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ORIGINAL

Diversity of theoretical sources in the Ecuadorian constitution

Diversidad de las fuentes teóricas en la constitución ecuatoriana

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ABSTRACT

Introduction: one of the greatest challenges for justice operators in any society is the lack of understanding of the genesis, scope, and meaning of the norms governing their people, especially when these have constitutional status. This lack of comprehension can undermine the effectiveness of the legal system, rendering it merely declarative and inert instead of an effective structure for collective life and the exercise of fundamental rights.
Method: while an empirical study on the application of the Ecuadorian Constitution in the ordinary and special jurisdictions since its enactment in 2008 can be conducted, the results would be largely quantitative. Therefore, it is essential to carry out a theoretical, historical, critical, and analytical study of the foundations that support the Ecuadorian constitutional proposal to understand its true impact on the legal system.
Results: only through rigorous analysis is it possible to assess the nature and scope of the Constitution, ensuring that it functions as a substantive and effective norm. Its proper application is crucial to consolidating a constitutional state of rights and justice, where fundamental principles and guarantees are not only formally recognized but also effectively enforced.
Conclusions: in this context, the prevailing philosophical and theoretical currents of contemporary law that influenced the Ecuadorian Constituent Assembly are examined, with *Garantism* and *Principlism* standing out as the dominant approaches shaping the current legal framework.

Keywords: Garantism; Principlism; Argumentation; Legal Positivism; Natural Law Theory.

RESUMEN

Introducción: uno de los mayores desafíos para los operadores de justicia en cualquier sociedad es el desconocimiento de la génesis, alcance y significado de las normas que rigen a su pueblo, especialmente cuando estas tienen rango constitucional. Esta falta de comprensión puede comprometer la eficacia del ordenamiento jurídico, convirtiéndolo en un sistema meramente declarativo e inerte, en lugar de una estructura efectiva para la vida colectiva y el ejercicio de los derechos fundamentales.
Método: si bien es posible realizar un estudio empírico sobre la aplicación de la Constitución ecuatoriana

en la jurisdicción ordinaria y especial desde su entrada en vigor en 2008, los resultados obtenidos serían mayormente cuantitativos. Por esta razón, resulta indispensable llevar a cabo un análisis teórico, histórico, crítico y analítico de los fundamentos que sustentan la propuesta constitucional ecuatoriana, con el fin de comprender su verdadero impacto en el sistema jurídico.
Resultados: solo mediante un estudio riguroso es posible dimensionar la naturaleza y el alcance de la Constitución, garantizando que esta funcione como una norma material y efectiva. Su correcta aplicación es esencial para consolidar un Estado constitucional de derechos y justicia, en el que los principios y garantías fundamentales no solo sean reconocidos formalmente, sino también ejecutados en la práctica.
Conclusiones: en este contexto, se examinan las corrientes filosóficas y teóricas del derecho contemporáneo que influyeron en la Asamblea Constituyente ecuatoriana, destacándose el Garantismo y el Principialismo como los enfoques predominantes que sustentan el marco normativo vigente.

Palabras clave: Garantismo; Principialismo; Argumentación; Luspositivismo; Lusnaturalismo; Valores.

INTRODUCTION

The Ecuadorian Constitution, in force since October 20, 2008, was approved by referendum on September 28, 2008, and drafted by the National Constituent Assembly, which met between November 30, 2007, and July 24, 2008. In general terms, it is a material constitution, as it incorporates a programmatic dimension, particularly in the determination and specification of collective and social rights outlined in the Charter of Good Living.[1]

Since its promulgation, it has been the subject of multiple intellectual analyses that seek to clarify its content and scope. Many of these studies have focused on specific aspects of the topic. At the same time, a holistic view of its content would allow for a better understanding of the theoretical influences that guided the constituents of the time. These influences stem from the contemporary philosophy of law, integrating currents of guaranteeism, neo-constitutionalism, and principlism.

There are also critical positions regarding the Montecristi Constitution. However, leaving aside political passions, an impartial analysis reveals that the constitutional text did not ignore the contributions of legal science developed since the mid-twentieth century and the beginning of the twenty-first century, particularly in Europe and later in Latin America.

Despite more than a decade having passed since its entry into force, its potential internal conflicts have yet to be identified. This is due, in part, to the lack of precision and misinterpretation in its classification within the legal sphere, where it has been labeled as a guarantee law without a thorough analysis of its scope and effects. Before labeling it in this way, it is essential to determine whether it complies with the principles of the 'garantista' doctrine or whether it simply adopts some aspects of this doctrine.

Consequently, it is necessary to identify the theoretical sources that influenced the vision of the constituent legislator. Although the political discourse proclaimed a break with Westernism and Eurocentrism, the reality shows that the constitutional text incorporated theses from both the Latin and Anglo-Saxon legal traditions.

