms" (Vidaurre, 2020).

2. CHARACTERIZING THE MARKET

Article 5 of the Organic Law for the Regulation and Control of Market Power (LORCPM) provides that the determination of the market will consider the particular characteristics of the sellers and buyers participating in such a market. Competitors in a market must be comparable, for which purpose the characteristics of the sales area, the set of goods offered, the type of intermediation, and the differentiation with other distribution or sales channels of the same product will be considered. (LORCPM, 2011). This "normative" and legal economic consideration forces us to bring up the following topics.

2.1 Market Structure

"An organized and established market directly influences the behaviour of its economic agents, who will determine the price and quantity of goods or services that will be traded." (Westreicher, 2019). This structure comprises four fundamental elements: supply, demand, price and marketing of a product.

Supply. - It is defined as "the set of offers made in the market for goods and services for sale. The supply curve

captures the location of the points corresponding to the quantities offered of a particular good or service at different prices." (Marshall, 2017)

The purpose of supply in a market is to make goods or services available in a given period and at a price established by the economic environment. The competition between different suppliers in the same territory must occur in an environment of free participation. The only determining factor for consumers to choose one or another supplier is fair treatment, represented by a fair price, unbeatable quality, and optimum service.

Demand. - It is the overall market value that expresses consumers' purchasing intentions. The demand curve shows the quantity of a specific good that consumers or society are willing to buy to function the price of the good and disposable income. (Marshall, 2017)

For Laura Fisher de la Vega (2011), demand is "the quantity of a product consumers are willing to buy at the market price". In addition:

> The prices of goods or services in the market depend directly on the demand variants, i.e. the higher the consumption, the higher the production and therefore the higher the economic performance. On the contrary, the lower the consumption, the lower the production and the lower the profit. (n. p.)

Price. - It is defined as "the quantitative estimate that is made on a product and that, translated into monetary units, expresses the consumer's acceptance or not of the set of attributes of said product, based on its capacity to satisfy needs" (Muniz, 2021).

On the other hand, Raquel Valera (2019) makes some remarks regarding price:

> It determines the cost that a product or service has in the market so that in order to consume such goods and services, it will be necessary to pay that selling price and determine the prices of products or services destined to the market for its commercialization. Several factors must be taken into account. Among these, we have the cost of production, fixed costs, variable costs and profit percentages. (n. p.)

When the customer buys a product in the market, the product's price already includes all the costs and benefits invested in its production, thus being called the selling price. The price of a good or service for manufacturers or producers is a decisive factor for decision making focused on their income since raising the price of a given product will generate dividends, but the demand will fall. Otherwise, by lowering the price of a good, its demand will grow and its benefits in the same way. In economies in crisis almost constantly and insignificant percentage, the sales tend to fall, and therefore the price is an important variable that will be defined according to the parameters established in each company.

Graph No. 1: Factors influencing price fixing

Source: Gonzales (2014, n. p.)

Own Elaboration

As shown in Graph No. 1, the prices set for a given good or service depend directly on the company's internal and external activities to position its product in the market with high-quality standards to generate demand thus obtain higher profits.

2.2. On the marketing of a product

A given good or service marketing is regulated by a chain of activities that facilitate its movement from the manufacturer to the customer, including a series of adjustments directly linked to promotion, diffusion, distribution, product projection, mobilization, and storage. "The marketing of a product or service focuses on marketing, which consists of putting a product on sale, giving it the necessary commercial conditions for its sale and providing it with the distribution channels to reach the final public" (Caurin, 2018, n. p.).

> Every company dedicated to the commercialization of its products or services in a market must have clear and objective strategies for the best use of the opportunities presented for sale, thus managing a series of approaches whose challenges are palpable at the time of the adaptation of a good or service in the market and whose durability is protected by innovative methodologies. (Muñiz, 2021, n. p.)

Finally, one of the essential objectives to develop high-level commercialization in commercial companies lies essentially in the human talent since it depends on this that the commercial department contributes with ideas, strategies, possible solutions to problems presented, and many skills so that the good or service is placed in competitive standards and thus continue with the commercialization chain.

2.3. On Market definition

The market is defined as "places where there are, on the one hand, sellers who offer their goods in exchange for money and, on the other hand, buyers who contribute their money to obtain those goods. There is, therefore, a supply and a demand. What is paid is the price" (Sampedro, 2020, n. p.).

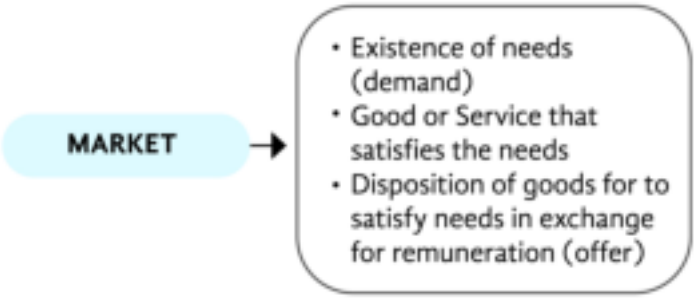
According to the Royal Spanish Academy Dictionary, the market is defined as a set of activities carried out freely by economic agents without the public authorities' intervention.

From the perspective of economics, the market is "the place where suppliers and demanders meet, and it is there where the prices of goods and services are determined through the behaviour of supply and demand" (Fisher, 2011, p. 58).

On the other hand, it is considered that "The purpose of the market study is to determine the number of goods and services coming from the new production unit that, under certain conditions of price and quantity, the community would be willing to acquire to satisfy its needs" (Miranda, 2012, n. p.).

The market (see Graph No. 2) comprises two consumers: actual consumers, who buy your products or services regularly, and potential consumers who could probably be interested in an offer.

Graph No. 2: The Market



Source: Fisher (2011, n. p.).

Own Elaboration

A market originates when there is a need or lack of a good or service, and it is here where the capacity of producers to offer suitable products that comply with the characteristics established according to the consumption habits of the demand and with accessible prices intervenes. Thus, fulfilling a harmonic satisfaction between beneficiaries and suppliers, it is worth mentioning that the clients' acquisition is exclusively for their consumption and not commercialising them.

The indicator that positions a market to be competitive against its adversaries is to externalize information records, which will be the key for the actors involved in the commercial negotiations of goods or services. Then, making clear and concise decisions with optimal marketing strategies, allowing them to position themselves with high-quality standards and whose effort is reflected in their economic environment.

The main objective in a market economy is to achieve the highest levels of performance, but when this for some reason presents shortcomings, it is said that there are market failures.

From the point of view of the typical customer, the markets are distributed in four essential groups. The first is related to the demand market and is nothing more than obtaining the good or service intended solely for personal consumption. A second concerns the supply or producer market, which is the one that transforms the raw materials to obtain the final product and can market it. The third is related to the reseller market, which acquires the good through a sale from the initial producer and resells it at higher costs, obtaining a profit; and the last refers to the state market, which is responsible for acquiring goods to provide services to its government departments and for works in the community (Fisher, 2011).

Economic science, through the construction of models, has made it possible to differentiate between two types of market: the perfect market, which is the utopian construction of an exchange space that has reached maximum efficiency, and the real market, which is the actual and practical situation of economic exchanges.

2.4 Market typologies

a. Idealized or perfect market

The idealized market is:

> Where no participant can individually influence prices or quantities, it is also assumed that everyone is fully informed of what is offered or demanded at available prices. Under these conditions, any buyer can choose with certainty what suits him best and at the best price available. Therefore, it is claimed that the consumer is the king of the situation and that the market gives him the freedom of choice. (Sampedro, 2020, n. p.)

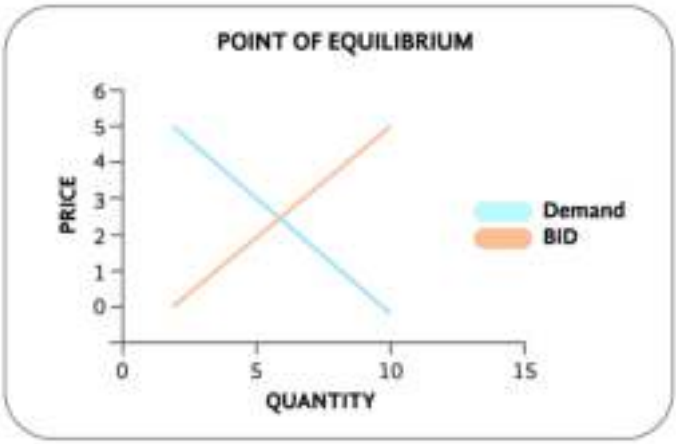
For Gregory Mankiw (2012), author of the book "Principles of Economics", a market is "a group of buyers and sellers of a given good or service. The buyers jointly determine the demand for the product, and the sellers" (n. p.).

The fact that there is perfect competition means that each competitor does not have power in the market, i.e. does not influence the optimal functioning of the market (Durán, Quirós & Rojas, 2009).

It is a market where suppliers and demanders share clear and essential information, so that the transfer of ownership of a good is homogeneous, producing an economic scenario, without overpricing, with free competition, with similar products, with no barriers to entry and exit, without unfair competition, with similar conditions for potential competitors and thus, promoting an ideal balance between all the actors involved in this marketing process.

In other words, it is a place where everyone can access in the same way and the same amount of information, which will facilitate the making of reasoned decisions, and this means that those who want to produce a good and those who want to acquire it have access to the data, which consequently will allow them to interact in the market. On the other hand, the ideal market is a space that regulates itself, i.e. the quantity of the product demanded and the product offered to reach a certain point of exchange, known as the equilibrium price, without the intervention of any factor that alters this result.

Graph No. 3: Idealized market - the break-even point



Own Elaboration

As shown in Graph No. 3, the quantity demanded coincides with the quantity supplied of the same good or service, generating the equilibrium point or equilibrium price, which (as mentioned above) results from the self-regulation of the perfect market.

b. Real Market

> It comprises a group of people who need a good or service, who possess the necessary financial means to cover it and are interested in acquiring it. The primary objective of the real market has always been the exchange of goods at a realistic market price, determined by the combination of supply and demand. (García, 2014, n. p.)

Based on this, the real market is understood as space where situations do not happen as ideally planned due to many factors known as market failures. One of them is that there is much hidden information. In addition, it is noted that not everyone has the same access to information and that people do not process it in the same way. Therefore, producers and consumers are not usually in a position of the equality of conditions, but someone will always know more than others. This means that there cannot be parity between demand and supply, thus generating an imbalance that does not reach an equilibrium price, as in the ideal market.

This situation triggers phenomena such as waste or scarcity. In the first case, there is more supply than is consumed, and there is excess production, and in the second case, supply does not meet demand, so there are unsatisfied needs. This is why the real market is not self-regulating; it needs the intervention of a regulating entity to operate in the best possible way.

Graph No. 4: Market Failures - Actual Market

Own Elaboration

Graph No. 4 shows that the lack of information directly affects the demand with products or services that are scarce for use and the supply with excess production, causing waste in their sales and directly generating an impact on the price, clearly detecting a market with failures.

Segmentation of a real market. "Market segmentation is a process by which a group of homogeneous buyers is identified, i.e., the market is divided into several segments according to the different purchasing desires and requirements of consumers" (Fisher, 2011, p. 61).

The need to segment a market lies in classifying consumers according to their consumption preferences, and with these guidelines, manufacturers will be able to target consumers by facilitating transparent and strategic processes safely. Proper market segmentation requires effective measures to match goods and services perfectly to the needs of each individual.

c. Types of market segmentation

There are four types of segmentation in the market, and these are:

I. Geographic segmentation divides the market into geographic units, such as nations, states, regions, provinces, cities or neighbourhoods that influence consumers. The company can operate in one or several areas; it can also operate in all of them, but paying attention to local variations. In that way, it can adjust marketing programs to the needs and desires of local groups of customers in trade areas, neighbourhoods, and even individual stores. (Kotler & Lane Keller, 2012, p. 214)

II. Behavioural market segmentation is one of the leading market division techniques. These four market segmentation techniques represent the fundamental tools to support a good marketing and communication plan in distributing products and services. (Argudo, 2017)

III. In demographic segmentation, the market is divided by age, family size, family life cycle, gender, income, occupation, education level, religion, race, generation, nationality and social class. One of the reasons why demographic variables are so popular among marketers is that they are often associated with consumer needs and wants. (Kotler & Lane Keller, 2012, p. 216)

IV. Psychographic segmentation is effective, and when associated with other segmentation criteria (geographic, behavioural, demographic, among others), it becomes an essential tool for the correct adaptation of the marketing mix (price, place, promotion and product) to the target audience, i.e., it allows the company to position its product more coherently in the market. (Ciribeli & Miquelito, 2015).

c. Imperfect competition

It is a market situation in which sellers or companies competing in the market have some control over price because they offer differentiated products and limit supply. In addition, there is incomplete market information and emotional buying behaviour in this type of market, so companies use the promotion to inform, persuade or remind their target market of the characteristics and benefits of their products (Thompson, 2005).

This phenomenon produces:

a) Low degree of concentration of companies: The number of companies that form this type of market is reduced, contrary to what occurs in a market of perfect competition (Jiménez, 2012).

b) Sellers influence price: In most cases, sellers significantly influence price, thus contradicting the spirit of the free market advocated by Adam Smith with his metaphor of the "invisible hand" (Jimenez, 2012).

c) Product differentiation: Companies in this type of market are perceived as different by the consumer. Characteristics such as design, use or usefulness are different from one product to another (Jiménez, 2012).

d) There is incomplete information in the market: Buyers and sellers have different information about the product. Cases of asymmetric information in which the seller has much more information about

the product than the buyer are expected in this type of market. (Jiménez, 2012)

e) High prices and low production levels: This is because sellers can control the price of their products to some extent, which results in a decrease in demand. (Jiménez, 2012)

f) Existence of high barriers to market entry: The main barriers to entry that prevent or hinder the entry of new companies into the market are cost advantages, product differentiation and the high capital investments required to enter the market. (Jiménez, 2012)

In other words, there is an imbalance between demand and supply, so the market cannot regulate itself. In a scenario of imperfect competition, some situations can be distinguished that, based on the amount of supply or demand, trigger consequences such as monopoly and monopsony, which are extremes that directly affect the price of market products (see Graph No. 5).

A monopoly is defined as "a market that has only one seller, but many buyers" (Pindyck & Rubinfeld, 2009, p. 395). Market failure occurs when there is a single supplier in the market that, through opportunism, in terms of supposed efficiency, seeks to maximize its price, i.e. it has total control of the market section to which it belongs and can impose the price it considers best on the goods it produces.

To obtain more profits, the monopolist must first investigate the types of demand existing in the market since this information is essential for the company to make financial decisions and thus decide on the quantity it will produce and

sell. In other words, the monopolistic company determines the price and quantity it will sell. (Pindyck & Rubinfeld, 2009)

A Monopsony "is a market that has many sellers, but only one buyer" (Pindyck & Rubinfeld, 2009, p. 395). That is, it is a single person, the consuming or demanding party; however, variants such as duopsony and oligopsony, which are small groups of buyers, can also be found; these together cause prices to fall to a minimum value and consequently the supply must produce more to offset the cost of production. "When there is only one buyer, monopsony power influences the product's price by allowing the buyer to purchase the good at a lower price than in a competitive market". (Pindyck & Rubinfeld, 2009).

Another failure is an oligopoly, which is understood as a "market in which only a few firms are competing with each other, and the entry of new firms is impossible". (Pindyck & Rubinfeld, 2009, p. 507).

> In specific oligopolistic factories, firms collaborate, but in others, they do not, becoming rivals, even if this means lower profits. To understand why it is necessary to know how these industries manage their production and pricing decisions. The measures are complex since each company must act with planned methodologies, and when it makes a decision, it must deduce the likely reactions of its rivals always to be one step ahead of them. In oligopolistic markets, economic performance is very high because there are barriers to entry for new companies forced to give up because of barriers to entry. (Pindyck & Rubinfeld, 2009, n. p.)

On the other hand, another flaw is the oligopsony, which refers to "a type of market where there are few demanders, although there may be a large number of bidders. Therefore, control and power over prices and transaction conditions reside with the buyers" (Cabello, 2016, n. p.). The dominance identifies this type of market failure it has over the market, and its profits are enormous. These companies have policies of reciprocal dependence with the same economic purpose.

Graph No. 5: Type of market failures - Imperfect Competition

Own Elaboration

For a more detailed example, Table 1 shows some situations of imperfect competition and the degree of control they exert on price:

Table No. 1: Market structures and degree of price control

Market Structure	Number of Bidders	Degree of control exercised over the price.	Example
Monopoly	One Bidder	Complete Control	Drinking-Water Service
Oligopoly	Few Bidders	Exercises little control	Vehicle Manufacturing

Monopsony	Single Claimant	Complete Control	Public Works
Oligopsony	Few Claimants	Exercises little control	Large Distributors

Source: Fuenmayor (2017, n. p.)

Own Elaboration

Monopoly power causes the costs of a good to be higher and the quantity produced to be lower; in the case of monopsony power, the buyer's capacity will influence the price of the good so that it will be lower than that which would be in force in a market.

c.1 On Commercial Regulation

This is done to prevent this imbalance between demand and supply from significantly harming the price of the goods offered and prevent fraudulent or evil faith actions that could harm the proper development of the market.

Two solutions are proposed to avoid this situation: the first is to set the price as if it were in perfect competition, which means that the price is in equilibrium. Graph No. 6 shows this:

Graph No. 6: Price in perfect competition

Own Elaboration

The second solution proposed is to set a price proportional to the total cost of production; however, the long-term problem is that the producer, seeing himself with a fixed income, may lower the quality of the goods he offers to maximize his profits.

c.2 On the Regulatory Framework

The application of norms and rules established in the Constitution is of vital importance since they are created to avoid unfair and restrictive practices, distorted data and others that may affect healthy competition and transparency in the economic activities of the market.

These control measures are typified in the Constitution of the Republic of Ecuador (2008) approved in 2008, where it states "That, Article 304 paragraph 6 of the Constitution establishes that trade policy will aim to prevent monopolistic and oligopolistic practices, particularly in the private sector, and others that affect the functioning of markets" (art. 304.6). It should also be noted that in 2011, the National Assembly enacted the Organic Law of Regulation and Control of Market Power (LORCPM), and in 2012, the Superintendence of Control of Market Power (SCPM) was created as a control entity to regulate and sanction all those economic agents that are not aligned under the law.

c.3 Asymmetric Information Considerations

Information asymmetry (see Graph No. 7) constitutes a market failure because it contributes to an unequal state among market players. This occurs when one party has more knowledge than the other regarding the good or service to be exchanged in a negotiation. Without information, the decisions

to be made are imprecise and can benefit or detriment an agent in the transaction.

In the context of an "economy with asymmetric information, the more informed agents displace the less informed ones in the market" (Perrotiní, 2002, n. p.).

When the asymmetry of information originates in the negotiation of a good or service, tacitly, the market equilibrium disappears, and the negotiator with more information is placed in a privileged situation causing the other negotiating party to be in a vulnerable situation generating erroneous decisions and thus placing itself in inefficient situations in the market (McGraw-Hill, 2019).

Asymmetric information leads to market failure since it induces the buyer to be at a disadvantage without knowing it, acquiring a good or service of dubious quality at high prices, so this dishonesty should be sanctioned in the regulations of the Organic Law of Regulation and Control of Market Power (LORCPM).

One of the causes that give rise to the appearance of information asymmetry in the market is the poor allocation of the few information resources among the economic participants, which restricts the companies without this tool to function better, causing this inefficiency to become an economic problem since decision making will be complex and, in some cases, erroneous.

The failure of information is frequent, and its effect acts as a limiting factor in the exercise of goods or services, generating conflict and discouraging suppliers and demanders from participating in the market.

A market with few buyers and few sellers is sometimes called a thin market. Conversely, a market with many buyers and sellers is called a dense market. When imperfect information is severe, and buyers and sellers are discouraged from participating, markets can become extremely thin as a relatively small number of buyers and sellers attempt to communicate enough information for them to agree on a price. (Gonzales, 2020, n. p.)

Figure No. 7: Information asymmetry - practical example

Own Elaboration

Information asymmetry also results in the following problems:

a. Adverse Selection. - The quality of a good or service depends directly on the asymmetry of information. When one of the participants in the transaction has clear and concise information and does not share it with the other party or provides distorted information, tacitly both parties are affected, since their production levels will not be optimal and with the risk that these goods or services do not offer the quality offered or worse still cannot even be exchanged.

In an economy with asymmetric information Akerlof (1970) (The economics of asymmetric information: micro-foundations of imperfect competition) "the more informed agents (borrowers, sellers in second-hand markets) crowd out the less informed agents in the market, and, as a result, the "bad" product crowds out the "good" product" (n. p.). Akerlof extended the famous Gresham's Law to the case where agents cannot distinguish between the high-quality sound and the low quality good due to the presence of asymmetric information"; the assumptions of his model are:

i. The offer of an indivisible good that is presented in two qualities, the low quality good and the high quality good;

ii. The offer is made in fixed proportions, and respectively;

iii. consumers cannot recognize a priori the qualitative differences of the product due to "private" or "hidden" information held by the seller;

iv. In the absence of market regulation, the same dual quality good (high and low) will be traded in only one market, and consumers will not be able to identify this qualitative duality, giving rise to the phenomenon of adverse selection.

In a scenario where the conditions of information asymmetry give rise to a problem of adverse asymmetry, the seller of a high-quality product should not simply tell his customers but demonstrate it, and a clear sign of this is the so-called manufacturing guarantees of a good or service.

This failure in the market of adverse asymmetry harms everyone, both buyers who, in good faith, acquire products thinking that they are of good quality and that only in their consumption will prove otherwise; as well as sellers who will get bad publicity and who knows even complaints about misleading advertising and deception. The different guarantees existing in a market are a reflection of the quality of each of its products.

One of the solutions to this market failure is the one developed by the governmental entity, by issuing within the constitution the so-called Organic Law of Regulation and Control of Market Power (LORCPM), which protects the interests of buyers, sellers, customers, suppliers, consumers, users, distributors and other actors that are part of the market, through mechanisms that guarantee a free competition system avoiding and sanctioning bad commercial practices if necessary, and thus having efficient, transparent, competitive, productive, technological and fair markets. (Constitution of the Republic of Ecuador, 2008)

Within the guidelines for the application of the conducts contained in the Organic Law of Regulation and Control of Market Power (LORCPM) (2020), we find article 1, which determines:

> The purpose of this Law is to avoid, prevent, correct, eliminate and sanction the abuse of economic operators with market power; the prevention, prohibition and sanction of collusive agreements and other restrictive practices; the control and regulation of economic concentration operations; and the prevention, prohibition and sanction of unfair practices, seeking market efficiency, fair trade and the general welfare of consumers and users, for the establishment of a social, supportive and sustainable economic system. (art. 1)

This phenomenon can be better understood from the following example (see Graph No. 8):

Graph No. 8: Information asymmetry - adverse selection

Own Elaboration

b. Moral hazard. - Ex post in terms of exchange decision. Moral hazard is a problem derived from the asymmetry of information (see Graph No. 9 and Graph No. 10), where one of the parties generates its benefit without considering that the other party cannot observe it or be aware of its movements.

For Krugman (2017) "moral hazard refers to any situation in which one person decides how much risk to take, while another person bears the cost of things going wrong" (n. p.)

For another author, moral hazard is:

> The incentive of a person A to use more resources than he would otherwise have used, because he knows, or thinks he knows, that some other B will provide some or all of those resources. What is important is that this occurs against B's will and that B is unable to approve of this appropriation immediately. (Hülsmann, 2008, n. p.)

This type of market failure occurs because the economic agents participating in a transaction are uninformed about the reality of some consequence given by one of the parties. This asymmetry of information operates in activities generally in insurance contracts, in auditing companies, in banking entities towards their clients, among others.

Graph No. 9: Market Failure - Moral Risk

Source: Guido (2008, n. p.)

Own Elaboration

As can be observed, moral risk arises once a contract has been accepted, with all its terms and conditions. The contractor, due to some adversity in the environment of the contracted agent, cannot verify whether such calamity occurred due to imprudence or not of the contractor, so the contractor claims its rights established in the signed document, thus obtaining a favourable situation with the execution of such agreement, which the contractor omitted information or distorted it.

Finally, asymmetric information leads to a moral hazard caused by the scarcity of informative data due to the concealment of information for convenience, as detected in confirmed cases in the market.

According to Rodriguez (2013), market failures corresponding to information asymmetry influence the behaviour of economic agents since it allows them to decide which action to take is the most appropriate for their commercial benefit within a business market, implying short-term consequences that will only generate situations of inefficiency and loss of consumer welfare.

The existence of asymmetric information justifies an immediate intervention to correct or mitigate its effects. Therefore, a market must correct itself with regulatory strategies and radical approaches to mitigate information asymmetry.

This problem must be overcome through natural incentives and strategies by all the intervening agents in the economy, who suffer from market failures due to the lack of information reflected in their productive activities.

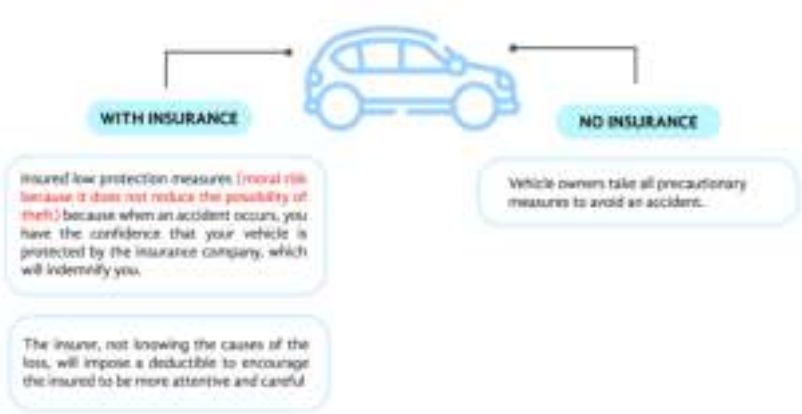
A direct measure to stop the lack of information in current times is that digital technology, which develops, notifies and transmits information instantaneously and at a low cost.

Concerning manufacturers of high and low-quality products, another natural incentive mechanism in the face of lack of information is to offer guarantees to consumers, reducing the uncertainty they have at the time of acquiring a good or service and whose reward will influence the price, obviously the manufacturers of dubious quality will have little encouraging scenarios before their adversary. This incentive is significant even in monopolistic markets.

Chain advertising is another natural tool that facilitates the marketing of a product, and this occurs when satisfied consumers recommend the product to their relatives and these to the rest.

Other sources of information acquired innately are provided by retailers as they comment on their work practices to other consumers. Moreover, finally, we find the digital information, which, through computers, tablets, and cell phones, provides us with all kinds of valuable content across borders and with basic costs for its use.

Figure No. 10: Example of the type of market failure - Information asymmetry - moral hazard



Source: Rodriguez (2013, n. p.)

Own Elaboration

It is necessary to take into account for improving information asymmetry, measures based on regulatory standards, which should include standardization of parameters, in order to manage information more accurately, as well as to improve reputation concerning market research and supply and demand behaviours in order to interact in an honest manner and with efficient results.

