

RIGHT TO ECCLESIASTICAL MARRIAGE IN A REGISTERED DOMESTIC PARTNERSHIP.

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ABSTRACT

This research was based on the right of citizens to profess their religion, practices and customs; a right that defends the constitution of Ecuador, based on the recognition of the de facto union as a civil state that citizens choose to recognize rights and contract obligations derived from the stable and monogamous cohabitation between people free of marriage, this type of state is voluntary and does not require requirements for its effectiveness or validity; However, given the similarity of civil states in Canon Law, this only recognizes civil marriage as a state of the person in stable and monogamous cohabitation, this being the main requirement for access to ecclesiastical marriage, categorically ignoring the de facto union; such effect limits the enjoyment of rights enshrined in Art. 68 of the Constitution of Ecuador in accordance with Art. 66 of the Constitution numeral 8; in this regard, the possibility of proposing a jurisdictional action with the objective of amending the rights that may be violated was analyzed.

Keywords: marriage; de facto union; canon law; religious beliefs; ecclesiastical marriage.

INTRODUCTION

With the validity of the amendment of the Constitution of the Republic of Ecuador in 2008, it gave recognition to the sentimental relationship known from the Civil Code as de facto union; this state is defined in the Constitution in its art. 68 as "The stable and monogamous union between two persons free of marriage bond who form a de facto household, for the period and under the conditions and circumstances indicated by the Law, will generate the same rights and obligations as families constituted by marriage. Adoption shall apply only to opposite-sex couples." (Constitución de la República del Ecuador, Registro Oficial 449 de 20-oct.-2008)

With this recognition granted in the Constitution of 2008, the Organic Law on Identity Management and Civil Data is reformed, in which de facto union is considered as a civil status, registering directly in the filiation records of each citizen; by effect the termination of the de facto union is also recorded.

The de facto union is understood according to the Constitution that maintains the same rights and obligations as families formed by marriage; To understand this legal effect, it is necessary to know what those rights and obligations are; In a brief detail, the right of equality is announced, which at the same time generates rights and duties between the consorts with respect to the children such as parental authority; another right and the related obligation is on the goods, the consorts are entitled to the patrimony this conformed by assets and liabilities; Among other obligations generated in marriage are fidelity, mutual support, solidarity, tolerance, protection, contribution, etc.

However, of all the exposed and understood that has been the de facto union since long before it was considered in the Constitution of 2008 as a recognition of a civil status of the citizen in particular,



but there is a right that citizens who are in this type of sentimental relationship called De Facto Union and legally registered cannot access.

In art. 66 of the Constitution, paragraph 8, states: "The right to practice, preserve, change, profess in public or in private, one's religion or beliefs, and to disseminate them individually or collectively, with the restrictions imposed by respect for rights." (Constitución de la República del Ecuador, Registro Oficial 449 de 20-oct.-2008)

Canon Law does not recognize de facto union with the effects of marriage, therefore, it does not accede to the request for ecclesiastical marriage of citizens who register this type of civil status in their cards, so the rights of freedom to profess and practice their religion or beliefs are violated.

METHODS

The objective of complying with the proposed methodology has been carried out a descriptive research with a qualitative, cross-sectional approach. To achieve the development of the study, the use of scientific research methods was undertaken: historical-logical, documentary review, analytical-synthetic.

This research is non-experimental based on the study of constitutional and canonical principles that are considered as the foundation on which the principles of equality and rights of liberty are based; By virtue of that definitive conclusions can be reached, however such results could calmly lead to an infinite discussion about other canonical dilemmas their rights and supremacy; However, the situation in which the study has been evidenced can be observed that the decisions taken by the clerics have not been entirely framed to respect the rights enshrined in our Constitution, leaving the question whether the canonical norm has greater hierarchy than the Constitution of the Republic of Ecuador; Within the type of non-experimental design, the so-called cross-sectional design will be used, since the information of a cross-sectional study is collected in the present and sometimes from past characteristics or behaviors or experiences of individuals at the given time.

A documentary review of the relevant Canon Law has been prepared to observe the principles on which it is based for its decision-making; in addition to some texts, scientific articles and other bibliography with a focus on this topic; which allowed together with the analysis and synthesis the elaboration of the development in which the discussion of the results obtained and therefore of the conclusions obtained is sustained.

RESULTS

GENERAL

1.- Independence and Jurisprudence of Canon Law.