The Ecuadorian Constitution unreservedly assumes diverse theoretical currents, even those that may be contradictory. This situation, combined with the strong positivist culture prevalent among justice operators in Ecuador, could cause the Constitution of Montecristi to face difficulties in its application and in achieving its objective of transforming society through constitutional justice, as its theoretical approaches lack harmony in its postulates. There is even confrontation from its first to its deepest manifestations. In this way, the constitution includes approaches that, in practice, can collide, and added to this, the positivist culture rooted in all the actors of Ecuador's judiciary makes the Montecristi Charter a failed attempt to change society through constitutional jurisdictional activity.

This article does not intend to specifically analyze the philosophy and theory of law of specific authors who influenced the Ecuadorian Constitution. The aim is to determine, in a general way, the impact of these theoretical currents and their content on the Ecuadorian Constitution. This approach allows us to demystify certain discourses on sovereignty and self-determination while recognizing that the reception and importation of legal models in Latin America has been and continues to be. It will probably continue to be influenced by Western legal culture, which has become a decisive intellectual ascription, dissociated from misleading discourses of sovereignty and self-determination, but which at the same time cannot necessarily be reproached, mainly when the world receives the importation of legal cultures, where we will continue to be indebted to Western culture.

DISCUSSION

Towards a change of paradigm or simply a nuance of the existing one

The history of philosophy, as viewed from Marxism, is a systematic and ongoing debate between idealist

and materialist positions, each with various forms and names. Similarly, the philosophy of law has oscillated between naturalism and iuspositivism; it can be said that the philosophy of law has walked for thousands of years between the so-called ius naturalist positions in controversy with the ius positivist ones and in the same way with different names and qualifiers; each one has modeled and built a theoretical framework that seeks to explain the essence of law, justice, law, democracy and its relationship with ethics in all its contents.

So, is there currently a resolution to this dispute, or has there been a Copernican shift in our view and practice of the ontological aspects of legal science? This does not seem to have taken place; some brand the others as neo-positivists, others as neo-naturalists. Could it be then that, on the ruins of the past, what is being done is to nuance the present?

Copernican Change or Nuance of the Present?

Even today, the dispute between these currents has not been overcome but is reformulated with new denominations such as neo-is naturalism and neo-is positivism. The Second World War prompted a reformulation of law, especially in Europe, where the role of law in totalitarian regimes generated a rethinking of its function in society and its reflection in constitutions, including the Ecuadorian one.

We want to identify a common thread between the theoretical and philosophical elaborations of law. In that case, they are attributed to the Holocaust, a tragic event caused by the Second World War, which forced the reformulation of life in general and the content and function of law as part of society in particular. In Italy, Germany, and Spain, fascist regimes were established that were not devoid of law, perhaps devoid of just law, but the state functioned and, in many cases, with instrumental rationality worthy of admiration, in which the role of law was an essential element for the realization of its aims and objectives.

From the experience of decadence and the search for a replacement for the totalitarian state, due to its effects on humanity, a rethinking of conceptions of law arose in the middle and end of the 20th century, which decisively influenced the content of the Ecuadorian constitution.

Legal positivism and its different nuances

Legal positivism, with its various variants, sought to establish certainty regarding the law and its application. In its purest form, it is considered that the valid law is only that which is enforced by the State, following the principle of lex dura lex. Its maximum consolidation occurred in the era of codifications when the law was understood as a mechanical system of interconnected rules.

Positivism also promoted the separation between law and morality, basing the validity of norms solely on their formal origin. The judicial function under this model was mechanistic and syllogistic: the judge was limited to applying the law without questioning it since the interpretation of the norm was the exclusive responsibility of the legislator.

Positivism thus sought to leave uncertainty behind and to establish ‘certainties’ based on the recognition of law, aiming to achieve ‘legal truth’ by starting with the sources and then moving on to its elaboration, content, and application. Indeed, about the origin, the monopoly of legal production in parliament, it refers us to the only law that can be recognized and valued, that emanating from the state; it is the rules imposed by the competent body that acquire binding force ‘per se’ when they are emanated by the organ empowered to do so.

The climax of this aspiration is the period of codification when the nomocratic state was considered to have reached perfection. Indeed, we are faced with a legal system that reflects the influence of mechanisms in the legal sciences, such that the legal system acts as a gear where everything is related, interconnected, and interdependent, thereby solving problems of gaps. This, together with the legal system that entails rules that are subordinate to one another, allowed and solved issues of antinomies. All this makes us think of the perfection of the system.

As for the content, the relationship between law and morality, law and justice, the impossibility of empirical certainty on metaphysical and moral questions, which would lead to the conclusion that the content of legal norms was not necessarily related to, or even less based on, values or conceptions of justice: Lex dura lex, leaving as the only criterion of validity its conformity to the procedure established in the constitution, which was nothing more than political manifestos.