Finally, it is pointed out that information asymmetry is a market failure caused by the lack of regulation since it is the interaction between the legal system and the economic reality.

c.4 "Externalities" considerations

> By definition, an externality is an overflow, and it is a positive impact (in which case we speak of "external" benefits) or a negative impact ("external" costs) on another party not directly involved in an economic transaction. In such cases, prices do not reflect the total costs or benefits of producing or consuming a product or service. Consequently, producers and consumers in a market do not bear all the costs or reap all the benefits of economic activity. (Bou, 2009, n. p.)

There is a cost or benefit to a third agent outside the interaction with the market. For example, during the production or manufacture of the product or good, side effects occur that were not planned within the cost of production and are assumed by agents who are not involved in the exchange.

According to Bou (2009), externalities in an economic market are made visible by the excessive production of a product whose purpose is to satisfy demand.

The internal costs that a manufacturer generates for the elaboration of a particular good or service for society's consumption are retributed in its profit. However, external costs are generated during the transformation of raw materials to the final product because they affect third parties. From the producer's point of view, they do not have any interference in the productive phase, and these costs are called contamination, destruction, pollution, originating the so-called negative externalities (Bou, 2009, n. p.). These costs are shown in Graph No. 11.

The economy shows that with the appearance of negative externalities, disastrous results are generated from the social point of view since the most harmed are not even aware of this situation. In other words, businesspeople pollute the air with the production of certain products. Their machinery generates the emission of gases that contact nature cause an environmental impact, and the surrounding people unknowingly inhale. Moreover, it is here where the State must apply corrective measures for these cases and charge monetarily for the negative impacts caused. (Bou, 2009)

As opposed to negative ones, positive externalities provide many benefits, as is the case of pollination, which generates benefits in the development of plants and these, in turn, produce fruit and the honey nectar produced by the bees. These activities help clean the environment and regenerate it, so they should be encouraged with economic support to promote this activity.

The existence of externalities creates an essential flaw in the operation of a market by creating diseconomies, which provide incorrect signals to companies and consumers and result in inefficient prices and goods. (Bou, 2009)

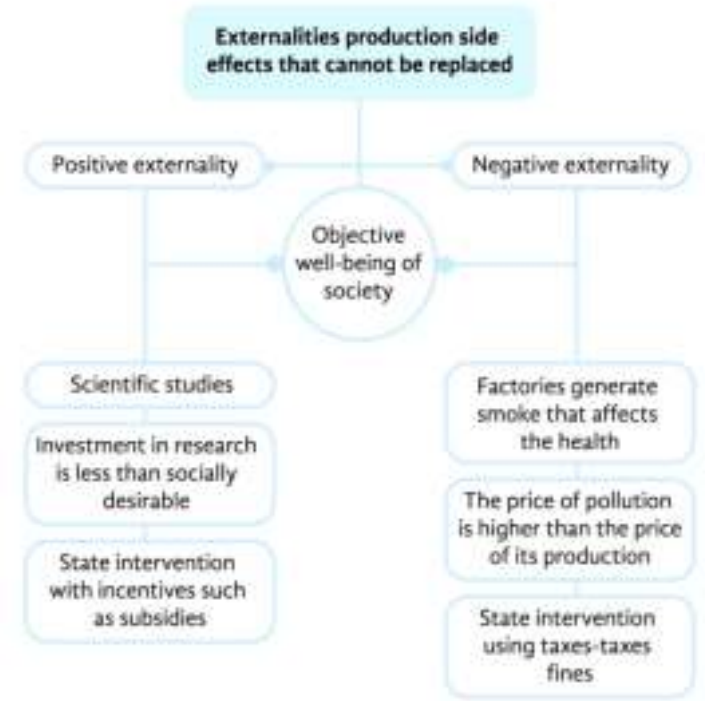
Faced with this problem of market failure, the central government should focus on applying a tax (negative externality) and a subsidy (positive externality) to mitigate some of the damage caused to the environment and reward the benefits caused to it. (Bou, 2009)

It should be clarified that judicially, the problem to be solved is the negative externalities that, whether premeditated or not, are not part of the production costs of the causers; and, consequently, these are assumed by society, so mechanisms

must be established to rectify these costs through penalties, fines, fees, taxes, among others.

With externalities, the premise of the perfect market is broken precisely because of the cost of the damage caused, and it is necessary to be aware of the damage caused to third parties so that this behaviour can be minimized through behavioural terms to achieve market equilibrium.

Graph No. 11: Example of the type of market failures – externalities



Own Elaboration

c.5 Public Property Considerations

Public goods are those that do not have a rivalry, which "means that the consumption of such good or service by one person does not reduce the amount available to others" (Tansini, 2003), nor exclusion, which implies that "it is impossible or prohibitive to prevent people who do not pay for such good or service from using it" (Tansini, 2003). To contribute to the definition of "public goods," we can paraphrase the author Alberto Benegas-Lynch (1998), who states that public goods produce effects for subjects that do not participate in an economic transaction, equivalent to generating externalities that cannot be internalized.

The doctrine recognizes two types of public goods: pure public goods and impure public goods. Now, what are pure public goods? A public good is pure when it is of total enjoyment, that is, when it exhibits no rivalry or exclusion in its use by the citizens, a clear example is street lighting, since everyone uses it and its use by one subject does not represent an impediment or detriment to the use of another (it can be enjoyed at the same time and without exception). On the other hand, impure public goods are those that have degrees of non-rivalry or joint consumption, but not absolutely; they are rivals, but the exclusion of their consumption is not efficient or is impossible, and they are not rivals, but it is possible to exclude people from their consumption (Filgueira & Lo Vuolo, 2020).

Another part of the doctrine affirms that any good and service continuously varies within the spectrum between public and private classic absolute constructions (exemplified in Figure 1). Since "strictly speaking there would be no goods and services, no matter how rivalrous or excludable they may

be, that do not generate some public externalities" (Filgueira & Lo Vuolo, 2020). For example, a perfume, which although it can only be used by the person who acquired it (through an economic exchange), can be perceived (and enjoyed or not) by all those who are in its periphery, or a tree, the exclusive property of the person on whose land it is located, which provides shade to the neighbouring house.

Graph No. 12: Characteristics of public and private assets

Own Elaboration

Other attributions of public goods are presented by the author Pimiento (2019), who states that:

> To simplify the legal regime of public property (...) it should be noted that: a) all public property (fiscal and public use) is imprescriptible; b) public use property and fiscal property destined to the provision of public service, provided by a decentralized entity or its concessionaire, are unseizable; and c) public use property and fiscal property determined by the constituent of the legislator are inalienable. (n. p.)

It is also necessary to cite the definition of public goods (or national goods) in the Ecuadorian civil code:

> Art. 604.- National assets are those whose domain belongs to the Nation as a whole. If, in addition, their use belongs to all the inhabitants of the Nation, such as streets, squares, bridges and roads, the adjacent sea and its beaches, they are called national goods of public use or public goods. Likewise, the perpetual snow-capped mountains and the areas of territory located more than 4,500 meters above sea level. The national goods whose use does not belong to the inhabitants are called State goods or fiscal goods" (CC, 2005, art 604).

In the perspective of the perfect market model, which implies property rights transactions for the satisfaction of needs, public goods represent a market failure. According to Bagattin (2018) and as a result of the non-rivalry of these goods, they produce the phenomenon above;

> For a price equal to zero that maximizes social benefit, there will be no provision under a market scheme unless the producer could obtain resources by alternative means to the sale of the good or service in the market. On the other hand, if the marginal cost is zero, any favourable price implies a reduction in efficiency and the additional need to implement some form of exclusion. (emphasis added) (n. p.)

Adding to this phenomenon the inability of these goods to be excluded, it is unlikely that there will be private participation in this type of market.

On the other hand, according to Benegas-Lynch (1998), the public nature of public goods (redundancy aside) implies the existence of "free-riders", i.e., individuals who benefit from the externalities (generally positive) of such goods without

having been part of a transaction. This implies an economic waste since the good, service or externality was not enhanced or maximized.

Now, it is pertinent to delve into the concept of "free riders", these are subjects within a group that grants a certain degree of anonymity and, upon receipt of a benefit, do not contribute to remedying production costs. This behaviour responds to a limited rational behaviour of satisfaction of individual interests or, in the words of Bagattin (2018):

> For the group of individuals when they contribute to sustaining the cost of the public good whose provision places all of them in a situation of greater welfare than in the case where it is not provided, but it will be the most profitable condition for each rational individual to obtain the benefits by leaving others to assume the costs. (emphasis added) (n. p.)

The solution to the problem of public goods is directly related to technological evolution since it provides producers with methods to generate rivalry and exclusion over goods and thus profit from their production. This gradual privatization of goods can be exemplified in the encryption of frequencies (for telephone, television and radio services) limiting access to them. It is also directly related to the development of research methods that identify non-internalized externalities.

From the legal perspective, state interventionism is proposed (and justified), i.e., that the State (in the absence of private providers) should provide these goods and services in exchange for taxes. In this way, there would no longer be "free-riders" (unless tax obligations are not complied with, legally sanctioned), and the costs of services and goods would

be covered. Alternatively, the State could incentivize the production of these goods through the exchange of taxes for the investment in public facilities and other related types of infrastructure.

In Ecuador, direct State intervention has a constitutional hierarchy, as it is enshrined in the following articles of the Constitution of Ecuador (2008): "Art. 285.- The specific objectives of the fiscal policy shall be as follows: 1. The financing of services, investment and public goods (...)" (art. 285).

> Art. 315.- The State shall constitute public enterprises for the management of strategic sectors, the provision of public services, the sustainable use of natural resources or public goods and the development of other economic activities. (CRE, 2008, art. 315)

This normative solution is currently applied to regulate the failure of public goods, but this does not mean that it is not subject to criticism. Benegas-Lynch (1998) questions the coercion applied by this type of regulation because from an economic perspective. The consumer is forced to pay for a good or service that he may or may not use. For example, a blind person does not benefit from public lighting, but part of his taxes will cover the costs of this service.

Other authors claim that public goods regulation policies do not "work according to Walrasian general equilibrium models" (Filgueira & Lo Vuolo, 2020) and that it would be unreasonable to try to create regulation policies based on this system, as it would result in many public goods and services not having a place in this perfect market model.

CONCLUSIONS

By way of synthesis, it is possible to affirm that Economics and Law are closely related. For:

> The Law, when it is put into operation, takes the basic social relationship (whether economic, political, family, among others,) [...] to inscribe it in public and general sphere of Law" (Ost, 2017).] to inscribe it in public and general sphere of Law. (Ost, 2017, n. p.)

In other words, Law adopts (generally in the normative legal system) situations of public interest and grants them legal consequences, which in turn creates obligations, which are enforceable and with non-compliance punishable by the state power; in other words, the function of Law is to regulate (with general, public and binding rules) interpersonal relationships, among which are economic exchanges.

Moreover, it can be argued that law plays a particular role within the market, and that is to facilitate its organization, regulation (of economic failures) and coordination. Therefore, it promotes rules that seek to model the behaviour of market actors so that the "real market" develops as close as possible to the "ideal market", i.e., so that the market is as efficient as possible. Furthermore, an exercise of social engineering is promoted where the efficiency of these rules (norms) will have its foundations in a system of incentives and disincentives, which "use" the desire to maximize the benefit (or otherwise minimize the loss) so that the agent (according to his limited rationality) is prone to make decisions according to ends in harmony with the legal system.

It should be noted that the market is a space in which human interactions take place, the purpose of which is the satisfaction of needs through the transaction of goods and services (which in the end constitutes an exchange of property rights). Also, in which there are constantly conflicting interests since the subject prioritizes his or her benefit over the common good. It is because of this individualistic eagerness inherent to the human being that straightforward rules are necessary.

On the other hand, market failures are products of reality in which the real market disagrees with the perfect market paradigm. These are a) information asymmetry, which arises from the factual inequality between agents in terms of their capacity to acquire and process information; b) non-internalized externalities, which third parties must assume; c) public goods, which despite being necessary, violate the logic pursued by the ideal market; and d) imperfect competition, which in short means that the parties are not on equal terms, resulting in price manipulation by the dominant participant. However, although the paradigm of the perfect market is helpful in approximate an ought to be, it is merely referential and cannot be used as a tool to justify irrational collective action. Social engineering has limits and requires that these limits be set to avoid overlapping "state failures" when attempting to correct "market failures".

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Thoughts about Stare Decisis: The Peruvian experience

Algunas consideraciones generales sobre el Stare Decisis: La experiencia peruana

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ABSTRACT: This research is a miscellaneous reflection on the *"Stare Decisis"* and *"Certiorari"* principles. It is assumed that courts are activists of law and, therefore, are also creators of law. This entails a frank and open discussion on what is the true objective of a justice system: the judge's pursuit of Justice versus the positioning of dynamic efficiency and sustainability as the main and decisive variables. The different aspects addressed by the article are presented openly and do not imply - per se - the closure of a debate that should be considered relevant and current. On the contrary, the ideas in the article lead to rethinking the scope of Law, understood instrumentally, i.e., as a tool for development and greater equity, and to approach desirable scenarios of social justice.

KEYWORDS: justice system, stare decisis, certiorari, efficiency.

RESUMEN: Este artículo plantea a modo de miscelánea una reflexión sobre los principios *"Stare Decisis"* y *"Certiorari"*. Se asume que las cortes son activistas de Derecho y, por lo tanto, son también creadoras de Derecho. Esto conlleva plantear una discusión franca y abierta sobre cuál es el verdadero objetivo de un sistema de justicia: la búsqueda de Justicia por parte del juez versus el posicionamiento de la eficiencia dinámica y la sostenibilidad como variables dirimentes y principales. Los distintos aspectos abordados por el artículo son planteados de modo abierto y no supone -per se- el cierre de un debate que debe ser considerado como pertinente y actual. Por el contrario, las ideas dentro del articulo llevan a repensar el alcance del Derecho, entendido de manera instrumental, es decir, como herramienta para el desarrollo y la mayor equidad y acercarnos a escenarios deseables de justicia social

PALABRAS CLAVE: sistema de justicia, stare decisis, certiorari, eficiencia.

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INTRODUCTION

We present to our readers a very interesting and little explored issue in Latin America, which is linked to the issue of binding jurisprudence, also known as the "*Stare Decisis*" principle.[1]

But what are judges there for? to seek justice? is the real objective to do justice or is it to generate legal certainty? The correct answer is that the administration of justice does

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not seek justice, it seems untrue, but the administration of justice seeks legal certainty and why the objective of the administration of justice is not justice, for a very simple reason because this is a very subjective concept and, in addition, what is fair for the members or let's say the winning party will be somehow unfair to the losing party, so this is one of the typical dilemmas that arise.

In this order of ideas, this article of reflection and analysis will present some considerations and reflections on the transcendence of Stare Decisis for the justice system, with emphasis on the Peruvian experience.

1. INITIAL CONSIDERATIONS

Based on the questions raised, we consider that the discussion related to the principle of "*Stare Decisis*" (Camarena González, 2016) and "*Certiorari*" becomes important and relevant. In all our countries the actions of the judicial powers are always criticized and it is argued that the judges, the Judicial Administration, the Supreme Court, and the Courts of Appeal, are not speedy, therefore, there must be a mechanism for cases to be resolved quickly since there are very few judges and that it could result in having more judges than currently exist but we consider that this also involves a significant social cost. In addition, it does not mean any improvement *per se*.

For example, Peru has proportionally more judges per capita than the United States, a detail that shows that the good administration of justice does not depend on the number of judges.

Although it is noted, by some critics, that the rules should be changed, i.e., to make the rules much more suitable

for cases to be resolved much more quickly so that there is more than a chance for litigants to resolve their cases speedily, does this imply an action with an immediate adjustment effect? We assume the answer is no.

Another problem that is always pointed out is that there is a lot of corruption in the judiciary and of course that judges "sell out" or "do things as they please", again it is argued that the solution to the judicial problem must be found and that this implies the adoption of modern computer management systems. Again, does this imply an action with an immediate adjustment effect? For the second time, we assume that the answer is negative if this action is considered univocally and not as part of a reform package.

At other times it is argued that the solution to this legal problem is for judges to have access to better salaries and, obviously, for the administration of justice to have a higher budget. However, this *per se* is not the cure for the institutionalized evils in justice in our countries.

2. FURTHER CONSIDERATIONS

Another issue, and therefore the Council of the Magistracy, or the Academy of the Magistracy has existed in Peru, is that judges must be trained. This assumption has been the typical variant that both the World Bank and the International Monetary Fund, the Inter-American Development Bank, have considered a necessity in all the judicial reform processes that have been proposed in all Latin American countries. These have involved the search for alternatives in different orders. Unfortunately, all of them have failed because none of them attack the real problem, but what is the way to attack it?

The structure of the Peruvian State is defined by the division of power or three powers in the Peruvian case: the Executive Power, the Legislative Power, and the Judicial Power. Certainly, it is mentioned that the three are equivalent and that they are part of the division of powers of the State. And the question we must ask ourselves is: What is the reason why you can say that you are a power of the State? And the reason is not that the Constitution says that you are a power of the State. The reason is not that the law says that it is a power or because the doctrine says so or because it has been taught to us since the first year of law school or even in high school.

Being a State Power means that you can change things or legislate, although it may seem untrue, the Legislative Power by definition is the main power in terms of dictating laws, but the Peruvian Executive Power also dictates laws because, in some way it does it through its supreme decrees, organic decrees, among others, in some way it establishes provisions, it also exercises the power to administer and generate norms. The legislature is a power because it dictates laws, and the Judiciary is also power not to the extent that it administers justice or because it dictates norms but because of what is called binding jurisprudence.

With this idea of power as novel as the possibility that the so-called Judicial Power has in the confirmation of establishing binding jurisprudence is that it establishes the real power that the Judicial Power has in some way. Another concept that is very important for us to keep in mind is that in law school comparative law has always taught us this idea: What is the primary source of law? What is the secondary source of law? Jurisprudence. What is the third source of law? Custom. What is the fourth source of law? Doctrine. This is the case in

all civilized countries of the world. But what happens in the framework of the Andean Community and Latin America the order is different, first, the normative order is the legislation, although it may seem untrue, the second is the doctrine and the third is the jurisprudence.

3. ON JURISPRUDENCE

Case law is a minor source of law, at least in my experience. A secondary source of law is also doctrine, i.e., what a law professor says, what a treatise writer says, what a law book says is sometimes relevant. In general, however, it is less relevant than what the jurisprudence in our courts says. Why is the jurisprudence in our courts not so relevant? In the Peruvian case, we find that Supreme Court A says one thing that often contradicts what Supreme Court B says. The same chamber in case A says one thing and fifteen days later exactly the opposite, the judge of a province or a department of my country has one thing, and the judge of another jurisdiction says exactly the opposite. That is to say, the judge interprets "as he pleases" and here we are in a serious problem because he assumes that we are at his whim and here we are not in a serious problem because we are supposed to be before a power that legislates through interpretation of the norm and this should be a report and not leave each judge free to do as he pleases or interpret as he pleases.

Furthermore, we have to talk about several types of jurisprudence, in general terms, the doctrine speaks of two main types of jurisprudence: a) doctrinal jurisprudence which is normally the *"obiter dicta"* or the opinion given by judges regarding a particular case, and which in some way serves as non-binding guidance for judges and deals with the way they

should decide; b) the second type is binding jurisprudence, and c) the third type is constituted by the first type of jurisprudence. In our opinion, both are similar since normative jurisprudence when it is binding jurisprudence concerning a pre-existing rule will imply that the judge interprets it in a particular way. The difference in the case of normative jurisprudence lies in the fact that when there is no norm, the judge will establish his legal criterion for this legal void. In general terms, binding case law and normative case law are almost the same and this is what is known in the Anglo-Saxon system as *"Stare decisis"*, which is the subject of this contribution (Civitarese, 2015).

4. HISTORICAL CONSIDERATIONS ON STARE DECISIS

What does *"Stare decisis"* mean? It is a Latin expression from the time of the Romans that says: *"Stare Decisis et non quieta mover"* which means *"stay to what has been decided and keep still"*. This indicates the Supreme Court when it determines in an indubitable way how the legal norms are interpreted in a concrete case and, therefore, it is implemented establishing as a precedent of obligatory observation for all jurisdictional bodies, and all Supreme Court sentences in general lines must establish this *"Stare Decisis" which* is a binding jurisprudence.

An example that I have put in class on several occasions is the following one, the check signed upside down can be increased validly that it is an expression of will fact that is signed upside down does not invalidate it does not matter what matters is that it was this signed, is upside down or not, it does not matter what matters is signed. But there can be counter documentation, that the check says that another value has a set formality and as it was signed upside down the formality was breached the arguments are perfect. But what does the

Supreme Court do through the "Stare Decisis"? It says for better or for worse if it is valid and, therefore, what happens from that date on, the hundreds of thousands of cases that there were at that time on the matter of checks signed upside down are automatically resolved and there would be no need to be debating, for a court to say one thing and another chamber to say another and a court to say the other. Therefore, the *"Stare decisis", in a way,* what this case generates is a precedent that makes it obligatory, that regulates how a concrete case must be interpreted from that moment on and, therefore, all the cases that are linked in the future must be seen in that way, which generates not justice but what will generate legal certainty, which is finally the most important thing for a country to be able to move forward.

This is normally done in the framework, as occurs in Ecuador and Peru. The Peruvian Supreme Court is dedicated to establishing decisions in the framework of cassations is the ideal scenario for it to interpret the norm. Therefore, the development of this principle of *"Stare decisis"* has always been incorporated. It starts from classical Roman law and is maintained during the Roman Empire and includes the *Code of Justinian* in the 6th century AD. Although the crisis of the Roman Empire made all the principles of Roman law gradually "disappear" (fall into disuse), however, in the 12th century A.D., the Code of Justinian reappears and incorporates into the law, not so much in countries like France, Germany, among others, which were very "codigueros", but in the *English system*, i.e., which had another normative source such as custom. Certainly, the identity and custom were not clear, therefore, they rescued the principle of "*Stare Decisis"* from Roman Law for when the Supreme Court at that time, the House of Lords, decide on what becomes or not a binding jurisprudence.

As we have observed, this principle, which has its origin in the Roman system but which, in the countries of continental tradition went unnoticed and is incorporated into the Anglo-Saxon system, is linked to the concept of the Bill of Rights and the English unwritten Constitution and from there it is consolidated as the great principle to guarantee legal stability. What happens, normally, in the Anglo-Saxon system of law and what then happened in continental Europe, this principle somehow remained in the European system. Later, Napoleon Bonaparte somehow "with the stroke of a pen" eliminated the principle of *"Stare Decisis"* because Napoleon considered the most important source of law to be the code. Therefore, to a certain extent, with Napoleon, the jurisprudential system is set aside as the most important source of law and the written rule becomes the most important source of law. And why then is the principle of *"Stare Decisis"* important? Because it is necessary to maintain this system as the most important source for the structure of law and legal certainty. Because it promotes procedural speed, avoids corruption, generates institutional credibility, promotes investment, revalues the judiciary, avoids political pressures, and confers stability, predictability, and rationality to authority.

5. ADVANTAGES OF STARE DECISIS

Starting from the idea that the Supreme Court in the framework of the legal institute of cassation establishes as its objective to establish precedents of binding jurisprudence, we will analyze the different reasons why, in my opinion, this is the system that our country should work on and impose.

So, first, the procedural celerity that is verified when it is already known how the Supreme Court is going to resolve in

some way based on the principle of *"Stare Decisis" as it* happens in the United States, England and common law countries discourages the filing of lawsuits whose possibility of success is not reasonable.

Secondly, the judges already know how they are going to resolve, the resolutions become faster and, therefore, this also has an advantage because it reduces the work of the judges and the need to enter complex legal discussions. After all, the Supreme Court has already determined in the framework of a song what was the right thing to do, which generates procedural speed.

Third, they limit corruption because it is logical that since it is already known how it will be resolved in advance, the discretion of the judges in the interpretation of the legal norm is reduced. We have always expressed our discomfort about judges interpreting the law as they see fit, of course, corruption is behind these strange payments that are made in jurisdictions to judges to "resolve". This entails the risk that a case is decided in a completely different sense. It also implies that *objective standards* are established to determine when the judicial interpretation departs from the spirit of the norm or the famous *prevarication*. By the way, to prevaricate is not to go against the express text of the norm, to prevaricate is to twist the interpretation of the norm. If the norm has already been interpreted by the Supreme Court in a sense A, then if the judge does not interpret what the Supreme Court said, he is prevaricating, then this generates the possibility that judges are not corrupted.

Another very important element is the existence of each jurisprudential line generating greater confidence in the Judiciary and providing an image of transparency and

impartiality, it makes the Judiciary respected, the judicial institution is respected, and provides a very clear chair of transparency towards the judge or the system, therefore, This situation of not having contradictory sentences generates credibility in the Judiciary, allows the quality of the resolutions and the service provided to the citizens to be seen progressively, a situation that generates a virtuous circle in favor of the administration of Justice.

In addition, there is a very important element, and it is the issue of *legal certainty*, to the extent that it is known in advance which is the jurisprudential line that the Supreme Court through the cassation, via precedent of mandatory observance generates legal stability, it is already known how the law was applied in specific cases and this is legal certainty. This would generate a more favorable investment climate, thus reducing the risk of the country and therefore investors decide to invest in the country. What investors are most interested in is that there is legal certainty because there are rules that provide legal certainty, but that is interpreted with certainty and that is what makes the business climate adequate and, therefore, generates higher levels of investment will provide more jobs and there will be a greater contributive capacity in society, ergo the system works properly.

Another relevant issue is that there is a great crisis in Latin America regarding the valorization of judges, to the extent that this principle of *"Stare Decisis"* exists, the service is much more transparent, more efficient, and legitimized. There is nothing more important for the justice system than the social perception of the figure of the judge, and this rises considerably. This is what happens in all the countries of the Anglo-Saxon system where the *"Stare Decisis"* exists. That is to say, the judge

is "a gentleman judge" and nobody messes with them because it is known what they are called, that they are transparent people, and that they apply the principle of *"Stare Decisis"* in a proper way. This makes the process much faster and, therefore, the judiciary takes on greater importance. However, we cannot deny that there are discordant voices such as the one expressed by Núñez Vaquero (2016).

Let us also remember that the "Stare Decisis" is a mechanism that should also promote private investment and, therefore, allow the Judiciary to justify a system of improvements and, most important of all, the "Stare Decisis" system should avoid political pressures which, as we know, involve the political power pressuring the judges to "interpret" the rules according to the interests of the Government of the day.

In Peru, during the Fujimori dictatorship, the Executive not only controlled the Executive, but also the Legislative and the Judiciary, and therefore controlled the Supreme Court and, consequently, the Supreme Court ended up issuing rulings following the preferences of the Executive. On the other hand, as the legal principle of "Stare Decisis" or binding jurisprudence becomes more vigorous, it is very difficult to change whimsically a jurisprudence that has been repeated and consecrated for many years and it is very difficult to distort what the judges say and what the justice system seeks in the long term: dynamic efficiency and sustainability[2] in the provision of the justice service in an open and democratic society.

2 We understand dynamic efficiency as the capacity to adapt, respond and generate new knowledge. This within an environment of maintenance in time or sustainability of results (which involves the fulfillment of objectives and certainly, to satisfy the objects of a social system (justice, productive or economic process, among others)".