Canon law contains the norms, rights and obligations of the Catholic Church which, as an independent body, has its own courts and jurisprudence. The code of canon law is of the main legislative corpus and it establishes throughout its 7 books the general norms that affect the Latin church, such as the obligations of the faithful, the hierarchical structure of the institution and its relationship and organization with particular churches, the function of teaching by members of ecclesiastics or the regulation of property or procedural norms.

2.- Canon matrimonial law.

It is one of the branches that may be best known since it is the legal framework that establishes the rights and obligations of a marriage contract concluded by the Catholic Church including the causes that cause the nullity of the marriage and the procedure for its application.

3.- Canon Code, Chapter I, of pastoral care and of what should precede the celebration of marriage.

Art. 10711, Except in case of necessity, no one shall attend without permission from the local Ordinary:

2. a marriage that cannot be recognized or celebrated under civil law;

4.- Protection Action.

The protection action is based as a jurisdictional guarantee whose purpose is to be the direct and effective protection of rights, that is, it acts as a mechanism available to the civil collective for the



protection of their fundamental or human rights against the power of the State and even in the face of the power of individuals. By virtue of this, the protection action becomes the most relevant jurisdictional guarantee in terms of its scope of protection, considering that it not only protects the rights enshrined in the Constitution and international treaties, but also protects rights that are not protected by a specific procedural route, thus becoming an essential tool for the Ecuadorian legal system; In addition, taking into consideration that the comprehensive reparation measures ordered and derived from the protection action can mean advances in the legal system, according to the regulations of substantiation of processes of competence of the Constitutional Court, it establishes the freedom that judges have at the time of being with the constitutional investiture and can determine any of these in order that this generates a significant aspect of promotion and Protection of rights as we analyze it.

DISCUSSION

Article 68 of the Constitution of the Republic, concomitant with article 67 *ibid.*, specifies that "the stable and monogamous union between two persons free of marriage who form a *de facto* household, for the period and under the conditions and circumstances indicated by law, shall generate the same rights and obligations as families formed by marriage". (Constitución de la República del Ecuador, Registro Oficial 449 de 20-oct.-2008). In this sense, article 223 of the Civil Code clarifies that "it will be presumed that the union is stable and monogamous, after at least two years of this". (Código Civil, Registro Oficial Suplemento 46 de 24-jun.-2005)

Thus, the Supreme Norm ensures the formality of the family spectrum under this figure. Under Zannoni's criterion, this is nothing but a union whose particularities connote characters of a certain stability and permanence, insofar as they require a "community of life", through which a certain stability is attributable to it in the expression of the union, in such a way that, it is projected in the figure of an apparent conjugal state, because similar aspects are derived such as singularity, stability and monogamous permanence. The doctrine is related to the positive norm, in that it indicates that *de facto* union denotes particularities analogous to marriage, which also requires a guarantee for the exercise of the freedom provided for in chapter six of the Constitution of the Republic. (Zanoni, 2021) On the above, Doyharcabal explains that, with the appearance of this figure, Roman law nominated it as *concubinatus*, and brought with it no moral reprobation, so that he recognized it parallel to marriage as long as it is a stable union, as well as, provided that it is consensual between single persons or widows who, because of their peculiarities, could not marry each other, or did not wish to do so; denoting it by this of inferior category. (Doyharcabal, 2019)

In this regard, according to the Code of Canon Law, article 1059 mentions that "the marriage of Catholics, even if only one of the contracting parties is Catholic, is governed not only by divine but also by canon law, without prejudice to the competence of civil authority over the purely civil effects of the same marriage". In this sense, the Catholic Church disregards civil law as to the interference that it is competent for marriage, in such a way that the Catholic celebration is alien to the provisions of the positive norm. (Código de Derecho Canónico, s.f.)

It is imperative to mention that article 1093 of the Code in question states that "the impediment to public honesty arises from invalid marriage after the establishment of life in common or from notorious or public concubinage; and settles marriage in the first degree of straight line between the male and the consanguineous of the woman and vice versa" (*ibid.*). That is, Catholic marriage can be invalidated whenever the sacrament is consummated through dishonesty, that is, not complying with the requirements provided for by canon law.

Professor Sanmartin mentions that "although civil law does not govern canon law, since they are very independent, canon law respects many issues that could affect the person as a social individual, in the case of Ecuador, for example, according to universal canon law indicates that the couple can have the fourteenth wife, and the male sixteen, but the canonical stipulation of Ecuador indicates that the woman must be sixteen and the man eighteen, precisely to ensure that the psycho-affective maturity of the contracting parties is better. (Sanmartin, 2022)



Under this premise, regarding concubinage, he comments that the Church makes this decision "to guarantee that there is a commitment, that is, that, in this decision, she marries the one who asks without having a civil bond with another person" (ibid.). In this sense, he alludes that this guarantee expresses the permanence of the union under ecclesiastical honesty without there being a dishonesty in civil matters.

