CONSTITUTIONAL PRINCIPLES IN THE APPLICATION OF INDIGENOUS JUSTICE.

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Summary

The subject matter of study lies in determining the limits that must exist in the application of indigenous justice, the current Ecuadorian constitutional system precisely marks the constitutional principles in the application of indigenous justice, in the 1998 Constitution it is already regulated and recognizes this jurisdiction that was considered a great advance for indigenous law, breaking the monist idea that in no State can two jurisdictions coexist, and that only the State is responsible for generating laws and applying them, the 2008 Constitution came to give strength to legal pluralism that gives all the powers to those who exercise the functions of indigenous authorities so that they administer justice within their territories, in order to resolve their internal conflicts, always observing the limits on which their resolutions must be based and punishments or reparations.

Keywords: *Constitutional principles, indigenous justice, limits, legal pluralism.*

INTRODUCTION

The topicality and importance of the issue lies in the limits that must be observed and respected when applying indigenous justice, take into account that in the world indigenous justice is as old as humanity, this customary right is part of the permanent struggles of indigenous peoples and nationalities who have persevered in the achievement and respect for their rights.

Thus, it is considered that indigenous justice formally has its starting point only from the Second World War, so much time has passed but unfortunately it seems that the statement, recognition and materialization of their rights does not find an echo anywhere in the world, which if evidenced is a clear demonstration of discrimination towards this jurisdiction, demonstrating that the efforts seem to have been in vain, even more so when there are no clear guidelines in their application, which leads to the violation of the rights of citizens who are subjected to this jurisdiction, by not observing or applying the constitutional principles provided for in the supreme norm. (Estrada, 2029)

The administration of indigenous justice has different visions that were presented from the very beginning of history, which has led this jurisdiction to have a clear sign of resistance to it, under the argument or pretext that it violates and affects human rights, considered them as those instrumental conditions that allow people to realize it.

Subsuming those freedoms, faculties, institutions or claims relating to primitive goods or also called basic rights contemplated in indigenous jurisdiction, the indigenous peoples and nationalities of the world live a real uncertainty in the respect of their jurisdiction and their decisions within their territories, the same ones that at all times have been between them.

In the year of 1948 through the Universal Declaration of Human Rights, it establishes and marks the very beginning of the fundamental rights and freedoms of protection that is universally applicable in favor of the citizens of the world, which specifies that the rights that assist people are a function of human dignity, which consists of the sum of the individual and collective rights that are embodied

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in the different constitutional norms and international law that protects and protects the rights of members of indigenous peoples and nationalities, in which several jurisdictions coexist. (Ayala, 2019) The International Labour Organization (ILO) and its Committee on the Elimination of Discrimination, which includes not only the protection of the civil, political, economic, social and cultural rights of its citizens, but also beyond the programmed collective rights of indigenous peoples and nationalities; in the 88th Session of the General Assembly, dated October 13, 2019, of the United Nations, in which the rights and freedoms of both individuals and indigenous peoples and nationalities are recognized, in which it should tend to apply equality and non-discrimination, for which the correct thing would be to respect the fundamental rights of the people who are subjected to this jurisdiction.

In America the administration of indigenous justice has its genesis or origin with the appearance of this in the firmament and in American territories, based on the practice and repetition of the acts also called custom, in America with the arrival of the Spaniards these peoples have had to fight and resist their exclusion and marginalization in clandestinity, And this has allowed them over time to obtain a minimum of recognition of their rights.

The right of the indigenous people to be able to apply their customary regulations, part or is based on Roman law that allowed in practice that the different peoples can observe their own regulations, so also in the colonial era the influence of the Catholic Church was gravitating in the processes of domination towards the indigenous, one of its firm representatives was the Dominican priest Bartolomé de las Casas, who took his speech full of emotion and academic technique, the same that was presented to the Spanish royalty, in order to advocate in favor of the Indians who lived in territories invaded and usurped by the Spaniards.

In colonial times the indigenous peoples and nationalities, to ensure that their rights are respected have had to work and go through real processes of resistance to submission, so since 1549, there was already talk of the right that assisted indigenous peoples to appoint judges, aldermen, bailiffs, notaries, notaries, In order to administer justice and proceed to resolve small claims, this was known at that time as legal plurality, today it is known as legal pluralism. (Hernandez, 2019)

METHODS

The present research work will highlight the dogmatic and hermeneutic methods, with the purpose of studying the legal norm, as well as the legal system that regulates and regulates all legal processes, giving validity or not, depending on the norms coming from the legislation and doctrine, to study the legal institution of indigenous justice and the application of constitutional principles. as an instrument of reparation in an abstract or theoretical way, that is, without verifying its materialization in reality, which is equivalent to subjecting to a critical study the legal figure of indigenous justice and the application of constitutional principles, since not complying with or observing constitutional principles makes it an instrument of application of indigenous jurisdiction improper and inaccurate loaded with inconsistencies in their customs, Since custom could in no case be limiting human rights, in order for indigenous justice processes to be considered and respected, the principles and rights provided for in the Constitution must be applied, based on critical thinking. (HERNANDEZ, 2017, pp. 98).

