

CONCILIATION AS A TRANSFORMATIVE PROCESS THAT GUARANTEES COMPREHENSIVE REPAIR IN THE CRIME OF THEFT

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Summary

The present research work is a critical-legal document that replicates the non-application of conciliation by those who administer justice in the crime of robbery typified in article 189, first paragraph of the Comprehensive Criminal Organic Code, which states: The person who by means of threats or violence removes a movable object of another, whether the violence takes place before the act to facilitate it, at the time of committing it or after committing it to seek impunity, it will be sanctioned with a custodial sentence of five to seven years, in this context, numeral 3 of article 663 ibidem provides that, the conciliation may be presented even before the conclusion of the fiscal investigation stage, in crimes against property whose amount does not exceed thirty unified basic salaries of the worker in general, (National Assembly, 2014) this in compliance with constitutional regulations. The methods used were synthetic analytical; inductive-deductive; Historical-logical; and the survey. The application of conciliation, in addition to guaranteeing comprehensive reparation to the victim, would contribute to procedural speed; To this end, judges and prosecutors must protect the freedoms and guarantees of citizens, applying the criminal law as a last resort, guaranteeing the rights emanating from the Constitution.

Keywords: conciliation, crime, comprehensive reparation, rights, speed.

INTRODUCTION

Historically, it seeks to establish a justice system that guarantees any person who has been illegitimately impaired in their rights, can demand the aggressor to fulfill their legal responsibility of integral reparation for the damage caused, in this way that right that has been violated, as far as possible return to its original state, in criminal matters it is a task that is often not fulfilled; In this context, Article 63.1 of the American Convention on Human Rights states: When it decides that there has been a violation of a right or freedom protected in this Convention, the Court shall order that the injured party be guaranteed the enjoyment of his or her violated right or liberty. It shall also provide, if appropriate, for reparation of the consequences of the measure or situation that has led to the violation of those rights and the payment of fair compensation to the injured party. (Organización de los Estados Americanos, 1969)

One of the alternative mechanisms for the resolution of conflicts is conciliation, it is a useful tool that benefits the parties, especially the Victim, who was violated a right, without any justification; For this reason, the State and those who administer justice are obliged to ensure that their rights are restored. Conciliation has two different meanings depending on the context in which it is used: one procedural and the other substantial. In relation to its procedural meaning, conciliation is "a conflict resolution mechanism through which two or more people manage by themselves the resolution of their differences, with the help of a neutral and qualified third party, called a conciliator. (Movimientos de reformas para garantizar acceso a la justicia, 2001)



As conciliation is an alternative to resolve conflicts between the subjects involved in a judicial process, it has been present in our Ecuadorian legislation for several years, established in different matters such as civil, labor and criminal; but its benefit not only guarantees comprehensive reparation, but also constitutes a way to decongest cases in the different judicial units.

Likewise, the Constitution of the Republic of Ecuador 2008, establishes that: "Arbitration, mediation and other alternative procedures for the resolution of conflicts are recognized. These procedures shall be applied subject to the law, in matters in which by their nature it is possible to compromise (...); for his part, Cabanellas defines it as the (Asamblea Nacional, 2008) Compromise of the parties in a judicial act, prior to the initiation of a lawsuit, seeks the compromise of the parties, in order to avoid the lawsuit that one of them wants to initiate. (Cabanellas, 2015)

The Ecuadorian State, with the implementation of the COIP, by involving conciliation as a procedural alternative responds to the conception of restorative justice understood as a fair balance of claims between perpetrator and victim. This institution allows the imposition of a fair sanction on the first and due reparation on the second, under constitutional parameters, that is, it returns the conflict to the parties. (Aguirre Guanin, 2018)

In Ecuador, in criminal matters, methods of conflict resolution are also established, through restorative justice, as well as the Organic Integral Criminal Code in its second conciliation chapter, article 663, establishes that conciliation may be presented until before the conclusion of the fiscal investigation stage, determining the cases in which it can be applied, This also clarifies what its exceptions are.

Reconciliation may apply when:

1. Offences punishable by a maximum penalty of up to five years' imprisonment.
2. Traffic crimes that do not result in death, or serious injuries that cause permanent disability, loss or disablement of any organ.
3. Crimes against property whose amount does not exceed thirty unified basic salaries of the worker in general.

