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Perceptions of Stakeholders on Health and Management Risks for the Recovery of Household Solid Waste in Adiopodoumé (Abidjan)

By Kouassi Nalysa Rachel, Adiko Adiko Francis & Tra Fulbert

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Keywords: *solid waste, recovery, health and environmental challenges.*

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Perceptions of Stakeholders on Health and Management Risks for the Recovery of Household Solid Waste in Adiopodoumé (Abidjan)

Kouassi Nalysa Rachel [α], Adiko Adiko Francis [σ] & Tra Fulbert [ρ]

Abstract- The Services Platform of Yopougon (PFS-Yop) has set up an organic waste recovery center in Adiopodoumé for training, the promotion of sustainable peri-urban agriculture and the development of entrepreneurship in the District of Abidjan. However, this recovery initiative is marred by structural-organizational problems which explain the demotivation and reluctance of the stakeholders in households solid waste management. The general objective of this study is to determine the factors limiting the control of households solid waste recovery in Adiopodoumé. The qualitative approach included ten semi-structured interviews with five workers from Groupe Bio, the technical manager of the town hall, four representatives of the village community, and eleven focus groups of seventy-eight household members. The survey results revealed that the success of the organic waste recovery system involves adapting actions and results to socio-economic, health, and environmental challenges, but above all, strengthening awareness and involvement of stakeholders nationals. In this sense, the lack of communication, the lack of shelter, and the dysfunction in the remuneration of actors are perceived as demotivating factors in the managing the recovery of household solid waste in Adiopodoumé.

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I. Introduction

Waste management remains a significant concern for most countries around the world. Furthermore, the quality of life and the sustainable socio-economic development of populations in urban and peri-urban areas are understood by greenhouse gas emissions, the eutrophication of environments due to untreated solid and, or liquid discharges, the lost soil fertility, groundwater pollution (Lakiotia *et al.,* 2017; World Bank, 2010, p. 33). It represents one of the most complex environmental problems to solve because of its transversal and multifactorial nature. Indeed, the difficulties in implementing climate change mitigation measures stem from the poor management of most waste produced in low-income countries (Kaza *et al.,* 2018; McAllister, 2015). In these countries, the increase in this waste is due mainly to galloping urbanization, accelerated population growth, and new consumption patterns in urban areas. In India, for example, the mode of transport and time of dumping of abused waste, coupled with the issues of the rapid urbanization process and its environmental degradation impacts, constitute the most pressing issue which is causing the health hazards in outlying areas of cities (Narain *et al.,* 2014, pp. 11, 18). The anarchic management of household waste has a significant environmental impact. In the informal neighborhoods of African cities, the poor management of sanitation systems is considered a factor in the deterioration of the health status of communities. Malaria and diarrheal diseases, whose prevalence (47.1% and 19.2%, respectfully) increase during the rainy seasons are among the most worrying non-communicable diseases in these poor areas in Abidjan (Dongo *et al.,* 2010, p. 34; Naibbi & Umar, 2017, pp. 31-32). Thus, the degradation and insalubrity linked to the poor management of household waste are the cause of approximately 2.2 million deaths per year in the African region. This number compared to the global burden of disease (12.6 million deaths) represents a mortality rate of 17.46% in 2012 (OMS, 2016).

In Africa, the management of household solid waste has become an essential concern in urban areas, given that they concentrate on different categories of populations and economic activities. The daily production of household waste from about 2500 tons in 2002 increased to 3500 tons in 2010 (Nallari *et al.*, 2012). However, management is limited to landfilling, and therefore, household waste is not subject to any treatment or control process. Thus, this method of waste management strongly contributes to the degradation of the environment due to the proliferation of illegal dumping. These sources of nuisance expose local residents to health and environmental risks. Indeed, mosquitoes, flies, mice and bacteria are factors in the spread of diseases. These are malaria, typhoid fever, cholera, yellow fever, pulmonary infections and acute

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respiratory illness (World Bank, 2010; Athanase, 2016, p. 60).

This is the case in the city of Abidjan, where most of the population in households is exposed to the effects of pollutants (62.1%) and shows signs of intoxication (51.1%) as well as respiratory, cardiac, and cutaneous diseases such as cough (37.1%), asthenia (33.1%), pruritus (29.9%) and nausea (29.1%) (Dongo *et al.*, 2012). In addition, this situation leading to ecological risks justified the implementation of the project to close the Akouédo landfill on December 15, 2018, according to the Ministry in charge of sanitation. Indeed, this landfill opened in 1965 and has saturated in recent years. It made it possible to collect 3,000 tons of waste composed of 49% food per day (Soumaho *et al.*, 2021; Japan International Cooperation Agency, 2018).