6. ON *CERTIORARI*

As we can see for all these reasons the principle of *"Stare Decisis"* is extremely important. Binding jurisprudence is very important for all the reasons we have explained, but of course, from time to time, it is necessary to change it. Legal circumstances or social or economic circumstances make it necessary to modify the judgment on a subject matter, this is a situation that reflects the evolution of the law, and here comes the exception to the rule of *"Stare Decisis"* which is the principle of *"Certiorari"* or *certification*.

What does *"Certiorari"* mean*?* It is the mechanism through which the Supreme Court of Justice has the power to select cases that it considers important for economic, political, social, or other reasons, on which it will apply the principle of *"Stare Decisis"* (Weigand, 1994). This does not mean that all the sentences that go to the Supreme Court must be subject to review, which happens in many countries.

The American case that leads to a request for review on appeal and/or cassation and the American Supreme Court, for example, decides to consider that the case is no longer worth seeing and what is limited to say, *"Certiorari di nai"*, which means denied or not subject to review, because there is already extensive prior case law that resulted from the issue previously examined.

With this type of mechanism you are not overloading the Supreme Court with thousands of cases on which it will have to resolve what has already been resolved, but simply limiting itself to say *"Certiorari di nai"* and of course, there is the other possibility that they indicate "*Certiorari ofrecido"* which means that part of the request is considered: This is identified in the

decisions of the American Supreme Court or the Supreme Court of the English House of Lords. It assumes that the case merits review or deserves to be heard adequately. The U.S. Supreme Court by 1888-1891 had an avalanche of cases, -approximately 2000 cases in reserve- and was three years late in sentencing. This was generated around 1891, 121 years ago, protests from judges, businessmen, and civil society, among others.

In that order of ideas, we must bring up what happened with the Supreme Court of the United States when it was verified that it was taking too long to resolve (a typical and current problem in Peru) and the risks of an indiscriminate Stare Decisis. In addition to Stare Decisis, the decision was made to incorporate the "Certiorari" principle whereby when a minority of four of the nine justices of the Supreme Court say that a case is important, the position of the minority is respected, and the case is analyzed by the U.S. Supreme Court. In this way, the dictatorship of the majority is avoided, and the minority is respected.

CONCLUSIONS

By way of conclusion and final reflection we would like to share with you a historical fact, it is interesting that the U.S. Supreme Court until 1914 offices were in the basement of the Capitol and the judges were not full-time but were judges "scattered" throughout the United States and that they met from time to time to establish their resolution on the cases to be resolved.

Certainly, the subject has evolved from five thousand cases that with the incorporation of the *"Certiorari"* and the rational use of the *"Stare Decisis"*, currently, the American Supreme Court does not resolve more than 400 cases per

year, with which, the system has acquired predictability and its sentences of the Supreme Court acquire great relevance and importance. This must be incorporated with efficiency, efficacy, and effectiveness in Peru and the rest of the Latin American countries. Certainly, the search for balance for the benefit of society and the establishment, consolidation, and respect for a justice system that meets the objectives expressed by the rationality that sustains it and gives it its raison d'être is still a pending task.

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Incertidumbre: Uma revisão conceitual

Incertidumbre: Una revisión conceptual

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ABSTRACTO: Risco não é bom nem ruim. No entanto, o que a inteligência humana faz em cenários incertos é o que transforma este fenômeno em uma oportunidade para as empresas e para a economia. As seguradoras, por exemplo, gerenciam esquemas, elementos e classes de riscos que permitem que este seja seu eixo de negócios, sendo um dos negócios mais rentáveis. Sem dúvida, rejeitamos a incerteza culturalmente e por natureza humana porque são eventos que não conhecemos, mas na realidade, o desenvolvimento do direito econômico nos permite compreendê-la de forma promissora. Este artigo é um olhar inovador sobre a compreensão do risco e seus elementos. Compreender a interação entre eventos ambientais nos níveis macro e microeconômico é parte do entendimento de que o risco é apenas uma característica inata de todos os mercados, especialmente em todos os cenários de vida.

PALAVRAS-CHAVE: direito, economia, risco, seguro

RESUMEN: El riesgo no es bueno en su esencia, sin embargo, lo que hace la inteligencia humana en escenarios inciertos es lo que hace de este fenómeno una oportunidad para las empresas y la economía. Las aseguradoras, por ejemplo, manejan esquemas, elementos y clases de riesgo que te permiten ser

tu negocio, siendo uno de los negocios más rentables. Sin duda, culturalmente y por naturaleza humana, rechazamos la incertidumbre porque son pocas las que no conocemos, pero en realidad el desarrollo de los derechos económicos nos permite entenderla de manera promisoria. Este artículo es una mirada innovadora a la comprensión del riesgo y sus elementos. Comprender la interacción entre los eventos ambientales a nivel macro y microeconómico es parte de comprender que el riesgo es una característica innata de todos los mercados, pero especialmente de todos los escenarios de la vida.

PALABRAS CLAVES: Derecho, economía, riesgo, seguros

JEL CODE: D81, G32, G52

INTRODUÇÃO

A incerteza é entendida como o desconhecimento de um fato ou circunstância inevitável que pode distorcer a tomada de decisão.[1] A definição expressa permite uma estreiteza entre incerteza e conceitos de risco, entendendo que toda incerteza é um risco, mas nem todo risco econômico e contratual é necessariamente desconhecido. De um ponto de vista geral, os modelos econômicos são analisados sem considerar o elemento de incerteza devido à dificuldade de conceder um valor esperado, com base no qual, o presente ensaio pretende conduzir uma análise completa da incerteza no Direito Econômico (Holmes, 1897).

1 O primeiro passo deste projeto, realizado sob o apoio do Escritório de Advocacia M&Z, foi publicado como um capítulo de livro estendido (Direito e Economia: Direito de propriedade e normas regulatórias, ISBN 978-9942-36-806-5) em 2020. Esta segunda etapa foi escrita como um artigo original diverso que resume e discute alguns dos argumentos mais relevantes. O objetivo é resgatar a relevância do direito e da economia, concentrando-se na análise da incerteza e do comportamento humano como um elemento recorrente na elaboração de contratos de seguro e outros instrumentos jurídicos específicos.

A incerteza no mundo corporativo tem sido confundida com o risco. Entretanto, a incerteza é um elemento que pode ser parte de um esquema de risco, mas não é o único. Na realidade, o risco mais significativo no mundo corporativo e jurídico não é a incerteza, mas a desinformação. Neste sentido, a incerteza que trata as variáveis de informações completas, precisas e atualizadas, entre outras, não constitui necessariamente um risco.

Este artigo diverso dedicará os parágrafos seguintes para falar sobre os tipos de risco e sua gestão em Direito Econômico. Esta contribuição preliminar é relevante uma vez que cada ato humano traz uma decisão e arrisca um tipo e meio em particular. Consequentemente, o risco faz parte do ato humano e da coexistência. Entretanto, este artigo não pretende promover uma extensa pesquisa teórica (artigo de pesquisa) uma vez que argumentos trazidos ao debate foram previamente desenvolvidos por muitos teóricos em economia, psicologia, estatística e matemática.

1. INCERTEZA PRIMÁRIA E SECUNDÁRIA

Economicamente, existem dois tipos de incerteza: primária e secundária. A incerteza primária consiste em eventos, circunstâncias, fatores, entre outros, que não são conhecidos e que influenciam diretamente a tomada de decisão atual. A incerteza primária pode ser minimizada através de fontes de informação tais como estatísticas, análise de mercado, entre outras. Enquanto isso, a incerteza secundária consiste na falta de conhecimento devido à obtenção de informações errôneas, ou sua ausência, ou seja, o conhecimento de um grupo seleto, causa uma assimetria na informação entre os agentes do mercado. É essencial diferenciar estes dois tipos de incerteza devido aos fenômenos econômicos e jurídicos de cada um deles (Thomas, 1997).

Dentro da incerteza primária, o primeiro fenômeno jurídico, econômico, é o "valor esperado". O valor esperado matematicamente consiste na soma das probabilidades de cada resultado possível multiplicado pelo valor de cada resultado (Joshua, 2018). O valor obtido é um valor comparativo representativo dos valores ganhos ou perdidos dentro de um modelo econômico com informações desconhecidas, comparado a um modelo econômico preciso. O valor esperado se aproxima da taxa de lucratividade com base em expectativas tangíveis e quantificáveis através de formas de probabilidade (Varas, 2010).

Outro fenômeno para o tratamento da incerteza classificada como primária é a "maximização do lucro esperado" com base na aversão dos investidores ao risco (Thomas, 1997). Em outras palavras, independentemente de haver uma igualdade no valor esperado entre dois cenários: um certo e um incerto, as pessoas escolhem naturalmente o primeiro porque têm maior controle e segurança da situação. Como esta preferência é expressa pelo que é conhecido é expressa em utilidade desde a certeza do mercado, e as reações o ampliam.

2. AGENTES, COMPORTAMENTO E INCERTEZA

A aversão ao risco é sem dúvida a aversão à incerteza e, de uma perspectiva legal, é a fonte do sistema jurídico, que é criado e recriado precisamente para reduzir os espaços de incerteza e cobri-los com uma certa previsibilidade. Neste sentido, a aversão à incerteza garantiu que as relações socioeconômicas não se esgotam na análise estatística da probabilidade de lucro, mas, no que é possível condicionar o cumprimento do compromisso, contrato e obrigação a uma sanção econômica, legal e social (Bandler, 2019).

Além disso, considerando a utilidade de uma determinada transação econômica, mais significativa do que o lucro esperado, a aversão ao risco é uma operação econômica incerta. Entretanto, a igualdade do valor monetário esperado em ambos os cenários não é a única tendência no mercado. Alguns agentes do mercado são neutros em relação ao risco. Os sujeitos que dão conotações, nem positivas nem negativas, ao risco terão uma utilidade marginal da renda constante, sendo o componente indiferente incerteza nos cenários possíveis. Os investidores neutros aumentaram sua renda na mesma proporção em que aumentam seus lucros. Por exemplo, sendo a renda de 400 dólares, o lucro aumentará precisamente 400 dólares. As economias assumem que as empresas são neutras em relação ao risco. Entretanto, muito poucos agentes econômicos mantêm uma avaliação de risco neutra (Fraga, 2011).

Outros agentes econômicos preferem o risco como um componente necessário do investimento. Aqueles que tendem ao risco terão uma utilidade marginal de aumento de renda, ou seja, em crescimento contínuo. Os sujeitos que preferem o risco entre dois cenários em que há igual valor monetário escolherão a perspectiva de renda incerta. Os sujeitos econômicos que preferem o risco compreendem a economia de escala e sujeitam sua utilidade à quantidade cumulativa de sucesso, bem ou serviço oferecido pelo produto (Thomas, 1997).

Os três tipos de agentes econômicos: aversivos, neutros e preferenciais, em representações gráficas de rentabilidade e lucro, respectivamente, são:

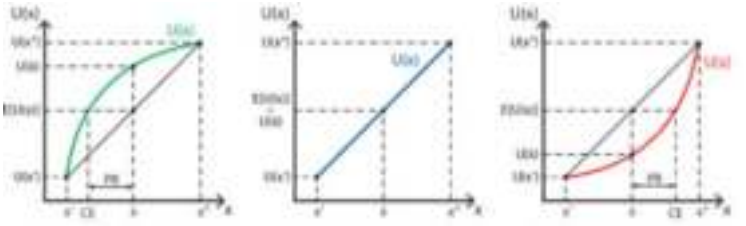

Tabela 1: Agentes econômicos

Fonte: Policonomics (2019, n. p.)

Cada um de nós enfrenta o risco o tempo todo ao tomar nossas decisões com base em informações que conhecemos ou tentamos conhecer, sendo responsáveis, ou seja, empresas e pessoas aplicam os preceitos legais da devida diligência. Entretanto, nós humanos não podemos lidar com todas as informações em um cenário, portanto o risco é uma questão eminente, independentemente dos gostos e preferências dos agentes econômicos, por isso o negócio de Seguros foi criado (Thuesen, 1981).

3. COMPANHIAS DE SEGUROS E CONTROLE DE RISCOS

Nesta ordem de idéias, o controle de risco tem perspectivas diferentes. O seguro é uma opção quando um indivíduo quer evitar responder diretamente ao risco. Entretanto, é essencial observar que a responsabilidade da Seguradora, seguindo os termos do contrato, também pode ser limitada. Neste sentido, o Contrato de Seguro, que estipula os termos e condições sob os quais a Seguradora cobrirá todos os tipos de eventualidades de risco, deve ser um instrumento para conhecer e exigir os direitos e obrigações das partes (Prado, 2011).

As seguradoras, como qualquer empresa, procuram maximizar seus lucros, para os quais utilizam informações estatísticas

sobre a freqüência de ocorrência de um evento para estabelecer uma taxa que permita que o negócio de "seguro" seja rentável. Nesta análise de estatísticas de probabilidade realizada pelas seguradoras, é utilizado um teorema matemático conhecido como a "lei dos grandes números". O teorema sustenta que os eventos imprevisíveis de indivíduos tornam-se previsíveis entre grandes grupos de indivíduos (Thomas, 1997). Por exemplo: individualmente, não sabemos se o veículo será roubado amanhã. No entanto, muitos roubos em uma determinada cidade tornam este evento verdadeiro através de estatísticas precisas que uma companhia de seguros pode realizar.

Assim, a certeza nas companhias de seguros é uma certeza estatística, que, embora tenha uma margem de erro, trata-se de obter um índice de confiabilidade suficientemente alto para fazer com que as reclamações sejam testadas positivamente no futuro. A certeza, legalmente entendida como um valor intangível neutro presente, serve às seguradoras para calcular o valor econômico a ser desembolsado para um risco iminente (Tung, 1983). Neste sentido, a seguradora não assume riscos, assume certezas probabilísticas.

As Seguradoras enfrentam dois fenômenos chamados: chance moral e seleção adversa. A chance moral, a mudança no comportamento do sujeito contratante. O acaso moral demonstra a falta de estatísticas, que podem projetar uma afirmação para o futuro, mas com base em comportamentos ou dados passados. Entretanto, se o padrão de comportamento observado e analisado nas estatísticas mudar radicalmente, então o resultado probabilístico também será alterado (Joshua,

2018). Por exemplo, um indivíduo que sabe que seu carro está segurado provavelmente não tomará tantas medidas de segurança como tomou antes de fazer o seguro de seu veículo.

A companhia de seguros conhece os efeitos do acaso moral, portanto sempre maximiza o valor esperado para cobrir um risco. O valor real para responder ao cliente pelo evento arriscado deve ser mais significativo para não afetar a rentabilidade contínua da empresa e garantir sua subsistência no mercado. A empresa que não elevar o valor do prêmio, considerando as possíveis modificações das variáveis no cenário segurado, estará assumindo um risco adequado e não uma certeza probabilística como pretendido (Graells, 2011).

As seguradoras aplicam métodos diferentes para minimizar os efeitos da aleatoriedade moral. Entre os métodos mais sistemáticos estão o co-seguro e as franquias. O co-seguro e as franquias consistem em que o segurado é responsável por uma porcentagem fixa de sua perda para que o segurado pratique comportamentos consistentes para proteger o bem segurado. Assim, também há descontos nos prêmios para pessoas que praticam atos que reduzem o risco. Por exemplo, o seguro de vida para não fumantes é mais barato do que para fumantes (Thomas, 1997). O czar moral é um fenômeno derivado da renúncia total do segurado, que pode ser reduzida com um peso percentual de responsabilidade.

Enquanto isso, a seleção adversa consiste em catalogar o segurado como de alto risco ou baixo risco. Embora a Lei de Grandes Números ajude a calcular a probabilidade de risco em um assunto e em outro, ela é fornecida com amostragem e não da população como um todo, portanto, não pode ser perfeita. O prêmio do seguro deve ser suficientemente valorizado porque há um retorno razoável ou pelo menos compensado em caso de

erro na classificação do sujeito (de baixo risco para alto risco). A maioria das companhias de seguro utiliza os mesmos métodos ou métodos similares para controlar o fenômeno do acaso moral para o problema da seleção adversa (Machado, 2019).

A seleção adversa mostra como a generalização tende sempre ao erro. Neste sentido, alguns grupos são geralmente de baixo risco, mas há sempre a possibilidade de que haja um elemento que não obedeça a um comportamento generalizado. Por exemplo, os jovens entre 15 e 30 anos são mais propensos a sofrer um acidente de carro. Entretanto, neste grupo, pode haver sujeitos que lidam mais cautelosamente com outros. Erros de generalização de maior risco não se traduzem em perda para a seguradora, mas a generalização de menor risco, se não for suportada por um prêmio razoável, resultará em perda para a empresa (Machado, 2019).

CONCLUSÕES

No mundo do Direito Econômico, a devida diligência diante da incerteza tem sido mal interpretada como abstenção de uma decisão específica. Entretanto, a devida diligência diante da incerteza é motivada pela intenção de decidir de forma positiva, ou seja, tomar uma ação específica, para a qual é necessário realizar tarefas específicas de pesquisa que minimizem o risco de uma decisão errada. Há várias maneiras de lidar com o risco, como a avaliação por antecedentes, a conclusão de contratos de performance, entre outras. Nenhuma destas opções deve ser entendida isoladamente, mas pelo contrário, elas funcionam de forma multidisciplinar e complementar.

Resumindo, o risco é um elemento natural da tomada de decisão. Existem diferentes maneiras de reagir a ele: adverso, neutro ou preferencial. Neste sentido, existem diferentes formas

de gerenciamento de risco, seja utilizando-o estrategicamente para desvalorizar bens e serviços a nosso favor, minimizando-o através de ações específicas que fazem parte de nossa due diligence, ou finalmente transferindo a responsabilidade do risco para terceiros, através de seguros. Nesta ordem de idéias, a gestão de risco de terceiros torna-se uma oportunidade no mercado, na qual as empresas autorizadas podem dar valor agregado aos intangíveis presentes e futuros: segurança, certeza e o mesmo risco. As companhias seguradoras enfrentam fenômenos de sua natureza, tais como a oportunidade moral e a seleção adversa. O risco está no viver, e o viver está no risco.

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Property Rights, Entrepreneurship and Public Policy: A Review from Classical Liberalism

Derechos de Propiedad, Empresarialidad y Políticas Públicas: Una revisión desde el Liberalismo Clásico

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ABSTRACT: This research describes how Market Ecology constitutes the basis for understanding and implementing efficient and innovative actions for the Conservation of Natural Resources. Basically, through this article, it will be understood that the ideas of freedom, the market, and a public policy that promotes the entrepreneurial function, are the basis for protecting, managing, and caring for those beautiful spaces, full of life and nature, that we appreciate so much.

KEYWORDS: market ecology, property rights, entrepreneurship, public policies.

RESUMEN: Este artículo describe cómo la Ecología de Mercado constituye la base para entender e implementar acciones eficientes e innovadoras de Conservación de los Recursos

Naturales. Básicamente mediante el presente trabajo se entenderá que las ideas de la libertad, el mercado y una política pública que fomente la función empresarial, constituyen la base para proteger, gestionar y cuidar esos espacios hermosos, llenos de vida y naturaleza, que tanto apreciamos.

PALABRAS CLAVE: ecología de mercado, derechos de propiedad, empresarialidad, políticas públicas.

JEL CODE: G18, H82.

INTRODUCTION

Market Ecology is a theoretical approach that began to be conceived in the 1980s by a group of young economists (Terry Anderson, John Baden, P.J. Hill, and Richard Stroup) around the *Property and Environment Research Center (PERC)* in Bozeman, Montana, an institution founded by these professionals to investigate how markets can improve environmental quality.

According to Anderson (1993):

> At its core, Market Ecology is based on a system of well-defined property rights over natural resources. If these rights are in the hands of individuals, corporations, non-profit environmental groups, or communal groups, a discipline is imposed on resource users, because the wealth of the owners of the property rights are at risk if wrong decisions are made. Of course, the further a decision is removed from this discipline - as is the case when there is political control - the less likely it is that resources will be properly managed. Moreover, when well-defined property rights are transferable, owners must consider not only their value but also what others are willing to pay for them. (p. 32)

Market Ecology is fundamentally based on an adequate definition of property rights as the basis for guaranteeing property owners the incentives to develop initiatives to protect natural resources. Well-defined and transferable property rights generate positive incentives for people to act in an environmentally friendly manner. In this sense, this article addresses the implications of peaceful interaction between property rights, entrepreneurship, and public policies to achieve sustainable preservation of the environment.

1. PROPERTY RIGHTS AND PRODUCTIVE ENTREPRENEURSHIP

In addition, an adequate definition of property rights motivates owners to develop their Business Function, i.e., to carry out the necessary actions to enhance the value of a given area with valuable natural resources. In the case of natural resource conservation, having properly defined property rights encourages the owners of these areas to promote business initiatives such as ecotourism, biodiversity research, or other options that generate economic benefits for them.

Property rights form the basis of the theoretical approach to Market Ecology, as indicated by Anderson (1993):

> The approach to property rights over natural resources admits that such rights imply a dependence on the benefits and costs derived from their definition and application. This calculation depends in turn on variables such as the expected value of the resource in question, the technology of measurement and control of property rights, and the moral and legal usages that condition the behavior of the acting parties. At a given point in time, property rights will reflect the perceived benefits and the costs of definition and enforcement. (p. 56)

In this conceptual framework, we can find several elements that distinguish property rights. First, we see that property rights generate information on the benefits and costs to be considered by individuals, entrepreneurs, and communities wishing to protect the natural resources of their respective territories.

In simple terms, environmental entrepreneurs will feel more confident in promoting ecotourism, research, or recreation project within their respective properties if they have information on the benefits they will achieve through certain costs. Likewise, they will be able to evaluate the generation of partnerships with other actors that complement the business initiative they wish to undertake. For example, a community that has information on the benefits and costs involved in protecting a given resource will evaluate the convenience of partnering with a tourism entrepreneur to preserve an area with beautiful natural scenery. In conclusion, a definition of property rights allows owners to have "Information".

Without defined property rights, environmental entrepreneurs will never have the necessary "information" to make decisions or undertake a business initiative that protects natural resources. But the issue of property rights in the environmental field is not only about the production of information on benefits and costs, but a clear definition of property rights in addition to the generation of "Information" also allows for cooperation between individuals. In other words, defined property rights prevent the emergence of conflicts between two individuals who wish to use the same natural resource for different purposes.

As Cordato (2004) points out:

> Irresolvable inefficiencies, i.e., inefficiencies that cannot find a solution in the business operation of the market process, arise due to institutional defects associated with a lack of clearly defined or well-enforced property rights. In a situation where rights are clearly defined and strictly enforced, plans may conflict, but the resolution of that conflict is implicit in the exchange process. In other words, the conflict may appear in the planning stages, but it is resolved before the actors proceed to implement those plans. (p. 8)

As we can see, an adequate definition of property rights resolves conflicts that may arise between two actors. For example, if a community has an area with flora and fauna resources but does not have clearly defined property rights over the area in question, another invader or extractor of natural resources will enter and deforest the forests in that territory without caring about the damage caused to the community, creating a conflict scenario that will pit the community against the illegal logger who wishes to deforest the forest.

However, if in the above case there were a clear definition of property rights backed by an institutional level, the conflict would not arise. On the contrary, new forms of cooperation would develop between the community and the illegal logger since it is very likely that an exchange or cooperation could emerge between both actors through some business alternative. In the end, the illegal logger could become a timber buyer and the community would undertake the cultivation of timber trees for commercial purposes. But alternatives such as these will only emerge if there are clear institutional rules that guarantee defined property rights.

In this sense, a clear definition of property rights that generates conditions to protect and efficiently manage natural resources implies the development of clear Institutions or institutional rules. In other words, as Anderson (2014) indicates:

> By Institutions, we mean the rules that govern the way people interact with each other. More specifically, property rights are those that determine who should use resources (including natural resources, capital, and labor), how other resources could be used, and whether these could be exchanged. (n. p.)

These institutional rules must have two fundamental characteristics. First, they must be accepted by the stakeholders who wish to conserve natural resources and, second, they must be supported by legislation or public policy. Otherwise, if the public policy goes against the institutional rules that emerged from the free agreement of the stakeholders interested in conserving natural resources, the environmental undertaking to conserve these resources will not be fulfilled and cooperation will be replaced by conflict and the destruction of biodiversity-rich territories.

As Anderson (2014) points out:

> When property rights are dictated by central authorities with a minor stake in the outcome, time and effort are usually wasted in the process of creating property rights, so productive investment suffers. Just as technological change is generally incremental rather than discontinuous, effective institutional change evolves slowly, taking into account specific conditions of time and place. (n. p.)

As we can see, property rights have an evolutionary nature, especially regarding the conservation of natural resources. Since property rights are institutional rules governing the exchange between two actors, the emergence of property rights will depend on the work of institutional entrepreneurs to create new ways of establishing clearly defined property rights. The solutions proposed and implemented by these entrepreneurs will be based on information about time and place.

In this sense, the evolving nature of property rights develops according to the new challenges that institutional entrepreneurs must face to guarantee the use of a given natural resource. These entrepreneurs promote new institutional rules that make it possible to use and enhance the value of a given territory rich in biodiversity.

In this context, the work of institutional entrepreneurs is fundamental, since they, in an environment of freedom and cooperation, create rules to be able to exchange, trade, and protect certain natural resources. For example, if a farming community wishes to establish agreements with environmental entrepreneurs, it will need to establish clear rules of exchange based on clearly defined property rights, such as contracts, delimitation of areas, traditional systems of area protection, technology to establish property boundaries, among other innovative initiatives that will only come from the actors directly involved.

As Anderson (2014) points out:

> It is easier to understand the importance of institutional entrepreneurs in a context that tests their ability to prevent the *tragedy of the commons*. The tragedy of the commons occurs when there are no limits to accessing a

> resource, resulting in overexploitation of the resource. The most typical example is the overgrazing of village commons. If customs and traditions do not limit access to pastures, individuals will exploit them irremediably, and the entire pasture will be devoured by livestock. The entrepreneur who can develop rules to restrict grazing will gain part of the increased value of the pasture. Thus, their value will not dissipate, something that does happen through the tragedy of the commons. (n. p.)

As we can see, the work of institutional entrepreneurs is fundamental to addressing the tragedy of the commons, as institutional entrepreneurs can develop innovative initiatives to create institutional rules to define property rights to conserve natural resources. The work of the owners of biodiversity-rich areas, be they individuals, NGOs, entrepreneurs, or communities, in defining property rights is fundamental to undertaking innovative initiatives to conserve nature.

However, the success of institutional entrepreneurs will depend on public policies not affecting the free development of their initiatives. That is, given that public policies are generated by officials who do not have information on time and place, the application of these policies may generate a risk that blocks the initiatives of these environmental entrepreneurs. As Anderson (2014) points out:

> Although formal property rights, norms, and laws may be important in determining economic prosperity, their effectiveness in promoting harmony depends largely on how formal rules interact with informal institutions. Custom and traditions can be decisive factors in the

process of growth. (n. p.)