Excluding from this procedure offenses against the efficient public administration or affecting the interests of the State, crimes against the inviolability of life, integrity and personal liberty resulting in death, crimes against sexual and reproductive integrity and crimes of violence against women or members of the family nucleus. (República del Ecuador Asamblea Nacional, 2014)

The research work will address article 663 numeral 3 of the COIP, legal provision that empowers the procedural parties to reach an agreement, in crimes against property whose amount does not exceed thirty unified basic salaries of the worker in general, conciliation can be given until before the conclusion of the fiscal instruction stage.

Among the crimes that violate the right to property are the crime of theft, typified in COIP; in Ecuador, and particularly in the city of Riobamba, Chimborazo Province, due to its frequent commission, it constitutes one of the criminal offenses with the highest rate of participation; For this reason, it is a cause of greater prosecution and resolution by judicial bodies; In his thesis entitled, the crime of Aggravated Robbery and Citizen Insecurity prior to obtaining the professional title of lawyer, he states that this problem has caused great discomfort to society, causing fear and insecurity, even a sense of impunity on the part of the authorities, which should safeguard our integrity and heritage. (Cayo Mamani, 2021)

Citizen insecurity forced the legislature to seek solutions to curb the high crime rate, agreeing that toughening penalties for those who participate in this criminal offense (theft) was the solution; however, having taken this decision does not turn out to be the right one, considering that the application of the Criminal Law must be *da ultima ratio*.

In this line, article 3 of the COIP, on the principle of minimum intervention, states that: Criminal intervention is legitimized as long as it is strictly necessary for the protection of people. It is a last resort, when extra-penal mechanisms are not sufficient. (Asamblea Nacional, 2014). Deprivation of liberty is defined as the restriction of one of the fundamental rights of the human being, freedom, understood as the right to free mobility and interaction with their environment. It is necessary to specify that the consideration of freedom as a right not in a subject that concerns the history of

humanity precisely, but that there have been different perspectives on its consideration, such as those established by various authors: Descartes, Aristotle, Locke, Plato, which were raised even within their works; All these thinkers focused on specifying the importance of freedom and its consideration as a human right inherent to the person. . (López Melero, 2013)The penalties established do not reduce the rate of criminal acts that threaten property, there is a high number of people sentenced to imprisonment, which contributes to prison overcrowding, and in the economy of the Ecuadorian state. The judges and criminal courts of the City of Riobamba, at the time of issuing a conviction in crimes against property (theft), often undervalue the freedom of the defendant as a fundamental right of man, without considering the application of the provisions of article 663.3 of the COIP, which provides an alternative to end the litigation until before the conclusion of the stage of fiscal instruction in crimes against the property whose amount does not exceed thirty unified basic salaries of the worker, this in accordance with the provisions of the Constitution of the Republic of Ecuador; despite an express request by the Prosecutor's Office; There are few judges who, in accordance with constitutional norms, accept the request of the owner to exercise public action, thus guaranteeing comprehensive reparation to the victim and providing an opportunity for vindication to the accused.

MATERIALS AND METHODS

The present research work is through the non-experimental design, of cross-sectional type, due to the time of its determination, by the scope it is descriptive because its purpose is a complete analysis of the object of study.

The methodological procedure that was used is the mixed, this approach arises from the combination of the quantitative and qualitative method to have results that allow evaluating and determining values that support the initiative as such, this dissolution of methods provides a combination that allows to focus data that demonstrate qualities or traits that can be interpreted and that contribute to the investigation in an effective way, In general there is a greater preponderance of the qualitative approach this method will provide a clear collection of timely data to obtain the best results. scientific, normative and documentary information was collected, however, the quantitative was also applied when conducting field research through interviews with Riobamba prosecutors for the collection of unpublished data from primary sources.

METHODS

Synthetic analytical: intellectual operation that makes it possible to mentally decompose a whole into its parts and qualities; Thus realize the division in thought of the whole in its multiple relations and components.

Induction: moment of reasoning through which one passes from the knowledge of particular cases, to a more general one that reflects what is common in the individual phenomena. It allows generalizations to be made.

Deduction: because the moment of reasoning through which one passes from a general knowledge to another of lower level of generality was detailed; It allows the realization of deductive inferences.

Historical-logical: the historical studies the real trajectory of phenomena and events throughout their development.

Axiological: seeks to discover the values on which the positive legal order should be inspired.

Legal hermeneutic: this method helps to interpret the texts, that is, to understand the true meaning.

Instrument

As a research tool, the questionnaire was used in the form of a survey and tables, which reflect the information of each of the cases analyzed, in accordance with the crimes of robbery processed in the Prosecutor's Office of Riobamba Province of Chimborazo.