The public authorities have made the management of urban solid waste one of the challenges to be met, in accordance with the vision of emergence in Côte d'Ivoire by 2020. In 2016, a budget of 30 billion FCFA was allocated for the collection and disposal of waste (RCI, 2011, 2015). In practice, the solid waste management process, through the involvement of both formal actors and private sectors, generates beneficial impacts on the monthly amount that households are willing to pay for the improvement of the collection, sorting and recycling service. Indeed, local informal or private operators (including NGOs) interact with the formal sector represented by government agencies at every stage of solid waste management (Suchada *et al.*, 2003, pp. 8-9; Oteng-Ababio, 2012, p. 417; Briand & Koné, 2020, pp. 16-18). But waste management remains a concern because the efforts are far from favoring the achievement of the expected results.

In the District of Abidjan, the Yopougon Services Platform (PFS-Yop) has made it possible to involve households in the waste recovery activity. With the support of an intermediary in the village, Group Bio, an Economic Interest Grouping (EIG) created to ensure the execution of the project, carried out sensitizations to explain the benefits of this project and how it was going to happen. Thus, he distributed garbage bags to collect only organic waste. Households, for their part, had the role of sorting their waste and putting in the bags, only organic waste such as banana skins, cassava, food scraps, etc.

However, this development project is encountering difficulties in its development in Abidjan and particularly in the Adiopodoumé village, located in the commune of Yopougon. Indeed in the field, we found that the structural-organizational problems enameled the management of household waste in the municipality. But on analysis, some facts and observations lead one to believe that these project difficulties are linked to the demotivation of the actors that are the Group Bio, the intermediary of the village and the households.

The general objective of this study is therefore to understand the factors that explain the demotivation of the actors in the solid waste recovery activity (households, Group Bio, and village intermediary). As specific objectives, it is a question of describing the strategies of management of the valorization of the organic waste, identifying the representations of the actors, and analyzing the stakes related to this activity in Adiopodoumé.

II. Theoretical Framework

The problem of waste management is a complex societal challenge in contemporary societies. It is a social object constructed by the social representations of individuals and communities. Among these populations, awareness of environmental responsibility could be a determining factor in ecological behavior (Kaiser *et al.*, 1999, p. 66). This ecological awareness reflects the level of commitment of the populations in their community space. Each actor therefore has a role to play in the effective management of waste, within its social structure (Suchada *et al.*, 2003). Thus, the theory of structural-functionalism chosen made it possible to explain the phenomenon better. According to this theory, the actions of individuals fulfill functions in the social structure (Parsons, 1937). The structural-functionalist view is drawn from the work of several classical and neoclassical sociologists in Europa (Weber, Pareto, Alfred Marshall, and Emile Durkheim) and translates a standard systematic theory of action based on a voluntarist or alternative principle.

For Parsons, individuals are social actors who seek to satisfy needs; to do this, they set themselves objectives and develop the most effective strategies to achieve these objectives. The author also notes that the satisfaction of these needs is achieved under material and, above all, symbolic constraints that individuals must consider.

Parsons suggests analyzing society, which he calls the social system, as a set of exchanges regulated by a cybernetic principle; through its means of communication. Because the system is a complex object composed of interdependent elements, which allows the integration of individuals. This social system must satisfy four needs in order to maintain itself and subsist. Those are:

- Adaptation, meaning that society must balance its resources to ensure its survival;
- The maintenance of relations with its environment to take what it needs. For this, the system must mobilize its resources to achieve its goals;
- The pursuit of objectives involving the coordination and integration of the different interests of all parts of the system;

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– The maintenance of models and standards and the management of tensions. This implies that the system must ensure the cohesion of its social structures and maintain the motivation and commitments of the actors.

The Yopougon Services Platform (PFS-Yop) is a system created in September 2011. Its objective is to promote the sustainable integration of young people through economic activity. The platform has set up an organic waste recovery center in Adiopodoumé for training, the promotion of sustainable peri-urban agriculture and the entrepreneurship development. The official launch of this project was made on February 27, 2015. The goal is to improve the management of 180,000 tons of waste in the municipality. The Yopougon Services Platform ensured the management and control of the recovery activity.

For the execution of the recovery project, the PFS-Yop has made available to Group Bio, a newly created Economic Interest Grouping (EIG), financial, material, and human resources. Group Bio has worked with PFS-Yop to help clean up the living environment of communities by collecting around 7.5 tons of waste per day and producing about 100 tons of compost to improve local market gardening.

