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An Economic Analysis of Extortion in Guayaquil and the Crisis in Legal Certainty

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OECD classification: 5.5 Law; 5.2 Economics and Business.

Abstract

This article analyzes extortion in Guayaquil from the perspective of the Economic Analysis of Law and its effects on productive activity, property rights, and legal certainty. It examines how so-called "vacunas" function as illegal levies that raise transaction costs, distort economic incentives, and lead to disinvestment, forced informality, and business closures. It also examines the issue of attempted extortion under Article 185 of the Comprehensive Organic Criminal Code and the difficulties in punishing it when the economic benefit is not actually realized. From an economic perspective, this shortcoming reduces the expected cost of the crime, weakens the deterrent effect of the penalty, and discourages reporting out of fear of retaliation. The study also addresses the violation of legal certainty recognized in Article 82 of the Ecuadorian Constitution, as criminal coercion replaces regulatory predictability with arbitrariness. Finally, it proposes reforming the legal framework for punishing attempted crimes and strengthening judicial intelligence mechanisms and victim and witness protection measures, in order to increase the costs of organized crime and restore institutional conditions that foster the safe conduct of commercial activity in the local business sector.

Keywords: Extortion, legal certainty, economics and business, criminology, criminal law.

Introduction

In recent years, the public security crisis in Latin America has found in Guayaquil a particularly critical setting. In Ecuador's principal port and economic engine, the proliferation of organized crime has transformed social and market dynamics. In this environment, the crime of extortion, popularly known as "vacunas", ceased to be a marginal infringement against property and became a genuine para-state system for the illegitimate extraction of rents. This sustained coercion undermines peaceful coexistence and progressively usurps the State's sovereignty over the regulation of territory and the economy.

The core of the problem lies in the gap between growing criminal violence and an ineffective criminal justice response. In Ecuadorian judicial practice, Article 185 of the Comprehensive Organic Criminal Code (COIP) presents structural gaps that prevent the effective punishment of attempted extortion. When the threat persists but the economic benefit does not materialize, the imprecision of the criminal definition produces impunity, reduces the cost of failure for the offender and discourages citizens from reporting for fear of violent retaliation.

This research is justified by the need to address the phenomenon beyond classical criminal law doctrine, incorporating the perspective of the Economic Analysis of Law (AED). From this standpoint, "vacunas" operate as an arbitrary illegal tax that drives up transaction costs and stifles private investment. Likewise, the resulting impunity directly violates the legal certainty guaranteed by Article 82 of the Constitution, whose essence requires prior and clear rules and the effective protection of rights against arbitrariness.

Against this reality, the article analyzes the socioeconomic and legal repercussions of extortion in Guayaquil and the shortcomings in the criminal definition of attempt under the COIP. The study unfolds along three axes: extortion as an unlawful tribute that distorts the market, the doctrine of this multi-offense crime and the

inefficiencies of its sanctioning regime, and the lines of institutional reform aimed at raising the cost of the crime and restoring commercial certainty.

1. Extortion as an Illegal Tax and a Factor in Economic Deterioration

From the neoclassical economics of crime formulated by Becker (1968), the offender acts as a rational agent who weighs the expected benefits against the potential costs of his conduct. Under this approach, the decision to commit a crime responds to a utility function in which the low probability of capture and the leniency of sanctions reduce the expected cost of the crime, maximizing its net profitability. In Guayaquil, the systematic extortion of transport workers, small merchants and microenterprises, popularly called "vacuna", operates materially as an arbitrary illegal levy or tax. Unlike legitimate taxes, which finance public goods and infrastructure, this forced exaction transfers wealth coercively, creates no value and distorts incentives for production and investment.

The periodic imposition of this unlawful tribute drives up transaction costs in the local market (Coase, 1960). Economic agents are forced to allocate productive resources to unforeseen defensive measures or, in the worst case, to assume fixed payments that stifle their profit margin. This dynamic destroys the viability of traditional business models, encourages the mass closure of premises and pushes merchants into forced informality or the abandonment of their productive activity.

In microeconomic terms, extortion alters the efficient allocation of resources and breaks the free play of supply and demand. When the cost of operating formally in a geographic area becomes prohibitive because of criminal blackmail, the market undergoes a process of accelerated disinvestment. This economic deterioration is not a mere side effect but the direct consequence of a defective institutional environment in which impunity reduces the expected cost of the crime at the expense of the suffocation of the commercial sector (Becker, 1968; Coase, 1960).

2. Doctrinal Differentiation and the Regulatory Inefficiency of Attempt

To understand the dimension of the problem in the Ecuadorian criminal legal order, it is necessary to begin with an adequate doctrinal delimitation. Criminal law doctrine agrees that extortion should not be classified as a simple crime against property, but as an offense of a multi-offense nature. Its commission not only harms the patrimony of the victim but simultaneously violates the victim's freedom of economic self-determination and psychological integrity, also affecting public tranquillity. This harmful complexity requires that the normative design punish each of its stages of execution forcefully; however, in local legal practice a severe mismatch in the standard of punishability is evident.

The critical point lies in the wording of Article 185 of the Comprehensive Organic Criminal Code (COIP), which displays application gaps with respect to attempt (Art. 33 of the COIP) in the structure of the crime of extortion. When the perpetrator carries out suitable executive acts, such as death threats, sustained intimidation or the placement of explosive devices, but the patrimonial advantage or economic benefit does not materialize for reasons beyond his control (for example, because of police intervention or the victim's economic impossibility), the punitive response tends to fade or to be dismissed procedurally. The judicial system usually experiences serious operational difficulties in punishing attempt with the severity that the magnitude of the risk demands, generating de facto impunity when the conduct does not reach the perfect consummation of payment.

From the perspective of the Economic Analysis of Law, this regulatory imprecision radically distorts the offender's incentive structure. If attempted extortion is not pursued and punished appropriately, the cost of

"failure" for the criminal structure tends toward zero. The extortionist assumes minimal risk when initiating coercion, knowing that if the victim does not pay or the operation is interrupted, the probability of receiving an effective penalty is negligible compared with the high expected profitability if the collection is completed. This criminal justice inefficiency, which cheapens the crime, neutralizes the deterrent effect of the rule, leaves the victim unprotected in the initial stages of the aggression and discourages citizens from reporting for the justified fear of retaliation without State protection.

3. The Destruction of Legal Certainty and the Proposal for Institutional Reform

The ultimate impact of impunity in extortion not only destabilizes the market but violates the backbone of the constitutional State of rights: the principle of legal certainty. Enshrined in Article 82 of the Constitution of the Republic of Ecuador, this right guarantees the predictability of the legal order, based on respect for the Constitution and on the existence of prior, clear, public rules applied by competent authorities. When transnational organized crime imposes a coercive regime in the commercial areas of Guayaquil, the certainty of the State legal rule is supplanted by the arbitrariness of criminal blackmail, breaking the trust that citizens place in State institutions.

From the economic theory of law, legal certainty constitutes the indispensable institutional asset for guaranteeing property rights and minimizing transaction costs. Without predictability or effective State protection, formal business activity enters a crisis of incentives: agents reduce their working capital, limit the opening of new branches or end up closing their businesses because they cannot foresee their operational risks. The lack of a criminal justice response to attempt turns the regulatory framework into an inefficient rule: the State fails to guarantee the minimum conditions for legitimate commerce and free enterprise.

To correct this regulatory and governance failure, it becomes imperative to promote a legislative reform focused on the Comprehensive Organic Criminal Code (COIP). This institutional proposal should focus on two priority axes:

Reform of the punishability of attempt in multi-offense crimes: adjust Article 185 of the COIP to explicitly define and punish with severe penalties the suitable executive acts of extortion (systematic threats, sustained intimidation and the use of explosives), regardless of whether the patrimonial harm is ultimately realized.

Realignment of incentives and procedural strengthening: substantially increase the expected cost of criminality by making the "failure" of the crime more expensive, while strengthening judicial intelligence mechanisms and the protection of victims and witnesses in order to restore the density of reporting.

Only through clear legislative technique and rigorous criminal prosecution will it be possible to raise the cost of organized crime, returning to economic actors the minimum institutional guarantees necessary to operate peacefully.

Conclusions

The crime of extortion in the city of Guayaquil has transcended the category of an ordinary property offense to become the most aggressive manifestation of the breakdown of legal certainty in the regional socioeconomic fabric. The application of the Economic Analysis of Law shows that the proliferation of the so-called "vacunas" responds to a defective incentive structure in the criminal justice system, in which the expected benefit of crime comfortably exceeds the real cost assigned to effective punishment and to the probability of State prosecution.

This distortion turns extortion into a highly profitable illegal levy that erodes free enterprise, destroys the value of private property and forces economic agents into informality or the definitive closure of their activities.