RESULTS

Criminal judges and courts, in relation to the offence established in art. 189, first paragraph, of the Integral Organic Code, after having analyzed the evidence provided in the process, resolve that those who participated in said criminal offense must pay a custodial sentence ranging from five to seven years, and economic compensation in favor of the victim, comprehensive reparation that in most cases is not complied with. In addition, the deprivation of liberty generates an amount of between 31% and 62% of a unified basic salary, destined to satisfy the basic needs of the convict, a value that is covered by the State, also has an impact on prison overcrowding.

The lack of application of the constitutional mandate and the Law (COIP), in relation to conciliation in the crime of theft, typified in art. 189, first paragraph, of the Integral Organic Code, leads to the issuance of many sentences with deprivation of liberty and ineffective reparation in favor of the victim; The judges do not apply the provisions of Article 663. 3 Ibid., which states: "(...) The conciliation may be presented until before the conclusion of the stage of fiscal investigation in crimes against property whose amount does not exceed thirty unified basic salaries of the worker in general, this despite the fact that there is a request by the prosecutor's office.

In this scenario, conciliation as a restorative measure, becomes an alternative to traditional justice, which is an opportunity where the parties in a conflict face each other personally listening and dialoguing, in this way they can settle and compensate. consequences of criminal conduct between the victim and the aggressor before a third party mediator, requesting restitution, compensation to the victim.

DISCUSSION

Ecuador is a constitutional state, which is why legal certainty, Article 11, must be guaranteed. 5 of the Constitution states: In matters of constitutional rights and guarantees, public servants, administrative or judicial, must apply the norm and interpretation that most favor their effective validity., in this sense the same supreme norm in its article 78, provides that mechanisms will be adopted for a comprehensive reparation that will include, without delay, the knowledge of the truth of the facts and the restitution, compensation, rehabilitation, guarantee of non-repetition and satisfaction of the violated right, the aforementioned correlates numeral 3 of article 663 of the COIP, providing that the conciliation may be presented until before the conclusion of the stage of fiscal investigation, in crimes against property whose amount does not exceed thirty unified basic salaries of the worker in general. (Asamblea Nacional , 2008)

However, it is evident from the foregoing that not all criminal judges apply conciliation in the crime of robbery typified in article 189, first paragraph of the COIP, when a person steals a movable thing of others, in which the threat and violence mediate. In the judges this belonging of constitutionalism must always prevail, the deprivation of liberty should not prevail as the only alternative, on the contrary, they must seek alternatives for the solution of conflicts, where the sanctioning entity goes to the background.

From the point of view of the criminal process, the victim has the right to comprehensive reparation, by constitutional and legal mandate the violated right must be compensated in some way, this must be quantified by the judge at the time of issuing the sentence, and in this way guarantee that the state fulfills its function as the only one in charge of protecting their rights.

CONCLUSIONS

The legal analysis on conciliation allowed to determine that this means constitutes a valuable mechanism fast and timely in the solution of a conflict, in accordance with the constitutional provision ensures compliance with the rights violated, when applied in the crime of robbery typified in article 189, first paragraph of the COIP would guarantee the right to comprehensive reparation of the victim. The research demonstrates the need to implement adequate protection and assistance to all actors in the criminal justice system, to prevent cases from going unpunished. The purpose of the constitutional guarantee of comprehensive reparation to victims of criminal offences is aimed at restoring rights, guaranteeing as far as possible that things return to their normal state as they

were before the crime, the restitution of stolen property and compensation of a material and immaterial nature.

Criminal acts perpetrated against property in the city of Riobamba have increased, leading to more people deprived of liberty in the social rehabilitation center; This also increases the number of victims who have not had their violated rights repaired; despite the fact that comprehensive reparation seeks to compensate for the damage caused to the victim, whether material or immaterial, in Ecuador it is not fulfilled despite being established in the sentences; The greatest justification for this failure is the poverty and economic inactivity of the sentenced persons. (Machado, 2021) So there is a question here, what does the state and the victim gain from the deprivation of liberty? The answer "NOTHING", for this reason those who administer justice must accept the request of the prosecution and apply article 663.3 of the COIP, this in compliance with the constitutional mandate article 78, in order that the last solution is not the custodial sentence and can be reconciled; evading cumbersome judicial processes, guaranteeing the integral reparation of the victim and contributing something in the solution of prison overcrowding, avoiding expenses to the State for maintaining an inmate.