Finally, the mechanisms of judicial action under this model are mechanistic and syllogistic, the logical method of subsumption and adherence to the letter of the law is of supreme obligatory nature of a judge, the omnipotence of the legislator will be given in the exclusivity of his power not only of the creation of the law but of its interpretation, only the legislator is responsible for interpreting the law in a generally obligatory way. To achieve this, it was equipped with all the theoretical elements of normative conflict resolution, as well as the adaptation of facts to the law. Although positivism leaves open the possibility of judicial discretion and acknowledges sound criticism, it does not appeal to the existence of an objective ethic to which the application of the law should be subordinate; instead, it refers to the logic of the current legal system.

Natural law and its resurgence

Natural law is gaining strength again in two key areas: the validity of law and judicial activism. This argument suggests that legal systems should be grounded in moral principles and values of justice that precede written law.

Fundamentally, it is gaining strength in two crucial aspects, among others, those related to valid law and its consequences in the activism of judges. Like legal positivism in its various presentations, naturalism has evolved with nuances; thus, we can identify natural law in the strict sense of the term theological natural law. For this article, we are interested in the one that understands the existence of a set of values and appreciations on justice and rules of conduct before their politicization, transferring them, especially to constitutional norms, and that goes from being purely political manifestos to being bodies with important moral and value content that must be taken into account when it comes to imparting justice. As a result, the law moves from an understanding of law to a sense of justice or from scientia juris to juris prudentia.[2]

In general terms, naturalism according to [3] is characterized by the following: (a) Morality is part of and gives sustenance to every legal system in such a way that it could not even be considered as such without a moral foundation; (b) There is a moral normative system independent of a legal system agreed upon by individuals or agreed upon by them; and (c) There are methods or intellectual procedures that allow us to determine the scope, of moral precepts that the administrators of justice can use to make their decisions, which do not necessarily coincide with what is established in positivist law.

The neo-post era and critical positivism

Today, traditional positions have evolved into hybrid models such as neo-constitutionalism, which combines elements of positivism and iusnaturalism. Two approaches that stand out are guaranteeism and principlism.

The question in the times we live in is: 'whether these positions have been overcome, varied, mutated or combined and result' after the emergence of material constitutions, which are considered the 'breeding ground' from which a vast theoretical elaboration will emerge that conditions the understanding and development of the science of law in the middle and end of the 20th century and the beginning of the 21st century. In the case of the Ecuadorian constitution, the openness to foreign approaches will be intense and decisive, as outlined since the 1998 constitution, but with supreme importance in the Montecristi charter.

This adherence to theoretical models in legal science does not have a single guideline but rather fluctuates between the same theoretical foundations in which it develops. Suppose we were to characterize the current moment. In that case, there is a mosaic of positions ranging from a naturalist and positivist perspective, which do not always have a meeting point but rather substantial contradictions. A large part of these proposals can be located in the term' neo-constitutionalism,' which has been long treated by the doctrine. This article aims to distinguish between three positions, which are labeled as post-positivism, critical positivism, and neo-naturalism. Still, in this article, we place the guarantees proposal in the former and the principlist proposal in the latter.

Legal guarantee

Luigi Ferrajoli proposes the guarantee approach as an alternative to the liberal state, whose principle of legality does not guarantee social justice. He defines fundamental rights as 'positive or negative expectations recognized for all human beings by a legal norm.' These rights are based on values such as life, dignity, liberty, and material equality.[4]

From this perspective, guaranteeism proposes that the validity of a norm depends not only on its formal origin but also on its conformity with the Constitution and fundamental rights, which implies a greater judicial responsibility in interpreting and applying the law.

Ferrajoli starts from the conviction of two enlightened men, Montesquieu and Hobbes, regarding the distrust of the powers and, consequently, the task will consist of constructing an alternative model to the liberal Rule of Law where rights become a valid guarantee, limiting both public and private power, and, consequently, the law will be the guarantee that the weakest have against the powerful.[4]

This alternative model of state is presented as an option to a liberal state, which does not fulfill the objectives of social justice and which, in the field of law, rests on the principle of legality whose aim is to protect the economy and its actors with minimal intervention of power, resulting in the generation of greater social inequality and as a result this type of state enters into crisis, which can be resolved through the establishment of guarantees of individual rights traditionally known, but adding previously unknown social rights.

This project can be achieved through a conception of law in which social benefits are stipulated as universal rights rather than as circumstantial, discretionary, and selective policies established by the authorities. The enshrinement in the form of fundamental rights, both freedom and collective rights, must be achieved not only in obedience to a principle of legality in which public officials are obliged to comply with what is written but also go beyond strict legality, in which even laws are subordinated to the constitutional content of fundamental

rights. Consequently, politics is subordinated to law and will no longer be an instrument of law,[5] since the actions of power in its various manifestations — whether legislative, executive, or judicial — will no longer act only under formally validated norms but also substantially by the constitution.

Now that the role played by fundamental rights in the guarantee proposal has been distinguished, which, to reiterate, is nothing more than the control of power through limits on action, the vital question remains as to how these fundamental rights are to be determined. In this respect, Ferrajolli points out that if we locate fundamental rights according to those established in the legal system, we would be giving a positivist answer to the question: what are fundamental rights? In this sense, the Italian philosopher resorts to Kantian thought to determine the contents of these rights and considers the human being 'as an end in itself and not as a means.' Consequently, he will propose four substantial values for people: life, dignity, freedom, and survival, which must be executed through the fulfillment of axiological criteria, such as material and formal equality before the law, as well as the link between the legal and the political (law-democracy).