For these reasons, the Market Ecology approach highlights the importance of the work of institutional entrepreneurs and the application of their knowledge (customs and traditions) when defining property rights and the danger of a public policy that goes against the free development of these private initiatives that seek to conserve natural resources.

In this regard, it is key that public policies only focus on guaranteeing property rights or developing institutional rules that allow landowners to undertake natural resource conservation initiatives. As Cordato (2004) mentions "if legal institutions, instead of making it more expensive to establish private property rights, stimulate them, markets can develop recreational spaces and pleasant environments in the same way that they provide traditional products" (p. 235).

Likewise, Larraín (1995) indicates that an:

> In-depth examination of the solution to environmental problems leads us to suggest that the adequate response is not indiscriminate regulation, which is usually advocated. On the contrary, a more efficient solution, in terms of resource allocation and even environmental objectives, can be achieved through the definition of property rights where they do not exist. These, together with a competitive market, allow for greater care of the environment in a process of economic growth. (p. 17)

In this sense, a definition of property rights allows owners of biodiversity-rich land to obtain economic benefits from initiatives that conserve nature. This means that an adequate definition of property rights reduces the transaction

costs involved in protecting a natural resource, as Anderson (2014) points out:

> Institutions that elucidate existing property rights, or create them when needed, also reduce transaction costs through the oversight and protection they provide. For example, rules for branding cattle with iron caused their market to be more efficient, and land inspections and records made property transfers cost less. (n. p.)

Property rights provide landowners with tangible benefits expressed in lower transaction costs and income generation. These benefits become the incentive for landowners, whether they are individuals, communities, NGOs, or entrepreneurs, to undertake conservation initiatives such as ecotourism, recreation, and nature research, among others. However, this incentive or stimulus will be blocked when public policies that go against the property rights of these actors are implemented. In this situation, the owners will not feel confident about obtaining benefits and therefore economic progress will dissipate.

On this point, Anderson (2014) tells us that "rules that restrict exchange discourage profitable business and encourage conflict. And laws that prevent private property can cause rents to disappear, as happens with overgrazing, uncontrolled fishing, or overexploitation of resources. All these types of rules create artificial transaction costs" (n. p.). For that reason, public policies should only focus on guaranteeing the exchange and ownership of natural resources held by owners of biodiversity-rich land. Only in this way will transaction costs decrease, and benefits increase.

Anderson (2014) summarizes this point with the following sentence:

> By focusing on transaction costs and how they relate to different institutions, we can better understand the origin of cooperation and prosperity. When property rights are well defined and adequately protected, markets promote gains from trade and encourage more efficient use of resources. However, when property rights are not well specified not protected, valuable resources vanish, as people will then compete to obtain the rents from unique resources. (p. 542)

On the definition of the Entrepreneurial Function, Professor Huerta de Soto (2015) tells us the following:

> In a general or broad sense, the entrepreneurial function coincides with *human action* itself. Moreover, it could be stated that the entrepreneurial function is exercised by any person who *acts* to modify the present and achieve its objectives in the future. Although at first sight, this definition may seem too broad and not in line with current linguistic usage, it must be borne in mind that it responds to a conception of entrepreneurship that is increasingly elaborated and studied by the economic sciences and that, in addition, it is fully in line with the original etymological meaning of the term company. Both the Spanish expression "empresa" and the French and English expressions *entrepreneur come* etymologically from the Latin verb *in prehendo-endi-ensum*, which means to discover, to see, to perceive, to realize, to catch, and the Latin expression *in prehensa* carries the idea of action, it means to take, to grasp, to do. In short, the enterprise is synonymous with action.

> Now, the meaning of enterprise as action is necessarily and inexorably linked to an entrepreneurial attitude, which consists of continually trying to seek, discover, create, or realize new ends and means. (p. 41)

Therefore, adequate development of the entrepreneurial function depends to a great extent on an adequate definition of property rights, i.e., if the rights over territory or area cannot be definable, defensible, and transferable, its owner will not have the motivation to invest money, time and work that will allow him to achieve a personal purpose or benefit. In this respect, the entrepreneurial attitude will only awaken when the individual has the security that the resources he invests will be protected by a contract, document, or legislation. In simple terms, this condition means having property rights.

For this reason, the conservation of natural resources, or specifically the conservation of an area that has valuable flora and fauna resources, will depend on well-defined property rights over this area, and this implies that the owner, be it an individual, businessman, NGO, or community, has the security to choose what actions to take over the natural resources under his ownership. For example, renting, selling, or transferring this property to another interested actor. If these conditions exist, the owner will be motivated to undertake or create business initiatives to obtain economic benefits in line with the conservation of natural resources.

In this respect, Professor Huerta de Soto (1994) indicates that:

> What is important is to put into operation the entrepreneurial processes aimed at solving the problems. This means that concrete and specific

> technical recipes cannot be given, since they will have to be discovered, considering the circumstances of time and place of each environmental problem by the force of the entrepreneurial function, in a context of free enterprise and correct definition and defense of property rights. (p. 225)

As Professor Huerta de Soto (1994) points out, the development of the entrepreneurial function allows the use of time and place information, that is, information that is only available to individuals who are in the area, either because they live in the area or because they have direct contact with the area. For example, if a community owns an area rich in natural resources and there is also a group of professionals in the area who wish to join the community to conserve those natural resources, then both actors have the knowledge to undertake more creative and efficient actions on how to conserve those natural resources (ecotourism, research, or recreation). This knowledge of time and place cannot be replaced by the knowledge of some state authority or technician who is not in the place and even less so who does not have the property rights to the area in question.

2. FREE-MARKET ENVIRONMENTALISM IS BASED ON PRODUCTIVE ENTREPRENEURSHIP AND ENTREPRENEURSHIP

As Anderson (2015) points out:

> Free-market environmentalism relies on entrepreneurship as a driving force that is to reduce the costs of defining, enforcing and negotiating property rights so that resources can be used more efficiently. This way of thinking follows the work of Nobel Laureate

> Friedrich Hayek whose ideas are compared to those of Charles Darwin. Hayek saw markets as processes in which demanders and suppliers continuously responded to changing price signals in the same way that Darwin saw species taking advantage of empty niches. Thus, both markets and ecosystems are bottom-up systems that cannot be managed from the top down. Matt Ridley captured the similarities between Hayek and Darwin, saying that both markets and nature are spontaneously self-ordering through the actions of individuals, rather than ordered by a monarch or parliament. (p. 13)

For these reasons, Market Ecology is not only based on an adequate definition of property rights and the development of the entrepreneurial function, but also on the influence that public policy can have on both points. For example, if the public policy does not guarantee landowners their property rights and instead violates them, these landowners will not be able to develop their entrepreneurial function or undertake creative initiatives to conserve natural resources. Infringement of property rights by the State means that the State is promoting policies that do not allow owners, be they individuals, entrepreneurs, NGOs, or communities, to define, defend or transfer their property.

This negative influence of the State is reflected in concrete actions such as the political distribution of property rights, i.e., when the State grants rights to various agents over the same territory, regardless of whether these rights conflict. For example, in the Peruvian Amazon, the State has granted property rights over the same territory to communities, mining concessions, settlers, and forestry concessions, among others,

causing what is called “overlapping property rights”.

In places where this overlapping of property rights is evident, the incentives for landowners to develop nature conservation initiatives are lower, and this is evident because property rights in these areas are not adequately defined, creating a situation of conflict, and blocking the development of the landowners’ entrepreneurial function.

Another action by the State that blocks the development of the business function is expressed in the public ownership of territories rich in biodiversity. In this regard, it should be noted that in many parts of the world, areas characterized by particularly valuable flora and fauna resources are protected by the State under the model of national parks or simply as public property. In the case of the Peruvian Amazon, more than 60% of this territory is owned by the State, a situation that has not allowed the development of private initiatives in this territory, except for a few experiences such as the Conservation Concessions and Ecotourism Concessions that we will explain below.

It is evident that one of the obstacles to achieving an adequate allocation of property rights has been the State itself, which, in its eagerness to protect natural resources through the formula of public goods, has given rise to two visible consequences: a) the monopolization of land and b) the origin of negative externalities due to the excessive eagerness to create protected natural areas that in the end it cannot control and monitor.

The influence of the State in the definition of property rights plays an important role in the development of private initiatives for the conservation of natural resources. For

example, if a landowner does not have legal security from the State that provides guarantees to protect his property rights, he will never consider the conservation of natural resources as an end, since he will not have the necessary incentives to devise or undertake market solutions for the conservation of biodiversity.

Likewise, if the State monopolizes lands of great value in flora and fauna (Amazon) under the modality of public property, businessmen, NGOs, communities, or other actors will not be able to enter these areas to create efficient nature conservation proposals, since they will not have recognized property rights.

For this reason, the Market Ecology approach seeks to study the relationship between property rights, entrepreneurial function, and public policy influence. The entrepreneurial function is another component of Market Ecology, and its development depends closely on a clear definition of property rights. In other words, if property rights are clearly defined, environmental entrepreneurs will have the incentives to promote initiatives that conserve natural resources.

As we indicated in the previous point, a clear definition of property rights provides landowners with the security to establish medium and long-term plans that seek to conserve natural resources. This security allows landowners to find strategic partners such as entrepreneurs or institutions interested in ecotourism, conservation, and biodiversity research.

But the key point that motivates landowners to implement their business function is the "information" produced by the defined property rights and this "Information"

is expressed in the *costs and benefits* that the landowner comes to know to be able to define his plans, actions, and decisions in the face of future risks involved in undertaking a biodiversity conservation initiative.

In this regard, Huggins (2013) indicates that:

> Property rights provide the basis for a market economy. Without private property rights there would be no exchange, without exchange there would be no prices, and without prices, there are no clear signals to transmit information to consumers and producers. The three *Ps* of *Property, Prices, and Profit*/losses, provide the three I's of a dynamic economy of *Incentives, Information, and Innovation*. (p. 9)

In a broader context these elements: ownership, pricing, profit/loss, incentives, information, and innovation relate to three basic aspects that characterize the individual or environmental entrepreneur. These three aspects are *Human Nature, Knowledge, and Processes and Solutions.*

Regarding ***Human Nature***, which is the first aspect that characterizes the environmental entrepreneur who exercises the entrepreneurial function, Anderson (1993) indicates that "free market ecology considers that man is interested in himself", in that sense, "the good management of resources depends on how social institutions manage to set in motion their interests through individual initiatives" (p. 33). This means that to foster the development of the entrepreneurial function it is important to understand that individuals respond to their ends and seek the means to achieve those ends, in that sense, if the rules or institutions foster a context for landowners rich in biodiversity to achieve their ends, they will

seek the most creative and innovative means to achieve their end or personal interest.

On this point, we must consider that, in the field of natural resource conservation, there are owners (individuals, entrepreneurs, or communities) who are interested in conservation. There are also investors, researchers, scientists, and international organizations that are also interested in achieving this objective. Consequently, all these actors have a common goal, which is to "protect natural resources". Now, if government institutions and regulations foster the conditions for these actors to achieve this goal, cooperation will immediately develop, and each of these actors, either individually or in association, will seek the most creative and innovative alternatives to achieve this goal.

These creative and innovative ways will depend exclusively on the information of time and place available to each of these actors, therefore, only they will be able to undertake innovative initiatives to conserve natural resources. These environmental actors or entrepreneurs will be able to fulfill their interests by generating new forms of conservation of natural resources. This new knowledge will serve as an example or inspiration for new entrepreneurs who will improve the processes towards better management of nature.

In this sense, *Knowledge becomes the seco*nd aspect that characterizes the environmental entrepreneur, in this respect, Anderson (1993) tells us the following:

> The free-market ecology considers that the gap between the knowledge of an expert and the average individual is much smaller. From this point of view, individual private owners are in a better position and

> have greater incentives to obtain time- and place-specific information about their resources and to manage them than centralized bureaucracies. (p. 34)

This means that the *information or knowledge* that the owners of biodiversity-rich territories have is more useful than the information available to a public official who wishes to promote an environmental policy. This is because landowners are much closer (in time and place) to the natural resources. In this regard, Huerta de Soto (2015) tells us that this information and knowledge that forms the basis of the business function is characterized by six key aspects:

Subjective knowledge of a practical, non-scientific type: "It is all that which cannot be represented, in a formal way, but which the subject acquires or learns through practice, that is, through human action itself in its corresponding contexts" (n. p.). In the case of natural resource conservation, the landowners have local knowledge about the traditional use of natural resources, for example, many of the landowners know very well the traditional use of plants, places for bird watching, trails to walk through the area, and other local knowledge about the natural resources found in their territories.

Privative and dispersed knowledge: "Each man who acts and exercises the entrepreneurial function, does it in a strictly personal and unrepeatable way since he starts from reaching certain ends or objectives according to a vision and knowledge of the world that only he possesses in all its richness and variety of nuances, and that is unrepeatable in an identical way in any other human being" (n. p.). In the case of nature conservation, each of the owners, whether they are individuals, community members, or entrepreneurs, has a unique knowledge of their goals and the means to achieve these goals. For example, if the

landowners' goal is to conserve the natural resources of their land, they will implement the most creative and innovative means to achieve these goals (ecotourism projects, research, and other innovative initiatives).

Tacit and inarticulable knowledge: "The actor knows how to do or perform certain actions but does not know what the elements or parts of what he is doing are, or whether they are true or false. For example, the set of habits, traditions, institutions, and norms that constitute a law, which the individual obeys without theorizing on their content" (n. p.). In the case of nature conservation, communities have institutions, traditions, and norms that form the basis of their organization and become the strength when managing a natural resource conservation initiative.

The knowledge that is created ex nihilo, out of nothing, through the exercise of the entrepreneurial function: "The creative character of the entrepreneurial function is embodied in the fact that it gives rise to entrepreneurial profits, which, in a certain sense, arise out of nothing. It is enough for individuals to become aware of misalignments or miscoordinations among other individuals and immediately find the opportunity to obtain an entrepreneurial profit" (n. p.). In the case of natural resource conservation, the owners of land rich in biodiversity identify the conservation option as an alternative to obtain economic income, for this reason, they seek alternatives to obtain these benefits by promoting business projects such as ecotourism or biodiversity research.

Transmissible knowledge: "The creation of information simultaneously implies its transmission in the market. To transmit something to someone is to make that someone generate or create in his mind part of the information that

we created or discovered previously. Prices are a powerful means of transmitting information and respond to a subjective valuation set by the actors" (n. p.). In the case of natural resource conservation, the defined property rights of land rich in biodiversity generate incentives for landowners to coordinate with other professionals or investors interested in nature conservation. This coordination takes place through the prices assigned by the landowners to the services that their area can offer, such as lodging, viewpoints, lodges, landscapes, and biodiversity, among other services.

The knowledge that generates learning and coordination: "The actors that communicated through the entrepreneurial function learn to act in a coordinated way, that is, in the function of the other human being. Consequently, without the exercise of the entrepreneurial function, the economic calculation that is based on the information that is necessary for each actor to adequately calculate or estimate the value of each alternative course of action is not generated" (n. p.). In the case of private conservation areas, coordination among the stakeholders involved, whether they are owners, investors, or users, is one of the strengths of undertaking a natural resource conservation initiative. For example, the joint work between a community and a tourism entrepreneur has made it possible to combine traditional knowledge with professionals and thus develop sustainable initiatives on private natural resource management.

As we can see, "knowledge" is one of the key elements of the entrepreneurial function, especially the knowledge of the owners or stakeholders directly involved with biodiversity-rich areas. Although the knowledge of *time and place* that these actors have is the basis for undertaking innovative initiatives

on natural resource management, this condition alone does not guarantee the development of successful environmental ventures.

In addition to "knowledge", it is necessary to develop a third element that sustains the entrepreneurial function, this third element is constituted by ***the Processes and Solutions*** that institutional entrepreneurs put into practice when creating rules, norms, and contracts that allow defining property rights over biodiversity-rich territories.

The planning of new institutional solutions constitutes the most tangible expression of the processes developed by entrepreneurs to establish rules that allow defining property rights. In the development of these processes, the innovative solutions they plan to address the tragedy of the commons and promote productivity. In this context, institutional entrepreneurs reorganize existing property rights or define new rights needed to obtain benefits from the conservation of natural resources.

However, if institutional entrepreneurs, instead of reorganizing or defining property rights, opt for the option of redistributing property rights, productivity will be reduced, and conflict will arise. For example, in the Peruvian Amazon, the State has redistributed property rights under a political criterion. This situation has caused an overlapping of property rights and a continuous conflict, since on the same territory there are several types of properties such as mining concessions, protected natural areas, forest concessions, and communal lands, among others. In such a context, it is normal that conflicts to arise and innovative solutions to conserve natural resources are blocked.

For this reason, the work of institutional entrepreneurs in defining rules and contracts that reorganize and define property rights is key to the emergence of the entrepreneurial function. As Anderson (2014) indicates:

> Institutional entrepreneurs are motivated by achieving high returns. Such perceptions require the entrepreneur to establish control over productive resources: labor, capital, and land. The entrepreneur is first and foremost a *contractual innovator* who must find ways to capture the value generated through the creation and reorganization of property rights. (n. p.)

The task of institutional entrepreneurs is to find a balance between increasing business benefits and the costs of defining and monitoring property rights to biodiversity-rich areas. Consequently, when entrepreneurial action finds the most innovative ways to establish property rights, it results in increased rents and decreased costs associated with monitoring conservation areas.

In most cases of private conservation of natural resources, the solutions to the problems of defining property rights were initiated by the private sector and not by the state sector. For example, in the Peruvian case, legislation on private conservation arose after the initiatives of institutional entrepreneurs, which shows that the knowledge of the owners (individuals, communities, entrepreneurs, NGOs) of lands with valuable natural resources, are the ones who can undertake the most innovative solutions to manage and conserve these territories.

In this regard, Anderson (1993) tells us that:

> Entrepreneurial imagination is of fundamental importance to Free Market Ecology because it is in areas where property rights are evolving that resource allocation problems arise. When entrepreneurs working with ecological resources can discover ways to market these values, market incentives can have dramatic results. It is important to recognize that any instance of external benefits or costs is fertile ground for an owner capable of defining and enforcing property rights. (p. 56)

In summary, the entrepreneurial function in the field of natural resource conservation allows for the discovery of options to enhance the value of the flora and fauna resources of a given area. This achieved by the development of the entrepreneurial function is based on the work of institutional entrepreneurs to establish creative ways to define property rights over these resources. Establishing these property rights implies the development of private and state actions.

Private actions are those undertaken by landowners, entrepreneurs, NGOs, and communities to establish rules or implement technology to guarantee property rights over their areas or territories. On the other hand, public actions are policies or legislation issued by public officials.

Unfortunately, if public actions do not promote entrepreneurship and the entrepreneurial function that are private actions, the development of innovative initiatives for the conservation of biodiversity-rich areas will fail, since public policies will block the emergence of the incentives or benefits that entrepreneurs need to know to feel motivated to establish

actions or take risks to define property rights, invest financial resources and undertake entrepreneurial actions to enhance the value of the natural resources of their territories.

For this reason, public policy should allow institutional entrepreneurs to implement innovative initiatives for the management and conservation of natural resources, since only in this way will it be possible to develop the entrepreneurial function that will provide innovative solutions to the conservation and management of biodiversity-rich territories. For example, solutions could include business initiatives such as ecotourism, research, and recreation, among others.

In this regard, Huggins (2013) tells us:

> Entrepreneurs are addressing environmental challenges by learning to reap benefits from what would otherwise have been a "tragedy of the commons," a term coined by Garret Hardin (1968) in Science to describe a common cow pasture that is ruined by too many people overgrazing their cattle. His fable is a useful illustration of a genuine public policy problem: how to manage a resource that belongs to no one? Some solutions: ***One***, close the commons and turn the environment into a private asset. This requires the entrepreneur to create or define property rights, which he will do when the benefits of having a well-defined system outweigh the costs of creating the system (Boettke and Coyne 2003). ***Two***, given rigorous institutional arrangements, the commons can remain open, but must be commonly managed (Ostrom 1990). (n. p.)

Solution ***One*** implies that the benefits outweigh the costs that the environmental entrepreneur will assume to secure

the property rights to his land, i.e., profit is the main driver for a landowner (individual, entrepreneur, NGO, or community) to implement natural resource conservation solutions or alternatives. As Anderson (1993) points out:

> If the connection between private interests and good resource management breaks down because the good steward cannot reap the benefits, or cannot bear the cost of his decisions, or receives distorted information because of political interventions, the effectiveness of free market ecology will be damaged, just as centralized planning would damage the efficiency of an ecosystem. (p. 36)

In the case of solution ***two,*** for territories belonging to communities, it is not only important to obtain benefits, but also to develop rigorous institutional agreements that allow community members to guarantee adequate management of natural resources for common use. In this context, it is important to highlight the seven principles that characterize sound common pool resource institutions as outlined by economist Elinor Ostrom. According to Ostrom (2000), the design principles characteristic of long-lasting Common Use Resource institutions is the following:

a) Clearly defined boundaries: "The individuals or families with rights to extract resource units from the RUC must be clearly defined, as must the boundaries of the resource" (n. p.). This principle is a clear indication that communities also need institutions to guarantee the property rights of their territories. These institutions will determine what actions community members should take to protect the boundaries of their

territories and efficiently manage natural resources. For example, in the private conservation experiences that have been developed in Peru, the peasant or indigenous communities that have been most successful in managing a private conservation area have been those that have very clear institutional guidelines to guarantee their property rights.

b) Coherence between the rules of appropriation and provision with local conditions: "The rules of appropriation that restrict time, place, technology and the resource units are related to local conditions and to the rules of provision that require labor, material, and money or both" (n. p.), Each experience of natural resource management is different and characterized by its peculiarities, for that reason, it is not possible to apply centralized management plans or from the government. To work with communities, it is important to consider local conditions and the rules of natural resource appropriation that develop in the area.

c) Collective choice arrangements: "The majority of individuals affected by the operational rules can participate in their modification" (n. p.), communities that have institutionalized coordination spaces where their members can discuss decisions or agreements involving the private management of natural resources in their territories, have greater strength to manage biodiversity conservation initiatives. This strength is not only evident within the communities, but also when the community coordinates with a company or other actor interested in partnering with it to undertake a business project on the private management of natural resources.

d) Oversight: "Overseers who actively monitor the conditions of the RUC and the behavior of appropriators are either accountable to them or are appropriators" (n. p.). Oversight of property rights, as well as compliance with rules or agreements, is the basis of the communities that have the greatest strength to manage a conservation area. When managing a Common Use Resource, it is not enough to have coordination spaces, but also clear rules for supervision of property rights and the obligations of each member of the community.

e) Graduated sanctions: "Appropriators who violate operating rules receive graduated sanctions (depending on the severity and context of the infraction) from other appropriators, appropriate officials, or both" (n. p.). Establishing graduated sanctions for those community members who have not complied with their obligations or established agreements constitutes a key piece that reinforces oversight actions. In the case of natural resource conservation and management, graduated sanctions constitute an institutional rule to prevent actions that go against biodiversity conservation, such as illegal logging, deforestation for agricultural activities, or hunting of wild animals.

f) Mechanisms for conflict resolution: "Appropriators and their authorities have quick access to local instances to resolve conflicts between appropriators, or between appropriators and officials at low cost" (n. p.). During the fulfillment of the commitments established by the community to manage a biodiversity conservation area, disagreements or conflicts may arise that alter the efficiency of the area's management. For this reason,

the community must have spaces or mechanisms for conflict resolution. Communities that have these mechanisms in place have been better able to resolve disputes that have arisen during the management of a private conservation area.

g) Minimum recognition of organizational rights: The rights of the appropriators to build their institutions are not questioned by external governmental authorities. Communities usually maintain institutional rules that have prevailed from generation to generation, since they have been the main strength of their organization and decision-making. Most of these rules have prevailed over time because of the community's work, but also because of minimal recognition by government authorities. In the case of private conservation and management of natural resources, it is key to respect and rescue those institutional rules of the community that can provide efficiency in the management of a private conservation area. In some cases, the decisions made by the communities on natural resource management are likely more efficient than a businessman or nature-loving professional. For this reason, the State, when applying its public policies, must be very careful not to override these local institutions, which are undoubtedly the basis for the entrepreneurial function of communities interested in biodiversity conservation.

Communities that put these seven principles into practice have proven to have greater strengths in managing a natural resource conservation area and in dealing with the

uncertainties involved in undertaking a business project in the field of biodiversity conservation.

3. THE ROLE OF PUBLIC POLICIES

In this context, the role of public policies should be limited only to establishing legal certainty that guarantees individuals, communities, or other actors property rights over the territories they own. As Anderson (2015) points out:

> Undoubtedly, governments play a critical role in clearly specifying and recording property claims, establishing rules of accountability, and adjudicating disputed property rights. That said, well-defined and enforced property rights impose discipline on resource owners, holding them accountable for the harm they do to others and rewarding them for improving resource use. Property rights incentivize owners to protect the value of their environmental assets. (p. 4)

Undoubtedly, the role of the State should be limited only to the generation of legal guarantees that allow owners to have clearly defined property rights. In the case of natural resource conservation, this would imply that the property of individuals, NGOs, entrepreneurs, and communities interested in conserving the flora and fauna resources of their territories be protected by the State through an official registry of their land ownership and the issuance of clearly defined property titles. As Coase (2009) points out:

> If I am correct that trying to get the government to undertake new activities will only make it perform worse than before in the activities it is already responsible for, the continued expansion of government responsibility

> will lead to the situation where most of its activities end up doing more harm than good. I guess that we have already reached that point. (p. 77)

As Anderson (1993) points out:

> The free-market ecology emphasizes the importance of the role of government in enforcing property rights. With clearly specified titles - obtained through a land registration system, with strict accountability rules, and with allocations through court judgments of disputed property rights - the market process can stimulate better resource management. If property rights are unclear or poorly enforced, over-farming occurs. (p. 32)

For these reasons, the State should only focus on guaranteeing property rights and not waste efforts formulating public policies that violate property rights and block the development of entrepreneurial initiatives. In other words, the State should avoid the political management of natural resources or the development of proposals that involve centralist or state management of conservation areas or nature protection areas, since this entity does not know of time and place that the actors involved with natural resources (communities, landowners, businessmen, and researchers) have.

Market Ecology recognizes that politicians and their experts do not have all the information necessary to make the right decisions to protect the environment, and for this reason, it considers that the only actors that can propose solutions to environmental problems are those directly involved in the problem. In this regard, Anderson (1993) states the following:

> Market ecology recognizes that information about the environment is so diffuse that a small group of experts cannot manage the planet as if it were a single ecosystem. Specific people must be counted on to process time- and place-specific information and to discover niches, just as other species do in their ecosystems. (p. 261)

Market Ecology offers an approach to environmental problems that is compatible with the principles of Ecology This means that there is a closer relationship between economics and ecology than we think, in this regard, Professor Walter Block (1989) tells us the following:

> It is not that there is a simple analogy between the market and ecosystems, but that the laws of evolution and interaction in both processes are very similar, so it could be said that ecology is but a part of the economic sciences, or if you prefer, that the economy itself would be a discipline encompassed in a broader one: ecology, hence the term "Market Ecology". (n. p.)