To all this, the Catholic Church in Ecuador, specifies that to contract ecclesiastical marriage requires certificate of baptism, civil marriage, premarital course, singleness, and copy of ID of the godparents who must be married by the Catholic Church. Although Ecuador is a secular State as stated in the first article of the Constitution, failing that, article 67 *ibid.* recognizes the family in its various types; However, let us remember that both article 1059 and 1093 of the Code of Canon Law at no time urge that the contracting parties require civil marriage as a prevailing element for the consummation of ecclesiastical marriage, for a simple reason, that just as civil law has no interference in canon law, this in its absence does not have to consider the positive norm in its articles. (El Diario, 2008)

For this reason, this article examines the doubt of how detached the Ecuadorian Catholic Church is in relation to positive law, this in turn, is an offense for the group that for the sake of its freedom decides to express its beliefs through the celebration of a Catholic sacrament, which should not depend on any other than canon law; It should also be noted that this constitutional guarantee on the recognition of a family is vitiated by the formality of the Catholic Church.

CONCLUSIONS

It can be concluded that canon legislation is a source of law, however it is independent of the Ecuadorian legal system and is not part of it, even though the Organic Code of the Judicial Function indicates comparative law as part of our legal system; so it is therefore not applicable in general terms, this is because the Apostolic and Roman Catholic Church is not the official one in our country, this considering that Art. 1 of the Constitution of the Republic indicates that Ecuador is secular. So the Code of Canon Law is not law, and the only law is the one that emanates from the National Assembly with constitutional and legal formalities.

The Catholic Church in Ecuador would be violating the right of the citizen to profess his religious beliefs and to access the sacraments instituted in the church contravening the constitutional norm in which he establishes the rights of citizens.

One of the corrective actions for this violation of rights would be the protection action, which by its characteristics aims to amend or reverse the damage affected; In the case of analysis of ecclesiastical marriage without the prior requirement of civil marriage, it remains a novel fact and not previously analyzed, much less is there evidence that a protective action has been proposed to amend such a violation.

REFERENCES

- [1] Calasso, F. (2019). *Canon law and civil law*. Madrid: Medievo del Diritto.
- [2] Civil code. (Official Register Supplement 46 of 24-jun.-2005). Last modified: 08-Jul-2019: Status: Reformed.
- [3] Code of Canon Law. (n.d.). Retrieved from https://www.vatican.va/archive/cod-iuris-canonici/cic_index_sp.html
- [4] Constitution of the Republic of Ecuador. (Official Register 449 of 20-Oct.-2008). Last modified: 12-Mar.-2020: Status: Reformed.
- [5] Doyharcabal, S. (2019). *Concubinage and Christianity*. Quito: Corporation of studies and publications.
- [6] The Journal. (December 01, 2008). What requirements are needed to marry in the church? Retrieved from <https://www.eldiario.ec/noticias-manabi-ecuador/100426-que-requisitos-se-necesitan-para-casarse-por-la-iglesia/#:~:text=Para%20contraer%20matrimonio%20eclesiástico%20lo,de%20llevar%20a%20la%20parroquia.>
- [7] Espanés, M. (2008). *Family Law*. Córdoba: Academia Nacional de Derecho de Córdoba.
- [8] Iglesias, J. (2015). *Roman law*. Barcelona: Ariel.
- [9] Martinez, M. (2018). *Studies in Canon Law*. Madrid: Revista Española de Derecho Constitucional.
- [10] Martinez, T. (2017). *Ecclesiastical Law of the State and Canon Law*. Pamplona: Tirapu.



- [11] Molano, E. (2020). *Introduction to the study of Canon Law and Ecclesiastical Law*. Barcelona: Navarro Valls.
- [12] Olmos, M. (2019). *Canon law and formation of the jurist*. Madrid: IUS CANONICUM.
- [13] Ormaza, A. (2018). *Do we need a new Constitution? An uncompromising political analysis*. Quito: Will.
- [14] Sanmartin, L. (October 4, 2022). *On canonic law*. (F. Vega, Interviewer)
- [15] Zanoni, E. (2021). *Civil Law volume II: Family Law*. Argentina: Astrea.