This group was responsible for carrying out the organic waste recovery activity by involving members of the village community of Adiopodoumé in a particular task. In this context, the village intermediary played the role of guide for Group Bio, which he supported during the sensitization of households. Thus, he oriented him on the behavior to adopt in the village. As for families, they have been made aware of sorting their waste, by putting only organic waste such as banana skins, cassava skins, food scraps, etc., in the garbage bags distributed by Group Bio.

This whole organization forms a system in the organic waste recovery activity in Adiopodoumé.

Figure 1 describes the relationship between the actors involved in the integrated process of managing the recovery of household solid waste in Adiopodoumé.

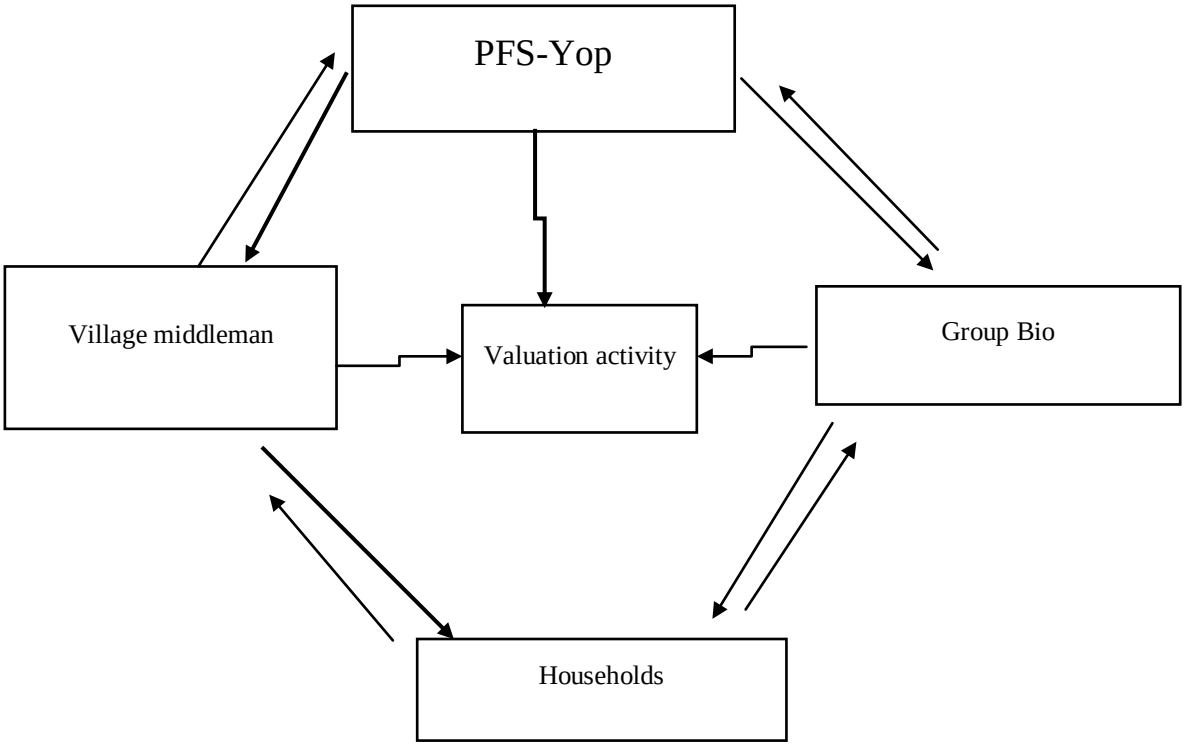

Figure 1: Operating system of the organic waste recovery activity

III. Methodology

a) Field of study

The definition of the geographical field makes it possible to circumscribe the space in which our study is carried out. The research is conducted in the village of Adiopodoumé.

The village of Adiopodoumé is located southwest of the commune of Yopougon in the District of Abidjan. It is in a sedimentary basin, and the soils are clay sediment type. Adiopodoumé is crossed by a river and to the south by the Ebrié lagoon. Its location on the coast's edge gives it a humid equatorial climate. Precipitation subdivides the annual cycle into four essential seasons.

Temperatures vary between 29 ^{0} C and 35 ^{0} C (Koffi, 2007).

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The choice of Adiopodoumé is justified because this village, which is in a peri-urban area, is confronted with the problem of managing household waste, the majority of which is of organic origin.

In addition, Adiopodoumé is an area with high vegetable production. The recovery of this waste can bring many immediate environmental, health and agricultural benefits. However, the demotivation of the actors does not favor this condition in Adiopodoumé. This reality led to the choice of this peripheral village as a field of investigation. Figure 2 below shows the location of Adiopodoumé.