From the perspective of criminal law doctrine, the inefficiency of the normative framework reaches its most critical point in the regulatory imprecision surrounding attempted extortion under Article 185 of the Comprehensive Organic Criminal Code. Since it is an offense of a multi-offense nature, which simultaneously attacks freedom, psychological integrity and patrimony, dismissing punitive severity when the economic benefit does not materialize generates a scenario of de facto impunity. This doctrinal gap drastically cheapens the cost of "failure" for criminal structures, neutralizing the deterrent power of the criminal rule and leaving victims defenseless in the initial stages of the aggression.

The restoration of market order and the guarantee of the constitutional principle of legal certainty enshrined in Article 82 of the Constitution of the Republic require urgent and focused institutional reform. It is imperative to adapt criminal legislation to define and punish autonomously and rigorously the suitable executive acts of extortion, such as sustained intimidation and the use of explosive devices, so that the risk of attempt approaches that of consummation. Only through a substantial increase in the expected cost of the crime and the strengthening of procedural intelligence to protect citizen reporting will the Ecuadorian State be able to restore the normative certainty indispensable for the peaceful development of commercial activity and the full validity of the rule of law.

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Does the Filing of a Lawsuit Interrupt the Statute of Limitations? Analysis of Subsection 3 of Article 1996 of the Civil Code and the 2016 Civil Procedural Plenary

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Abstract

This article examines whether filing a lawsuit within the statutory limitation period interrupts that period when service of process on the defendant occurs after the period has expired. The issue arises from the interpretation of paragraph 3 of Article 1996 of the Peruvian Civil Code, which links the interruption to the service of the complaint and may shift the consequences of delays in the judicial system onto the diligent litigant. Through a normative, doctrinal, and jurisprudential analysis, this article examines the debate resolved by the 2016 National Plenary Session on Civil Jurisdiction and Civil Procedure, as well as the evolution of the Supreme Court's criteria. It also addresses the nature of the statute of limitations, the calculation of the limitation period, and the significance of filing the complaint as an unequivocal expression of the claimant's intent to exercise their right. The article argues that the filing of a complaint breaks the inactivity that forms the basis of the statute of limitations and that conditioning its effects on subsequent notification, which is subject to judicial action, undermines the pro actione principle and the right to effective judicial protection. Finally, it concludes that, despite advances in case law, legislative reform is necessary to expressly stipulate that the timely filing of a complaint interrupts the statute of limitations.

Keywords: Statute of limitations, legal action, interruption of the statute of limitations, legal proceedings, case law.

Introduction

Extinctive limitation seeks to provide legal certainty by penalizing the inactivity of the holder of a right over the passage of time. However, its application in Peru gave rise for years to a persistent dilemma: Article 1996, subsection 3 of the Civil Code requires "service of the complaint" in order to interrupt the limitation period. This literal requirement collides directly with procedural reality, in which the caseload of the judiciary and the administrative delays involved in notifying the defendant often take months, exposing the diligent litigant to a declaration that the action has prescribed for reasons entirely beyond their control.

In order to curb this inequity, the 2016 National Civil and Civil Procedural Jurisdictional Plenary marked a milestone by establishing that limitation does not operate if the complaint was filed on time, thereby prioritizing the constitutional right to effective judicial protection over grammatical formalism.

Analyzing this interpretive shift is crucial in order to determine whether the plenary agreement definitively resolves the problem or whether legislative reform remains necessary. In this sense, this article examines the nature of extinctive limitation, the evolution of Supreme Court case law and the scope of the pro actione principle, with the aim of supporting a lege ferenda proposal that brings the Civil Code into line with contemporary procedural reality.

1. The Problem Raised in the Civil and Civil Procedural Jurisdictional Plenary

The central debate of the National Civil and Civil Procedural Jurisdictional Plenary of July 2016 was structured around a question critical to procedural protection: if the complaint is filed within the limitation period but is served after that period has expired, should the action be declared time-barred? This dilemma divided the judiciary into two markedly distant interpretive currents.

On the one hand, a first position adopted a strictly formalist criterion of Article 1996, subsection 3 of the Civil Code. Under that premise, the absence of timely service inevitably produced limitation, on the argument that delays in the judicial apparatus could not shift legal uncertainty onto the debtor's sphere. By contrast, a principled position held that the right of action is fully perfected upon the filing of the complaint at the filing office. From this perspective, it is legally unacceptable to attribute to the diligent plaintiff the harmful consequences of procedural overload and the bureaucratic inefficiency of the judiciary.

The Plenary adopted the second position by majority, concluding that the timely filing of the complaint prevents limitation from arising, even when effective service takes place after the expiry of the substantive period (Pleno Jurisdiccional Nacional Civil y Procesal Civil, 2016). This agreement represented an indispensable shift in subordinating the substantive civil rule to the constitutional guarantees of access to justice and effective judicial protection.

2. Preliminary Questions: The Object Extinguished by Limitation

In order to understand the significance of the 2016 plenary agreement, it is essential to define precisely what limitation actually extinguishes. A literal and uncritical reading of Article 1989 of the Civil Code suggests that the passage of time destroys the "action" understood as a procedural claim (Morales Godo, 1999). However, contemporary procedural doctrine has moved beyond that premise: once the action is conceived as the abstract and unconditional power to resort to the jurisdictional organs, limitation can never annul the subject's faculty to file a complaint and activate the machinery of justice.

Against this position, a sector influenced by pandectist doctrine maintains that limitation does not attack the abstract action but rather the substantive claim, that is, the enforceability of the obligation owed (Vidal Ramírez, 1985). Although this approach represents an advance by distinguishing the procedural plane from the substantive one, the more rigorous position holds that the phenomenon of limitation deprives of judicial protection those active subjective legal situations that have remained inactive for the period established by law (Ariano Deho, 2005).

Under this latter perspective, the passage of time does not erase the right or annul the action; rather, it disarms the coercive support of the State vis-à-vis the negligent holder. When the coercibility that protected the creditor's position of advantage is dissolved, the debtor is correlatively released from their position of disadvantage, thereby guaranteeing stability and certainty in legal transactions (Ariano Deho, 2001, 2005). Thus, understanding that limitation penalizes the inactivity of the holder of the right is decisive for assessing whether the mere filing of the complaint breaks that state of inertia.

3. Computation and Running of the Limitation Period

Determining the exact moment at which the limitation period begins and ends is essential for assessing whether the claim retains its legal protectability. Article 1993 of the Civil Code establishes the general rule that limitation

begins to run from the day on which the action may be exercised. As Rubio Correa (1990) clarifies, this legal criterion does not depend on the caprice of the parties but on a rigorous conceptual reference based on the effective enforceability of the right. Along these lines, Vidal Ramírez (1985) specifies that the starting point of the computation varies according to the nature of the legal relationship: in absolute rights, as in extracontractual liability, the period begins with the infringement or actual damage, whereas in relative rights the countdown begins upon non-performance of the agreed obligation.

Now, for limitation to operate fully, the uninterrupted concurrence of the time factor and the inactivity of the holder is required. When the plaintiff resorts to the judiciary and files a valid complaint, they formally manifest their unequivocal willingness to preserve and assert their right, categorically breaking with that state of inertia (Muro Rojo, 1999). From that moment, the holder has energized their active legal position within the temporal framework granted by law.

It is therefore manifestly contradictory and legally fragile to penalize the timely plaintiff by charging them with the time that subsequently elapses in procedural qualification and service (Muro Rojo, 1999). The running of the limitation period must reflect the creditor's lack of interest, not the slowness of the state apparatus; hence, once the right of action has been exercised through the filing of the complaint, the computation of the period must be understood as stopped or interrupted for purposes of judicial protection.

4. Evolution and Shift in the Supreme Court's Case-Law Criteria

The treatment of limitation in Peruvian case law has undergone a profound transformation, moving from rigid formalism to an interpretation protective of the right of action. Initially, the civil chambers of the Supreme Court applied subsection 3 of Article 1996 of the Civil Code unrestrictedly and literally. An emblematic example of this position was Cassation No. 2466-2009-Huánuco, in which a claim for annulment of a legal act, filed on time, was declared time-barred solely because effective notification to the defendant took nine months owing to judicial processing. Under this formalist criterion, the inefficiency of the notification office and the court's caseload were transferred directly as a sanction against the plaintiff.

This rigid scheme began to give way to a jurisprudential shift led by decisions such as Cassation No. 2982-2010-Huaura and Cassation No. 774-2011-Huánuco (Muro Rojo, 2013). In Cassation No. 774-2011-Huánuco, the Supreme Court granted the cassation appeal after noting that procedural and administrative delays cannot undermine the periods established by substantive law for the exercise of actions. The Supreme Court emphasized that the mere filing of the complaint at the filing office constitutes the core act that breaks the holder's inactivity and demonstrates their interest in preserving the right (Cárdenas & Villegas, 2013; Muro Rojo, 2013).