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SURVEY OF PROSECUTORS IN RIOBAMBA CANTON, CHIMBORAZO PROVINCE

Question 1. Do you know the criminal type of theft?

Table 1. Criminal type of the crime of theft

Detail	Population	Percent
Yes	18	100%
No	0	0%
Total	18	100%

Source: Survey.



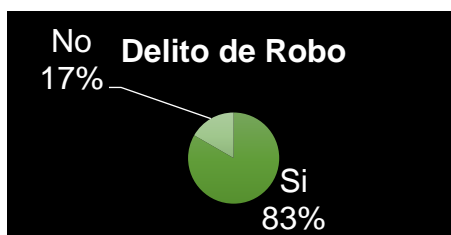
Data analysis and interpretation. 100% of respondents said they were aware of the criminal type of theft.

Question No 2. In his position as prosecutor, he has substantiated cases for the crime of robbery typified in article 189 first paragraph of the COIP

Table 2. Crime of theft

Detail	Population	Percent
Yes	15	83%
No	3	17%
Total	18	100%

Source: Survey.



Analysis and interpretation of data: 83% of prosecutors surveyed mention having substantiated cases for the crime of theft typified in article 189 first paragraph of the COIP, while 17% of respondents stated that they have not substantiated such cases.

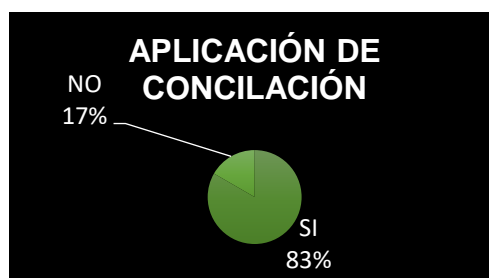
Question 3. With regard to the offence of robbery defined in article 189, first paragraph, it has requested the judge of criminal guarantees to apply conciliation.

Table N° 3 Application of Conciliation

Answer	Frequency	Percentage
Yes	15	83%
No	3	17%
Total	18	100%

Source: Survey.

Prepared by:



Analysis and interpretation of data: 83% of prosecutors surveyed mention having requested the judge to apply the Conciliation in the Crimes of Theft contemplated in article 189, first paragraph, whose amount does not exceed the thirty unified basic salaries of the worker, while 17% of the respondents stated that they have not requested the application of the Conciliation in the Crimes of Theft contemplated in article 189, first paragraph.

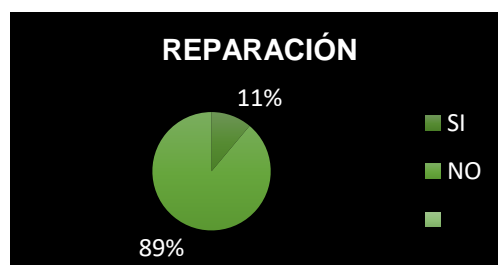
Question 4. In relation to the previous question, your request on the application of conciliation in the crimes of theft contemplated in article 189, first paragraph, has been accepted by the Judge of Criminal Guarantees.

Table N° 4. Reparation for the victim

Answer	Frequency	Percentage
YES	2	11 %

NO	16	89%
Total	18	100%

Source: Survey.



Data analysis and interpretation. In this question, 11% of prosecutors surveyed mention that their request on the application of Conciliation in the Crimes of Theft contemplated in article 189 paragraph one, has been accepted by the Judge of Criminal Guarantees, while 89% of the respondents said that it has not.

Question 5. You believe that the sentence, issued by a judge or criminal court, for the crime of robbery typified in article 189 first paragraph, which establishes an economic value as integral reparation for the victim, is fulfilled by the sentenced person.

Table N° 5. Reparation for the victim

Answer	Frequency	Percentage
YES	2	11%
NO	16	89%
Total	18	100%

Source: Survey.



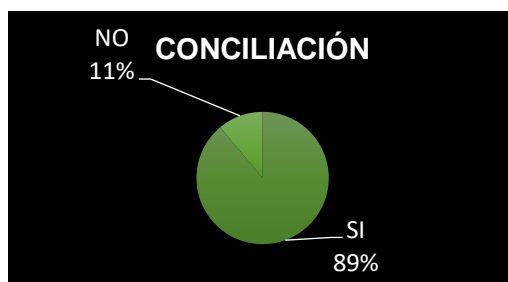
Data analysis and interpretation. In this question, 11% of prosecutors surveyed mention that the sentence, issued by a judge or criminal court, for the crime of robbery typified in article 189 first paragraph, which establishes an economic value as integral reparation for the victim, if it is fulfilled by the sentenced person; while 89% of the respondents stated that the payment of the Economic value as comprehensive reparation for the victim

Question No 6. You believe that the application of conciliation in the crime of robbery, established in article 189, first paragraph, by the person who administers justice, would guarantee that the victim receives full reparation from the defendant.