RESULTS

The results are based on the bibliographic review of different sources, which allowed to systematize the information obtained and generate the following results:

1. Limits of indigenous justice

The subject matter of study is based on the provision of article 246 of the Constitution of the Republic of Ecuador, which marks and delimits in matters of the administration of indigenous justice, so that the authorities of indigenous peoples and nationalities may exercise jurisdictional functions within their territorial scope applying their ancestral laws and procedures, justice that in no case may be contrary to the Constitution of the Republic of Ecuador and the International Human Rights Instruments, under this premise addresses the issue of the limits of indigenous justice vis-à-vis human

rights, since on the pretext that indigenous justice is restorative, the fundamental rights of those who are subjected to this jurisdiction cannot be violated. (Constitution Ecuador, 2008)

The limits within the indigenous jurisdiction in Ecuador, part of the express recognition that the Constitution of the Republic of Ecuador gives to the indigenous authorities, authorities that have the investiture to exercise jurisdictional functions, giving them certain powers to define their own regulations, duties, rights, guarantees and obligations, against those who contradict the provisions that govern within their communities; From the above, it follows that we are facing the same powers that are given within the ordinary jurisdiction.

Indigenous justice came to confront and resolve conflicts that arise within indigenous peoples and nationalities, for which it is necessary to identify the limits that must be observed and respected by the authorities that administer indigenous justice, which has its origin and foundation in customary law and traditional norms. Indigenous jurisdiction moves away from ordinary jurisdiction, particularly since this is not a written right, which in some cases leads to arbitrariness and violation of human rights.

Positive and negative aspects of indigenous justice.

The positive aspect of the administration of justice within indigenous communities, peoples and nationalities is that it has enabled its members to resolve various conflicts, has enabled community authorities to value and strengthen the cultural identity of indigenous peoples, and that authorities must apply and exercise autonomy vis-à-vis judicial authorities. The inhabitants of the communities are becoming aware that indigenous peoples have rights that are recognized in the Constitution and other international human rights instruments, and that they must be fully exercised in order to achieve the long-awaited autonomy in the territories within the framework of the national state. (Ayala, 2018)

They have become aware that state justice has done so much damage and it is necessary to strengthen and develop their own right consequently the inhabitants of indigenous communities in particular do not go much to the cities in search of a solution to their problems, since they consider it a justice alien to their cultural reality.

The practice of resolving conflicts in the communities themselves has strengthened the Kichwa language as an important element of interrelation and has reduced costs in conflict resolution: it is not spent on lawyers and judges.

There are many casuistry in the communities, peoples and nationalities that serve as support for analyzing and establishing the rules of cooperation and coordination between the two justice systems in the country; and even the Constitutional Court itself can draw on these practices to adopt mandatory rulings and rules for indigenous jurisdiction.

In the country there are currently many judgments and resolutions of the judicial units, where they have resolved the dregations of competences, applying the principles of intercultural justice, of ILO Convention 169, and indigenous rights, in each case. For this reason, it is necessary to review, analyze the development and especially the respect for the rights of indigenous peoples that have been given by justice operators in this country.

Some universities and faculties of jurisprudence in which ours is included have included in their careers and academic offers, studies at the level of master's degrees, acts that guide to know and debate legal pluralism and contribute to the implementation of interculturality and plurinationality from the university classrooms; However, these are incipient initiatives that deserve to be institutionalized in all university careers in the country.

Negatives.

The negative aspect of the administration of indigenous justice has been that many of the communal authorities do not apply sanctions based on respect for human rights, in other cases there are people who do not yet identify with the administration of indigenous justice, failing which they go to the authorities of the ordinary justice system.

In many cases, there are families of social prestige, family and crony relationships that try to evade indigenous justice; In the same way, there are leaders who evade and defend violators of their own legal systems.

Another negative aspect is that the indigenous authorities have been reduced in the application of indigenous justice, since the law or ancestral traditions say nothing or say little about a certain problem that is subject to this jurisdiction, issues such as youth gangs, homicides, witchcraft, possession of weapons, trafficking in persons, drugs, etc., or because with the passage of time and due to influences of foreign culture they have lost their own legal systems; that is, there is no procedure to be followed and the corresponding sanctions to be applied, making it necessary to exercise the right determined in article 57 No. 10 of the Constitution and create its own right. (Constitution Ecuador, 2008)

The clear example of this is when there is a murder case. But it is important to point out that when an indigenous community does not have particular ways of administering justice or does not have its own normative system, the right of self-disposition may be applied; The same that " implies that the group can organize and govern itself according to its own vision of the world, its traditions and desires. This includes, therefore, the right of indigenous people to be governed by their own norms, which in turn includes the possibility of creating norms and applying them" (Sánchez, 2019, pp. 62).