This change of course in the Supreme Court's decisions laid the foundations for the consolidation of a uniform jurisprudential doctrine. By recognizing that the creditor's inertia ceases with the formal entry of the complaint, case law detached the effectiveness of the exercise of the right from the procedural vicissitudes of service, preparing the way for the definitive consensus reached at the 2016 Jurisdictional Plenary.

5. Constitutional and Systematic Interpretation: The Pro Actione Principle

The 2016 plenary agreement rests on a systematic and constitutionalized interpretation. Instead of assessing the subjective "reasonableness of the creditor" as to whether they should have sued earlier, the Plenary defines the complaint as the act that generates the jurisdictional function and the premise of the constitutional right to effective judicial protection (Article 139, subsection 3 of the Constitution). Under the pro actione principle, the

judge must favor access to justice and avoid formalisms that render protection theoretical or leave the party defenseless. Sumarriva Benavente (2013) and Saavedra Dioses (2013) agree that the functionality of limitation requires that acts of procedural communication (notification) not undermine the timely exercise of the substantive right at the filing office.

Conclusions

Extinctive limitation is an institution designed to penalize the inertia of the holder of a right in safeguarding legal certainty; however, its application in Peru was distorted by an excessively literal interpretation of Article 1996, subsection 3 of the Civil Code. By conditioning the interruption of the limitation period on effective notification of the complaint, the legal system improperly shifted the burden of the judicial system's inefficiencies onto the diligent litigant. This dogmatic distortion meant that complaints filed in a timely manner were ultimately dismissed merely because of the procedural processing of service, a circumstance beyond the plaintiff's control and will.

The 2016 National Civil and Civil Procedural Jurisdictional Plenary represented a transcendental step by aligning civil hermeneutics with the postulates of the pro actione principle and the fundamental right to effective judicial protection (Pleno Jurisdiccional Nacional Civil y Procesal Civil, 2016). By consolidating the criterion that the timely filing of the complaint breaks the holder's inactivity and interrupts or suspends the running of the limitation period, Supreme Court case law and the jurisdictional plenaries restored the balance between certainty in legal relations and free access to justice (Ariano Deho, 2005; Muro Rojo, 2013). Thus, the formal manifestation of the will to protect a right through the filing of the complaint dissolves any presumption of lack of interest or inertia.

Despite this unquestionable jurisprudential advance, the survival of the literal text of Article 1996, subsection 3 of the Civil Code continues to generate uncertainty and discretion in lower judicial instances. It is therefore imperative to formulate a lege ferenda legislative reform that expressly positivizes that the mere filing of the complaint formally interrupts limitation. Only through an express normative amendment will it be possible to fully harmonize the substantive code with the constitutional guarantees of procedure, definitively shielding the protection of subjective rights against the vicissitudes and delays of the administration of justice.

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Neoconstitutionalism and Economic Analysis of Contract Law in Colombia: Horizontal Effectiveness and Business and Human Rights

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Abstract

This article analyzes the relationship between neoconstitutionalism and the economic analysis of contract law in Colombia, based on the constitutionalization of private law and the horizontal effect of fundamental rights. Its objective is to examine the limits of judicial intervention in contractual relationships, taking into account contractual autonomy, economic efficiency, and the protection of human rights. To this end, it addresses three dimensions: power asymmetries and the distribution of contractual risk; the horizontal effectiveness of fundamental rights in relation to digital platforms and algorithmic architectures; and corporate and human rights standards, as well as the limits of the tutela action in property disputes. Through a legal, jurisprudential, and doctrinal analysis, the paper argues that constitutionalization does not entail the replacement of private law or the elimination of contractual freedom. On the contrary, constitutional intervention must operate as a corrective mechanism in proven situations of vulnerability, defenselessness, or substantial imbalance. It is concluded that, among contractually equal parties, the autonomy of will, efficiency, and the free allocation of risks must be preserved, avoiding hyper-constitutionalization that creates legal uncertainty and increases transaction costs.

Keywords: Keyword: Contract law, economic analysis of law, human rights, businesses, digital platforms.

Introduction

The 1991 Constitution transformed the relationship between the State, the market, and private individuals by consolidating a social market economy and imbuing the legal order with a guarantee-based catalogue of fundamental rights. Nevertheless, this phenomenon of constitutionalization has opened a crucial debate: to what extent does judicial intervention in contracts jeopardize legal certainty and contractual autonomy? Although the Constitution radiates into private law, it does not replace it or become an automatic parameter of contractual validity; the tutela against private parties operates only under the cases exhaustively established in Article 86 of the Constitution.

Faced with the temptation of a "hyper-constitutionalization" that ignores the economic logic of contract, this article seeks to analyze the confluence between Neoconstitutionalism, through the horizontal effectiveness of rights (Drittwirkung), and the Economic Analysis of Law. The research is justified by the need to offer a predictable hermeneutic standard in the face of contemporary phenomena such as mass contracting, financial services, the platform economy, and conflicts between multinational corporations and communities. Thus, the central objective is to examine how constitutional review engages with efficiency and the allocation of risk, addressing the jurisprudential evolution in power asymmetries, the digital environment, and the limits of judicial intervention in human rights.

The thesis guiding this work is clear: the constitutionalization of private law does not eliminate the economic analysis of contractual agreement. Judicial review acts as a corrective clause that is activated only upon proof of substantial asymmetries, vulnerability, or defenselessness. Between equal parties, efficiency, the reduction of

transaction costs, and freedom to allocate risks retain full force.

To develop this position, the text is structured along three axes: first, asymmetries and risk management in the constitutionalization of contract; second, the horizontal effectiveness of rights in the digital environment; and third, the business and human rights standard together with the limits of the tutela action in the proprietary sphere.

1. The Constitutionalization of Private Law and Asymmetries

Classical private law was structured on the premises of autonomy of the will and an abstract presumption of formal equality between the parties (Diez-Picazo, 2007). However, the enactment of the 1991 Political Constitution redefined these pillars by subordinating contractual freedom to a higher order composed of the values of distributive justice and social solidarity (Arts. 1, 13, and 333 of the Constitution). Within this framework, constitutional intervention in the private sphere does not seek to suppress private initiative but to correct those market dynamics in which formal freedom masks genuine situations of material imbalance.

This correction has been progressively shaped by case law and the legislature through specific sectors. In the financial sphere, by characterizing banking activity as a public service of genuinely collective interest (Art. 335 of the Constitution), the Constitutional Court specified that the contractual autonomy of lending institutions cannot be exercised disproportionately to the detriment of users' fundamental rights (Judgment C-616, 2001). However, review of abusive clauses did not originate in the constitutional jurisdiction but in ordinary civil cassation. The Supreme Court of Justice delimited this standard by requiring three concurrent conditions: the absence of individualized negotiation (unilateral pre-drafting), the violation of the principle of good faith, and the generation of a significant imbalance in the rights and obligations of the parties (Judgment Exp. 1998-00366, 2001). This standard was subsequently adopted and systematized by the legislature in the Consumer Statute (Law 1480, 2011, Art. 42).

The distribution and management of contractual risk confirms this cautious position. In relations between equal parties, the appropriate instrument for restoring equivalence in the face of unforeseen and unforeseeable imbalances is the theory of imprevision, whose application falls exclusively to the ordinary judge (Commercial Code, Art. 868). Constitutional intervention operates under a different logic. During the housing finance crisis under the UPAC system, the Constitutional Court did not individually renegotiate the debts; on the contrary, it grounded its intervention on the right to decent housing (Art. 51 of the Constitution), the reservation of law in securities matters, and the dominant position of the banking sector, censuring disproportionate mechanisms such as the capitalization of interest in housing loans (Judgment C-383, 1999; Judgment C-700, 1999).

Read through the lens of the Economic Analysis of Law (EAL), this decision responded to the efficient allocation of risk: in the presence of structural imbalances and runaway inflation, financial risk had to be borne by the cheapest cost avoider, in this case the financial institution, given its capacity for diversification and foresight, and not by the mortgage debtor (Calabresi, 1970; Posner, 2014). In this way, caps such as the limit on default interest and the restrictions on acceleration clauses, later introduced by the legislature and endorsed by the constitutional adjudicator, are not mere acts of altruism but mechanisms for correcting market failures and mitigating transaction costs ex ante and ex post.