Table N° 6. Conciliation in the Crime of Theft

Answer	Frequency	Percentage
Yes	16	89%
No	2	11%
Total	18	100%

SOURCE: Survey



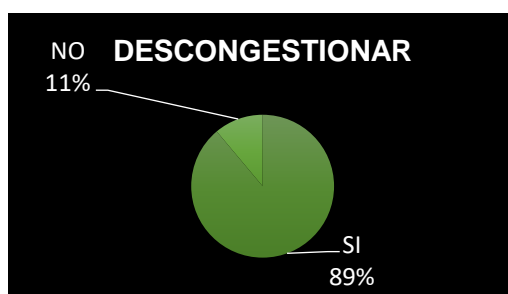
Data analysis and interpretation. In this question, 89% of prosecutors surveyed mention that the application of conciliation in the crime of theft, established in article 189, first paragraph, by the person who administers justice, would guarantee that the victim receives full reparation from the defendant, while 11% of respondents said no.

Question No 7. Do you believe that the application of conciliation in the crime of theft, established in article 189, first paragraph, would contribute to decongest the cases in the penal units of the Riobamba Canton.

Table N° 7. Decongest the cases in the penal units of the Riobamba Canton

Answer	Frequency	Percentage
Yes	16	89%
No	2	11%
Total	18	100%

SOURCE: Survey



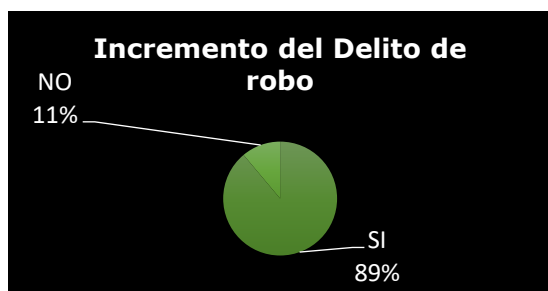
Data analysis and interpretation. In this question, 89% of prosecutors surveyed mention that the application of conciliation in the crime of theft, established in article 189, first paragraph, would contribute to decongest the cases in the criminal units of the Riobamba Canton, while 11% of the respondents said no.

Question No 8. Do you consider that in the City of Riobamba there have been increased cases for the commission of the crime of robbery.

Table N° 8. Increase in the crime of theft

Answer	Frequency	Percentage
Yes	16	89%
No	2	11%
Total	18	100%

SOURCE: Survey



Data analysis and interpretation. In this question, 89% of prosecutors surveyed consider that in the City of Riobamba there has been an increase in cases for the commission of the crime of robbery, while 11% of respondents said no.

SURVEY OF PROSECUTORS IN RIOBAMBA CANTON, CHIMBORAZO PROVINCE

Question 1. Do you know the criminal type of theft?

Otherwise

Question No 2. In his position as prosecutor, he has substantiated cases for the crime of robbery typified in article 189 first paragraph of the COIP

Otherwise

Question 3. With regard to the offence of robbery defined in article 189, first paragraph, it has requested the judge of criminal guarantees to apply conciliation.

Otherwise

Question 4. In relation to the previous question, your request on the application of Conciliation in the Crimes of Theft contemplated in article 189, first paragraph, has been accepted by the Judge of Criminal Guarantees.

Otherwise

Question 5. You believe that the conviction, issued by a judge or criminal court, for the crime of robbery typified in article 189, first paragraph, which establishes an economic value as integral reparation for the victim, is fulfilled by the sentenced person.

Otherwise

Question No 6. Do you believe that the application of conciliation in the crime of robbery, established in article 189, first paragraph, by the person who administers justice, would guarantee that the victim receives comprehensive reparation from the defendant.

Otherwise

Question No 7. You believe that the application of conciliation in the crime of theft, established in article 189, first paragraph, would contribute to decongest the cases in the penal units of the Riobamba Canton.

Otherwise

Question No. 8: Do you consider that in the city of Riobamba there has been an increase in cases for the commission of the crime of robbery.

Otherwise