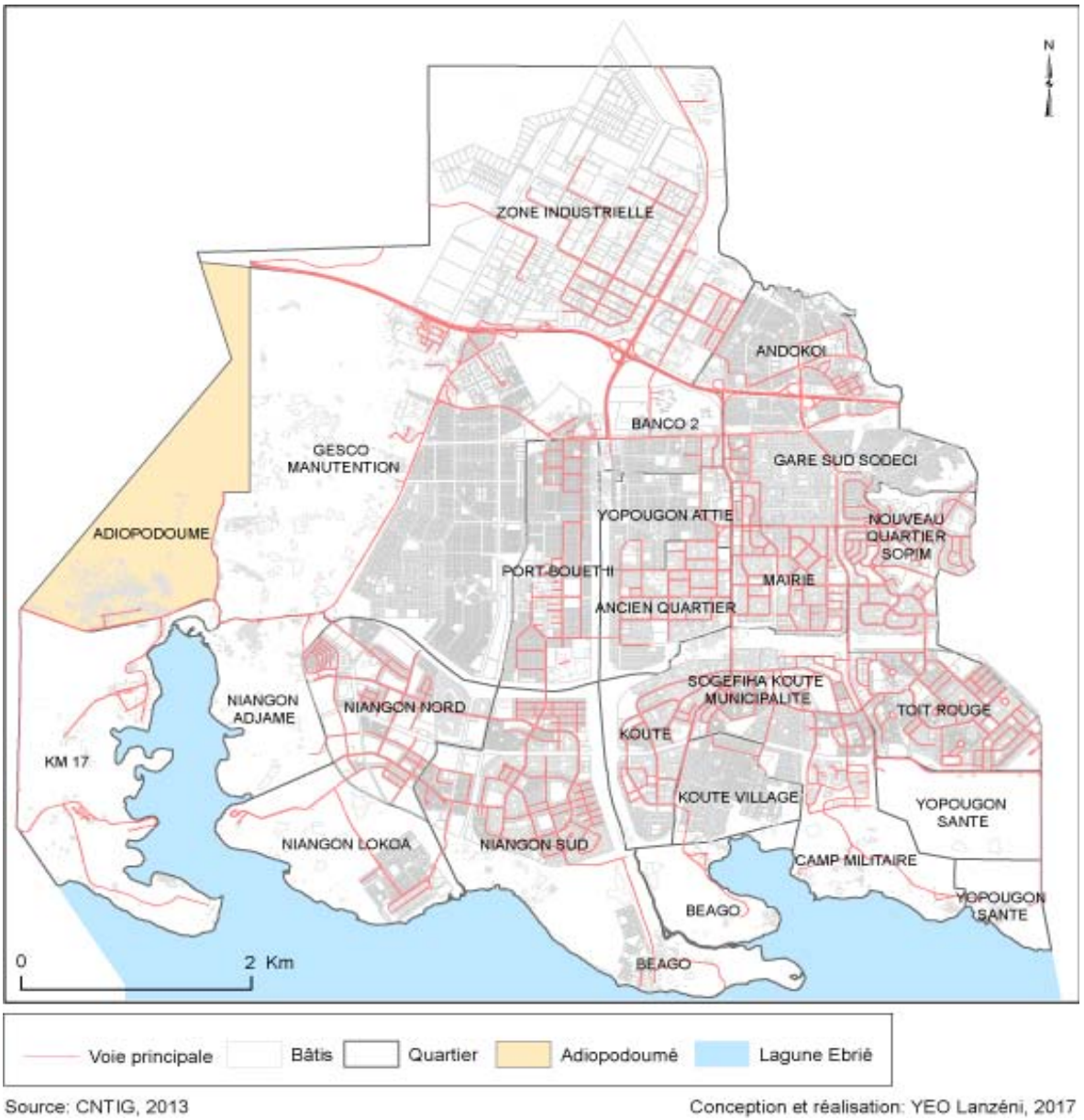

Figure 2: Map of the municipality of Yopougon

As for the social field, its determination consists in defining the object of study and in determining the target population, that is to say the individuals or groups of sociologically representative individuals. The purpose is to reach the numbers of these at the time of the field survey (Kawulich, 2005; Smit & Onwuegbuzie, 2018).

The objective of the study led to identify:

- The head of the PFS-Yop;
- The technical manager of the town hall;
- Members of Group Bio;
- The intermediary of the village;
- The customary authorities of Adiopodoumé
- Households that hold the raw material for the recovery activity.