2. The Horizontal Effectiveness of Fundamental Rights in the Digital Environment

The horizontal effectiveness of fundamental rights (Drittwirkung) posits that constitutional guarantees not only

bind the State but also directly bind private parties in their reciprocal interactions (Alexy, 2007). In the Colombian legal order, this effectiveness is mediate and subject to a closed procedural regime (Political Constitution, Art. 86; Decree 2591, 1991). The admissibility of the tutela against private parties requires proof of subordination, defenselessness, the provision of a public service, or serious impairment of the collective interest. In the contractual sphere, defenselessness is relational and is proven case by case; the mere existence of a contract does not render a party defenseless or enable the judge to assess the validity of the agreement (Judgment T-277, 2015).

This model faces its most critical scenario in relation to large digital platforms and algorithmic architectures. In the digital economy, asymmetry derives not only from financial muscle but from control of source code, the massive handling of data, and the unilateral power of content moderation. In the face of unjustified closure of accounts and business profiles, the Constitutional Court has specified that moderation is not absolute, requiring due process, transparent rules, and mechanisms for contestation (Judgment T-040, 2020).

From the perspective of the Economic Analysis of Law (EAL), the requirement of ex ante clarity reduces information and transaction costs for users (Coase, 1960). However, EAL warns that excessive ex post judicial intervention, case by case, generates uncertainty, increases the cost of digital operations, and discourages innovation. For this reason, the case law itself avoids turning platforms into censoring judges or public service providers, preferring clear rules that preserve market dynamics.

A similar nuance is observed in delivery platforms or the gig economy, where statutory regulation requires human review and causal justification for suspending accounts (Law 2365, 2024). In short, digital asymmetry justifies the tutela for the protection of fundamental rights, but it does not authorize the adjudicator to replace contractual autonomy between parties in purely proprietary and equal-standing matters.

3. Business, Human Rights, and the Limits of Judicial Intervention

The most complex asymmetry in contemporary contracting pits transnational corporations or large companies against vulnerable communities and subjects of special protection. At the international level, the United Nations Guiding Principles on Business and Human Rights have consolidated a soft law framework structured around three pillars: protect, respect, and remedy (United Nations, 2011). However, these instruments express an expectation of conduct and do not directly bind private parties unless incorporated into domestic law. In Colombia, regulatory advances bind primarily the State and merely recommend business due diligence schemes. Even in avant-garde scenarios such as the European Union, the scope of the Corporate Sustainability Due Diligence Directive was limited in its final approval to large corporations, with a gradual application scheme and without harmonizing a strict civil liability regime (EU Directive 2024/1760, 2024).

This tension between economic development and constitutional protection is evident in participation mechanisms such as prior consultation. Originally designed as a space for intercultural dialogue to mitigate environmental and social impacts, its application has generated complex economic dilemmas. When constitutional case law requires prior consent as an indispensable requirement in cases of intense impacts, consultation operationally adopts the function of a veto right (Judgment SU-123, 2018). From the standpoint of the Economic Analysis of Law (EAL), procedural indeterminacy and the proliferation of procedures raise ex ante transaction costs and regulatory uncertainty, discouraging investment projects without necessarily guaranteeing an effective remedy for communities.

Against this backdrop, constitutional case law has set limits on the intervention of the tutela judge, reaffirming the

principle of subsidiarity (Decree 2591, 1991). Disputes of a purely economic nature, the setting of the contractual price, and compensation or damages claims correspond to the ordinary or arbitral jurisdiction, and as a general rule lack constitutional significance (Judgment SU-226, 2019). Although exceptions exist in situations of defenselessness or threat to the minimum vital income, the legitimacy of the constitutional jurisdiction lies in respecting the sphere of the ordinary judge in proprietary matters. In short, protection against human rights violations by companies requires correcting abuses through due process and due diligence standards, but without transforming the tutela action into a disproportionate mechanism for renegotiating equal-standing legal transactions.

Conclusions

Constitutional intervention does not annul private law or the economic analysis of contract. Judicial review acts only as a corrective mechanism in the face of proven asymmetries, defenselessness, or vulnerability. Between equal parties, contractual autonomy, efficiency, and the free allocation of risks retain their ex ante force.

Jurisprudential indeterminacy in the digital environment and in the field of business and human rights itself represents a high transaction cost. To preserve the balance of the system, it is essential to avoid the legal uncertainty arising from a hyper-constitutionalization of commercial dealings.

The constitutional adjudicator is not called upon to renegotiate the proprietary conditions of a legally binding transaction. Its function is to serve as a closing norm that guarantees fairness and due process in asymmetric markets, respecting the autonomy of the will as a fundamental pillar of economic freedom.

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Optimal Competition-Oriented Taxation: A Law and Economics Approach

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OECD classification: 5.5 Law; 5.2 Economics and Business.

Abstract

This article analyzes taxation as a preventive policy tool for correcting market failures and promoting free competition, from the perspective of the Economic Analysis of Law. The study focuses on oligopolistic markets with homogeneous products and a propensity for tacit collusion, where the tax structure can influence business costs and competitive incentives. To this end, it examines the Brazilian fuel market and the constitutional framework established in Article 146-A of the Federal Constitution of Brazil. It also analyzes the assessment by the Administrative Council for Economic Defense (CADE) and the transition from the ICMS tax substitution regime to the single-stage ad rem system, introduced by Complementary Law No. 192/2022. Based on the theory of optimal taxation and the "second-best" approach, the study identifies the limitations of both tax models in ensuring effective conditions of competition, particularly due to their effects on cost asymmetries and price rivalry. Finally, the paper argues that extrafiscal taxation can complement the actions of competition authorities through ex ante interventions, provided that it respects the principles of tax equality, ability to pay, and non-confiscatory taxation, thereby harmonizing economic efficiency with tax justice and legal certainty.

Keywords: Law, Economics, Taxation, Economic Competition, Economic Analysis of Law.

Introduction

The intersection between Tax Law and Competition Defense (Antitrust) represents a fascinating meeting point for modern regulatory analysis. For decades, taxes have been understood almost exclusively as revenue-raising tools (fiscandi causa). However, the perspective of the Economic Analysis of Law (EAL) reveals a different reality: tax rules directly alter costs, barriers to entry and the incentives of competitors, and are therefore never fully neutral.

In sectors with high concentration and homogeneous products, such as fuel distribution, competition tends to be stifled by implicit agreements or tacit collusion in which there is no formal cartel to sanction ex post. Faced with this dilemma, the need arises to explore how tax design can function as an ex ante tool that breaks those collusive equilibria through calculated cost asymmetries, without transgressing the constitutional guarantees of the taxpayer.

The justification for this study lies in the need to question the idea that the mere administrative simplification of a tax generates more competitive markets. Taking Brazil as a regulatory laboratory under the protection of constitutional Article 146-A and CADE's interventions, it is crucial to evaluate the transition from the ICMS tax substitution model to the single-stage ad rem regime (Complementary Law No. 192/2022) in light of optimal taxation theory and the Second Best.

With this in mind, the general objective of the article is to analyze extrafiscal taxation as a pro-competitive instrument of preventive intervention in the face of market failures in oligopolistic sectors. To this end, the work unfolds in four steps: to examine the Brazilian constitutional foundation of competition-oriented taxation; to review CADE's empirical assessment in the fuel sector; to compare the microeconomic effects of the ad rem regime with those of the traditional model; and to outline the substantive limits imposed by the principles of

equality, ability to pay and non-confiscation.

1. Taxation for Competition Purposes at the Constitutional Level

The constitutional framing is decisive for legitimizing fiscal intervention for regulatory purposes. Traditionally, tax doctrine has subordinated extrafiscal purposes to purely extra-economic aims or to the encouragement of specific sectors. Nevertheless, the Economic Analysis of Law (EAL) shows that tax rules constantly reconfigure the structure of incentives and the marginal costs of firms, affecting the competitive dynamics of markets (Cooter & Ulen, 2016; Silveira, 2009).

In the Brazilian legal system, this link acquires direct normative rank. Article 146-A of the Federal Constitution of 1988 explicitly authorizes the legislator to establish special taxation criteria with the aim of preventing imbalances in competition, without prejudice to the State's competence to intervene in the economic domain (Article 170, item IV). This constitutional authorization transcends the mere revenue-raising function (fiscandi causa) and consolidates an ex ante corrective function.

In markets with high concentration and cost parity, the ex post sanctions of the competition authority are usually insufficient to dismantle tacit collusion or conscious parallelism. Against this backdrop, the tax rule becomes a complementary instrument of antitrust enforcement. Under the EAL framework, taxation for competition purposes does not seek to distort the market but to neutralize existing structural inefficiencies, harmonizing tax neutrality with free initiative and ensuring that tax design does not act as an unintended catalyst for collusive agreements (Silveira, 2009).

2. The Fuel Market and CADE's Assessment

The sector of distribution and retail sale of liquid fuels constitutes a privileged setting for observing the failures of tax design with respect to competitive dynamics. Owing to its structural characteristics (high concentration in refining and distribution, a practically homogeneous product and marked price transparency at service stations), this market exhibits a natural propensity toward tacit collusion or conscious parallelism without the need for an explicit agreement among competitors (Morganti, 2020).