For this reason, Market Ecology considers that environmental policies or regulations should be carefully analyzed and evaluated to identify whether, instead of providing a benefit to the conservation of natural resources, they block the development of business initiatives or environmental enterprises that can provide market solutions to the issue of nature conservation.

CONCLUSIONS

Finally, we must not lose sight of the fact that although environmental policies may have the purpose of benefiting society and protecting the environment, there will always be

a risk that these actions may lead to bureaucratic inefficiency, over-regulation, and excessive public spending, which will directly affect owners and investors who wish to invest or undertake projects that seek to manage natural resources to conserve them and obtain financial benefits.

Nor should we forget that part of the nature of the State is its tendency to grow without control, for this reason, we must always be alerted to ensure that this natural growth of the State does not invade spaces that could very well be managed by the private sector. Currently, the State already has responsibilities in the areas of security, health, and education, among others, and to add to these issues the protection and management of natural resources are put at risk an area that could very well be managed by private actors such as communities, landowners, NGOs, or companies.

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Punitive damages for the non-property damage derived from the crime of corruption: Constitutional and efficient?

Daños punitivos para el daño no patrimonial derivado del delito de corrupción: ¿constitucional y eficiente?

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RESUMEN: Este artículo analiza la constitucionalidad y justificación económica sanción del supuesto daño no patrimonial a favor del Estado en los casos de delitos de corrupción. Los autores llegan a la conclusión de que los daños punitivos tienen muchos problemas en general que resultan en su inconstitucionalidad e ineficiencia, especialmente cuando es derivada de un proceso penal.

PALABRAS CLAVE: Daños punitivos, responsabilidad civil, daño moral, daño no patrimonial, delitos de corrupción, justificación económica.

ABSTRACT: This research analyzes the constitutionality and economic justification of the use of punitive damages for the sanction of the supposed non-patrimonial damage in favor

of the State in the cases of crimes of corruption. The authors conclude that punitive damages have many problems that result in their unconstitutionality and inefficiency, especially when it is derived from a criminal proceeding.

KEYWORDS: punitive damages, tort law, moral damage, non-patrimonial damage, corruption crimes, economic justification.

JEL CODE: K14, D63.

INTRODUCTION

On September 21, 2020, the ad hoc prosecutor's office of the famous LavaJato case identified more than $394,400.00 US dollars as patrimonial damage to the State in the main process where the irregularities of the Interoceánica Sur highway, sections 2 and 3, are being investigated. What the Attorney General's Office did, in a manner compatible with the doctrinal and jurisprudential criteria currently prevailing in Peru, is to use punitive damages to punish the alleged violation of the right to the image of the Peruvian State. We consider this to be of great academic interest or even from a public policy perspective, not only because of its economic and social implications but also because it is a relatively virgin topic.

The relationship between punitive damages and other systems such as administrative and criminal law has received little attention in the civil and economic literature (Sustein & Schkade, 1997, p. 57). Specifically, we have not found any work that addresses the problem concerning civil liability for non-pecuniary damages derived from criminal proceedings for corruption offenses.

The use of punitive damages for these cases, as is obvious, is intended to punish the perpetrators; but also, to deter

them from committing acts of corruption in the future. In this brief essay, we will address the problem of the use of punitive damages to sanction non-pecuniary damages, especially those derived from crimes of corruption, where the State is the victim. As we will see, in this case, it is not possible to achieve an adequate balance, since the reparation of non-pecuniary damages in these circumstances ends up being redundant and arbitrary, which has constitutional and economic implications.

The research has the following structure: first, we will briefly discuss the functions of civil liability, noting that there is no consensus on a single function, but there is usually a consensus on its use for sanction and deterrence, beyond the mere repair of damages. Then, we will deal with the assimilation of liability for non-pecuniary damage to punitive damages that have operated not only in international but also in Peruvian doctrine. This assimilation is justified, to a large extent, by the difficulty in determining non-pecuniary damages and the supposed need to have an extra tool to reinforce, precisely, the dissuasive and punitive function that it has. Thirdly, we will address the issue of the use of punitive damages in civil proceedings arising from corruption offenses. We will see that, at first, no distinction was made between types of damages - pecuniary or non-pecuniary - but then - since the approval of the criteria - it has become the norm and has been applied to the most relevant cases. Finally, we will analyze this policy, explaining the reasons why this type of reparation -assimilated to the concept of punitive damages- turns out to be unconstitutional and at odds with economic efficiency.

1. FUNCTIONS OF CIVIL LIABILITY

There is no consensus on what are all the functions that a civil liability system should fulfill, although we must admit

that there is agreement on the main functions. There is also an arduous debate as to which of these functions should be prioritized.

For his part, Monateri, Pier & Schkade (1998, pp. 19-27), conceives the three main functions of civil liability the compensatory function, the punitive function and the preventive function. It is worth saying, briefly, that this function arises in Anglo-Saxon Law because of *punitive damages*, through which - in certain cases - compensations higher than those necessary to compensate the damages suffered by the victims are granted. However, this function is alien to our legal tradition, since in our system the calculation of compensation is always made based on the damage caused. This is not diminished by how compensation for extra-patrimonial damages is calculated, although in these cases -certainly- the judge has greater discretion.

Notwithstanding the foregoing, we must point out that it does not seem convenient to qualify the punitive function autonomously. This is because, even in common law, the figure of *punitive damages* seeks to generate a greater disincentive rather than to punish. *Punitive damages* are not awarded in all cases but, on the contrary, only in those situations where there is a special desire to discourage. In this way, in any case, the alleged *sanction* is a means to an end, namely, the greater disincentive of certain conducts. Consequently, we believe that rather than qualifying it as an autonomous function, it should be recognized as a means that contributes to *deterrence*.

Fernández (2001, pp. 393-445) has classified the functions of civil liability from a dyadic "or micro-systemic" perspective and a systemic "or macro-systemic" perspective. Thus, from the dyadic perspective, he points out that civil liability fulfills a satisfactory, equivalence, and distributive

function, while from the systemic perspective it would fulfill a function of incentivizing or discouraging activities and a preventive function.

On the other hand, Calabresi, in formulating his theory on accidents and describing the costs derived from those events, distinguishes - as we explain in detail below - primary costs (derived directly from the accident and which can be reduced through general, specific, or mixed prevention), secondary costs (sums of money to be paid as compensation to those who suffered damages, which can be reduced through fractionation and the Social Diffusion of Risk Theory) and tertiary costs (those derived from setting in motion the legal apparatus so that, among others, the victims can enforce their rights and obtain the compensation due, which can be reduced in various ways) (Trazegnies, 2005, p. 88). The purpose of a tort liability system is to prioritize these costs and implement measures aimed at their reduction.

2. ROLE OF NON-PECUNIARY DAMAGES: ASSIMILATION TO "PUNITIVE DAMAGES"

In principle, non-pecuniary damages follow a scheme like pecuniary damages; however, given the difficulty of calculating them, some authors have emphasized their "punitive" function, arguing that these damages should be used to show social reproach for conduct and to deter its occurrence in the future. In this way, non-pecuniary damages are assimilated into punitive damages (Sustein & Schkade, 1997, p.57).

For authors such as Massino Franzoni (1999):

> [...] the tendency to assimilate non-pecuniary damage with non-pecuniary damage results in the fact that its pre-eminent function is actually to punish the person

> responsible for the antisociality of the act, satisfying the victim, at the same time. (pp. 68-87)

For his part, Diez-Picasso (1999) pointed out that:

> Nor can the idea of a sanction be found in the rules that fulfill a compensatory function, unless by sanction is understood, in a very generic way, the attachment to the behavior of certain consequences that may be unfavorable for someone. The rules on civil liability cannot go beyond the economic scope of the damage effectively produced and cannot come into operation if the damage has not existed, no matter how reproachable the conduct of the defendant or accused may have been. (p. 46)

In the Peruvian case, we see that both positions have also been accepted, but the consideration of moral damages as punitive damages has prevailed. According to Morales Godo (2009):

> [...] we think that if there are extra-monetary ways to compensate the victim of a personal injury, good time; but this is not an obstacle to dispense with reparation in pecuniary terms, understanding it as a way to produce a compensatory satisfaction to the victim. (p. 466)

The same criterion has been shared by Liñán, Morales Hervías, Fernández Cruz and Fernando de Trazegnies. So, we can say that there is a certain consensus that -in general- the reparation of moral damages fulfills the justiciary function (satisfaction of the victim), but also a social function, which is associated with the punishment of the act. But why punish the act? As we have seen, the aim is to punish an act not only for the sake of justice, but also to discourage it, and this, in turn, is associated with the economic function of civil liability.

From this perspective, moral damages fulfill a dissuasive function of conduct that we consider especially reprehensible, with which the mere economic compensation of the damage would not be enough -as pointed out by Diez-Picasso-, but it is necessary to go beyond it, by sanctioning the offender.

For this reason, it is not surprising that, in the case of liability derived from the crime, moral damages have been used in Peru as a form of economic sanction.

3. NON-PECUNIARY DAMAGE DERIVED FROM THE CRIME OF CORRUPTION

Initially, no distinction was made as to the type of damage - pecuniary or non-pecuniary - but it was imposed jointly[1].

1 It is important to mention four Peruvian cases in which civil liability was imposed in cases of public officials who committed crimes against the State.
The First Transitory Criminal Chamber of the Supreme Court of Justice with resolution N° 05-02-2008 Lima, May 2009, imposed jointly and severally to four former parliamentarians the payment of S/. 1'000,000.00 for civil reparation derived from improper passive bribery and receiving. Context: paid defectors subsidized by Vladimiro Montesinos with public funds.
The Permanent Criminal Chamber of the Supreme Court of Justice, with resolution No. 984-2005 Junín, dated June 7, 2005, ordered a former director of a juvenile school who stole US$ 1,900.00 that was to be used for the purchase of computers, to pay S/. 1,000.00 for civil reparation derived from the crime against public administration to the detriment of the State and the school, paying S/. 500.00 to each one.
The Permanent Criminal Chamber of the Supreme Court of Justice, with resolution No. 07-2007, dated 07.10.2009 imposed to a former parliamentarian for the crime of illegal appointment to public office the payment of S/. 30,000.00 in favor of the State.
The Special Criminal Chamber of the Supreme Court of Justice, in case AV-23-2001, with the resolution of July 20, 2009, imposed a former president, for the crimes against public administration - fraudulent misconduct against the State and public faith - ideological falsehood against the State, the payment of S/. 3'000,000.00 jointly and severally with three other defendants.

The Manual of criteria for the determination of the amount of civil reparation in corruption crimes (Ministerio de Justicia y Derechos Humanos, 2018), has begun to distinguish non-pecuniary damages from pecuniary damages, for corruption cases. As can be inferred from the STC of the Transitory Criminal Court Cassation No. 189-2019 Lima Norte, the State is considered a victim of non-pecuniary damages, in cases derived from the corruption of public officials.

In these cases, it is formally considered that the image of the State has been damaged, but -in reality- what is applied are punitive damages, which do not depend on the value of the damage, but on the seriousness of the crime and independent criteria of the non-pecuniary damage. Thus, the reparation has a form of calculation that is associated with deterrence, considering the following criteria:

a) The seriousness of the wrongful act: Associated with the nature of the legal interests affected and the importance of the duties breached.

b) The circumstances of the commission of the unlawful conduct: The place, context, and manner of the commission of the unlawful act shall be considered.

c) The advantage obtained by the responsible parties: The degree of advantage obtained will be a factor to be considered, the greater the advantage, the greater the amount of compensation.

d) The level of public dissemination of the unlawful act: This refers to the transcendence and social extension or public knowledge of the unlawful conduct.

e) The affectation or social impact of the illicit act: The influence on the living conditions of the population.

f) The nature and functional role of the harmed public entity: Following the previous criterion, the public function of the state entity within which the unlawful act was committed must be identified.

g) The scope of competence of the aggrieved public entity: It is essential to consider whether the aggrieved public institution has a local, regional, or national scope.

h) The position or position of public officials: Consider the hierarchy of the position held by the public official.

As can be seen, being associated with the illicit benefit (seriousness of the crime), the non-pecuniary damage serves specifically to discourage its realization in the future, while at the same time it can satisfy - in the case of damage to the State - the population. We see, however, some problems associated with the consideration of the disincentive as a justification for non-pecuniary damages.

These criteria, as mentioned in the introduction, have been used in cases of major relevance, such as the LavaJato mega-corruption case. Concerning the compensation claim, the attorney general's office postulates the amount:

i) For the crime of collusion (Fact 1): USD 403'354,688.35, for pecuniary damage and S/ 1,292'476,500.00, for non-pecuniary damage.

j) For the crime of money laundering (Fact 2): USD 60'436,772.00 for non-pecuniary damage; and

k) For the crime of money laundering (Fact 3): S/. 545'484,102.30 for non-patrimonial damage, the corresponding legal interests should be considered in all cases.

As can be seen, in recent cases, starting with the Manual of Criteria, pecuniary damage has begun to be separated from non-pecuniary damage, which has been applied with a punitive criterion, with the aim of deterrence. However, as can also be seen, these damages have been imposed or requested in conjunction with prison sentences, which leads us to think that there is redundancy or over-penalization that may lead to a level of deterrence above the optimum or create inadequate incentives for other actors -including the State- that could be in a better position to reduce the costs of corruption in the future.

4. CRITICISM OF THE CONSIDERATION OF NON-PECUNIARY DAMAGES AS PUNITIVE DAMAGES

4.1. Unconstitutionality

Punitive damages arising from criminal proceedings have several problems that not only make it an inconvenient policy but possibly unconstitutional. We start from the assumption that punitive damages must meet the same criteria as criminal law (Jeffries, 1986., pp. 139-158). If this is so, several criteria are not met by punitive damages in general, and some are specifically affected when used in the framework of a criminal proceeding.

Beyond the formal criteria, the application of punitive damages can lead to an erosion of the rule of law, being arbitrary and inherently unfair.

4.1.1. Arbitrariness and inconsistency

There is extensive literature documenting how punitive damages are erratic and arbitrary. There are no clear criteria on how they are awarded, and the applicable evidentiary standards do not meet the standards of punitive law. In the Peruvian case,

it has been applied under the guise of damage to the image of the State, damage that has been assumed without even the minimum intent of proof. The lack of predictability also affects the principle of legality of the penalty. Penalties, fines, or sanctions in general, must be pre-established to be applied legitimately.

In the Peruvian case, although there is a manual of criteria for the determination of the amount of civil reparation in corruption offenses and it contains criteria for its application, these criteria are divorced from effective damage, but rather respond to characteristics of the case that - in turn - do not give us lighter on how the damage could be quantified. The alleged "damage to the image of the State" derived from corruption cases has been used with such a loose and discretionary criterion that it ends up being arbitrary.

On the other hand, if this type of punitive damage is only used in cases where there is non-pecuniary damage, this leads to two potential problems, depending on the orientation of the jurisprudence with the proof of the existence of moral damages. If the judiciary adopts a flexible criterion, non-pecuniary damage is presumed in all cases, which generates the problem of the standard that we will see below. If, on the contrary, the judiciary assumes a more restrictive criterion, this leads to the problem of the differentiated treatment that cases with and without non-pecuniary damage will receive.

In other words, based on this second criterion, only some cases will have punitive damages, despite being substantially the same as others, for the sole reason that moral damages cannot be proven. This would create an incongruity in the system that would be difficult to overcome by making punitive damages dependent on a different criterion, which

does not depend on the seriousness of the damage or the reachability of the conduct.

4.1.2. Illegality

Additionally, the use of non-pecuniary damages for the imposition of punitive damages has been the result - as we have seen in section 3 - of a doctrinal criterion but has not been supported by any law. Can a sanction be created via jurisprudence, or must it be included in the law? We consider that the creation of a complete penalty item must be provided for in the law.

In the Peruvian case, the Civil Code -applicable even to liability arising from criminal proceedings- speaks of reparation and compensation, but never of a sanctioning function of civil liability that can be operationalized beyond the recognition of actual damages, and even less of the application of punitive damages (1984).

4.1.3. Disproportionate

The successive application of fines, penalties, and civil sanctions for the same act, although it does not formally violate the ne bis in idem principle, is inconsistent and disproportionate. Beyond formalities, we are faced with a single act that receives triple sanction by the system. All these sanctions, at the end of the day, are intended to dissuade those who cause damage or crimes and are therefore redundant.

In principle, an administrative or criminal sanction should seek to complement a civil system that only compensates -but does not sanction- the tortfeasor. But if the civil system does sanction the tortfeasor, what is the need to use a system that is considered an ultima ratio? In other words, there would be no need to use Criminal Law when there are other sanctions that already fulfill the sanctioning purpose.

4.2. Inefficiency

As we shall see below, the constitutional problems encountered in the application of punitive damages arising from criminal proceedings also generate problems from the economic point of view. That is, they not only undermine the rule of law but also - predictably - generate social costs.

4.2.1. Disincentive beyond the optimum

The lack of certainty about the sanction imposed for committing a crime generates that people who are not risk-averse perform more of such activity than is socially optimal and that risk-averse people perform it in a lower proportion (Sustein & Schkade, 1997, pp. 17-18). Applied to the case of corruption in public works, the unpredictable system will tend to attract bad players and drive away those with more corporate locks. For example, compliance systems.

Moreover, a system that doubly penalizes the offender will tend to deter above the optimum. Although it may seem counter-intuitive, there is an optimal level of corruption (Tanzi, 2002, pp. 19-58), just as there is an optimal level of car accidents or other social ills. Just as it would be highly questionable to advocate the total elimination of cars to eliminate car accidents, it is unrealistic to eliminate corruption, for example, from major public works. Eliminating them may have the undesirable effect of decreasing the number of public works done in a country, with the economic and social effects that this would entail.

Specifically, in the case of large public works in Peru, many companies have received up to three sanctions for the same infraction: fines, penalties, and civil sanctions. This not only represents a disincentive beyond the optimum but can have the practical effect of bankrupting many of the companies

currently in the market, benefiting the larger ones, with greater financial backing.

4.2.2. Perverse incentives

As Fernández Cruz has already pointed out (Rosas, s. f., p. 1049), compensating the victim beyond the actual damage can have the perverse effect of encouraging socially inefficient behavior (reducing the level of care below the optimum). In cases of corruption linked to public works tenders, for example, the State itself bears a large part of the responsibility for the collision that may exist, by not designing more efficient or transparent bidding procedures. If the State itself is compensated for the damages suffered in processes that lend themselves to collusion, it will lack incentives to improve the process itself.

CONCLUSIONS

We can conclude that one way to approach the same point is through the "rule of the hand", linked to the concept of "cheapest cost avoider". Who is the most economically able to avoid collusion in bidding processes? Certainly, the State.

From the economic point of view, public policies must respond to rational criteria and be aimed at reducing social costs. Opening the door to punitive damages for non-pecuniary damage creates an incentive for populism. This, in turn, gives rise to the problems already pointed out in the previous sections: arbitrariness, inconsistency, and excessive penalization.

Punitive damages have serious issues that result in their unconstitutionality and ineffectiveness, especially when they arise from a criminal proceeding, since. As we have mentioned before, punitive damages must meet the same criteria as criminal law; however, despite the existence of these criteria for determining the amount of civil compensation in crimes of

corruption, these are far from effective damage. but it is only limited to the characteristics of each case. The "damage to the image of the State" is criticized, it would be arbitrary to apply this last concept as a basis for civil compensation since it is the same that can efficiently avoid crimes such as collusion in bidding processes. We repeat the fact that the State he oversees designs which processes he intervenes, processes in which there is room for the practice of collusion.

Moreover, after practices like this, the State is rewarded by situations where it receives economic compensation because of damage to the image of the State because it would not make sense to change the processes, improve efficiency that prevents crimes such as collusion or push transparency much further. There would be no incentives for the State itself to apply these changes, it is more convenient for these events to occur.

We do not conclude the fact that the State not only does not assume the consequences of events that are in its control but even financially compensates itself for the damage suffered. Public policies must respond to rational criteria and be aimed at reducing social costs, we are facing a scenario where the instigator of these "mega crimes" is not punished, which gives way to the sanctions no longer being applied based on objectives and begin to apply based on a matter of populism, where public opinion is valued more.

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Analysis of the imposition of fines in case of reluctance to comply with administrative orders in Colombia: The case of sanctions against Uber Colombia

Análisis de la imposición de multas en caso de renuencia de incumplimiento de órdenes administrativas en Colombia: El caso de las sanciones contra Uber Colombia

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RESUMEN: El artículo 90 de la Ley 1437 de 2011 prevé un mecanismo para la ejecución forzada de órdenes administrativas consistente en la imposición de multas económicas por la renuencia de un particular a cumplir tales órdenes. Si bien, la ley colombiana no prevé un procedimiento específico para la aplicación del artículo, este artículo sugiere que deben cumplirse cuatro presupuestos: (i) prexistencia de un acto administrativo definitivo que imponga una obligación no dineraria; (ii) renuencia del administrado a no cumplir dicha obligación; (iii) concesión de un plazo razonable para que cumpla con

la obligación, y (iv) razonabilidad y proporcionalidad de la multa a imponer. En Colombia la aplicación de esta norma se ha dado mayoritariamente en materia urbanística, esto es, en casos en los cuales se ordena desalojar un predio o demoler una construcción. Es decir, en estos casos, la administración impone obligaciones de hacer. Sin embargo, a la fecha se conoce un único caso en el que la administración ha impuesto una obligación de no hacer, concretamente contra la empresa Uber Colombia. Así las cosas, este artículo también analiza el cumplimiento de los cuatro presupuestos en este caso concreto.

PALABRAS CLAVE: sanciones administrativas, ejecución forzada de actos administrativos, Uber.

ABSTRACT: Article 90 of Law 1437 of 2011 provides a mechanism for the forced execution of administrative orders consisting of the imposition of financial fines for the reluctance of a private party to comply with such orders. Although Colombian law does not provide a specific procedure for the application of the article, this article suggests that four conditions must be met: (i) preexistence of a final administrative act that imposes a non-monetary obligation; (ii) reluctance of the person to not comply with such obligation; (iii) granting of a reasonable period to comply with the obligation, and (iv) reasonableness and proportionality of the fine to be imposed. In Colombia, the application of this rule has occurred mostly in urban planning matters, that is, in cases in which an order is issued to vacate the property or demolish a construction. In these cases, the administration imposes obligations to do. However, to date, there is only one known case in which the administration has imposed an obligation not to do, specifically against the company Uber Colombia. Thus, this article also analyzes the fulfillment of the four requirements in this specific case.

KEYWORDS: administrative sanctions, enforcement of administrative acts, Uber.

JEL CODE: K23, L62.

INTRODUCTION

In administrative law in general and concerning the beginning and end of any administrative action, there is a classic division between administrative procedural acts and definitive administrative acts. Regarding the latter, Colombian law, specifically Article **43** of Law 1437 of 2011 (Code of Administrative Procedure and Administrative Litigation or CPACA) indicates that definitive [administrative] acts are those that directly or indirectly decide the merits of the matter or make it impossible to continue the action.

Regarding this type of administrative action, the contentious-administrative jurisprudence of the Council of State (Administrative Chamber. Second Section, Radication 2014-02393. Order of September 14, 2017. C.P. Sandra Lisset Ibarra Vélez) has stated that they are those that "...are issued to culminate the administrative proceedings initiated through the right of petition, ex officio or in compliance with a legal duty [of the administration]". Similarly, it has also been said that these are acts that "...put a peremptory end to the administrative action, so that in them the activity of the administration is exhausted, or only the execution of what has been decided remains pending" (Council of State. Contentious-Administrative Chamber. Second Section. Radicación 2010-00011 (0068-10) Ruling of March 8, 2012. C.P. Víctor Hernando Alvarado Ardila). In this order of ideas, and for this article, it is important to emphasize that final administrative acts decide,

create, define, modify, or extinguish legal situations concerning an administrative or private party.

For its part, concerning the acts of procedure within the administrative action, the same Council of State IN Auto del 14 de Septiembre de 2017 has stated that:

> Between the opening of the administrative action and its conclusion, there are certain actions of the authorities that tend to push it from one stage to another and/or prepare the final decision, building the reasons or legal grounds for a definitive decision on the matter (...) These acts, [those of procedure] do not contain a decision but an impulse to the action of the authority, and therefore, as a general rule, they are not liable to be judged, unless they make impossible its culmination.

Moreover, the character of impulse or preparation of the procedural acts means that they do not have their own identity or independence, but are, if anything, an instrument whose existence is dependent on a definitive administrative act. In this way it has been explicitly recognized by the administrative jurisprudence of the Council of State, Chamber for Contentious Administrative Proceedings, Second Section in its Ruling of March 8, 2012, when it states that the procedural acts are:

> Instrumental provisions that make it possible to develop in detail the objectives of the administration; then the existence of these acts is not explained by themselves, but insofar as they are part of a sequence or series of activities united and coherent with a spectrum of broader scope that forms a totality as an act.

Now, without prejudice to the jurisprudential definition of the administrative acts of procedure, it is important to highlight that as they are acting with instrumental character and dependent on a definitive act, then, one of their species is the known administrative acts of execution whose particularity is that their existence is related to the enforceability of a definitive administrative act, then they are after this one. This is so not only because, according to the above definition of the definitive act, in these "...only the execution of the decision is pending" but also because the Constitutional Court has explicitly recognized it (Constitutional Court. Decision SU - 077 of August 08, 2018. Case T-6.326.444. M.P. Gloria Stella Ortiz Delgado), who based on the specialized legal doctrine (Rodríguez, 2008, pp. 290, 298). has indicated that the acts of execution are a kind of procedural acts, in addition, that they are different and after the definitive acts as follows:

> However, an act of execution is not an act of execution when it is not limited to simply complying with an act or judgment that it intends to execute and serves as a basis for it, but rather when it eliminates elements or introduces new ones. In this case, it is an act of apparent execution, which constitutes a new definitive act as to those new elements.

Having thus defined the administrative acts of execution, it is worth noting that they have three relevant and closely related characteristics, namely: (i) as they are a kind of procedural acts, they are not acts that can create, define, modify or extinguish legal situations concerning an administered party; (ii) as they are related to the enforceability of a definitive administrative act, they are acts whose purpose is to achieve the material effectiveness of the act on which they, in turn, depend

and enable it, therefore, they are a means, an instrument for the definitive act to be effective, that is to say, for it to produce effects; and finally, (iii) the production of these effects may depend on the fact that the act of execution leads to an eventual enforceable demand by the administration.

In its order, the first characteristic of the acts of execution has been ratified by the Council of State (Contentious-Administrative Chamber. Fourth Section. Radicación número: 68001-23-33-000-2013-00296-01(20212) Auto del 26 de Septiembre de 2013. C.P Jorge Octavio Ramírez Ramírez) by stating that "...the acts of execution are limited to comply with a judicial or administrative decision, without it can be stated that from them arise legal situations different from those of the executed sentence or act".