However, axiological or value-based proposals can be opposed to each other, which is why we need another criterion to establish the meaning of fundamental rights through a conventional response that does not appeal to moralism. Thus, the author states:

'I propose a theoretical, purely formal or structural definition of fundamental rights: fundamental rights are all those subjective rights that correspond universally to all human beings insofar as they are endowed with the status of persons, of citizens or persons with the capacity to act; subjective right being understood as any positive expectation (of benefits) or negative expectation (of not suffering harm) ascribed to the subject by a legal norm; and status as the condition of a subject also provided by a positive legal norm, as a presupposition of his suitability to be the holder of legal situations and/or author of acts that are exercises of these.'[6]

From this definition, rationalist universalisms are extracted in a Kantian manner by establishing a conceptualization of fundamental rights that are universally applicable to human beings with the status of persons or citizens possessing the normatively or positively recognized capacity to act.

These expectations of people are presented in two forms: one through the demand for benefits, i.e., active and positive, and the other through the demand not to be harmed, i.e., negative, in the author's words. With this definition, the philosopher distinguishes between economic rights and fundamental rights, assigning the latter as the foundation of democracy.

In synthesis, the guarantee model is based on constitutionalized rights and the development of these rights, not only obeying the form of producing infra-constitutional legislation but also ensuring that the contents of the laws have substantial subordination to the fundamental rights.[7]

In addition to the proposal of constitutional democracy, a second approach to guaranteeing rights focuses on a theory of law in which aspects are considered, such as changes in the actions of the judge and the jurist, in the first case, the possibility of applying norms, and in the second case the possibility of judging the validity of norms. Although Ferrajoli describes himself as a critical positivist, he seeks a rapprochement with its naturalism. However, it is essential to consider that a general theory of guarantees lies in the separation between law and morality, between the being and the ought-to be of law.

Legal principlism

Principlism, as identified by authors such as Dworkin and Alexy, holds that law is not only composed of rules but also of moral and political principles that justify legal norms. In contrast to positivism, which conceives law as a closed system of rules, principlism asserts that principles allow for a single correct answer in every legal case.[8] Rules are applied in terms of 'all or nothing,' whereas principles are optimization mandates that can collide and must be weighed.[9] It reinforces this idea by conceiving principles as norms that require compliance to the greatest extent possible within the factual and legal possibilities.

Principlism is presented under the adjectives of neo ius naturalism or moralism, concepts that allow us to perceive its contents and the way of explaining the law. In general terms, principlism considers that the substance of the law is to be found in the moral principles that guide it, which are before any written order. "The principlist conception of law explains that legal norms, daughters of legal positivism, come from axiological burdens before them, that is, from values and principles that justify them. They come from a socially institutionalized and individually internalized list of axiological priorities".[10]

The principles are clauses full of content so that their application differs from a legal rule; they are not exhausted in a discursive exercise, and they derive from a set of prevailing values that arise from the same activity of societies. These values are directly related to the notions of justice of the time and have been incorporated as norms in current constitutions. For this reason, [8] proposes a model of norms that, unlike legal positivism, includes principles and guidelines. The former are declarations of morality, and the latter are political. A principlist legal model will be endowed with axiological postulates in the form of positive legal principles within the legal system.

The Oxford philosopher [11] posed the possibility that there could be only one answer to every case in law,

which resulted in far-reaching implications in the legal-philosophical discussion, which was substantially based on the criticism of positivism by recognizing in legal systems the existence of norms only in the form of rules, so that the legal system was open and could not necessarily regulate all facts or, in other words, not all facts could be adapted to a legal rule, leaving the judge with a certain freedom to make a decision that was not bound by dogmatics; In other words, a decision based on extra-legal criteria, which is why positivism also recognizes the existence of liberality in the task of judging. Dworkin contrasts the system of rules with a model of principles. Given the substance of these, every fact could fit into a principle, and consequently, no judge's decision would be outside positivist law. It could rigorously reach a single answer according to this theory, which would allow for the much aspired-to 'single answer' to be achieved.

In light of these reflections, the resolution of even the most complex cases may not be possible within the prevailing legal system, as the absence of applicable rules necessitates the application of a principle. For this, it is necessary to understand the DNA of principles and prima facie. We say that principles are more general than rules, with a difference in degree, meaning that principles can be applied to various cases, whereas rules cannot. However, a careful analysis of the principles is conducted based on how a legal system of rules operates. In that case, we find that if there is a contradiction of rules, i.e., an antinomy, one of them will always be invalid, which is how it arises: a higher rule versus a lower rule, a later rule versus an earlier rule, an organic rule versus an ordinary rule, and so on.