In addition, the study on the problem of the recovery of solid organic household waste falls within environmental sociology.

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b) Data collection and analysis techniques

The documentary research was beneficial for the elaboration of our research question. It led us to consult the works that had a link with our research topic. These include specific and methodological works, reports and dissertations, related to our research topic. To this end, we visited libraries, in particular, the CSRS and the CIRES. We also consulted press articles, investigation reports, conferences, theses, books, etc.

The internet also allowed us to complete the information collected. These helped us to draft the theoretical and methodological framework.

Observation is the set of operations by which the analytical model is subjected to the test of facts. It consists of apprehending behaviors or events over a given period and recording them (Kawulich, 2005).

It made it possible to get closer to the target population to access the information requested (Reinharz, 2011). It also facilitated the collection of certain preliminary report concerning the degree of involvement of each actor in the waste recovery activity.

First, we walked through the village to soak up the level of sanitation in the village. We observed that the main activity of women is the marketing of attiéké and identified several wild dumps. This accentuates bad smells, flies and mosquitoes in the town.

We also did the pre-collection with the young people of Group Bio. Thus, we obtained results on women demands and pre-collectors difficulties.

To establish a relationship of trust and belong to the community, we participated in fraternal meals. This approach made it possible to have information on the village and to know the attitude of the population concerning sanitation.

For the interview with specific players in the waste recovery activity, we have drawn up an interview guide. This guide focused on the organization of the different entities and their representation and the challenges of the recovery activity. Table 1 shows the people we interviewed.

Table 1: Number of actors interviewed

Type of people	Number
Members of the Group Bio	04
village middleman	01
Customary authorities	03
Head of the PFS-Yop	01
Technical manager of the town hall	01
Household members	78
Total	88

Source: 2017 survey

About the processing, we carried out a manual analysis of the data through transcription. For the analysis of these data, the transversal synthesis of the interviews is obtained by the content method following a process of thematic analysis (Braun & Clarke, 2006; Flick, 2006).

IV. Results

a) The sanitary and hygienic challenges of the recovery activity

Sanitary and hygienic reasons are perceived as a significant problem for participation in the waste recovery project. Indeed, this activity allows a considerable reduction of household waste. Households are aware of the problems associated with waste and see this project as a way to have a healthy living environment. But behind this reason hides a material interest, which is reflected in the promises made by Group Bio.

In addition, the analysis highlights the risks of injury and contamination to which those involved in composting are exposed:

> "*Equipment such as the shredder could cut us. We weren't fully protected. Often households do not sort well, so there may be syringes, bottles, and sharp objects that can hurt us.*"

Admittedly, the latter benefited from vaccines before the start of the project and received boxes of milk after their activity and even medication when they felt unwell. One of the actors mentions that they did not carry out medical visits during the activity. He says it in these terms:

> "*Since the project started until today, we have never gone to the hospital for medical follow-up.*"

The analysis at the sanitary level highlights the importance of the clean and hygienic aspects in executing the recovery activity. The results obtained show that this is one of the main reasons, according to membership, even if on the ground, the observation is different.

The health risks related to the execution of the recovery activity are among other difficulties for the project's sustainability. Indeed, the lack of shelter on the composting site was also a difficulty during the interviews. We observed during the field visit that the area which received the organic waste was not covered. Rotting waste in windrows is exposed to weather and animals. One respondent stated that this situation did not make repositories more accessible:

> "*We also don't have shelter for the composting site. This prolongs the maturity of the compost, and in periods of heavy rain, there is no quality compost. There is a release of stinky odors, a lot of leachates; which affects the compost quality.*"

b) Valuation put to the test by demotivation and the reluctance of the actors

The survey revealed that most households are not informed of the recovery activity and that they do not know what becomes of their waste, once collected. Indeed, many of them are unaware of the recovery activity, which shows a lack of awareness or the

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absence of communication on the action. This is what a notable means in these terms:

"*We don't have feedback on what they do with our waste; the results are not disseminated.*"

Households agreed to donate their waste, because it enabled them to get rid of their garbage and have free labor. Another respondent emphasizes the advantage of collecting and recovering household waste:

"*It made it easier for us. Instead of going to pay, we give it to them and they help us keep our houses clean.*"

But at the same time, they complain about the lack of communication on the recovery activity, because behind this activity, households see the material and financial gains that they can draw from it.

"*I want them to communicate what they do with the waste. On the results, they must clearly state the expectations and the benefits for the population.*"

These remarks show that the households see the improvement project as a means of making a profit, apart from the sanitation of the village.