The second important characteristic of the act of execution as a component related to the effectiveness of the final administrative act has been highlighted by the local administrative legal doctrine when it states that

> Effectiveness, unlike validity, is projected to the outside of the administrative act in pursuit of its objectives and achievement of its purposes; hence institutions such as the administrative operation or the execution of the act are phenomena proper of this external instance of the administrative act. (...) the effectiveness of the administrative act can also occur by way of coercion or forced effectiveness of the same before the opposition of the passive subject for its acceptance and compliance. (Santofimio, 2017, p. 562)

Finally, it should be noted that this doctrinal citation is consistently linked to the third characteristic of the acts

of execution related to the eventual -although not always- requirement or forced execution of the final act on which it depends, as stated by the Council of State (Contentious-Administrative Chamber. Fourth Section. Radicación número: 25000-23-27-000-2010-00169-01(20350) del 28 de Septiembre de 2016. C.P. Martha Teresa Briceño de Valencia):

> Compulsory execution requires the pre-existence of an administrative act suitable for securing the execution, i.e., containing an imperative mandate that constitutes the enforceable performance, i.e., the one whose term for compliance has expired, without the defendant having satisfied it.

Now, when speaking specifically of the subsequent and forced execution of a definitive administrative act as something that is sometimes required for it to be effective, what is being said is that some administrative acts of execution -not all assume that the act to be executed contains a certain obligation, to be borne by the person administered and that this obligation is imperative in the sense that, beyond the simple will of this person administered, it becomes enforceable once the term for compliance has expired. In other words, by definition, final administrative acts always contain a declaration that creates, defines, modifies, or extinguishes legal situations, but only sometimes, for these legal situations to materialize and take effect, it may be necessary that the same administration, through subsequent acts, forces the execution precisely through acts aimed at the realization of such effects. In this way, it has been recognized by the Constitutional Court (Decision T-152 of March 12, 2009. Case file: T-2.030.895. M.P. Cristina Pardo Schlesinger) by stating that:

> In effect, the presumption of validity of the administrative act and the power of self-tutelage of the public administration constitute the main foundations of what is known as the enforceability of the act, according to which the administrative decision not only has binding force against individuals but also imposes itself against the same administration and against the same authority that issued it. It is, therefore, due to this attribute or quality of the administrative act that the execution of the decision adopted unilaterally produces all its effects even against the will of the person against whom it is directed and can even impose the forced execution of the same, either by the same authority that issued it (proper enforceability or enforceability) or by another authority with competence to do so (improper enforceability).

Now, within these acts of forced execution as a kind of acts of execution of a definitive act, it is worth noting that in Colombia, Article 90 of Law 1437 of 2011 establishes an alternative of coercive nature reserved to force the compliance of non-monetary obligations established in definitive administrative acts as follows:

> Without prejudice to the provisions of special laws, when an administrative act imposes a non-monetary obligation on an individual and the latter refuses to comply with it, the authority that issued the act shall impose successive fines for as long as he remains in default, granting him reasonable terms to comply with the order. The fines may range between one (1) and five hundred (500) legal monthly minimum wages in force and shall be imposed with criteria of reasonableness and proportionality.

In other words, forced execution, of which the administrative power of Article 90 of the CPACA is a species, is derived from two attributes of administrative acts: enforceability and enforceability. The first refers to the obligatory nature and the effectiveness of the act; it is an element even external to the validity of the act to be executed, being indifferent to the administration the will of the administered to fail to comply with its obligation. The second, enforceability (to which we have already referred), refers to the power (privilege) of self-judgment of the administration, which enables the possibility of forcibly and directly obliging the administration to comply without the need to go to court (heterotutela). (Sanchez, 2016, p. 269). Due to these attributes of the act, especially the second one, the possibility for the administration to impose fines for non-compliance (Art. 90 of the CPACA) must be based in each case on the fulfillment of certain requirements or assumptions, as we will explain below.

In effect, and according to what has been indicated so far, it is understood that if the administration intends to force the execution of a final administrative action through the alternative allowed by Article 90 of Law 1437 of 2011, we consider that four assumptions must be met: (i) the first, refers to the pre-existence of a definitive administrative act that imposes a non-monetary obligation to the administered party; (ii) the second refers to the reluctance of the administered party not to comply with such obligation; (iii) the third indicates that the administration must grant a reasonable term to the taxpayer to comply with the obligation; (iv) and the fourth refers to that, once the above assumptions are demonstrated, the imposition of fines must be subject to reasonableness and proportionality criteria by the administration.

Thus, we will now briefly explain each of these four suggested assumptions:

(i) Pre-existence of a final administrative act imposing a non-monetary obligation.

Following Article 90 of the CPACA, a mechanism has been established for the forced execution of definitive administrative acts that require the fulfillment of a certain personal obligation on the part of the administrative party, therefore, it is an obligation that cannot be fulfilled directly by the administration (including another public entity) or by third parties, including individuals obliged to follow its instructions, and this because in the definitive administrative act an obligation was imposed that only the administrative party to whom the act is addressed can comply with. Furthermore, this obligation, since it is required not to be monetary, cannot be applicable when it is a simple administrative economic sanction. In other words, the only options are that it is an obligation to do or not to do.

Thus, when it is a matter of acts of personal compliance and the obligor refuses to perform them, the first condition for imposing successive fines will be satisfied if the obligor continues to refuse to comply with the obligation imposed by the administration. In other words, as long as this omissive, passive or active conduct contrary to the order persists, the individual may be sanctioned with subsequent fines that, it is worth saying, in no way affect, compensate, excuse, or transform the compliance with any of the obligations contained in the final act, with the addition, however, that for the application of such fines a reasonable term

must precede him to comply with the order, which in turn is a term independent of the one eventually established in the final act.

(ii) The reluctance of the individual not to comply with the obligation imposed by the administration

The reluctance to comply with the obligation contained in the administrative act may occur either due to negative conduct of the person administered not to do when the obligation is to do, or when it displays positive conduct contrary to the obligation to do established in the administrative act or to the obligation not to do. In other words, the reluctance to comply may be the result of multiple options of conduct, either omissive or active, which depends on the type of obligation established in the final administrative act.

Of course, such reluctance must be at least supported by some evidence to activate the enforcement mechanisms contemplated in Article 90 of the CPACA, to bring to faithful compliance with the provisions of the administrative act. This means, among other things, that when the obligation is to do, the person administered may be required to demonstrate the active conduct with which he complied with the obligation, for example, in urban planning matters, to demonstrate that he demolished a construction that the administration ordered him to demolish. But it also means that when the obligation is not to do, by the burden of proof, it is up to the administration to demonstrate the active conduct that is opposed to the obligation not to do, for example, in matters of consumer law, if what was ordered was that the producer must

refrain from promoting a certain product, the burden of proof is on the administration itself through the verification of an advertising piece in which, after the final act, the producer promotes the product.

This being so, and since the verification of this presupposition on the reluctance to comply on the part of the administered party may certainly suggest an evidentiary debate, this also implies that, in general, the application of article 90 of the CPACA is not exempt from complying with the duties of due process to which the administration is always subject, especially when, as we have already said, it is an expression of the administration's power (privilege) of self-policing, and especially when this is another case in which the administration is deploying its power to sanction. (Rojas, 2020, p. 228 et seq.).

(iii) The administration must grant a reasonable period to the taxpayer to comply with the order.

Knotted to what has just been mentioned about the duty of due process that is required, this is reinforced by the fact that article 90 of Law 1437 of 2011 itself requires the concession to the administered party of a 'reasonable term' so that the administered party leaves its reluctance, that is so that it complies with the order in the final administrative act that is the object of forced execution. This presupposition then implies a narrowing of the administration's discretion, since even if the reluctance is demonstrated, it is necessary to add to it the concession of a term for compliance, which, since this is an enforcement action, is an additional term to the term of the first one. Of course, and due to the principle

of economy, this additional term may overlap with the eventual termination of the requirement made by the administration for the individual to prove compliance when the obligation is done.

(iv) Reasonableness and proportionality of fines.

As an expression that reinforces the due process required by the need to demonstrate the reluctance to comply, knotted to the additional reasonable term to achieve compliance with the obligation established in the final act, and insofar as -it is worth insisting- it is about the deployment of the administration's power of self-tutelage from which derives, in this case, the possibility of imposing fines, then, the application of Article 90 of Law 1437 of 2011 is also governed by the general principles and criteria of reasonableness and proportionality on which any type of administrative order must be based, especially when it is of a repressive or punitive nature. (Sarmiento, 2007, p. 443 and ff.).

In this regard, and as it has been widely recognized by the administrative contentious jurisprudence of the Council of State (Contentious Administrative Chamber, Third Section, Judgment of October 22, 2012, Rad. No. 05001-23-24-000-1996-00680-01(20738). C.P.: Enrique Gil Botero and Fourth Section, Judgment of December 9, 2013, Rad. No. 25000-23-27-000-2006-0046-01(18726). C.P.: Carmen Teresa Ortiz de Rodríguez), the imposition of administrative fines, in general, supposes by antonomasia the repressive affectation and contrary to the will of the administered party, but in any case, it is a legitimate affectation by the administration of an economic or patrimonial right of the individual, thus:

> From a material perspective, it is necessary that the legal consequence expressly qualified by the legal norm as an administrative sanction entails a coercively imposed evil by the Administration to the individual, and implies, therefore, the deprivation, reduction or affectation of a right, interest or legal situation of the offender as a response to the performance of behavior previously classified as an administrative infraction or misdemeanor. The administrative sanction will have then, by definition, a punitive, retributive sense of the transgression committed, for which it will have an inherent "afflictive character" and will always be the "repressive response of the State to the breach of obligations, duties and general mandates on the part of its addressees.

Due to the repressive nature of administrative sanctions in general, their reasonableness and proportionality are also requirements derived from administrative law in general, however, in the case of Article 90 of the CPACA, the legislator wanted the reasonableness and proportionality of those to be an explicit requirement, and therefore, The application of the fines of this article 90 is not subject to the formal and general rules applicable to the general administrative sanctioning procedure, which has a different nature and purpose than the economic sanction for reluctance referred to in article 90 of the CPACA.

In effect, although this or that fine coincides in affecting an economic right of an administered party, one of their differences is that, while the administrative sanction, in general, may have a retributive function (in which the public interest is implicit) the fine of article 90 has a strictly punitive function, hence the rule punishes the reluctance and permanence in the

rebellion of the administered party, which implies a special and even higher scrutiny on the reasonableness and proportionality of the fine.

In this regard, the Spanish legal doctrine (which contains a rule like the Colombian one) offers an approach to the nature and purpose of the fines established in Article 90 of Law 1437 of 2011 by stating that:

> The purpose of the coercive fine is to bend the will of the administrative party reluctant to comply with the administrative act, through the imposition of payment of monetary amounts of the moderate amount that, however, because they are repeated, may involve an economic impairment in the individual sufficiently important to compel him to comply. They lack a retributive purpose, although in essence they are imposed successively because of non-compliance with the original act. Therefore, García de Enterría considers them to be an intermediate figure between enforcement and sanction (...). Sanctions do not have a retributive purpose either, but rather a dissuasive purpose against the commission of future infringements. (Sanchez, 2016, p. 280)

Now, as a final note of this introductory part of the brief, it is important to emphasize that without prejudice to the set of the four assumptions to which the application of Article 90 of Law 1437 of 2011 is subject, it is important to emphasize that such application is not and cannot be subject to the general administrative sanctioning procedure, for both legal and practical reasons.

Indeed, in the framework of administrative proceedings in general, we have already said that these are framed at a beginning and an end, that is, they begin by a request, ex officio, or by compliance with a legal duty of the administration, and end with a final administrative action. In the specific case of the administrative sanctioning procedure regulated by the CPACA itself, this means that the administrative action may be initiated ex officio or at the request of any person, and then it may evolve in the procedural stages of (i) preliminary inquiries, (ii) formulation of charges by an administrative act, (iii) presentation of discharges and request or submission of evidence, (iv) evidentiary period, (v) closing arguments and (vi) finally the final decision eventually sanctioning. (Fernández, 2015, pp. 347-349).

However, although the application of Article 90 of Law 1437 of 2011 may result in the imposition of a fine on the individual, it is important to emphasize that this is an act of execution (a kind of procedural act) aimed at punishing reluctance and forcing compliance with an obligation established in a final act on which in turn it depends. Thus, it would not make sense for the imposition of a fine for the reluctance to comply with an administrative act to be subject to the rules of the general administrative sanctioning procedure, since this would be like opening an administrative action within another administrative action, in which the imposition of the fine for reluctance would have the character of a definitive act, therefore it would no longer be an act of execution.

However, it is important to insist, on the fact that the application of Article 90 of Law 1437 of 2011 is not subject to the general rules of the administrative sanctioning procedure of the same law, this does not imply disregarding the fundamental

guarantee of due process in favor of the individual. On the contrary, the strictly punitive nature of this fine and the absence of a specific procedure regulated by law, suggests a greater observance of the guarantees and high scrutiny of the principles to which the same administration is subject, which in addition to the reasonableness and proportionality of the fine, also includes, according to Article 3 of Law 1437 of 2011, the guarantee of the right of defense, the principle of contradiction (including evidence), impartiality, morality, accountability, transparency, among others.

Now, having a clear legal framework regarding the application of fines in case of reluctance to comply with an order issued by the administration, i.e., the assumptions that must be met, to which administrative acts it applies, against which obligations the fine can be imposed and what is the procedure to be followed, all in light of Article 90 of Law 1437, we will analyze a specific case specific to Colombian administrative law, to determine whether its application was correct concerning a series of administrative acts issued by the Superintendence of Transportation, in the framework of the case against Uber Colombia, focusing especially on Resolution 14920 of December 18, 2019.

1. ADMINISTRATIVE ORDERS AND THEIR ENFORCEMENT AGAINST UBER COLOMBIA

1.1. Relevant facts for the analysis of the specific case

To identify the scope of Article 90 of the Code of Administrative Procedure and Administrative Disputes for the "administrative orders" issued by the Superintendence of Transportation, it is necessary to briefly review the administrative process that resulted in such order.

a) On November 26, 2014, through Resolution 19712, the Superintendence of Transportation opened an administrative investigation against Uber Colombia, for allegedly facilitating the provision of unauthorized - illegal - transportation services.

b) Said investigation culminated with Resolution No. 18417 of September 14, 2015, in which the company Uber Colombia was sanctioned with the imposition of a fine amounting to COP 451,045,000 equivalent to 700 legal monthly minimum wages in force (SMLMV) at the time.

c) The latter is a definitive administrative act in that, as required by Article 43 of Law 1437 of 2011 it is deciding the merits of the matter initiated with Resolution 19712 of 2014.

d) Resolution 18417 of 2015 as a definitive administrative act creates or defines a specific legal situation for Uber Colombia expressible in two obligations: On the one hand, we said **(i)** orders the payment of a monetary obligation by way of penalty for $451,045,000. COP, and on the other hand, **(ii)** obliges the company to cease the facilitation of the violation of the rules on the provision of the public service of special motorized land transportation.

e) Now, in an act after Resolution 18417 of September 14, 2015, specifically Resolution 40313 of August 19, 2016, the same Superintendency ordered Uber to "*(...)* cease *facilitating and promoting the provision of unauthorized transportation services. Through spokespersons or third parties, or advertising or dissemination media of any kind (whether individual or massive)*".

f) Subsequently, the same entity issued Resolution 72653 of December 13, 2016, in which it imposed on Uber the sanction established in Article 90 of Law 1437 of 2011 for the reluctance to comply with what was ordered in Resolution 40313 of August 19, 2016. The fine imposed was the maximum cap of 500 SMLMV effectively allowed by Article 90 of Law 1437 of 2011. Which to date corresponded to a value of COP 414,058,000.

g) Then, in December 2019, the Superintendency again requested explanations from Uber for allegedly being in default for not complying with the order issued in Resolution 40313 of 2016. In the same month, and without Uber having yet given any explanation to the Superintendency's requirement, the Superintendency again sanctioned with the fine provided for in Article 90 of Law 1437 of 2011, this using Resolution 14920 of December 18, 2019.

h) Finally, in 2021 the same Superintendency resolved appeals filed by Uber against Resolution 14920 of 2019 and revoked such administrative act arguing a violation of Uber Colombia's due process.

1.2. Analysis of the specific case

Having clear the context of our case under study, we will proceed to analyze the legal nature of Resolution 40313 of August 19, 2016, by which Uber was ordered to cease facilitating and promoting the provision of unauthorized transportation services, through spokespersons or third parties, or advertising or dissemination media of any kind (whether individual or massive). Likewise, we will analyze whether the sanctions

provided in Article 90 of Law 1437 of 2011 apply to this "administrative order".

In this regard, note first that Resolution No. 40313 of September 19, 2016, is intended to serve as an execution of the obligation imposed by Resolution No. 18417 of September 14, 2015. Therefore, that one is a kind of a procedural act. This is so much so that it was ratified by the Council of State in an order of June 29, 2018, in which, before the claim filed by Uber Colombia against Resolution No. 40313 of 2016 itself, the Court rejected the claim because the contested act was not susceptible to jurisdictional control, precisely because it was an administrative procedural decision. Specifically, the order rejecting the claim stated that.

> The censured acts are limited to ordering the company Uber Colombia S.A.S. to cease the provision of the public individual transportation service, which is why they are not subject to prosecution before this jurisdiction, since in addition to having been issued on the occasion of the administrative decision that imposed the sanction consisting of a fine of seven hundred (700) s.m.m.l.v. [COP 451,045,000], their nature certainly corresponds to the so-called preventive acts of procedure issued in the exercise of the administrative control function.

Thus, Resolution No. 40313 of 2016 is an administrative act of execution, and therefore a kind of procedural act, against which jurisdictional controls did not proceed , since, as recurrently established by the jurisprudence of the Council of State:

> Only the decisions of the Administration resulting from the conclusion of an administrative procedure

> or the acts that make the continuation of such action impossible are susceptible to control of legality by the administrative contentious jurisdiction, which, in other words, means that "the acts of execution of an administrative or jurisdictional decision are excluded from such control since they do not definitively decide an action since they are only issued to materialize or execute those decisions.

Now, as noted, through Resolution 14920 of 2019, the Superintendence of Transportation declared Uber in reluctance for failure to comply with the order given in Resolution 40313 of 2016, this in the terms of Article 90 of Law 1437, and consequently in the same act imposed the highest fine allowed by the same Article 90, i.e., five hundred (500) SMLMV. As anticipated, this Resolution will be the specific object of our analysis to verify the correct or incorrect application of the article in question.

1.3. Analysis of a case of imposition of fines for non-compliance with an administrative order by the SuperTransporte to Uber Colombia.

As just stated, for this analysis we focus on Resolution 14920 of 2019 of the Superintendence of Transportation to verify whether it meets the four requirements for the application of Article 90 of Law 1437 of 2011 and that we developed in the first paragraph of this letter, as explained below:

> (i) Pre-existence of an administrative act imposing a non-monetary obligation.

The non-monetary obligation is effectively found in the first article of the operative part of Resolution 40313 of 2016, in which it was indicated that

> To ensure effective compliance with the rules governing the provision of public motorized land transportation services, the company UBER COLOMBIA S.A.S., (...) to cease facilitating and promoting the provision of unauthorized services, through spokespersons or third parties, or advertising or broadcast media or of any kind (whether individual or mass).

Thus, the verb ceases the action is the one that ultimately defines that we are facing a non-monetary obligation, more specifically, it is an obligation not to do, concerning which the doctrine has established that "(...) here the interest of the creditor consists in that a certain situation remains unaltered, and that the debtor is obliged not to execute (...) above all, that the debtor by this means is restricted in his radius of action, his initiative, his freedom" (Hinestrosa, 2007, p. 229)..

However, since Resolution 40313 of 2016, as we have already said, is an administrative act of execution that then depends on a previous definitive act, this is Resolution 18417 of 2015, for this reason, one could not create, define, modify or extinguish legal situations for the administered party, or at least, it could not make any modification, if only reiterate the obligations not to do originally established in Resolution 18417 of 2015.

The forced conclusion of this point is that, although, in the administrative action that is the subject of our analysis if there is an administrative act that imposes a non-monetary obligation to a private individual, this final act is Resolution 18417 of 2015, and not, as mistakenly held by the Superintendency that the obligation was established in Resolution 40313 of 2016.

(ii) Reluctance of the individual not to comply with the obligation imposed by the administration.

We found that concerning the reluctance of the private individual not to comply with the non-monetary obligation it is held that, in December 2019, the Superintendence of Transportation, certainly requested explanations from Uber indicating that:

> As of 2017, the Superintendence of Transportation has received different complaints which would account for an alleged disregard of the order issued through Resolution No. 40313 of August 19, 2016, which is enforceable and in effect
>
> To date, this Directorate does not have the evidentiary support that accredits compliance with the order issued through Resolution 40313 of August 19, 2016.
>
> In attention to the fact that the company UBER COLOMBIA S.A.S, is allegedly in alleged default of complying with the order issued by Resolution No. 40313 of 2016, please submit any explanations within five (5) working days following receipt of this request.

From the foregoing, it follows that the Superintendency established the reluctance of Uber Colombia since it did not prove compliance with the orders of Resolution 40313 of 2016, whereas we have already said- the company was ordered to cease the conduct of facilitating and promoting the provision of unauthorized services, through spokespersons or third parties, or advertising or broadcasting media or of any kind.

However, as already explained, the non-monetary obligation that should have eventually been subject to forced execution comes from Resolution 18417 of 2015, since this is the final administrative act that culminated the administrative sanctioning procedure against Uber Colombia, and not Resolution 40313 of 2016, since this is nothing more than an administrative act executing the 2015 Resolution.

Now, regarding the analysis of the same second assumption, it is also necessary to study the issue of the burden of proof regarding the reluctance to not comply with the obligation on the part of the individual, this taking into account two facts: on the one hand, that in the aforementioned request for explanations of December 2019 it was said that some allegations would account for an alleged disregard of the order to cease the action ordered in Resolution 40313 of 2016, and on the other hand, that in Resolution No. 14920 of 2019, the Superintendency itself supported the application of the fine referred to in Article 90 of Law 1437 of 2011, indicating textually "(...) what is notorious is that the company did not accredit compliance with the order in the ten days granted by this entity for such purpose, and since then the date, more than two years have passed without UBER COLOMBIA having accredited compliance with the order issued (...)".

Bearing in mind these two factual elements, we already said that the non-monetary obligation included both in Resolution 40313 of 2016 and in Resolution 18417 of 2015 is an obligation not to do, and regarding this type of obligation, the specialized doctrine has indicated that these are fulfilled or not fulfilled plainly (Hinestrosa, 2007, p. 232). In more concrete terms it is said that "*(...) as a general rule they are indivisible (...) whose infringement [utilizing an action], however minimal it may*

be, implies its non-compliance (...)" (Ospina, 1994, p. 254). In turn, for proof of the breach of this type of obligation, the same doctrine adds that:

> For logical reasons, as well as of a practical nature, it is not the debtor who bears the burden of proof of performance: it is not possible to think of the demonstration of an undefined fact, here negative, (...) and therefore, it is the creditor who must prove the non-performance of the debtor, by showing, with appropriate means, the infringement incurred by the debtor, or more precisely, the traces left by this (...). Think first of judicial inspection, but more broadly of confession and photographs, recordings, documents attesting to the commission of the prohibited act and the delays left by the infraction. (Hinestrosa, 2007, pp. 232-233)

Thus, it follows that when it comes to demonstrating the reluctance to comply with an obligation not to do, such as "...cease the facilitation and promotion of transportation services..." it is not the debtor of the obligation, in our case Uber Colombia, who had to give explanations or demonstrate that it was not doing something, i.e. a negative fact, but, on the contrary, in this or any other case of obligation not to do, it is the administration who has to prove that there is a positive fact that demonstrates the breach of the obligation.

> (iii) The administration must grant a reasonable period to the taxpayer to comply with the order.

Taking into account that in this case, the obligation that corresponded to Uber Colombia was not to do, this implies that in addition to the fact that the reluctance to comply in this

case was demonstrated was not from a proof of the debtor but the demonstration of a positive fact by the administration that then broke the indivisibility that, as we said, is a characteristic of the obligations of this type, then, after demonstrating such positive fact, it was necessary to grant a reasonable term and we also said, in addition to the term established in the final administrative act for it to 'stop doing what it was doing.

In the present case, the administration not only disregarded its burden of proof related to demonstrating non-compliance on the part of the administered party but never gave any kind of additional term for it to stop doing what it was 'supposedly' doing.

(iv) Reasonableness and proportionality of fines.

As we pointed out at the time, both the procedure and the fine for reluctance specifically addressed by Article 90 of Law 1437 of 2011 have two peculiar characteristics that distinguish it from the procedure and eventual sanction of the regular administrative procedure, namely: (i) that this procedure is not subject to the formal and general rules applicable to the administrative procedure in general, because if it were, it would be like opening an administrative action within another; and (ii) that the fine, in particular, has a strictly punitive function, since what it punishes is the simple reluctance and defiance of the defendant to comply with the obligation established in a final act on which then the fine for reluctance necessarily depends. As we also said, these two characteristics do not minimize but on the contrary raise the degree of scrutiny, the guarantees of due process, and a greater requirement to ensure compliance with the other principles to which the public administration is subject (Article 3 of Law 1437 of 2011).

Now, in the specific case analyzed here of the administrative action of the Superintendency concerning Uber Colombia in applying Article 90 of Law 1437, it is far from having satisfied such principles, not only because of the three previous assumptions required by the same rule, the administration did not comply with any of them and could have done so, but also, even without having complied with them, the Superintendency itself chose to impose the maximum fine allowed by the aforementioned Article 90.

In effect, on the one hand, the conduct of the Superintendency, even though it could have complied with the requirements of Article 90, does not fail to generate suspicion. Thus, (i) the Superintendency would have been able to advance the process of forced execution concerning Resolution 18417 of 2015 and not as it mistakenly did concerning Resolution 40313 of 2016. (ii) Assuming hypothetically that it had complied with this first assumption required by Article 90, the Superintendency should have, since it had the burden of proof concerning an obligation not to do, demonstrated with a positive fact of the individual that it was reluctant to comply with the obligation, however, the Superintendency did not do so either, or it could have done so. (iii) Even if it had demonstrated such a positive fact showing the reluctance to comply, the Superintendency should have granted an additional reasonable term to comply with the obligation, and it did not do so either, or it could have done so.

Without prejudice to the already sufficient confusion produced by the fact that even if all the elements were present for the Superintendency to have been able to satisfy the requirements for the application of Article 90, such confusion is further deepened by the fact that it was decided to impose the

maximum fine allowed by Article 90 of Law 1437 of 2011, which is far from withstanding any examination of reasonableness or proportionality.

CONCLUSIONS

From the case analyzed, it is an atypical situation of application of Article 90 of Law 1437 of 2011, since this article has been used mostly in administrative orders that entail an obligation to do, for example, to vacate a property, demolish a construction not authorized by the administration or obtain a construction license, however, in the case under analysis the obligation outlined in the administrative order was an obligation not to do, therefore, the civil doctrine itself has insisted on the reversal of the burden of proof, so it is then the administration who must prove, through a positive fact, that the person administered did not cease the execution of the conduct.

As could be evidenced, in this case, the administration indeed requested explanations from the company regarding its obligation to cease the facilitation of the violation of the rules on the provision of public service of special motorized land transportation, however, the question remains as to how to prove that certain conduct was not executed, is it not the administration who must prove that the conduct did not cease on the part of Uber and from there initiate an administrative sanctioning process providing the guarantees of due process?