In Brazil, the Administrative Council for Economic Defense (CADE) and the National Agency of Petroleum, Natural Gas and Biofuels (ANP) have repeatedly found that cost parity and the visibility of retail prices facilitate the spontaneous stabilization of collusive equilibria (CADE, 2018; ANP, 2020). In this environment, tax increases or modifications are usually passed on to the final consumer almost instantaneously, nullifying the agents' incentive to compete aggressively through prices.

The central finding of CADE's reports is that many of the distortions observed did not stem from traditional clandestine cartels but from the very regulatory and tax framework applied to the sector (CADE, 2018). The tax regime historically acted as a factor of rigidity that homogenized the structure of marginal costs among distributors and resellers, eliminating the natural asymmetries that would have driven price rivalry in the market. Given this limitation, institutional coordination between CADE and the ANP through the constant exchange of daily data showed that traditional coercive enforcement is insufficient if the tax architecture continues to encourage parallel behavior in the sector.

3. From the Tax Substitution Model to the Ad Rem Regime

The evolution of fuel taxation in Brazil offers a clear example of how the design of a tax can generate unintended

competitive inefficiencies. Historically, collection of the Tax on the Circulation of Goods and Services (ICMS) operated under the tax substitution regime. This scheme used the state's setting of a Maximum Consumer Price (PMPF) as an anticipated tax base, seeking to facilitate fiscal control and reduce evasion in the distribution chain.

However, from the perspective of game theory, the PMPF functioned in practice as a "public focal point of coordination" in Schelling's sense (1960). By sending a clear and public signal to the market regarding the reference price, the tax rule eliminated uncertainty among economic agents, allowing them to align their profit margins implicitly and discouraging price competition at service stations. Likewise, the operational complexity of the system and the high transaction costs of requesting refunds of tax balances further discouraged any aggressive commercial strategy on the part of the most efficient distributors.

In response to these distortions, Complementary Law No. 192/2022 introduced a substantial change by establishing single-stage taxation in the ad rem format, setting a specific and uniform tax rate per physical unit of volume (liter). Although this regime succeeded in eliminating the explicit price signaling of the PMPF and simplified tax administration, optimal taxation theory shows that the ad rem model engenders its own inefficiencies (Atkinson & Stiglitz, 1980).

By imposing an identical tax burden regardless of the final sale price, the ad rem tax proportionally penalizes the most efficient service stations and distributors that attempt to compete by offering low prices to the final consumer. By eroding the relative margin of lower-cost firms, fixed taxation per volume may end up attenuating price rivalry in the market, which indicates that the mere replacement of one tax regime by another does not guarantee per se full competitive efficiency.

4. Principles of Optimal Taxation and Substantive Limits

The construction of a tax system oriented toward free competition cannot be pursued without restraint or outside the fundamental guarantees of taxation. Optimal taxation theory and the Second Best doctrine show that, given the practical impossibility of implementing pure lump-sum taxes that do not alter the conduct of agents, any fiscal intervention will generate distortions in the economy (Musgrave & Musgrave, 1989; Smith, 1776). Therefore, extrafiscal design must carefully calibrate its impact in order to mitigate market failures without introducing even greater allocative inefficiencies.

In this scenario, the use of taxation as a pro-competitive policy finds insurmountable limits in constitutional tax principles, chiefly equality, ability to pay and the prohibition of confiscation. From the standpoint of the Economic Analysis of Law, tax equality does not require identical treatment of dissimilar situations but a legitimate differentiation based on objective criteria (Silveira, 2009). However, if the tax rule imposes arbitrary tax asymmetries in order to dismantle an alleged collusive equilibrium, there is a risk of violating the agents' ability to pay and of distorting tax justice.

Consequently, tax incentives or disincentives designed to stimulate price rivalry must be proportionate and directly linked to the neutralization of the market failure detected. Extrafiscal intervention founded on Article 146-A of the Brazilian Constitution must operate as a modulator of the strategic asymmetries of the market, but always respecting distributive equity and the essential content of individual economic freedoms (Silveira, 2009). Ultimately, a pro-competitive tax policy will only be sustainable if it manages to harmonize microeconomic efficiency with legal certainty and substantive tax justice.

Conclusions

The conclusions reached throughout this study show that tax policy cannot continue to be analyzed from a purely revenue-raising perspective, disconnected from competition defense. In strongly concentrated markets with homogeneous products, tax design acts as a determining element in the cost and incentive structure of firms, with the capacity to distort commercial rivalry or, conversely, to dismantle tendencies toward conscious parallelism and tacit collusion.

The empirical experience of the Brazilian fuel market illustrates the complexity of this phenomenon. On the one hand, traditional tax substitution generated unwanted price rigidity by establishing a reference price that functioned as a focal point for explicit and implicit coordination. On the other hand, the transition to the single-stage ad rem scheme introduced by Complementary Law No. 192/2022 showed that the mere setting of tax amounts per physical volume does not guarantee full market efficiency either, since it proportionally penalizes lower-margin business units that seek to compete through aggressive price reductions.

From the perspective of the Economic Analysis of Law and optimal taxation theory (Second Best), the formulation of extrafiscal taxes with a competition orientation must maintain a delicate balance. Although the constitutional authorization of Article 146-A permits the use of differentiated tax mechanisms to correct market inefficiencies, this power is delimited by fundamental tax guarantees, such as equality, ability to pay and non-confiscation.

In short, preventive state intervention (ex ante) through fiscal tools constitutes a valuable complement to competition authorities when traditional sanctioning control (ex post) proves insufficient. Nevertheless, its success depends on a rigorous technical design that assesses in advance the cost asymmetries and the strategic responses of the sector, ensuring that the tax remedy effectively promotes consumer welfare without compromising the principles of tax justice and neutrality.

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Blank Criminal Law and Open Offenses in the Economic Analysis of Law: Challenges to the Principle of Legality in Ecuador and Peru

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Abstract

This article examines the structure of blank criminal laws and open offenses in the legal systems of Ecuador and Peru, analyzing their compatibility with the principle of legality, particularly with regard to its requirement of specificity (lex certa). Through a review of legal doctrine and case law, this article identifies the constitutional limits of these criminal classification techniques, considering the risks involved in delegating the determination of punishable conduct to administrative provisions or judicial interpretation. It also addresses the distinction between true and false "blank" criminal laws, the criteria for the admissibility of open-ended offenses, and the main classification structures for criminal offenses. From the perspective of the Economic Analysis of Law, the balance between regulatory flexibility and legal certainty is evaluated, considering that, while these techniques reduce the costs of legislative updates and allow for a response to dynamic regulatory environments, their excessive use increases information costs, generates uncertainty for economic agents, and may discourage investment. It is concluded that the efficiency of economic criminal law requires preserving the essential core of the prohibition in formal law, thereby ensuring regulatory predictability, legal certainty, and unrestricted respect for the principle of legality.

Keywords: Blank criminal laws, open-ended criminal offenses, the principle of legality in criminal law, economic criminal law, economic analysis of law.

Introduction

In modern criminal law, the principle of legality, in its requirement of lex certa, acts as the fundamental shield of the citizen against the punitive power of the State (ius puniendi). However, the turmoil of contemporary markets and the speed of technological change impose a severe challenge on the legislator: the impossibility of drafting absolutely exhaustive criminal offenses for complex matters such as the environment, taxes, or the financial sector. Faced with this limitation, the system resorts to blank criminal laws and open offenses, tools that grant the flexibility necessary to protect the socioeconomic order but that open an inevitable gap in legal certainty by transferring the concretion of prohibited conduct to administrative regulations or to the judge's interpretation.

This work addresses the tension between the constitutional requirement of specificity and the functional need to employ permeable criminal offenses in Ecuador and Peru. The research is justified by a twofold urgency. From a doctrinal perspective, it seeks to draw clear limits on the technique of referral so as to prevent the administration from configuring crimes through regulatory means. From the perspective of the Economic Analysis of Law (EAL), it evaluates the efficiency of these norms: although they reduce legislative transaction costs by avoiding the need to update the Criminal Code with every technical change, their indeterminacy generates negative externalities and uncertainty, discouraging investment and economic activity.

By situating the analysis within the regulatory and jurisprudential frameworks of Ecuador and Peru, the objective of this article is to examine how blank criminal laws and open offenses operate in both countries, determining

their constitutional viability in light of the criteria of efficiency and legal certainty of the EAL. To this end, the study unfolds in four stages: the doctrine of blank criminal law, the scope of judicial discretion in open offenses, the structural taxonomy of offenses, and the economic balance between legislative flexibility and market predictability.