Another negative aspect of the process of strengthening and developing the administration of indigenous justice has been that the indigenous authorities are still not aware that indigenous peoples and nationalities have their own legal system; Consequently, they have been restricted in their ability to exercise, apply and dispense justice within the relevant jurisdictions.

At present, in several provinces with a significant presence of the indigenous population, indigenous prosecutors have constituted an obstacle and, in many cases, assume indigenous authority functions and resolve conflicts, or carry out processes of investigation and formulation of charges in cases specific to indigenous jurisdiction, within the framework of the ordinary justice system. violating constitutional precepts and disregarding the ruling of the Constitutional Court issued on the Cocha case. This situation is very dangerous, since the indigenous authorities lose competence, they leave it to the administrative state officials to resolve the conflicts. Its creation is illegal, since it does not appear within any legal norm. (Constitutional Court, 2018)

It follows from the foregoing that it is necessary to undertake work of socialization, debate, awareness-raising, training and wide dissemination in the indigenous bases and authorities on the issues, which assist them as groups and holders of rights; For the leader Luis Macas it is necessary to generate spaces for debate, analysis and consensus in order to legislate and issue secondary laws in addition to the relationship to the mandate of the Constitution that are intended for indigenous peoples, this for the fulfillment of the purposes it is necessary to initiate processes of study and rigorous systematization of indigenous norms and laws in force in the communities.

Controls on the administration of indigenous justice.

Every act must have mechanisms and controls that are equipped by the authorities and indigenous peoples in the exercise of the right to administer justice because this refers to the field of application if it is necessary to have some mechanisms that allow demanding that the rights guaranteed in the constitution are fulfilled, the control mechanisms are intended to verify whether or not the application of this right is within the established limits. For the constitutional norm, in other words the indigenous people must have guarantees to administer justice and the decisions of the indigenous authorities The councils with all authority must be subject to some type of control that therefore at this point can refer to the areas of control that exist and must exist in the practical application of the administration of justice.

Internal control within the community.

Internal control within communities in the application of indigenous justice leads to respect for the human rights of community members, this part of the ethnic groups and nationality of their local societies are the government responsible for verifying compliance with their legal systems to avoid a specific type of arbitrariness and abuse of human rights in the application of their justice. (LICTA, 2010)

External control of indigenous justice.

Externally, the exercise of indigenous justice has several mechanisms that allow indigenous authorities to establish the legality and constitutionality of the decisions they take. In the case of

Ecuador, it is the Constitutional Court, the body before which it was sued. Ensure that the Constitution and the law are respected. In particular, this is a case called guaranteeing the exercise of constitutional rights, where indigenous judicial actions and decisions are constitutional norms and rights through a special safeguard mechanism against indigenous judicial decisions.

DISCUSSION.

The non-application of constitutional principles in indigenous jurisdiction, so it is based on the enforceability of rights we refer to something that must be purely legal and fair, in order to understand it in a better way we can point out that the right is enforceable when the law clearly establishes the obligations of the State towards its holders. In the case of the Ecuadorian State, this principle is found in the Constitution of the Republic of Ecuador, which states in Article 11 that "rights may be exercised, promoted and demanded individually or collectively before the competent authorities; These authorities shall ensure compliance.

Constitutional principles are binding in all jurisdictions. With the above, Ecuador fulfills its role of recognition and protection of Human Rights through pertinent legal regulations, every individual is a subject of rights, and therefore their individual and collective connotations, it is important to emphasize that rights are realized through enforceability. Human rights are rights that are stipulated in the Universal Declaration of Human Rights become clearly enforceable, that is, every human being has the ability to assert their rights by demanding compliance with them. (Andrade, 2017)

The exercise of rights must be complete and may not be restricted in any way by the enjoyment of these rights by any person, people, nation or society. As indicated above, the principle of realization of rights is called enforceability and implies the demanding, exercise and promotion of fundamental human rights or values. The right is enforceable when the law clearly establishes the obligations of the State towards its holders.

CONCLUSIONS

The research has made it possible to see and present the full body of the legal figure of the non-application of constitutional principles in indigenous jurisdiction, indigenous justice cannot be seen solely as a fictional mechanism, which would limit respect for the rights of persons subject to this jurisdiction.

The normative guarantee is intended to adapt and harmonize infra-constitutional norms to the supreme norm, it is inconceivable that the governments of indigenous peoples and nationalities do not submit to respect human rights in the application of indigenous justice.

The reason that the citizens of the indigenous peoples and nationalities do not respect the application of constitutional principles at the time of being fulfilled in this type of justice in Ecuador.

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