If there were no form of adequacy or, in favorable terms, subsumption of a fact that is not prescribed by any rule, then a gap would arise, which could be filled by a legislative act or by a jurisdictional act of sound criticism by the judge. This is not the case with principles, since in the event of conflict or collision between them, their resolution does not eliminate one of them but is resolved based on an allocation of weight; in this sense, the rule is not invalidated, nor expelled from the system, but for the case, and plainly, its weight was not sufficient to triumph over another principle in collision.

This could close a debate on the possibility of reaching a single answer, which, in concrete terms, would be a solution based on the prevailing norms. However, the philosopher's questions about the collision of principles remain unsatisfied, and it is here that [9] proposes an explanation by likening principles to optimization mandates. Alexy considers that principles are norms that order the realization of something to the greatest extent possible, given empirical and legal possibilities. In contrast, rules restrict a case, resulting in compliance or non-compliance. In conclusion, with fear of being mistaken, it could be said that when we are faced with a norm applicable to a varied universe of facts with a particular factual and legal concatenation, we are faced with a principle; on the contrary, when we are faced with a norm applicable to a singular fact, we are faced with a rule. It will be understood that the collision of principles occurs as a consequence of the various spheres or sets of facts and legal assumptions to which it is applicable.

With the above issues addressed, the analysis of the principles is now closed. However, in addition to the reasons for the confrontation of principles, the question of how a judge determines the weighty relationships between them remains to be discerned, a question that is relevant to the argumentation of principles.

Arguing rules and arguing principles

In the previous sections, principles were presented as general norms, thereby maximizing their application to a greater number of facts or legal conditions than rules. However, it must also be stated that principles are axiological and postulates of justice. This inevitably leads to the view that principles express values. 'Principles and values are the same,' [11] says the relation of priority between principles is the relation of priority of values. How to assign differences in weight between competing values in the form of constitutional principles; the proposed methodology involves weighting, a question that requires detailed analysis, which falls beyond the scope of this paper.

Reception of the theories in the Ecuadorian constitution

The specialized and common legal jargon in various media and forms of communication have repeatedly described the Ecuadorian constitution as 'guarantees,' and even rulings analyzed by prestigious legal theorists and philosophers have patented the theoretical inclinations present in constitutional rulings[13] towards principlism. There are positive norms that include, in their articles, textually affirming the theory, such as the case of weighting.[14] Therefore, the affirmation that the Ecuadorian fundamental charter is influenced by contemporary philosophical currents of thought in diverse presentations could be considered irrefutable. However, it is necessary to note that in the Ecuadorian constitution, the influence of neo-constitutional currents is evident from the very name of the Ecuadorian State, which is a Constitutional State of rights and justice. Indeed, in Ecuador's legal evolution, the constitutions have gradually incorporated a set of material rules that have shaped the model of the state embodied in the Montecristi Constitution.

The degree of constitutionalization of the Ecuadorian legal system can be examined based on the conditions established by Guastini,[15] to identify whether an order is constitutionalized in legislation, jurisprudence,

doctrinal style, the actions of political actors, and social relations.

Next, concerning the elements of constitutionalization provided by the author above, the constitutional conditioning factors of the contents of secondary norms and how judges act in Ecuador are analyzed on the basis that neo-constitutionalism is a theory, an ideology, and also a method of analyzing the law:

> a) The rigidity of the Constitution: 'The idea of everlasting constitutions - which has a precedent in our land in the perpetual law of the Castilian commoners - never went beyond being in the 18th and 20th centuries, an ideal of revolutionaries lacking in realism, sometimes involved in the widespread sin of legislative vanity, and who, in any case, saw in their constitutions historical conquests of such magnitude that they should be conceived as immutable'.[16]

Nowadays, the rigidity of constitutions is not only something that should characterize them but also their very essence to guarantee compliance with their contents and the will of a pluralist society.

'Constitutional rigidity is not, in the proper sense, a guarantee of application and immutability, but rather a structural feature of constitutions, linked to their placement at the apex of the hierarchy of norms, so that constitutions are rigid by definition in the sense that, if they were not, they would not be constitutions, but would amount to ordinary laws'.[17]

A Constitution can be qualified as rigid when its reform process is carried out by a subject other than the ordinary legislator and under non-ordinary procedures (referendum, assembly convened for this purpose, intervention of several co-legislators) or using a qualified majority.[18]

In the Ecuadorian Constitution, it is possible to see this quality with absolute clarity since it devotes an entire title, the ninth and last, to establishing its supremacy over any other. Such prevalence is not only in cases of contradiction of content but also of application. Similarly, the reform procedure is limited since there is immutability in constitutional principles, rights, guarantees, character, and elements of the State, subjects expressly indicated on which no change is possible, except for a process of forming a new constituent assembly, which can only take place at the will of the Ecuadorian people and the initiative of the President, of two-thirds of the assembly, or the initiative of twelve percent of the people registered in the electoral roll, or outside of the provisions of the Constitution through a revolutionary process. For those issues that can be modified, however, there is an aggravated procedure, starting with the requirements for the initiative, given to the President of the Republic, who can call a referendum with the support of eight percent of the electorate. When the initiative is the responsibility of the General Assembly, it is up to the President of the Republic to call for a referendum with the support of eight percent of the electorate.