1. Blank Criminal Law and Its Constitutional Tensions

The structure of blank criminal law, introduced into legal doctrine by Karl Binding, is characterized by clearly contemplating the legal consequence (the penalty), while the description of the factual premise remains totally or partially indeterminate, referring to other normative provisions for its subsequent integration (Binding, 2009; Hurtado Pozo, 2011). This technique responds to the imperative need to endow the punitive system with dynamism; however, it generates a profound tension with the principle of legality (nullum crimen sine lege) in its dimension of lex certa or specificity, especially when the normative referral is directed to administrative norms of a rank lower than that of parliamentary law (Bacigalupo, 1999; Jescheck & Weigend, 2014).

To resolve this conflict of hierarchy, criminal law doctrine and case law distinguish between false blank criminal laws (when the referral is made to a norm of equal or superior formal rank) and true blank criminal laws (when the integration depends on decrees or regulations issued by the Executive Branch) (García Cavero, 2019; Polaino Navarrete, 2015). With respect to the latter, Peruvian case law established precise limits in Cassation No. 1126-2017-Arequipa, holding that the constitutionality of a true referral requires three insurmountable requirements: a) that the referral be indispensable due to the technical complexity of the matter; b) that the referral be explicit and clear; and c) that the essential core of the prohibition remain strictly reserved to formal law (Supreme Court of the Republic of Peru, 2017).

In the Ecuadorian legal system, the Constitutional Court has maintained a consistent position in interpreting Articles 76.3 and 132 of the Constitution of the Republic of Ecuador (2008), emphasizing that regulatory power may under no circumstances reconfigure the constituent elements of a criminal offense. As specialized doctrine points out, although the public sector requires regulatory margin in areas such as taxation or the environment, delegating the definition of the core conduct to administrative bodies deprives the democratic guarantee of the reservation of law of its content (Reyna Alfaro, 2000; García Cavero, 2019).

2. Open Offenses and Judicial Concretion

Unlike blank criminal law, open offenses do not explicitly refer to a complementary extra-criminal norm, but rather contain evaluative concepts or indeterminate normative elements that oblige the adjudicator to concretize the factual premise in the specific case (Bacigalupo, 1999; Jescheck & Weigend, 2014). The paradigmatic example is found in negligent or reckless offenses, where the prohibited conduct requires specifying the breach of an "objective duty of care" adjusted to the lex artis or to the practice of each economic sector (García Cavero, 2019; Hurtado Pozo, 2011).

From a constitutional perspective, open offenses are admissible provided that the indeterminacy of the term is filled by technical, social, or experiential criteria that are foreseeable for the citizen (Polaino Navarrete, 2015). Nevertheless, the insurmountable limit of this integrative task lies in the prohibition of analogy in malam partem and in respect for the principle of specificity; the judge's task must be limited to the exegesis and precision of the offense, without incurring the ex novo creation of criminal offenses or a judicial activism that violates the separation of powers (Bacigalupo, 1999; Feuerbach, 2007).

In the legal systems of Peru and Ecuador, this technique poses a constant challenge in the field of economic

criminal law. While the Supreme Court of Peru has insisted that judicial concretion must rely on pre-existing normative standards in order to safeguard certainty (Supreme Court of the Republic of Peru, 2017), Ecuadorian doctrine agrees that excessive vagueness in the drafting of evaluative concepts improperly transfers the legislative function to the judicial forum, eroding the legal certainty that market participants require for the development of their activities (Reyna Alfaro, 2000; García Cavero, 2019).

3. Structural Classification of Criminal Offenses

To understand the impact of blank laws and open offenses on the criminal legal system, it is indispensable to turn to the taxonomy that criminal law doctrine has built around offense structures (García Cavero, 2019; Polaino Navarrete, 2015). This classification is not a merely formal exercise, but determines the level of technical precision required of the norm and the degree of foreseeability granted to the citizen in the face of the threat of punishment (Jescheck & Weigend, 2014).

Depending on the technical configuration of the prohibited behavior, criminal law doctrine distinguishes the following key structures:

Depending on autonomy with respect to the basic offense: Special or autonomous offenses incorporate additional normative elements that configure an independent criminal conduct with its own punitive framework; by contrast, derived or subordinate offenses are limited to providing for specific mitigating or aggravating circumstances that modify the punishability of the underlying offense (Hurtado Pozo, 2011; Polaino Navarrete, 2015).

Depending on the consummation of the conduct: Offenses of mere conduct or simple activity exhaust the wrongfulness of the infringement in the very performance of the prohibited action (as in the omission of formal tax duties), whereas result-based offenses require the verification of a material effect of harm or endangerment to the legal interest, demanding a relationship of causality and objective imputation (García Cavero, 2019; Jescheck & Weigend, 2014).

Depending on the degree of legislative precision: The closed offense represents the ideal of the principle of specificity, since it describes in detail all the elements of the punishable conduct, leaving no room for regulatory integration or judicial discretion (Bacigalupo, 1999). By contrast, open offenses and blank criminal laws constitute porous techniques of criminalization where the normative premise is intentionally incomplete (Binding, 2009; Hurtado Pozo, 2011).

In the field of economic criminal law in Ecuador and Peru, the choice between one structure and another is not neutral. While closed offenses guarantee maximum legal certainty, the dynamics of financial and environmental crimes usually oblige the legislator to resort to offenses of mere conduct or to permeable structures (Reyna Alfaro, 2000; García Cavero, 2019). The challenge of the criminal system lies in preventing the adoption of subordinate offenses or open formulations from displacing the closed offense as the general rule, avoiding the blurring of the constitutional boundaries of the principle of legality (Bacigalupo, 1999; Supreme Court of the Republic of Peru, 2017).

4. Efficiency and Certainty: A Perspective from the Economic Analysis of Law

From the standpoint of the Economic Analysis of Law (EAL), blank criminal laws and open offenses are analyzed under the metric of the balance between institutional efficiency and regulatory transaction costs (Reyna Alfaro, 2000; García Cavero, 2019). In dynamic and hyper-regulated markets, obliging the Legislature to amend

the Criminal Code with every technological, environmental, or financial innovation would generate legislative transaction costs that are prohibitive for the State (García Cavero, 2019). Under this premise, referral to flexible administrative norms significantly reduces the cost of updating the normative system and allows an agile punitive response to new harmful modalities (Reyna Alfaro, 2000; Hurtado Pozo, 2011).

However, this search for operational flexibility generates severe negative externalities when the principle of specificity is sacrificed (Bacigalupo, 1999). The lack of normative precision raises the uncertainty of economic agents by increasing information costs: companies must allocate extraordinary resources to advisory services or compliance schemes in order to decipher whether their activities border on the punishable (García Cavero, 2019). Moreover, the unpredictability of the permeable offense discourages investment and innovation out of fear of incurring involuntary criminal sanctions or mistakes of prohibition arising from changing administrative regulations (Reyna Alfaro, 2000; Bacigalupo, 1999).

In the contexts of Ecuador and Peru, the EAL allows the conclusion that criminal efficiency is not equivalent to mere regulatory agility. A criminal norm is socially and economically efficient only if it minimizes both the costs of legislative production and the costs of legal uncertainty (García Cavero, 2019). For this reason, preserving certainty through an essential core reserved to formal law is indispensable: an unpredictable norm destroys confidence in the market and nullifies the preventive deterrent effect that justifies the criminal sanction itself (Jescheck & Weigend, 2014; Polaino Navarrete, 2015).

Conclusions

The doctrine of modern economic criminal law has shown that blank criminal laws and open offenses have become indispensable legislative instruments for addressing the volatility of hyper-regulated sectors such as the financial, tax, and environmental fields. In the legal systems of Ecuador and Peru, these techniques grant the malleability necessary for the punitive system to adapt its scope of protection to new harmful dynamics without paralyzing the functioning of the State. Nevertheless, their unconditional use breaks the essence of the principle of legality in its dimension of lex certa, improperly transferring the power to criminalize to administrative decrees or discretionary judicial exegesis.

The insurmountable constitutional limit in the face of the technique of referral and the indeterminacy of offenses lies in unrestricted respect for the essential core of the prohibition, which must remain reserved to formal parliamentary law. As constitutional and ordinary case law in both countries has reaffirmed, complementation by a norm of lower rank is legitimate only when the complexity of the matter makes it indispensable and the referral is explicit. Delegating the constituent elements of the criminal offense to regulatory provisions deprives the guarantee of the reservation of law of its content and damages the structure of the democratic State governed by the rule of law.

From the perspective of the Economic Analysis of Law, normative efficiency must not be reduced to the mere saving of legislative transaction costs achieved by not constantly reforming the Criminal Code. The sacrifice of the principle of specificity generates burdensome negative externalities that raise the information costs of market participants, plunging companies into legal uncertainty and discouraging investment out of fear of mistake of prohibition or unpredictable criminalization. Consequently, a criminal legal system in Ecuador and Peru will be socially and economically efficient only if it safeguards the certainty of integrative norms, guaranteeing a predictable market environment and preserving the deterrent function of the punitive system.