From this question, we were able to establish that, although article 90 does not bring a special procedure for its application, not because of this, on the contrary, with greater reason, the administration must respect the due process of the individuals it intends to fine, now, in the common cases of application of these fines in the face of the reluctance to

comply with an administrative order there is, on the one hand, an administrative order that contains (i) an obligation to do and (ii) a deadline to comply with such obligation. In this case, no special process is required, since once the term has expired, the administration must verify whether the party in question has accredited compliance with the obligation; if not, it may impose the fine, the purpose of which is to complete compliance.

However, in our case under study, the obligation contained in the 'administrative order' consisted in ceasing conduct, i.e., an obligation not to do, and no specific term was granted to cease the conduct of facilitating the provision of unauthorized public transportation service. On the other hand, the administration received a series of evidence indicating that Uber continued to advance its activities regarding intermediation for the provision of public transportation service, as well as the dissemination through the media of such activity, counting on such evidence, the administration requested explanations to Uber indicating that it would prove that the conduct had ceased, that is, it did not impose the fine contemplated in Article 90 immediately the breach of the order was accredited but created an additional procedure, that is, a request for explanations with a term to respond, without transferring it to Uber so that it could know the evidence against it.

Therefore, in our opinion, the issuance of Resolution 14920 of 2019 confuses the purpose of the fines established in Article 90 of Law 1437 of 2011, since these do not constitute a new administrative sanction, but have exclusively a punitive and dissuasive function so that the taxpayer who has been reluctant to comply with the obligation imposed by the final administrative act complies with the orders of the administration. However, the cited administrative act is reiterative in pointing out that it

imposes a sanction of an administrative nature, which ratifies the erroneous interpretation of article 90 of the CPACA.

In that order of ideas, the administration should have taken the evidence in its possession and in case of finding merit, initiate an administrative sanctioning process in the terms provided in Article 47 of Law 1437 of 2011, guaranteeing the right to due process and defense of the company.

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The distributed generation regime in Brazil: The electricity compensation system in Federal Law No. 14,300 of January 2022

O regime de geração distribuída no Brasil: O sistema de compensação de energia elétrica na lei federal nº 14.300, de janeiro de 2022

El Régimen de generación distribuida en Brasil: El sistema de compensación de energía eléctrica en la ley federal No. 14.300, de enero de 2022

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ABSTRACT: Federal Law No. 14,300, of January 6, 2022, introduced substantial changes to the Energy Compensation System (SCEE) applicable to consumers with small-sized distributed generation in Brazil until then governed by Normative Resolution No. 482, of April 17, 2022, of the National Electric Energy Agency (ANEEL). The SCEE enables consumer units participating in any of the compensation modalities to reduce the amount of energy consumed with energy injected into the distribution network. It was reformed under the new

Law to update the requirements applicable to consumers to frame the categories of micro and mini distributed generators and of potential beneficiaries; the modalities of energy surplus compensation, the legal framework for energy credits, and the methodology for compensation for electricity consumed, with the creation of transition regimes for the incidence of new tariff components on compensated energy and changes in the application of the availability tariff on the consumer unit that is part of the SCEE and of the contracted demand on the consumer unit with micro or mini distributed generation.

KEYWORDS: Distributed generation, electric power, compensation system.

RESUMO: A Lei Federal nº 14.300, de 6 de janeiro de 2022, introduziu alterações substanciais no Sistema de Compensação de Energia Elétrica (SCEE) aplicável aos consumidores com pequena geração distribuída no Brasil, até então regido pela Resolução Normativa nº 482, de 17 de abril de 2022, da Agência Nacional de Energia Elétrica. O SCEE, que possibilita às unidades consumidoras participantes de alguma das modalidades de compensação o abatimento na fatura do valor da energia consumida com a energia injetada na rede distribuição, teve novidades com a Nova Lei relativas ao enquadramento de consumidor como micro e minigerador distribuído e como beneficiário, às modalidades de compensação do excedente de energia elétrica, ao regime jurídico dos créditos de energia elétrica, e à metodologia de compensação da energia elétrica consumida, com a criação de regimes de transição para a incidência de novas componentes tarifárias sobre a energia compensada e mudanças na aplicação do custo de disponibilidade sobre a unidade consumidora integrante do SCEE e da demanda contratada sobre a unidade consumidora com micro ou minigeração distribuída.

PALAVRAS-CHAVE: geração distribuída, sistema de compensação, energia elétrica.

RESUMEN: La Ley Federal N° 14.300, de 6 de enero de 2022, introdujo modificaciones sustanciales al Sistema de Compensación de Energía (SCEE) aplicable a los consumidores con pequeña generación distribuida en Brasil hasta entonces regido por la Resolución Normativa N° 482, de 17 de abril de 2022, de la Agencia Nacional de Energía Eléctrica (ANEEL). El SCEE permite a las unidades consumidoras participantes en cualquiera de las modalidades de compensación reducir la cantidad de energía consumida con la energía inyectada a la red de distribución. Se reformó bajo la nueva Ley para actualizar los requisitos aplicables a los consumidores para enmarcar las categorías de micro y mini generadores distribuidos y de potenciales beneficiarios; las modalidades de compensación de excedentes de energía, el marco legal de los créditos de energía y la metodología de compensación de la energía eléctrica consumida, con la creación de regímenes transitorios para la incidencia de nuevos componentes tarifarios sobre la energía compensada y cambios en la aplicación de la tarifa de disponibilidad sobre la unidad consumidora que forma parte del SCEE y de la demanda contratada sobre la unidad consumidora con micro o mini generación distribuida.

PALABRAS CLAVE: generación distribuida, sistema de compensación, energía eléctrica.

JEL CODE: O13, P28.

INTRODUCTION

On April 17, 2012, the Electric Energy Compensation System - SCEE was introduced in Brazil, by force of Normative Resolution No. 482 of the National Electric Energy Agency -

ANEEL, which for the first time enabled consumers of electricity from the captive market to compensate in the electricity bill for the energy consumed from the distribution network with energy produced locally or remotely, in small generating plants, connected to consumer units of the same ownership or members of a joint venture, such as shared generation or the venture with multiple consumer units – EMUC. The captive or regulated market is the one in which consumers purchase the energy consumed through the concessionaire or permissionaire of electricity distribution (the "distributor") under regulated conditions. The distributor, in turn, should serve the entire regulated market assigned to it under the terms of its respective instrument granting the public distribution service. Then, the provisions of article 2, caput, of Federal Law no. 10,848, of March 15, 2004: Art. 2 The concessionaires, permissionaires, and authorized public service of electric power distribution of the National Interconnected System - SIN must guarantee the service to the totality of its market, through regulated contracting, using bidding, according to the regulation, which, observing the guidelines established in the paragraphs of this article, will dispose on: (...)

REN 482 thus introduced the two categories of distributed mini generators and microgenerators, according to the installed power of the generating plant connected to the holder's consumer unit, through which regulated consumers were given the possibility of joining the SCEE (Ioan and Dorin, 2014). Originally, the distributed microgeneration corresponded to the generating plant with an installed capacity lower or equal to 100 kW (one hundred kilowatts), and the distributed mini generation corresponded to the generating plant with an installed capacity higher than 100 kW (one hundred kilowatts) and lower or equal to 1 MW (one megawatt). However, these

limits had already been changed by later resolutions of ANEEL. Distributed microgeneration had its maximum limit of installed power reduced to 75 kW (seventy-five kilowatts) by ANEEL Normative Resolution No. 687 of November 24, 2015, while distributed mini generation had its maximum limit extended to 5 MW (five megawatts) by ANEEL Normative Resolution No. 786 of October 17, 2017.

Until the publication of REN 482, the electricity sector in Brazil presented a strong dichotomy between generation and consumption. Generators corresponded to concessionaires, permissionaires, and those authorized to generate electricity through formal concession instruments delegated by ANEEL, with few exceptions. The figure of the Auto producer of Electric Energy is the one that came closest to overcoming the generator-consumer dichotomy since its production of energy is intended primarily for the exclusive use of the producer. However, it still requires a concession instrument granted by ANEEL in the form of authorization. Article 2, II of Federal Decree No. 2,003 of September 10, 1996:

> Art. 2 For the provisions of this Decree, it is considered:
>
> (...) II - Auto-producer of Electric Power, the individual or legal entity or companies gathered in a consortium that receives a concession or authorization to produce electric power for their exclusive use.

The concept of distributed generation itself did not mean, for the regulatory order then in effect, a legal regime specific to the generation that was completely different from the others. Rather, distributed generation was a technical concept: the production of electricity from facilities directly connected to the distribution system. Furthermore, the provisions of

article 14, caput, of the Federal Decree nº 5.163, of July 30th, 2004: Art. 14 For this Decree, distributed generation shall mean the production of electric power originating from undertakings of concessionaires, permissionaire, or authorized agents, including those dealt with in Art. 8 of Law No. 9,074, of 1995, directly connected to the buyer's electrical distribution system, except for that which originates from undertakings.

In these terms the provisions of the original wording of article 3 and its paragraphs, of REN 482. Thus, the same enabling legal titles applicable to traditional centralized generation, connected to large consumer centers through transmission grids, were applied to distributed generation.

The generator-consumer dichotomy was finally mitigated with the introduction of mini generation and distributed microgeneration by REN 482. In addition to the main technical concept of the distributed generation then in effect, mini generation and distributed microgeneration (we will refer to them jointly as small, distributed generation) effectively introduced a special legal regime for the consumption and generation of electricity in Brazil.

The REN 482 introduced a special consumption regime because it allowed the regulated consumer class of small generators distributed exclusively through the SECS to deduct from the amount charged for the electricity consumed in their bills the corresponding amount of electricity generated by their small generating plants (Sosnina, 2019).

Complementarily, the REN 482 introduced a new legal regime for the generation of electricity in Brazil, since small, distributed generators were authorized to generate electricity without the need for an enabling legal title (concession,

permission, or authorization), as long as they applied to the distributor for the connection of the generating plant and fulfilled the other regulatory requirements. In these terms the provisions of the original wording of article 3 and its paragraphs, of REN 482.

However, the legal regime of small, distributed generators and the SECS presented, until recently, a relevant factor of legal uncertainty for its adherents. Unlike other legal regimes for generation, guaranteed and provided for directly by law, small, distributed generation was still provided for exclusively by regulation - REN 482 - and could, in theory, be amended at any time by ANEEL or even lose its effectiveness by a law that would be enacted to the contrary.

Resolving the issue of insecurity, Federal Law no. 14,300 was finally enacted, on January 6, 2022, which established the SECS and the special legal regime for small, distributed generators in national law. Besides this simple, but main change promoted by the new Law, new features were also introduced in the operation of this regime and the SECS, which will be the object of the following chapters.

Before moving on to a detailed analysis of the main points of the new legal framework, it should also be noted that the enactment of this framework seeks to respond, albeit in a transitional manner, as will be seen below, to a demand by different economic agents involved in the electricity sector for greater distribution of costs and charges for the maintenance of the electricity distribution system.

These agents include, on the one hand, the consumer-generators themselves (small, distributed generators), which after the enactment of REN 482, began to receive relevant

discounts on their electricity bills for the energy compensated by the injection of their energy into the distribution grid.

On the other hand, however, there is a portion of the other consumers in the regulated market without their generation - who are afraid of being proportionally more responsible for certain charges and maintenance costs of the distribution and transmission grid -, and especially the distributor, which has observed a reduction in the distribution market in recent years, since, with distributed generation, the distributor sells less electricity to consumer-generators.

1. FRAMING AS DISTRIBUTED GENERATION IN THE NEW LAW

The New Law introduced some changes in the framework of consumers as consumer-generator (or small distributed generators) for adhesion to the SCEE. Two hypotheses of classification were maintained: the holder of a consumer unit with distributed microgeneration or minigeneration. So provides Article 1 of Federal Law No. 14,300/2022: Art. 1 For the purposes and effects of this Law, the following definitions are adopted: (...) V - consumer-generator: holder of a consumer unit with distributed microgeneration or minigeneration.

The basic characteristics of the distributed microgeneration category were not changed by the New Law. Thus, it is classified as an electric power generating plant with installed power lower or equal to 75 kW (seventy-five kilowatts), whose energy source is qualified cogeneration or renewable sources of electric energy. Qualified cogeneration is a type of energy generation provided for in ANEEL Resolution No. 235 of November 14, 2006, which consists of the combined production of heat and mechanical energy, which is totally or

partially converted into electricity, provided that the process meets the minimum energy rationality requirements outlined in the regulation. This is provided by Article 1, item XI, of Federal Law No. 14,300/2022.

Distributed minigeneration, in turn, has undergone some changes. According to the REN 482, as updated, the generating plant with an installed capacity greater than 75 kW (seventy-five kilowatts) and less than or equal to 5 MW (five megawatts) was classified as mini generation, and these limits apply to both traditional and renewable sources of electricity. That was the provision of article 2, item II, of REN 482, as amended by ANEEL Normative Resolution No. 786, of October 17, 2017.

The New Law established some differences in the maximum installed capacity of the generating plant according to the source of generation. The maximum power of 5 MW (five megawatts) was maintained for hydroelectric plants, qualified cogeneration, biomass, and biogas, but for generating plants from wind, solar or other sources not listed in the law, the maximum power limit for classification as mini generation was reduced to 3 MW (three megawatts). This is provided by Article 1, items IX and XIII, of Federal Law No. 14,300/2022.

However, as a transition mechanism, the New Law determined that consumer units with a distributed generation already existing on the date of publication of the Law (January 7, 2022) and those that file their request for access to the distribution grid within 12 (twelve) months of the date of publication of the Law may maintain the 5 MW installed power limit until December 31, 2045. Therefore, the maximum limit of 3 MW (three megawatts) for the installed power of distributed

mini generation will only be applied to units that request access to the distributor as of January 8, 2023. Thus, the generating plants that exceed the limits of installed power foreseen by the New Law, observing the transition rule, will be forbidden to join the SECS. In this case, these generating plants may have their energy destined for the commercialization of energy in the free market or the participation in energy auctions of the regulated market.

In any case, to prevent interested consumers from artificially seeking the most beneficial classification of a plant with greater installed power as distributed microgeneration or minigeneration, the New Law prohibited the division of a generating plant into smaller units for classification purposes, a procedure known as "dismemberment of a plant". So provides Article 11, paragraph 2, of Federal Law No. 14,300/2022.

In this regard, it should be noted that the New Law did not impose a limit on the number of mini or micro-distributed generation plants that the same consumer-generator my own, and the consumer's autonomy should prevail on this point. In this way, the prohibition to dismember the plant does not translate into the imposition of a general maximum limit of installed power per consumer-generator, but only in the maximum limit of installed power per consumer plant for classification purposes.

Thus, the same consumer-generator may be the holder of different consumer units with the mini or micro-distributed generation, provided that such units cannot be considered the result of the dismemberment of a larger plant. ANEEL has not regulated, to date, the exact criteria for considering smaller plants as a split of a larger plant. However, the stipulation of

such criteria will likely be related to the physical proximity between the plants, the contiguity of the properties where they are installed, and/or the sharing of network infrastructure (such as the same power substation).

Additionally, the New Law allowed that the public lighting installations of a municipality may be considered a consumer unit with distributed generation for adhesion to the SCEE, provided that the regulations on the subject to be issued by ANEEL are observed. Article 20 of Federal Law No. 14,300/2022 provides in this regard.

On the other hand, the New Law prohibited free and special consumers who exercise the option to purchase electricity in the Free Contracting Environment - ACL from joining the SCEE and prohibited the classification as a small, distributed generation to generation projects that already have legal titles (concession, permission, or authorization) to sell energy in the ACL or the Regulated Contracting Environment - ACR, whose generated energy would already be committed with any distributor. This is provided by Article 9, sole paragraph, of Federal Law No. 14,300/2022.

2. THE SECS

The Electric Energy Compensation System or SCEE is what enables consumers in the regulated market (who buy energy directly from the distributor) with mini and/or micro-distributed generation to compensate, in their electric energy bill, the amount to be paid for electric energy consumed from the distribution network with the amount of electric energy injected from the generating plant. In this way, the electric energy injected into the distribution network is ceded as a free loan to the distributor, and the distributor must compensate the

consumer-generator by reducing the amount charged for the energy consumed from the distribution network in the same billing cycle or subsequent billing cycles. This is provided by Article 9, sole paragraph, of Federal Law No. 14,300/2022.

According to the New Law, the measurement and calculation of the amount of electric power injected into the distribution network, the amount of active electric power consumed, and the eventual surplus of electric power verified (positive difference between the energy injected and the energy consumed) must be conducted by the distributor at each billing cycle, and must be performed by tariff station, when applicable. This is provided by Article 12 of Federal Law No. 14,300/2022. Then, at each billing cycle, for each tariff station, the electric power distribution concessionaire must calculate the amount of active electric power consumed and the amount of active electric power injected into the grid by the consumer unit with distributed microgeneration or minigeneration in its respective concession area. This is provided by Article 9, sole paragraph, of Federal Law No. 14,300/2022.

The compensation described above may occur by up to four distinct and successive mechanisms. In the first two mechanisms, the compensation occurs in the same consumer unit to which the generating plant with distributed micro or mini generation is connected and in the same billing cycle. These four procedures, which we refer to here as mechanisms, are not systematically set out in Federal Law No. 14,300/2022 but can be inferred from the analysis of its provisions. These mechanisms should not be confused with what the New Law calls compensation modalities, which, as we will see below, are conditioning categories of what we call here tertiary and quaternary compensation.

Firstly, the electric energy injected into the distribution grid by the consumer unit with mini or micro-distributed generation will compensate for all the active electric energy consumed by the same consumer unit calculated in the same tariff station of the same billing cycle (in the same month). If the amount of electric energy injected is lower than the amount of energy consumed, the energy injected will be completely compensated only by this first mechanism, with no advance for the following ones. In this case, the consumer will have an immediate discount (in that same billing cycle), equivalent to the energy injected, in the amount charged in the invoice for the energy consumed in that same tariff station and must pay the distributor the residual value corresponding to the energy consumed that was not compensated. Moreover, the provisions of the first part of Article 12, § 1, of Federal Law No. 14,300/2022:

> Art. 12 (...)
>
> § 1 The surplus electricity from a tariff station must be initially allocated to the same tariff station and sequentially to other tariff stations of the same consumer unit that generated the electricity and, subsequently, to one or more of the following options.

In the shared generation and EMUC compensation modalities, which will be analyzed below, the New Law seems to allow an exception to this rule. Along these lines, in the two modalities mentioned above, all the electric power injected could, at the holder's discretion, be distributed as a surplus to other connected consumer units, even if energy consumption was calculated in the consumer unit to which the generating plant is connected. In this regard, check the provisions of the second

part of article 1, item VIII, of Federal Law no. 14,300/2022. In the shared generation and EMUC compensation modalities, which will be analyzed below, the New Law seems to allow an exception to this rule. Along these lines, in the two modalities mentioned above, all the electric power injected could, at the holder's discretion, be distributed as a surplus to other connected consumer units, even if energy consumption was calculated in the consumer unit to which the generating plant is connected. In this regard, check the provisions of the second part of article 1, item VIII, of Federal Law no. 14,300/2022.

Although the New Law does not conceptualize each of the four mechanisms, this first mechanism could be called, due to its characteristics and operation, primary compensation or compensation of the energy injected in the same tariff station.

This is provided by the first part of Article 1, item VIII of Federal Law No. 14,300/2022:

> Art. 1 (...)
>
> VIII - electric power surplus: the positive difference between the electric power injected and the electric power consumed by the consumer unit with distributed microgeneration or minigeneration owned by the consumer-generator, determined by tariff station at each billing cycle.

This mechanism could be called secondary compensation or immediate compensation of the surplus in the other tariff posts of the unit with generation. It is the provision of the second part of article 12, § 1, of Federal Law No. 14,300/2022:

> Art. 12 (...)
>
> § 1 The surplus electricity from a tariff station must be initially allocated to the same tariff station and sequentially to other tariff stations of the same consumer unit that generated the electricity and, subsequently, to one or more of the following options.

On the other hand, if the electrical energy injected is higher than the electrical energy consumed in the same tariff station, all this consumed energy will be compensated and the remaining difference will constitute surplus electrical energy. This is provided by the first part of Article 1, item VIII of Federal Law No. 14,300/2022:

> Art. 1 (...)
>
> VIII - electric power surplus: the positive difference between the electric power injected and the electric power consumed by the consumer unit with distributed microgeneration or minigeneration owned by the consumer-generator, determined by tariff station at each billing cycle.

Initially, this surplus electricity shall be allocated to the other tariff positions of the same consumer unit to which the power plant is connected. This mechanism could be called secondary compensation or immediate compensation of the surplus in the other tariff posts of the unit with generation. It is the provision of the second part of article 12, § 1, of Federal Law No. 14,300/2022:

> Art. 12 (...)
>
> § 1 The surplus electricity from a tariff station must be initially allocated to the same tariff station and sequentially to other tariff stations of the same consumer unit that generated the electricity and, subsequently, to one or more of the following options.

In sequence, if the energy consumption verified in all the tariff posts of the consumer unit with distributed generation is completely compensated with the calculated surplus, and there is still a surplus not compensated, the residual value of this surplus may have different destinations, depending on the compensation modality chosen by the consumer. The compensation modalities presented by the Law could properly be called tertiary and quaternary compensation modalities or simply surplus destination modalities, to differentiate them from the first two compensation mechanisms that apply, as a rule, regardless of the modality chosen.

The modalities will establish the way and the possibility of application of the tertiary compensation mechanism (compensation by other consumer units in the same billing cycle). About the tertiary compensation and the destination of the surplus, the third part and the clauses of article 12, § 1, of the Law:

> Art. 12. (...)
>
> § The surplus electricity from a tariff station should be initially allocated to the same tariff station and sequentially to other tariff stations of the same consumer unit that generated the electricity and, subsequently, to one or more of the following options:

> I - same consumer unit that injected the electric power, to be used in subsequent billing cycles, transformed into electric power credits;
>
> II - other consumer units of the same consumer-generator, including parent company and branches, served by the same electric power distribution concessionaire or permissionaire;
>
> III - other consumer units located in the undertaking with multiple consumer units that injected the electric power; or
>
> IV - consumer units of the holder of shared generation served by the same electric power distribution concessionaire or permissionaire.

Firstly, the surplus may be destined for the same consumer unit that generated it, becoming electric energy credits, to be used for compensation of energy consumed in future billing cycles. This modality is called local self-consumption. This is provided by Article 1, the item I of Federal Law No. 14,300/2022:

> Art. 1 (...)
>
> I - local self-consumption: modality of microgeneration or minigeneration distributed electrically close to the load, participant of the Electric Energy Compensation System (SCEE), in which the surplus electric energy generated by a consumer-generator consumer unit, natural or legal person, is compensated or credited by the same consumer unit. This compensation modality may be useful when a high seasonality index is verified in the generation of electric energy of the power plant.

> In this way, the energy generated in the summer could generate electric energy credits to be deducted from the energy bill consumed during the winter.

Alternatively, the surplus may be destined for another consumer unit owned by the same individual or legal entity that owns the consumer unit as micro or minigeneration, provided that both or all the participating consumer units are located in the concession area of the same distributor. To this second modality, the New Law attributes the denomination of remote self-consumption. So provides Article 1, item II of Federal Law No. 14,300/2022:

> Art. 1 (...)
>
> II - remote self-consumption: modality characterized by consumer units owned by the same legal entity, including parent and branch offices, or individuals who own consumer units with distributed microgeneration or minigeneration, with all consumer units being served by the same distributor.

In this case, the surplus may compensate the electric energy consumed by the beneficiary unit of the holder in the same billing cycle in which it was generated, contributing to the corresponding discount or rebate in the electric energy bill, or, if the surplus is higher than the energy consumed by the beneficiary unit in that billing cycle, it will be transformed into electric energy credits to be used for compensation in future billing cycles, following the mechanism exposed above. So provides Article 1, item II of Federal Law No. 14,300/2022:

> Art. 1 (...)
>
> II - remote self-consumption: modality characterized by consumer units owned by the same legal entity, including parent and branch offices, or individuals who own consumer units with distributed microgeneration or minigeneration, with all consumer units being served by the same distributor.

In the shared generation compensation modality, the surplus verified in a consumer unit with distributed micro or mini generation may be destined to consumer units of other holders, whether they are individuals or legal entities, provided that all the holders of the participating consumer units integrate the same civil entity for shared generation and that the units are in the concession area of the same distributor.

The New Law introduced a major innovation in this type of compensation by allowing consumers to join for shared generation purposes using voluntary civil or building condominiums or any other form of civil association instituted for this purpose, in addition to the possibilities of consortium or cooperative, already contemplated by REN 482. This flexibility means, in practice, that the Law expands the number of potential consumers capable of "purchasing" energy from distributed micro and mini-generation projects by joining an association for a shared generation. The amendment also allows for the diversification of business models in the distributed generation sector, contributing to an increase in market competitiveness. In this regard, see the provisions of article 1, item X of Federal Law No. 14,300/2022, and article 2, item VII of REN 482, as amended.

Finally, the compensation modality enterprise with multiple consumer units or EMUC may be formed by the set of consumer units located in the same property or contiguous properties, without separation by public roads or by other properties that do not integrate, in which the facilities to serve the common use areas constitute a distinct consumer unit, to which the generating plant with mini or micro distributed generation is connected. The physical proximity between the consumer units of the EMUC, often coinciding with the condominium building, is one of the main differences in this compensation modality for a shared generation.

In this case, the surplus verified in the consumer unit of the common use areas may be distributed among the other consumer units integrating the enterprise (this is the provision of Article 1, item VII, of Federal Law No. 14,300/2022).

In all compensation modalities with the plurality of participating consumer units (that is, except for the local self-consumption modality), the consumer-generator holder of the consumer unit with distributed generation may establish the criterion for distribution of the surplus among the beneficiary units. The distribution may occur by percentage (e.g. 60% for one unit, 40% for another), as already provided by REN 482, or by priority (e.g. destination of the surplus to consumer unit X until full compensation of its consumption, with the destination of the remaining surplus to consumer unit Y, to the extent available), a new possibility introduced by the Law. This is the provision of Article 1, item VII, of Federal Law No. 14,300/2022. Also, this is provided by Article 14, caput, of Federal Law No. 14,300/2022.

3. LEGAL REGIME OF ELECTRICITY CREDITS

As seen above, after all the possibilities of compensation of the surplus in the same billing cycle have been exhausted - either by the consumer unit with distributed micro or mini generation or any other beneficiary unit that has received it in the modalities of remote self-consumption, shared generation or EMUC - the surplus not compensated will accumulate in the beneficiary consumer unit and will be transformed into electric energy credits.

The electric energy credits, in turn, will be allocated to the beneficiary consumer unit (which in the case of local self-consumption, will be the unit with micro or minigeneration) and may (i) be used in subsequent billing cycles to compensate for the electric energy consumed; or (ii) be sold to the distributor.

In this line, the electric energy credits shall be registered in the beneficiary consumer unit in terms of active electric energy (kWh), and their accumulated amount cannot be changed due to the variation in the electric energy tariff values. For compensation for the energy consumed by the consumer unit, the oldest credits shall always be used to the detriment of the most recent ones. The credits are valid for 60 (sixty) months from the billing date in which they were generated, and their corresponding value will be destined to the tariff in case of expiration of this term without the use of the credits by the consumer.