When the initiative falls to the General Assembly, the majority is aggravated: only the will of two-thirds can approve constitutional reforms, so at present, the Assembly installed in May 2013, made up of one hundred and thirty-seven members, proceeds to constitutional reform on issues susceptible to change with the express will of ninety-one assembly members, this does not happen in the approval of organic or ordinary laws.

In any case, constitutional rigidity is intended to tie the hands of present generations to prevent them from amputating the hands of future generations.[17] Although many constitutions today are rigid, constitutionalization is emphasized when there are constitutional principles, formulated or implicit, that cannot be modified.

> b) The jurisdictional guarantee of the Constitution. - To ensure the validity of the Constitution, jurisdictional mechanisms have been established to control legal norms and all acts of public power that must correspond to the constitutional content to the point of settling political power relations. In the Ecuadorian system, it is possible to find not only jurisdictional control but even administrative control of creation control and application, but about the administration of constitutional justice, its control is not exclusively concentrated, that is to say, on the part of the Constitutional Court, but also diffuse, when any judge has the possibility and obligation to pass a test of constitutionality in the cases submitted to his or her knowledge. Currently, judges are 'granted an immense capacity to transform society through the creation of new law, a function that distances judges from the image of mute applicators of the law that classical liberal doctrine had imposed on them';[19] this can be expressly verified when competence is granted to the judge in general to hear and resolve questions of constitutionality, subject to the Constitution, international instruments and the law, even, the rights and guarantees established in the Constitution will be of direct and immediate application by and before any public servant, whether administrative or judicial, ex officio or at the request of a party.

The Constitutional Court's specialized administration of justice in constitutional matters is also carried out subsequently by the Constitutional Court about regulations and administrative acts of public power, to the extent that it can declare unconstitutional the substance and form of general regulatory acts, i.e. laws, with such a declaration leading to the invalidity of the regulatory act and/or administrative act. It can also hear appeals as judges ad quen in specific cases decided by ordinary judges a quo, in constitutional actions such as, for example, actions for protection. This subsequent control is not the only one.

This subsequent control is not the only one that exists in the system, but also the previous control, such as the aforementioned requirement for the legislature, but in a more obvious way, it is regulated in the Constitution when a prior opinion is required, which has the character of binding, that is, mandatory for the constitutional court to approve or reject international treaties, that will form part of the system with the hierarchy of constitutional norms; as well as the objection of unconstitutionality presented by the President of the Republic, in the formation of laws. In the case of conformity control, the constitutional court has the authority to approve or reject international treaties, and the objection of unconstitutionality that the President of the Republic presents in the formation of laws.

Now, in the control of conformity of laws dealt with by the ordinary justice system, it can be said that the 'judge judges the law' and, finding it incompatible, applies or disregards the norm for the specific case but does not expel it from the legal system, that is, he chooses the path of application of a superior norm. In any case, the system establishes a caveat of consultation by the judge directed to the Constitutional Court when, at the request of a party or ex officio, he finds a legal norm contrary to the constitutional norm. In the control of constitutionality. However, the judge must consult the Constitutional Court when they find a legal norm contrary to a constitutional norm, either at the request of a party or ex officio.

While in the control of the constitutionality of the law carried out by the specialized courts, the 'judge judges the law' and, finding it incompatible, invalidates it, with general effects, ultimately declaring its unconstitutionality expressly with its consequent expulsion from the legal system, the judges then act as negative legislators, given that their decisions have the same general scope as the laws.[18] This alters the system of sources, making jurisprudence the primary source of law, above the law, and consequently instituting the government of judges.

c) The binding force of the Constitution. - It was stated at the beginning of the chapter that neo-constitutionalism is based on the existence of material constitutions, i.e., 'long-winded' texts, generous in the stipulation of generic norms and principles for the application of rights, the aim of which is to achieve social justice. This is what the Ecuadorian Constitution does, with principles for the application of rights, stipulating collective rights, referred to in the charter as Good Living, individual rights referred to in the Constitution as Libertad, and due process rights referred to in the charter as protection rights. The Constitution of Ecuador does not contain all the constitutional content, however.

However, not all of the constitutional content indicated in the titles above is presented as concrete legal norms; moreover, in specific cases, the Constitution itself refers to the application of a right to the form and content developed in the law, for example, numeral fourteen, first paragraph of article sixty-six of the Constitution states: "The right to move freely through the national territory and to choose one's residence, as well as to enter and leave the country freely, the exercise of which shall be regulated by the law. The prohibition to leave the country may only be ordered by the competent judge". In any case, even in the absence of legislative development in these matters, the judge will be obliged to apply the Constitution, and the proposed mechanism will be jurisprudential.