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Fair Retribution in Military Criminal Justice: A Normative Vacuum in Colombia?

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OECD classification: 5.5 Law.

Abstract

This article analyzes the theoretical and practical effects resulting from the explicit omission of just retribution as a function of punishment in the Oral Adversarial Criminal System (SPOA) of the Colombian military criminal justice system, as regulated by Law 1407 of 2010. Through a rigorous dogmatic and conceptual analysis, the study examines how the absence of this principle, which serves as a safeguard, seriously compromises the proportionality of military sanctions and undermines the legitimacy of the state's right to punish (ius puniendi). It is demonstrated that, by making the imposition of punishment dependent exclusively on preventive and intimidating criteria, there is a risk of instrumentalizing service members and dehumanizing military criminal law. Furthermore, the study evaluates the implications of this regulatory gap on institutional trust and legal certainty among members of the security forces. Finally, the study proposes sustainable and effective punitive alternatives, such as the incorporation of fines, weekend detention, and restorative justice mechanisms, aimed at restoring the balance between maintaining discipline and unrestricted respect for fundamental rights, thereby promoting a necessary humanization of the military criminal framework within the social rule of law.

Keywords: Criminal law, military justice, proportionality of punishment, due process, fundamental rights.

Introduction

Military criminal justice in Colombia took a decisive step toward rights-based modernization with Law 1407 of 2010, by incorporating the Oral Adversarial Criminal System (SPOA) into the military jurisdiction. However, this transformation left a dogmatic shadow in its wake: the explicit omission of fair retribution as a function of punishment.

Whereas ordinary criminal law conceives fair retribution as a containment barrier that prevents the imposition of disproportionate penalties, military legislation left this principle in limbo, tilting the scales almost exclusively toward preventive and intimidating criteria. This asymmetry raises a central question: what are the theoretical and practical consequences of this omission for the proportionality of sanctions, the dignity of service members, and the legitimacy of the state's ius puniendi itself?

Addressing this gap is urgent. The specialized nature of the military forum, centered on preserving discipline and service, cannot become a blank check for instrumentalizing offenders for merely deterrent purposes. When punishment loses its anchoring in fair proportionality, the legal certainty of members of the security forces is eroded and the humanistic meaning of the sanction is blurred.

Against this backdrop, this article analyzes the theoretical and practical impact of this regulatory omission in the military SPOA. To that end, the text traverses four key axes: first, the evolution and nature of the military forum; second, the doctrinal debate between theories of punishment and optimal punishment; third, the perverse effects of instrumentalizing service members; and fourth, the proposal of efficient and restorative punitive alternatives to humanize the military criminal framework.

1. Evolution of the Military Forum and the Specificity of Military Criminal Law

Military criminal jurisdiction in Colombia does not arise as a caste privilege but as an institutional response to the need to adjudicate conduct that directly affects legally protected interests of special protection: discipline, honor, and the effectiveness of service (Law 1407 of 2010). The constitutional architecture of this special forum has undergone a progressive rights-based delimitation. From nineteenth-century antecedents to contemporary constitutional reforms (reflected in Legislative Acts 1995 and 2015), jurisprudence and criminal doctrine have required the concurrence of two substantial elements to activate military competence: a subjective element, referring to the status of active member of the security forces, and a functional element, strict and rigorous, consisting in the punishable act bearing a direct relationship to service (Arias, 2012).

However, the functional specialty of the forum does not imply a severance from the general framework of guarantees. The specificity of military criminal law does not constitute an exceptional regime outside the Constitution; on the contrary, it is called upon to align harmoniously with the principles of the social rule of law, due process, and international humanitarian law (Triana & Amado, 2017). It is at this dogmatic frontier that the omission of fair retribution compromises the balance of the system. Demanding rigor in military discipline is legitimate, but detaching such rigor from a framework of strict proportionality blurs the function of the sanction, risking the subordination of individual guarantees to institutional imperatives of control (Arias, 2012).

2. The Theoretical Debate: Absolute and Relative Theories and Optimal Punishment

The philosophical and dogmatic foundation of punishment has historically oscillated between absolute theories, relative theories, and unifying formulations. Absolute theories, essentially retributive in orientation, find their principal exponents in Kant and Hegel. From this perspective, punishment does not pursue an external social utility but constitutes an imperative demand of justice: punishment is imposed because a crime has been committed (punitur quia peccatum est). For Kant, conceiving the sanction as a mere instrument of collective deterrence entails degrading the dignity of the individual, turning him into an object in the service of state ends. Fair retribution thus operates as an insurmountable guarantee-based limit that demands strict equivalence and proportionality between the gravity of the wrong and the quantum of the sanction.

By contrast, relative or utilitarian theories justify punishment by its capacity to prevent future crimes (punitur ne peccetur). These bifurcate into general prevention, which seeks to intimidate society (negative) or reaffirm confidence in the norm (positive), and special prevention, oriented toward the resocialization or incapacitation of the offender. Nevertheless, when a criminal system dispenses with fair retribution as a conceptual barrier and adopts a predominantly intimidating stance, the sanctioning model enters into crisis. As Durán (2016) warns, general prevention devoid of retributive anchoring risks degenerating into penal terror, legitimizing draconian penalties in the name of deterrent efficacy.

This dogmatic tension acquires a particular dimension when analyzed from the perspective of Law and Economics (L&E). Authors such as Cooter and Gilbert (2025) note that achieving an "optimal punishment" requires weighing the severity of the sanction against the probability of its effective imposition and enforcement. In the military criminal sphere, the omission of fair retribution breaks the efficiency equation: lacking a strict proportionality limit, the legislature and the adjudicator tend to compensate for eventual failures in detection or adjudication by disproportionately increasing the severity of punishment. This distorts the balance of the system,

since punitive efficiency is not achieved through punitive excess but through the certainty of a just, adequate, and proportionate sanction.

3. Impact of the Omission: Dehumanization and Instrumentalization of Service Members

The explicit exclusion of fair retribution in Law 1407 of 2010 does not represent a mere lapse in legislative technique but a dogmatic vacuum that unleashes perverse effects on the legal and human condition of service members. By reducing the punitive function in the military environment to a predominantly preventive and intimidating scheme, the sanction loses its ethical and proportional anchoring, projecting three critical consequences in the administration of military criminal justice:

Instrumentalization of the individual: By subordinating punishment to negative general prevention, the offending service member is no longer judged according to the intrinsic gravity of his conduct and comes to be used as a mere exemplary means to deter the troops. This dynamic violates the Kantian principle of human dignity, reducing the subject of rights to an object of institutional coercion.

Dehumanization of military criminal law: Dispensing with fair retribution as a guarantee-based limit opens the door to the imposition of severe and disproportionate sanctions. When punishment disregards the strict correlation between the harm caused and culpability, military criminal justice risks becoming akin to a tool of blind disciplinary control or institutional revenge, moving away from the guarantees of the social rule of law.

Stigmatization and breakdown of reintegration: Penalties set under merely exemplary criteria usually translate into excessive periods of deprivation of liberty that fracture the institutional and family ties of the sanctioned individual. This perpetuates processes of secondary marginalization, hindering any real possibility of rehabilitation or reintegration into civil or military life.

In short, the absence of this principle-guarantee degrades the function of punishment, undermining the legal certainty of members of the security forces and weakening the very legitimacy of the state's ius puniendi.

4. Punitive Alternatives and the Efficiency of the Military System

Claiming fair retribution in military criminal justice is not equivalent to defending a hegemony of imprisonment or demanding greater severity in punishment. On the contrary, fair retribution acts as a framework of proportionality that allows the catalogue of sanctions to be diversified in order to respond adequately to the gravity of the conduct, while at the same time optimizing the State's resources. From the perspective of Law and Economics (L&E), the efficiency of a criminal system is not measured by the number of persons incarcerated but by its capacity to discourage crime at the lowest possible social and institutional cost.

In this context, the incorporation of a range of alternative penalties, such as pecuniary sanctions (fines graduated according to rank and economic capacity), weekend or operational recess detention, and the provision of services to the institutional community, represents a technically viable and retributively just solution. These measures prevent overcrowding and saturation of the military penitentiary system, reducing the operating costs of the judicial apparatus without diminishing the efficacy of the punitive function or weakening military discipline.

Likewise, the integration of restorative justice mechanisms adapted to the military sphere constitutes a promising path to restore the damaged institutional fabric. Allowing the effective reparation of harm to the legally protected interests or the affected parties not only dignifies the criminal sanction but also restores proportionality and humanitarian legitimacy to the decisions of military courts. Ultimately, a diverse and proportional punitive

catalogue does not diminish the rigor demanded by armed service; on the contrary, it balances the need to maintain institutional order with unrestricted respect for fundamental guarantees.