With the distribution of credits among the consumer units benefiting from the SCEE, in addition to the criteria for sharing the surplus allowed to the consumer and already explained above, the New Law innovated by conferring the right to reallocate credits accumulated by a consumer unit to another

consumer unit of the same ownership, upon simple notification to the distributor. Under REN 482, reallocation could occur only in the event of closure of a consumer unit, meaning that, in practice, many consumer units accumulated excess credits that they could hardly use or allocate to another unit. This change consists of one of the main flexibilities conferred by the New Law to the electric energy credit distribution regime.

4. CHANGES IN THE ENERGY COMPENSATION METHODOLOGY IN THE SECS

In addition to the novelties presented in the previous topics, the New Law introduced three substantial changes in the methodology for the compensation of electric energy in the SECS, which directly impact the viability and financial return of distributed micro and mini generation projects. They are: (i) the transition regimes for the incidence of tariff components in the compensated energy in the SECS; (ii) the correction of the "duplicity" in the collection of the availability cost for consumers in tariff group B; and (iii) the application of the TUSD Generation to consumers-generators in tariff group A with distributed generation.

4.1. Transition Regimes for the Incidence of Tariff Components on Compensated Energy

The main change in the methodology for calculating the compensation of electric energy in the SECS consists of the provision for the incidence of tariff components related to the operation and maintenance of the distribution electric system on all the energy compensated in new distributed micro and minigeneration projects, as will be seen below.

According to the Tariff Regulation Procedures approved by ANEEL in the form of Normative Resolution No. 1,003, of February 1, 2022 - PRORET, the monthly billing of users of the electricity distribution system is made by charging the Energy Tariff - TE and the Distribution System Use Tariff - TUSD. Both are applied on the amount of energy consumed and, on the demand, contracted by the user, when applicable, to calculate the final amount to be paid in a billing cycle to the distributor.

Along these lines, under the REN 482 compensation rules, the energy compensation that occurs under the SCEE is considered as parity, since 1 MWh (one megawatt-hour) injected into the distribution grid completely offsets all the costs of 1 MWh (one megawatt-hour) consumed from the distribution grid. In this way, the consumer only needs to pay the bill for energy consumed that is not compensated, without the incidence of any TE or TUSD tariff component on the compensated energy.

Also, according to PRORET, TUSD is composed of three tariff components: (i) TUSD Transport, which in turn comprises TUSD Fio A - corresponding to the regulatory costs for the use of transmission systems - and TUSD Fio B - corresponding to the regulatory costs for the use of assets owned by the distributor itself, including distribution system administration, operation, and maintenance costs; (ii) TUSD Charges; and (iii) TUSD Losses.

Thus, it can be observed that the equal compensation allowed to small, distributed generators under REN 482 exempts them from paying the TUSD and especially the TUSD Fio B - its main tariff component, which remunerates the distribution services - on all the compensated energy. This exemption allows

small, distributed generators to currently bear comparatively less of the costs of maintaining and operating the distribution system than other consumers in the regulated market. This difference is seen by some as a necessary cross-subsidy to stimulate a renewable energy source in the national electricity matrix, while by others, it is an injustice to the regulated consumer who is outside the SECS.

The second view seems to have prevailed over the legislator for the enactment of the New Law. Thus, transitional regimes were instituted so that the compensation of electricity under the SCEE ceases to be parity and becomes partial, with the gradual incidence of TUSD components - mainly the TUSD Fio B - on all electricity compensated by consumer units participating in the SCEE, no longer being limited to the incidence of these tariffs on the amount of energy not compensated.

In practice, this means that after the incidence of the tariff components, the electric energy injected will have a slightly lower value than the electric energy consumed, increasing the operating costs of distributed generation with those practiced under the REN 482.

However, due to the sensitivity of the topic, the New Law instituted transition regimes to safeguard the legal security of already existing projects and to mitigate the effect of the incidence of these tariff components on the viability of future distributed generation projects.

The first transition regime instituted by the New Law consists simply of the continuity of the surplus valuation rules of REN 482 until December 31, 2045 (that is, for almost 24 years after the enactment of the New Law). This transition regime applies to all the developments already existing on the

date of publication of the New Law and to those that file the access request within 12 (twelve) months from its publication, constituting a "window of opportunity" for the maintenance of the parity compensation until the deadline provided by the Law.

Regarding this final deadline for framing in the first transition regime, it is important to highlight that the law expressly states that the access request must be filed with the distributor within 12 (twelve) months. The protocol of the access request is the first step in the connection procedure of a distributed micro or mini generation plant with the local distributor, not to be confused with the later phases of issuing the access opinion, signing the access opinion, or signing the contracts for access to the distribution network. These later phases, therefore, may occur after the period of 12 (twelve) months from the publication of the Law.

In any case, a second deadline must be observed for this later phase to start the injection of energy by the power plant in the distribution grid, to ensure the maintenance of the framework in this first transition regime. This second deadline is counted from the issuance of the access opinion by the distributor and varies between 120 (one hundred and twenty) days for microgeneration, 12 (twelve) months for minigeneration of solar source, and 30 (thirty) months for minigeneration of other sources.

The New Law also provided for other three transition regimes, all applicable to consumers who file an access request after 12 (twelve) months from the publication of the New Law, with the three having as a common characteristic the levy of the TUSD Fio B on all the energy compensated in the respective consumer units as of 2023.

In the second transition regime, applicable to the consumer units that file an access request between the 13th (thirteenth) and the 18th (eighteenth) month counted from the publication of the New Law, the incidence will occur gradually, starting with the incidence of 15% (fifteen percent) of the TUSD Fio B as of 2023 until reaching 90% (ninety percent) as of 2028, maintaining this percentage (and the transition regime itself) until the end of 2030. The third transition regime, in turn, applies to consumer units that file an access request as of the 19th (nineteenth) month of the publication of the New Law, and has the same characteristics as the previous one, with the sole exception that in this regime the transition rules will only be in force until the end of 2028.

Finally, the fourth and last transition regime, applicable to units with distributed mini generation with installed capacity greater than 500 kW (five hundred kilowatts) that meet some specific energy and corporate requirements, consists in the incidence until the end of the year 2028 of 100% (one hundred percent) of the TUSD Fio B, 40% (forty percent) of the TUSD Fio A and 100% (one hundred percent) of the Research and Development (P&D), Energy Efficiency (EE) and the Supervision Tax of Electric Energy Services - TFSEE.

After the end of each transition regime provided by the New Law, the respective distributed generation projects covered by it must adhere to the single post-transition regime for the valuation of credits. However, the New Law gave great indeterminacy to the compensation rules of this future regime.

On the one hand, it established that all consumer units will be invoiced by the incidence of the TUSD components on all the electric energy consumed from the grid and on the

use or demand. On the other, it established that all benefits to the electrical system provided by micro and mini-distributed generation plants should be deducted from the amount billed. Along these lines, the Law granted the National Energy Policy Council (CNPE) the duty to establish the guidelines for valuation of the costs and benefits of small distributed generation within 6 (six) months of publication of the Law, and ANEEL the duty to establish the calculations for valuation of such benefits, following the guidelines approved by the CNPE, within 18 (eighteen) months after publication of the Law.

4.2. The Cost of Availability

In contrast to the transition regimes of surplus valuation, which increased costs for small, distributed generation, the New Law also brought changes in the compensation methodology that benefit the consumer-generator, such as the end of "double" charging for the cost of availability for consumers in Tariff Group B.

The availability cost is the minimum billable amount of energy that must be paid in every billing cycle by the consumer of Group B, to remunerate the distributor for the constant availability of energy to the consumer.

Under REN 482, many consumer-generators in Group B have the impression that they are paying the cost of availability "twice" since the standard provides for the minimum collection of the cost of availability in every billing cycle also for consumer units participating in the SECS but does not stipulate any rule that excludes from the compensation calculations the portion of active energy consumed that must be paid anyway by the consumer as availability cost. Thus, the consumer perceives a

double financial impact, because he pays the cost of availability with credits and with money every billing cycle.

The text enacted in the form of the New Law responded to consumers' demands for the elimination of this duplicity in two distinct ways. For consumers under the first transition regime described above, the New Law prevented the value of the availability cost from being counted as part of the energy compensated with credits, and it must only be paid in currency, separately, without debiting the value corresponding to the availability cost in the number of credits used in the consumer unit.

With a similar economic effect, for the other transition regimes, the New Law excluded the need for separate payment of the availability cost. For these, the availability charge must only be applied when the measured consumption is lower, and the verified difference must be paid by the consumer.

4.3. The TUSD Generation in Small Distributed Generation

The New Law introduced yet another novelty to the compensation methodology in the SCEE. This time, the beneficiaries are Group A consumers, a group that, as a rule, needs to contract demand with the distributor to guarantee the availability of the energy needed in the grid at the time of use.[1]

The novelty consists in the possibility of consumer units with mini generation paying for the contracted demand for the injection of the energy generated in the distribution network at a tariff significantly lower than the one charged on

1 Group A consumers, except for those who can and choose to be billed as Group B consumers ("B opting"), have the blue or green hourly tariff mode and are required to contract demand with the distributor.

the contracted demand for consumption. This special tariff is called TUSD Generation or simply "TUSD g".

Along these lines, TUSD Generation is a special tariff for power plants regulated by Submodule 7.4 of the PRORET. Although its specific value varies according to the concession area where the plant is located, it is usually, on average, considerably lower than the TUSD Demand or TUSD Load, corresponding to the common energy consumption demand of a consumer unit.

The Generation TUSD will be immediately applied to distributed generation projects governed by the new transition regimes (for which an access application is submitted to the distributor after twelve months from publication of the Law), but may only be applied to projects under the first transition regime - which covers existing generating plants and those that apply for access within twelve months of publication of the Law - as from the first tariff review by the local distributor after the publication of the Law

CONCLUSIONS

As seen above, Federal Law No. 14,300/2022 introduced important changes to the legal regime of small, distributed generations in Brazil. Firstly, by instituting the SECS by law, it conferred greater legal security for consumers participating in this market. The New Law also introduced novelties that made the system's compensation modalities more flexible, making it possible, in the case of shared generation, for consumers to join through any form of civil association permitted by law, contributing to the expansion and diversification of the distributed generation market. The distribution of the surplus and credits was also made more flexible with the introduction

of a new criterion of eligible distribution by the consumer-generator, namely the distribution among the beneficiary units in order of priority, and with the new possibility of reallocating credits already accumulated by a consumer unit to another unit of the same ownership, by simple request to the distributor.

As for the SCEE's compensation methodology, the New Law introduced transition regimes to allow the incidence of TUSD tariff components - especially the part relating to the operation and maintenance of the distribution network itself - to new distributed generation projects, as a way to address the growing concern of part of the electricity sector regarding the increase in maintenance costs for other consumers in the regulated market but creating mechanisms to preserve the legitimate expectations of consumers who made their investments under the previous rules of REN 482. On the other hand, new projects may gain in efficiency with the end of the "double" charging of the cost of availability, for Group B consumers, and with the introduction of the Generation TUSD, for Group A consumers.

Finally, it is worth noting that all changes that did not require a change in regulations or procedures of the distributor became effective immediately upon publication of the Law. In all other cases, distributors and ANEEL were able to adjust their regulations and procedures within six (6) months after the publication of the Law.

REN 482, in turn, was not formally revoked by the New Law, but all its provisions that diverge from the New Law ceased to be in force as of its publication, due to the principle of hierarchy of norms. Thus, ANEEL must update REN 482 to adapt it to the new contours of the SECS stipulated by law.

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Legal Report No. 01 - 2023
The integral control of vexatious clauses in the Peruvian Civil Code

Informe Legal No 01 - 2023
El control integral de las cláusulas vejatorias en el Código Civil peruano

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TO: Editorial Board

ABOUT: The need to establish a modern and updated regulation of integral control of vexatious clauses in the Peruvian Civil Code.

DATE: June 14th, 2020

ABSTRACT: The purpose of this report is to make a critical analysis of the normative areas that regulate the control of vexatious clauses that may be inserted in standardized contractual mechanisms, that is, to see whether or not it is necessary to maintain the legal framework of how this problem is being regulated, to conclude whether or not there is adequate comprehensive control of any clause that may generate a situation of imbalance in the contracting parties in this contractual mechanism.

KEYWORDS: Regulation, Civil Code, Integral Control, Vexatious Clauses.

RESUMEN: Este informe tiene por objeto hacer un análisis crítico de los ámbitos normativos que vienen regulando el control de cláusulas vejatorias que pueden ser insertas en los mecanismos contractuales estandarizados, es decir, ver si a la fecha es necesario mantener o no el marco legal de cómo se viene regulando esta problemática, para concluir si existe o no un adecuado control integral de cualquier clausulado que pueda generar una situación de desequilibrio en las partes contratantes en este mecanismo contractual.

PALABRAS CLAVE: Regulación, Código Civil, Control Integral, Cláusulas Vejatorias.

JEL CODE: K41.

1. BACKGROUND

At present, in our society, the consumerism of goods and services has been consolidated, since the great production erected since the industrial revolution, today, together with the expansion and opening of markets, together with globalization and the technological era, makes commercial transactions are increasingly numerous, dynamic, and even competitive, and therefore the use of contractual mechanisms that facilitate the procurement of goods or services has increased. It is then that the law, not being able to be alien to this phenomenon, must be in perennial linkage and observance with these vicissitudes that arise in our society and provide answers or solutions to the problems that arise in its development.

Article 18, paragraph d) established that a list of clauses inserted in general contracting clauses and adhesion contracts

that generate the improvement of the contractual situation of the person who drafts them at the expense of the consumers will be considered as not put in place. However, this law was repealed in 2010 by the Code of Consumer Protection and Defense (Law No. 29571) which establishes a more detailed regulation of these contractual mechanisms, under the figure of the consumer contract, in which a supplier and a consumer participate, under the concepts established in said Code, and even and unlike the civil code, it has more updated and effective control mechanisms, such as the general control of vexatiousness of a clause and a system of lists of vexatious and presumably vexatious clauses.

From the foregoing, it must be stated that to date the Civil Code maintains its article 1398 in force without any substantial modification, maintaining some cases of vexatious clauses that will not be valid, but it lacks comprehensive control in those cases outside the list provided in said norm and even that cannot be extended through interpretation or analogical application, lacking a framework of substantive and general control over the vexatiousness of any clause predisposed and that generates a detrimental situation to the adherents. Likewise, and although the Code of Consumer Protection and Defense contains a legal framework of control superior and improved to that of its civil counterpart, it must be kept in mind that its framework of protection is restrictive since it is intended to protect against those vexatious clauses that have been inserted in consumer contracts, that is, those entered into between a supplier and a consumer, being outside its scope all problems generated by the insertion of vexatious clauses in these contractual mechanisms entered into between businessmen and persons who are not considered consumers (final consumers).

In the case of vexatious clauses inserted in unilaterally stipulated contracts, the civil code does not have mechanisms of control of substance and general form to detect this type of clauses, and to date has only established a reduced group of clauses that it considers invalid in case they are inserted in a mass contract; and although the Code of Consumer Protection and Defense has a more detailed and updated regulation, it only regulates consumer contracts, where a supplier and a consumer must necessarily participate, leaving defenseless the entire mass of adherents who make use of this contractual mechanism, in which even companies or businessmen may be involved, since this contractual phenomenon is not designed for the exclusive use of certain subjects, but to dynamize massive transactions in a competitive market, and therefore for all subjects of law, which makes it necessary to establish mechanisms of general protection for all those who make use of these contractual mechanisms and do not remain in a state of defenselessness due to lack of legal mechanisms that adequately regulate their use.

2. CONSIDERATIONS OF THE PERUVIAN LEGAL SYSTEM

The Peruvian legal system has two normative bodies that regulate the phenomenon of mass contracting, and therefore the control of vexatious clauses, the first one is found in the Civil Code (1984), since articles 1390 to 1401, regulate the use of general contracting clauses and contracts of adhesion, and within these is the control of abusive clauses inserted in these contractual mechanisms, whose article 1398 stipulates as:

> Invalid those general contracting clauses (not administratively approved) and those inserted in adhesion contracts that establish in favor of those who have drafted their exonerations or limitations

> of liability; powers to suspend the execution of the contract, to rescind or terminate it, and to prohibit the other party the right to raise defenses or to tacitly extend or renew the contract.

As can be seen, although said regulation establishes a list of clauses that are considered vexatious, it has not taken into account that the universe of clauses that can generate a contractual imbalance is much greater than that foreseen, and even due to the variety of operations in which its use is immersed, it has given rise to problems regarding its scope of application, either through extensive interpretation or analogy, which is why it is not an adequate means of control for these contractual mechanisms, In addition to being of such massive and varied use, it is complicated to apply to other assumptions, since this contractual mechanism is so expanded in its use that it exceeds even the private sphere, since it can be observed in commercial relations that are also regulated by Maritime Law, Aeronautical Law, and even within Public Law, which has generated difficulties and made it impossible for the operators of the Law not to make an adequate application of control due to the shortcomings contained in said norm of the Civil Code.

In addition, there is a lack of contractual institutes and remedies provided by the civil code that is compatible with such contractual practice, since those existing in the referred code are to be applied to contracts entered into consensually by both parties and perfected by mutual agreement, since they are contracts where erected on a unilateral predisposition and perfected using assent (adhesion), it is incompatible or inapplicable to apply certain contractual remedies provided in the same code for this type of contracts, since such remedies have been designed for parity contracts. Therefore, the civil

code has a narrow control framework and does not have a general and adequate control mechanism to mitigate the insertion of any vexatious clause that may be inserted in these contractual mechanisms.

The second body of law that regulates the use of these contractual mechanisms is the Consumer Protection and Defense Code (Law No. 29571), which, taking as a reference the vexatiousness control model of the German system, has regulated the control of vexatious clauses by introducing a control of content together with a system of lists, but a problem arises with respect to its suitability as a control framework and also on its application, firstly, because this control system has been established without taking into account that it was foreseen in Germany for its judicial system, not to be applied in administrative courts (as has been done in our country), since the substantive control and its declaration of invalidity (of a vexatious clause) only corresponds to its determination and declaration in the jurisdictional sphere, It should be added that this Code of Consumer Protection and Defense has a narrow scope of application, since it has been foreseen to be applied only to consumer contracts, that is to say, only to that contract where a supplier and a consumer participate, and the latter has been defined in the same code as that natural or legal person who acquires, uses or enjoys as final recipients goods or services, and as has been previously stated, the use of these contractual mechanisms exceeds those made only by consumers, since there are many natural persons, such as businessmen; and legal persons, such as public and private, who acquire goods and services, even natural persons subscribe them not as final consumers, and are exposed to violations in their legal situation with the insertion of vexatious clauses, but as they are not final consumers, they will not be protected within the scope

of protection of said Code, and will have to resort to the Civil Code, which contains the deficiencies described. The same can be said concerning Law No. 28578, called "Complementary Law to the Consumer Protection Law on Financial Services", which regulates the control of vexatious clauses, but is intended to regulate and protect the contractual phenomena arising from the services provided by financial entities, and is focused on the development of such activities. In other words, its scope of application is more restrictive than that of the Consumer Protection and Defense Code since it only applies to consumer contracts between a supplier of financial services and a final consumer.

Given the above, the problem can be summarized as follows:

A) The civil code has a regulatory deficiency on mass contracting, specifically concerning the control of vexatious clauses, which does not allow to alleviate all the problems and abuses that can be generated with the use of these contractual mechanisms, to all the legal subjects that are immersed in this form of contracting.

B) There is restrictive protection by the Code of Consumer Protection and Defense, since it does not perform a substantive control regarding the vexatiousness of a clause, and both said code and the Complementary Law to the Consumer Protection Law on Financial Services (Law No. 28578), are intended to regulate consumer relations.

The legislative deficiency pointed out by the Civil Code has caused a complete lack of general and effective protection to all the legal subjects that are immersed in this contractual practice, together with the incompatibility of

control that exists concerning recourse and control with other institutes and contractual remedies provided for in said code, since these have been provided for parity contracts; on the other hand, the restrictive protection given only to consumers by the Code of Consumer Protection and Defense leads to evidence that in our Peruvian system there is no adequate and full protection concerning all the adherents in general, who establish contractual relations based on this form of contracting, and this is mainly because our civil code to date does not adequately regulate the pathological aspects of this form of contract, and it is the regulatory framework that has to carry out the adequate and full control of these.

From the above, the objective of the report seeks to answer the following questions: Is it necessary to establish a modern and updated regulation of integral control of vexatious clauses in the Peruvian Civil Code? Is the regulation of control of vexatious clauses in the Code of Consumer Protection and Defense satisfactory or sufficient to protect all contracting parties from abusive clauses?

3. REGULATORY MODEL OF VEXATIOUS CLAUSES: FURTHER CONSIDERATIONS

In the Peruvian Legal System, two bodies of law have regulated the problem of vexatious clauses in contracts of adhesion and general contracting clauses: i) The Civil Code; and ii) The Code of Defense and Consumer Protection (within it we include the Complementary Law to the Consumer Protection Law on Financial Services. Law No. 28578). The aforementioned codes have as a ratio the protection of the adherents in this form of contracting, but the civil code has established in its article 1398 the control for a group of clauses

that considers them vexatious and therefore sanctions them with their invalidity, not providing greater control mechanisms to the other assumptions that also generate a contractual imbalance and a detrimental situation for the adherent, which would result in a lack of full control of vexatiousness for the use of this contractual mechanism.

Although the Code of Consumer Protection and Defense has established a legal framework of control more updated to its civil counterpart, it does not perform control of substances for not being able to establish and declare the invalidity of these and is intended to protect certain persons (consumers) who have signed a consumer contract, which is only a part of the diversity of contracts that are perfected through this contractual mechanism, so its framework of application is restrictive.

This situation has led to the fact that many sectors and agents that interact and develop in the Peruvian market, and acquire goods or services through these forms of mass contracting, cannot be fully protected by the rules that regulate this contractual phenomenon, either by the insertion of vexatious contractual content that is not provided for in Article 1398 of the Civil Code, or by the activity they perform, by the nature of the transaction carried out or even depending on the situation or contractual position in which the contracting parties find themselves.

This leads to a lack of effective protection of the rights of those subjects that are within this form of contracting and do not comply with the requirements provided by one of these laws, therefore there is a lack of control and full protection regarding the entire universe of vexatious clauses that can be inserted in this form of contracting, and for all subjects that

make use of it, being necessary to establish a framework of full control within our Peruvian legal system.

Because of this situation, the civil code needs to have a medium-sized good or service adhesion. To this end, it is important to modify article 1398 of the civil code and to update and establish mechanisms of substantive control on vexatiousness and protection of the adherent contracting party, providing contractual remedies that seek contractual rebalancing, since they are by and necessary for this type of contracting.

4. PROPOSAL: CHANGES IN THE SYSTEM

We propose a critical analysis of the normative areas that regulate the control of vexatious clauses that may be inserted in standardized contractual mechanisms, i.e., to see whether it is necessary to maintain the legal framework of how this problem is being regulated, to conclude whether there is adequate comprehensive control of any clause that may generate a situation of imbalance in the contracting parties in this contractual mechanism. For this purpose, it is essential to make a normative analysis of how this contractual phenomenon is regulated to date, to be able to highlight whether there are deficiencies and problems, since from the above it is evident that there is a lack of an adequate regulation to control the pathological situations that may occur in this type of contracting, since the civil code does not provide a general and comprehensive control of any vexatious clause, nor does it provide a protection or protection framework for the non-stipulating party or adherent to these contracts, which can lead to abuses by the stipulating party in case he does not make correct and adequate use of these contracts. On the other

hand, the Code of Consumer Protection and Defense does not apply to all these contractual mechanisms, but only under certain subjective requirements since it requires the necessary participation of a consumer.

In this context, in our legal system, there is a deficient regulation and protection of vexatious clauses, since although the application of the existing rules seeks to counteract such abuse, and can protect any contracting party, it has only provided for the control of a group of vexatious clauses, without enabling a general control of their vexatiousness; and in the consumer protection and defense code, it protects a group of subjects (consumers) who have entered into a consumer contract, which leads to a lack of protection of the contractual situation of non-consumer contracting parties, since basically, our legal system has focused basic protection mechanisms on certain types of subjects and on certain commercial activities, which have been included within their respective scope of application.

In addition, it should be borne in mind that in the absence of comprehensive control of vexatious clauses in the Civil Code, it should be taken into account that the legal structure provided in Book VII (contracts, general part), is composed of a series of legal institutes and remedies that regulate parity contracting, Therefore, the use of these are incompatible and especially does not allow their application to standardized contractual mechanisms, where precisely there is a lack of parity and contractual freedom of the parties, since its perfection is achieved through the act of adhesion, so it is necessary to establish a comprehensive and updated control mechanism to alleviate any vexatious situation.

Given this situation, this report aims to describe and

identify the need to establish a legal framework of general and substantive control to avoid the insertion of any vexatious clause in these contractual mechanisms. To this end, it justifies and proposes the need to modify and update the civil code that regulates the contractual phenomenon generated by mass contracting, which should be based on considering that this form of control applies to all legal subjects involved in this type of contractual relations, and thus obtain efficient and total protection of the subjects included in these contracts.

5. REGULATORY REQUIREMENTS OF THE SYSTEM

The need to establish an adequate and comprehensive regulation of vexatious clauses that are inserted in mass contracts is evident, and for this purpose, it is necessary to study the existing regulation within our legal system, analyzing the provisions of the civil code and the code of consumer protection and defense, to verify the existence of deficiencies in the normative regulation and its application.

Likewise, it is identified and described that although the consumer protection and defense code has foreseen a comprehensive control framework, it only establishes protection for consumers considered in its regulatory framework, not being able to be applied to other contracting parties exposed to these situations of vexation, and therefore its solution is sectorial, This without taking into account that a control mechanism established for a judicial control system has been foreseen, but that in our country it was implemented for administrative headquarters, which also evidences a deficit of due control since it will not be possible to invalidate in said headquarters a vexatious clause, which reaffirms our proposal for a solution through a modification of the civil code.

CONCLUSIONS

The vexatious and presumably vexatious, which makes it necessary to modify the civil code in this matter, and to establish a legal framework of full control so that any predisposed content that generates a contractual imbalance, to the detriment of those who adhere to it, is corrected and rebalanced and thus maintain contractual equity.

Although the Consumer Protection and Defense Code has regulated vexatiousness control mechanisms, taking into account the German system, it must be taken into account that such a system has been designed for its application in court, since the declaration of invalidity of a vexatious clause is foreseen to be determined and declared by a judge, and even though it has been decided that an administrative officer may not apply it, this does not make it impossible for it to continue to be inserted in other contracts, which does not definitively solve the use of this clause, in addition to the fact that its application is restrictive, since it has been focused only on consumer contracts where a final consumer necessarily participates.

Through this report we propose an amendment to the civil code regarding the regulation of adhesion contracts and general contracting clauses, specifically inserting a general background control mechanism and together with a system of lists, to avoid the insertion of any clause that leads to a contractual imbalance and violates good faith in this matter.

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