Furthermore, although the constitutional norm does not expressly refer to the concretization of a right to the law as in the case cited, it does refer in general terms to the fact that the content of the rights will be developed progressively through norms, jurisprudence, and public policies. The right to a fair trial must be differentiated between the right to a fair trial and the right to a fair trial, as in the case of the right to a fair trial, and the right to a fair trial.

However, a distinction must be made between the materiality of the Constitution and its effective enforcement. Materiality, as has been pointed out, consists of the enshrinement of a set of rights and principles of different types. At the same time, the validity of the Constitution depends on its practical application. The indicators are the jurisdictional guarantees established as constitutional mechanisms.

In this way, the de-monopolisation of legal creation is verified. The power of the legislature in creating norms ceases to be exclusive, giving way to the judicial creation of law and even to the ordinary and non-specialized administration of justice.

d) On the interpretation of the Constitution. - According to Riccardo Guastini, it starts from a premise: however extensive a Constitution may be, it cannot exhaust all the facts produced in society.[15] The theory of constitutional interpretation and the indeterminacy of law argues that, although a Constitution may be extensive and detailed, it will never be able to foresee or regulate all the social facts that arise over time. This implies that the work of interpreting and applying the law is fundamental, particularly for judges.

To such an extent that it requires legal and jurisdictional development, indeed, it involves an extension of the Constitution itself through its interpretation, thus aspiring to form, as Kelsen and Bobbio[20] considered, a coherent, complete, and harmonious legal system of rules that regulate social life, to such an extent that there

is no possibility of gaps or normative vacuums, Since in the private sphere, for example, what is not expressly regulated is understood to be permitted by the law itself, and in the case of relations subject to public law, where the principle of legality prevails, only what is expressly indicated in the law is valid, so that there would be no room for unregulated spaces.

However, based on the thesis of incomplete law and legal order, the so-called constitutional interpretation is produced, which differs from constitutional interpretation, as the latter occurs when a constitutional norm needs to be specified through a ruling that establishes jurisprudence.

In response to the previous approach, the Ecuadorian constitution allows for constitutional interpretation. Although it will be addressed in the next topic, it is possible to anticipate that, in this case, it is debatable to imagine that there is an objective procedure for the application of constitutional principles and their scope. "Normative indeterminacy always opens the door to the subjective assessments of the judge. These will unfailingly appear both in weighing and in any other alternative procedure".[21] Despite this, it should be noted that in the case under study, the constituent assembly empowered the Constitutional Court to interpret the Constitution in the final and unappealable instance, in the administration of national, not supra-national, justice.

Now, suppose it is accepted that the Constitution can have 'gaps' and that such an omission can be filled by law. In that case, this is not compatible with a constitutionalized legal system, as it acquires its validity in the form in which it is created. The constitutional coherence of its content simplifies the terms: a law should only be considered valid if it formally and materially finds a basis in the Constitution since, legally, it cannot be derived from anything else.

Thus, the constituted power responsible for creating legal norms must assume its power legitimately by framing its creation within the formal and substantial limits established in the fundamental charter. It is for this reason that if constitutional gaps are filled through constitutional over-interpretation, or failing that, as the Ecuadorian Constitution does, by accepting the possibility of applying a supranational order that recognizes more favorable rights either through over-interpretation or through international treaties, especially when it is a matter of rights, whether by the judiciary or by the Constitutional Court, would mean taking over from the political and legal debate that should take place in a constituent assembly, affecting the principle of sovereignty and even the self-determination of peoples.

e) Direct application of constitutional norms. Based on a material Constitution, which is not limited to organizing the political powers and their competencies but is a code that regulates social relations, both of individuals with the State and individuals with each other, it is, therefore, necessary for judges and other officials with public powers to resolve conflicts taking into consideration the provisions of the Charter, especially when the rule that is applied is clear and does not admit of objection; Thus, for example, in the rights of protection, the prohibition of demanding or forcing a person to testify against him or herself on matters that may cause him or her to be liable, even criminally, is established. However, this is not the case when what is established in the Constitution is a general principle or a collective or diffuse right. Ecuadorian constitutional norms produce direct effects and can be applied by the judge in any litigation.

f) Conforming interpretation of laws. - The legal philosopher Dworkin, as noted above, raised the problem of whether there is only one answer in law,[8] a problem that motivates Alexy's theory of argumentation and his search for a criterion of correctness.

Concomitantly, Guastini points out that 'there is no normative text that has a single determined meaning before interpretation'.[15] Thus, the doubts that may exist about the meaning and scope of a norm are not only found in constitutional content but also in-laws, although they are generally presented in the form of rules. However, it is equally valid that in every legal system, there are legal statements in the form of principles. When faced with a law that requires interpretation, this must be done by the Constitution insofar as this is possible; this is not the case when the literal wording of a law restricts constitutionalized rights or unjustifiably diminishes, undermines, or nullifies the exercise of rights, in which case it will be unconstitutional and its effects will be suspended.