Conclusions

Fair retribution is not an obsolete figure oriented toward purely expiatory punishment but constitutes an indispensable and insurmountable guarantee-based limit in the social rule of law. Its explicit absence in the regulation of the Oral Adversarial Criminal System (SPOA) of military criminal justice in Colombia (Law 1407 of 2010) generates a dogmatic vacuum that exposes service members to the imposition of arbitrary, disproportionate penalties disconnected from the real gravity of the harm caused. By dispensing with this containment barrier, the administration of justice in the military jurisdiction faces the constant risk of tilting the punitive scales toward deterrent excesses under the pretext of institutional discipline.

This legislative omission structurally weakens institutional trust and erodes the legitimacy of the state's ius puniendi. When adjudicators and members of the security forces perceive that punishment is applied for a merely utilitarian purpose or as an instrument of coercion and collective exemplification, the individual is instrumentalized and stripped of his intrinsic value as a subject of rights. A criminal system that bases the efficacy of its control on excessive rigor loses its humanistic meaning and compromises the legal certainty of those charged with the defense of the Nation.

From the perspective of Law and Economics (L&E), punitive efficiency is not equivalent to the unbroken increase of deprivation of liberty but to the achievement of an "optimal punishment" through the certainty of a proportionate sanction. For this reason, it is indispensable to explicitly reincorporate the principle-guarantee of fair retribution and to incorporate a diversified catalogue of alternative penalties, such as fines, weekend detention, and restorative justice schemes. These measures relieve the prison system, optimize state resources, and restore the balance between the demand for rigorous military discipline and unrestricted respect for fundamental rights.

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The Economic Function of Trademark Law: Transparency and Efficiency in the Global Market

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Abstract

This article analyzes Trademark Law from the perspective of the Economic Analysis of Law. It examines how trademarks serve as transparency mechanisms in globalized markets, mitigating market failures such as information asymmetry and moral hazard. Through a review of their essential and derived functions, the paper concludes that the trademark system reduces consumer search costs and provides dynamic incentives for firms to invest in product quality and innovation.

Keywords: Trademark Law, Economic Analysis of Law, Information Asymmetry, Economic Efficiency, Competition.

Introduction

In a globalized market characterized by constant innovation, making efficient decisions is no easy task. Consumers are daily confronted with a broad supply of goods and services whose quality attributes they cannot always verify before purchase. This information asymmetry not only breeds distrust and sharply raises search costs for buyers, but also penalizes firms that invest in offering products of superior quality, exposing them to the risk of being displaced by unfair competitors.

Faced with this problem, Trademark Law transcends the simple protection of a formal registration: it becomes an indispensable institutional mechanism for restoring certainty and transparency to commercial dealings. Analyzing this regulatory framework in the light of the Economic Analysis of Law (EAL) is essential, since it allows us to understand how industrial property laws shape the real incentives of economic agents and promote optimal regulation that protects commercial value without stifling innovation (Méndez Reátegui et al., 2027).

Under this premise, this article examines the economic function of distinctive signs as an engine of market efficiency. To this end, it addresses the legal nature of the exclusive right and its main commercial functions, as well as its role as a solution to market failures, demonstrating how trademark protection encourages sustained investment in quality and strengthens fair competition.

1. The Legal Nature and Ownership of Distinctive Signs

Unlike other disciplines of intellectual property focused on inventive or artistic creation, Trademark Law centers its raison d'être on the distinctive capacity of the sign. A trademark constitutes an intangible asset that, although lacking corporeal existence, acquires tangible entity when embodied in commercial dealings to identify products or services in the market. From a strictly normative standpoint, the attribution of ownership grants an exclusive right articulated around the ius prohibendi, which empowers its holder to prevent third parties from using identical or confusingly similar signs that undermine its commercial position.

From an economic perspective, this legal protection transcends mere registration protection and becomes a decisive tool for delineating property rights and reducing uncertainty in exchanges, minimizing the transaction costs that arise when negotiating or defending assets in the market (Coase, 1960). Legal systems ground the

origin of this prerogative in the principle of priority in use or through the attributive registration system, the latter prevailing in most international legislation because it provides greater legal certainty.

Likewise, the scope of this ordinary protection is strictly bounded by the principle of specialty, which limits exclusivity to the specific class or category of goods and services for which it was applied. However, the economic and legal system itself recognizes indispensable exceptions: well-known and renowned trademarks. In these cases, the commercial reputation and the accumulated value of the sign justify enhanced protection that transcends traditional registration boundaries in order to prevent the undue exploitation of another's efforts.

2. Trademark Functions and Their Impact on Commercial Dealings

Doctrine and international case law have moved beyond the traditional conception of the trademark as a simple mark of identification, recognizing a broad spectrum of functions that strengthen market dynamics. The matrix or primary function is the distinctive function, whose purpose is to individualize the products or services of an economic agent vis-à-vis those of its competitors, enabling the firm to build, consolidate and maintain its own clientele in commercial dealings.

From this central pillar, three functions with a profound impact on commercial efficiency derive:

Function of indication of origin: It informs the consumer about the business origin of the good, guaranteeing that all products marketed under the same sign come from the same origin or quality control, which minimizes the risk of direct or indirect confusion in the purchase decision.

Advertising function: It transforms the sign into a key informative and persuasive channel for marketing strategies. The legal system protects this attractive value, including advertising phrases or slogans, in order to protect the commercial evocative power created by the holder.

Investment and intangible asset protection function: It facilitates for corporations the acquisition, defense and monetization of their reputation over time. This economic dimension is crucial, since the trademark acts as the container of the organization's intellectual capital and accumulated knowledge, protecting the firm's sustained investments against unfair conduct by third parties (Nonaka & Takeuchi, 1995).

In this way, the effective performance of these functions transcends the individual interest of the holder, invigorating fair competition and protecting consumer expectations in commercial dealings.

3. Economic Analysis of Trademark Law and Market Failures

From the perspective of the Economic Analysis of Law (EAL), the efficient functioning of free markets presupposes scenarios of perfect competition that, in transactional reality, are distorted by the presence of market failures. Among these distortions, information asymmetry constitutes the main obstacle to rational decision-making by economic agents. In contemporary commercial dealings, consumers are daily confronted with experience goods whose quality can only be judged after consumption, and with credence goods, whose quality can hardly be evaluated directly. This lack of complete information generates uncertainty and fosters scenarios of moral hazard and adverse selection, in which suppliers of low-quality products may displace firms that invest in higher standards.

Faced with this structural failure, information stands as a scarce and extremely valuable resource whose acquisition process generates significant costs for economic agents (Arrow, 1963). If consumers were forced to inspect in detail the technical characteristics and inputs of each product before purchase, transaction costs would

rise to levels that would paralyze commercial dealings. It is here that the trademark acts as an efficient signaling mechanism and as an information condenser. By consolidating in a stable symbol the reputation and quality expectations of a good or service, the distinctive sign functions as a "cognitive shortcut" that drastically reduces search costs for buyers in the market (Stigler, 1961).

The legal protection of the trademark not only generates static benefits by lowering the search for information for consumers, but also projects dynamic incentives indispensable for competitiveness. By guaranteeing through the exclusive right that third parties will not unduly appropriate the commercial prestige built up, the legal order ensures that the firm can internalize the economic returns derived from its investment. In this way, trademark protection encourages continuous quality improvement, makes transparency viable and promotes the sustainability of business models, from large corporations to SMEs, in the globalized market.

Conclusions

The protection of Trademark Law transcends the mere protection of an intangible industrial property asset; it is consolidated as a central legal institution for guaranteeing certainty, transparency and efficiency in the contemporary market. By endowing the holder with an exclusive right of use backed by the ius prohibendi and bounded by the principles of priority and specialty, the legal system establishes clear property limits that minimize transaction costs and prevent the undue exploitation of another's reputation in commercial dealings.

From the perspective of the Economic Analysis of Law, the trademark acts as an optimal remedy against the information asymmetry and moral hazard inherent in the marketing of experience and credence goods. By synthesizing in a stable symbol the quality attributes of a product or service, distinctive signs operate as cognitive shortcuts that drastically reduce search costs for consumers, facilitating informed decision-making and improving the allocation of resources in the economy.

Finally, the trademark system generates dynamic incentives indispensable for business development and fair competition. By ensuring that firms, from global corporations to small and medium-sized enterprises, can internalize the returns on their investments in reputation and intellectual capital, the legal order promotes continuous innovation, stimulates long-term quality investment and preserves an equitable competitive environment based on commercial good faith.

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