In addition, the survey revealed that during the first 06 months, the development activity was reimbursed monthly, thanks to the financing of external donors of the PFS-Yop. After this period, the self-financing, from the sale of the compost and its market garden products, which should perpetuate the functioning of the recovery activity, was not subsequently perceived. Consequently, the young people were no longer paid; this situation was the reason for the departure of the members of this group. The words of this interlocutor confirm this:

"*At the start, we were about ten people. But at the end of the project, with the lack of remuneration, there was no longer any motivation among the participants. In the end, we stayed with four people. Many left the group because there was no more remuneration. After all we paid for the transport ourselves, to get to the site. With the lack of salary and the distance to travel to get to the site, our comrades were discouraged."*

Thus, households have begun to express reluctance to donate their organic waste because of breaches of trust. The pre-collectors experienced more and more difficulties in the field in the accomplishing their task, faced with the various demands of the households. This situation contributed further to the demotivation of the members of Group Bio and the suspension of the recovery activity:

"*We had to stop because of the lack of manpower and the reluctance of households. We were also faced with the non-respect of our commitments".*

V. Discussion

The study results revealed the household waste management methods initiated by the Services Platform of Yopougon (PFS-Yop) in Adiopodoumé. The analysis highlights the shortcomings in the waste management system, despite the health and hygiene issues. These failures are perceived from the angle of material, financial, and communication management relating to the system.

The findings showed that the mode of management of household waste resulting in recycling is likely to promote the proliferation of pathologies in the peri-urban environment of Adiopodoumé. They thus reinforce others showing that composting can contribute to reducing the facal components and pathogens generally present in household deposits to ensure the quality of the living environment of households and waste workers (Gutberlet & Uddin, 2017, pp. 303-306; Siles-Castellano *et al.*, 2021, pp. 7-10). This is also why the literature suggests reconciling the recovery of organic waste with health, environmental and agricultural challenges. However, weaknesses in the strategies used to taint the implementation of initiatives by recovery actors due to economic, legal, and technical constraints related to the governance and organization of the waste system, particularly in African regions (Kulczycka *et al.*, 2011; Godfrey *et al.*, 2019, pp. 7-8). The inefficiency of these strategies led to the demotivation of the actors. This weakened the operating system of the recovery project.

The choice for households to throw their garbage in one place or another is not neutral. It stems from the traditional rejection system. The waste management method or the sanitation methods are not meaningless. They depend on the framework of socialization and are based, for the most part, on historical, social, and cultural conceptions. The results of this study stipulate that the waste "*results from symbolic and identity values that are appropriated and reproduced by the social group concerned, whatever the price to be paid*" (Djè, 2012, p. 204). But, this attitude could be explained by the lack of equipment such as dumpsters, garbage cans, and other materials that remains an obstacle to the pre-collection of garbage (Athanase, 2016; van Niekerk & Weghmann, 2018, p. 6). For other researchers, the dysfunction of waste management services results from the weakness of capital development, sometimes resulting in the lack of health training for individuals in popular neighborhoods (Kulczycka *et al.*, 2011, p. 83).

The fact of attributing the waste the dirty character, influences their mode of management. Although aware of the ills related to waste, households continue to throw their garbage behind their house, on the road, in holes and gutters. The vast majority of them refuse to pay any personal collection tax for dirt to have a healthy living environment. This result aligns with studies dealing with household behaviors, attitudes, and practices. Indeed, apart from the lack of resources of municipalities and African NGOs, the complexity of waste management is mainly due to the lack of

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education, ignorance, incivility and indiscipline of the populations (Athanase, 2016, p. 68; GIZ & ANGed, 2014, p. 41; Wang *et al.*, 2022, pp. 7-10). However, the collaboration between actors remains a factor to consider to solve the difficulties and concerns of waste management (Kulczycka *et al.*, 2011).

In addition, the unkept promises during the sensitization phase led to discouragement, according to the speeches of the respondents. To this end, the study questions the means used by the actors of the pre-collection and composting during the awareness which led the population to accept the project. Because the commitments not kept have created a crisis of confidence between the actors. This harmed recovery activity. Indeed, the normative reasons evoked by the actors for their adhesion to the valorization project come up against the way of building social relations within the framework of an economic opportunity. This economic perception of waste management explains the demotivation among actors due to the weakening of social ties presented as a factor in reducing a performance (Gutberlet *et al.*, 2017; Abegaz *et al.*, 2021, p. 9).