'The general form of law is language because its particular form of attribution can only be given in language; there is no law without language, and language is the house of being and the dwelling of man'.[22] But if, in the generality of cases, legal texts can be read and consequently understood in one way, and, at the moment of their application in a controversial fact, their interpretation differs, which of the interpretations is the one that should guide the decision of the judges, because it should be the one whose interpretation is more adjusted to the Constitution. Moreover, the understanding of the law must be developed progressively, building upon the prior conditions established in the Constitution,[22] so that the norm can be preserved. Otherwise, it would have to be disregarded. Therefore, it would lose its validity. If this happens, the passive legislator, who serves as the judge, would go on to complete the legal system through rulings, making the existence of the

legislature unnecessary, as it not only loses the monopoly on legal creation but also that of interpreting the law. Although the Ecuadorian Constitution does not explicitly grant judges the power to interpret laws, it is explicit in granting such power to the General Assembly. However, establishing a hierarchical order of application of norms, beginning with the Constitution, requires that the judge's initial attitude be to determine whether the law is applicable.

g) The influence of the Constitution on political relations: It is possible to find in the Ecuadorian Constitution powers given to the Constitutional Court and to judges whose purpose is to decide on conflicts of competence in the administrative and executive order, which are based on the following: 'constitutionalism is a normative model produced by a change in the paradigm of both law and democracy, thanks to which the validity of laws and the legitimacy of politics are conditioned by respect for and the implementation of the guarantees of rights stipulated in the Constitution'.[17] In this sense, it is possible to cite the cases in which the Constitution empowers the courts to decide on the issue, specifically the following:

1. The power of the Constitutional Court to settle conflicts of competence between State functions or other bodies established in the Charter.
2. The power of the Constitutional Court to judge the omissions in which State institutions and their authorities incur when, within previously established or considered reasonable periods, they have partially or disregarded the constitutional mandates and,
3. The power of judges to hear and resolve, as the case may be, all acts that are challenged and that come from any administrative authority, independently of the contentious administrative route, especially when the damage is imminent and the route is not expeditious.

The above analysis makes it possible to summarise that the Ecuadorian legal system is constitutionalized. The Magna Carta plays a preponderant role not only in the development of secondary legislation but also in the actions of the operators of justice, substantially in those who have jurisdiction, whether ordinary when exercised by ordinary judges in the control of the constitutionality of specific cases and with inter-parties effects, or special when exercised by the Constitutional Court in abstract control and with erga omnes effects. These new powers incorporated into the Ecuadorian constitutional order demonstrate the legal system's adherence to neo-constitutionalism.

It is debatable whether the contents of the Constitution have been fully understood.

The constitutional paradigm of the Montecristi Constitution implies transformations in the structure and functioning of the State; it becomes a 'jurisdictional ' state due to the active role assumed by judges, who play an essential role in the process of creating and applying the law and safeguarding constitutional rights.

This leads to the conclusion that the correct action of judges depends more on the application and interpretation of judicial guarantees of rights, which are the exclusive competence of ordinary judges, than on constitutional regulation. In this context, the theoretical preparation and committed involvement of judges are necessary conditions for them to assume this responsibility and to appropriate constitutionalism as an ideology concretized in the practical realization of the values and principles of the Constitution.

The Ecuadorian Constitution represents an epistemological change in the existing model of jurisdiction and justice, which has been replaced by a legal order, where the exercise of the judicial function is transformed into the mechanism of legal and political activism as a consequence of assuming a constitutional model, where judges can participate in the definition and control of public policies as a result of the necessary direct and immediate application of the constitutional rights known as 'Good Living .

It is necessary to regulate different limits to the judicial function as a guarantee for the exercise of democracy and the realization of popular sovereignty so that the judicial function does not centralize real power.

CONCLUSIONS

The debate between positivism and natural law has evolved into a more complex interaction. While guaranteeism seeks to limit power through fundamental rights, principlism introduces a moralistic view of law. Both currents reflect a shift in the conception of law that, while not completely breaking with earlier traditions, has nuanced and reshaped its foundations.

There is also the influence of neo-constitutionalism in the Ecuadorian constitution, which reflects an evident influence, as evidenced by its structural rigidity, the jurisdictional guarantee of its application, and the binding force of its provisions. The adoption of principles and rules of direct application, together with weighting as an interpretative method, demonstrates the intention to establish a state model based on rights and social justice.

The role of the judiciary in the constitutionalization of the legal system in Ecuador is not limited to the control concentrated in the Constitutional Court but also grants ordinary judges the power to apply norms contrary to the Constitution in specific cases. This model reinforces constitutional supremacy and enables the creation of law through jurisprudence, thereby modifying the traditional legislative monopoly.

The impact of the constitution on political and social relations in Ecuador is not only reflected in the structure of the state but also directly influences these relations by imposing limits and conditions on political actors. The resolution of conflicts of competence between state functions and the requirement of interpretation by the constitution consolidate a normative framework in which the validity of laws and political decisions is subject to their compatibility with constitutional rights and guarantees.

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