VI. Conclusion

Ultimately, we note that a device integrating the stakeholders has been put in place for the efficient management of the activity of recovery of solid household waste in Adiopodoumé. However, this initiative managed by the Services Platform of Yopougon (PFS-Yop), globally remained in the pilot phase, taking into account the limiting factors of material, financial and communication order.

The study aims to demonstrate the dysfunctions between the management strategies, the social representations of the actors, and the issues related to the activity of recovery of organic waste. It has contributed to an understanding of the problems associated with the rescue of organic waste in Abidjan and particularly in the municipality of Yopougon.

In any event, the success of the organic waste recovery system in the village of Adiopodoumé is based on an interaction between management strategies, social representations, and issues. However, it implies increased awareness of local elected officials and other state institutions. In this sense, organic waste recovery projects must be implemented through concrete actions and results adapted to socio-economic, health, and environmental realities.

Declaration of Interests

We have no conflict of interest.

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Foundations of Scientific thought in the Age of Knowledge and its Practical Implications in Research

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Abstract- The search for creative and holistic solutions favorable to the resolution of complex problems that underlie an interconnected world governed by Information and Communication Technologies (ICT) have stimulated the emergence of approaches with an emphasis on the integration of knowledge that represents scientific thought in the age of knowledge. This article aims to analyze the foundations of scientific thought in the age of knowledge and its practical implications in research. It is based on the integrationist epistemological approaches to research (Connectivism, System and Complex Thought) proposed according to the theoretical criteria of Bohórquez (2020), Bohórquez, Cabarcas and Ávila (2020), Martínez (2012), Fidias (2012), Corbetta (2010), Bernal (2010), Hurtado (2010), Barreras (2010), Siemens (2004) among others. It represents the product of a qualitative - interpretive investigation of documentary review, guided by methods and techniques inherent to documentary analysis and hermeneutics.

Keywords: *knowledge; scientific thought; holistic research; globalization.*

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Foundations of Scientific thought in the Age of Knowledge and its Practical Implications in Research

Fundamentos Del Pensamiento Científico en la Era Del Conocimiento y Sus Implicaciones Prácticas en la Investigación

Cesar Alonso Bohórquez [α], Priscila Isabel Ávila [σ], Martha Elena Galvis [ρ] & Adriana Cecilia Alcaraz [ω]

Resumen- La búsqueda de soluciones creativas y holísticas favorables a la solución de problemas complejos que subyacen en un mundo interconectado y gobernado por las Tecnologías de Información y Comunicación (TIC) han estimulado la emergencia de enfoques con énfasis en la integración de saberes que representan el pensamiento científico en la era del conocimiento para la solución de problemas complejos. Este artículo se propone Analizar los fundamentos del pensamiento científico en la era del conocimiento y sus implicaciones prácticas en la investigación. Está fundamentado en los enfoques epistemológicos integracionistas de la investigación (Conectivismo, Sistema y Pensamiento Complejo) planteados según los criterios teóricos de Bohórquez (2020), Bohórquez, Cabarcas y Ávila (2020), Martínez (2012), Fidias (2012), Corbetta (2010), Bernal (2010), Hurtado (2010), Barreras (2010), Siemens (2004) entre otros. Representa el producto de una investigación cualitativa – interpretativa de revisión documental, orientado bajo métodos y técnicas inherentes al análisis documental y la hermenéutica. Los resultados advierten que, en la era del conocimiento, se ha configurado un pensamiento científico integracionista, a partir de la resignificación del concepto de ciencia social, que asigna un carácter holístico a la investigación. Se concluye que la adopción de este pensamiento ha originado un conjunto de implicaciones prácticas en los procesos y métodos de investigación que actualmente cuenta con el respaldo de la comunidad científica mundial, entre ellas destacan, 1. Pluralidad de métodos, 2. Complementariedad de métodos, 3. Trabajo sinérgico (cooperación, colaboración) entre investigadores, comunidades de científicos y centros de investigación; y, 5. Organización del trabajo investigativo en planes, programas y proyectos.

Palabras clave: conocimiento; pensamiento científico; investigación holística; globalización.

Abstract- The search for creative and holistic solutions favorable to the resolution of complex problems that underlie an interconnected world governed by Information and Communication Technologies (ICT) have stimulated the emergence of approaches with an emphasis on the integration of knowledge that represents scientific thought in the age of knowledge. This article aims to analyze the foundations of scientific thought in the age of knowledge and its practical implications in research. It is based on the integrationist epistemological approaches to research (Connectivism, System and Complex Thought) proposed according to the theoretical criteria of Bohórquez (2020), Bohórquez, Cabarcas and Ávila (2020), Martínez (2012), Fidias (2012), Corbetta (2010), Bernal (2010), Hurtado (2010), Barreras (2010), Siemens (2004) among others. It represents the product of a qualitative - interpretive investigation of documentary review, guided by methods and techniques inherent to documentary analysis and hermeneutics. The results warn that, in the era of knowledge, an integrationist scientific thought has been configured, based on the resignification of the concept of social science, which assigns a holistic character to research. It is concluded that the adoption of this thought has originated a set of practical implications in the research processes and methods that currently has the support of the world scientific community, among them the following stand out: 1. Plurality of methods, 2. Complementarity of methods, 3. Synergistic work (cooperation, collaboration) between researchers, scientific communities and research centers; and, 5. Organization of the investigative work in plans, programs and projects.

Keywords: knowledge; scientific thought; holistic research; globalization.

I. Introducción

Los retos y desafíos de una sociedad global interconectada y gobernada por las Tecnologías de la Información y la Comunicación (TIC) han estimulado la evolución del pensamiento científico con respecto a los métodos de investigación y su impacto en el desarrollo humano de los pueblos. Durante el siglo pasado se hizo notable la resignificación del concepto de ciencias sociales luego de que el hombre tomara conciencia sobre la complejidad de los procesos de investigación, descubriendo que éstos no se dan de forma lineal y adaptable a cualquier contexto, sino que por el contrario, implican un proceso reflexivo y dinámico que busca responder a los cambios suscitados día a día en su entorno.

Es así como instancias educativas y centros de investigación, dada la complejidad del entorno global, han fijado su mirada en un modelo de investigación holístico que permita romper con los dogmatismos científicos y garantizar la pertinencia de los procesos

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investigativos, para lo cual resulta fundamental promover una práctica investigativa más inclusiva - cooperativa, donde la sinergia entre investigadores representa un elemento fundamental para adaptarse en la sociedad del conocimiento. No obstante, aún quedan vestigios de una tendencia academicista radical que se resiste a estos cambios imponiendo recetas para abordar la investigación desde una perspectiva reduccionista, descontextualizada y carente de pertinencia social. Se trata de un modelo investigativo individualista que sirve a intereses de personas y sistemas particulares (Hurtado 2010; Bernal, 2010).

No obstante, en la sociedad del conocimiento emerge, cada vez con más fuerza, una tendencia integracionista que complementa la investigación disciplinar, donde "*la investigación desarrollada de manera individual no tienen razón de ser"* (Bernal 2010: 53). Esta tendencia ha impactado el pensamiento científico en la sociedad del conocimiento generando implicaciones prácticas en la investigación.

Así, comprender los fundamentos del pensamiento científico en la sociedad del conocimiento pasa por estudiar la evolución del concepto de ciencia social analizando temas como la crisis de la modernidad occidental, el pensamiento científico moderno y sus fundamentos para poder entender los motivos que estimularon la emergencia de enfoques epistemológicos con énfasis en la integración de saberes, en función de configurar soluciones creativas y holísticas para la resolución de problemas. De manera que, el presente artículo se propone Analizar los fundamentos del pensamiento científico en la sociedad del conocimiento y sus implicaciones prácticas en la investigación.

II. Fundamentación Teórica

a) *Evolución del concepto de ciencia social*

Para Bernal (2010) comprender la evolución del concepto de ciencia social implica analizar los debates e ideas enfrentadas entre positivistas y hermenéuticos; los defensores del positivismo lógico (círculo de viena); racionalistas y defensores de la teoría crítica.

Este análisis pondrá al lector en una posición favorable para entender el origen y fundamento de las tendencias epistemológicas integracionistas que emergen en la sociedad del conocimiento. (Hurtado, 2010; Barrera, 2010) En efecto, los fundamentos del pensamiento científico moderno con sus postulados de objetividad, distancia entre lo objetivo y lo subjetivo, causalidad lineal, neutralidad, formulación de leyes generales, especialización del conocimiento, han establecido un marcado contraste con los conceptos de globalización, interdependencia, incertidumbre y relativismo asociados a la era del conocimiento originando la denominada crisis de la modernidad occidental (Bernal, 2010).

Tabla 1: Evolución del concepto de ciencia social

Evolución del concepto de ciencia social				
Período racionalista del conocimiento científico (1941 – 1970). Positivistas versus hermenéuticos:		Período humanista (1970 – 2010). Positivismo lógico versus racionalismo		Período evolucionista, (2010 con proyección al 2030). Epistemologías Integracionistas
Positivistas	**Postulados** Toda ciencia, para ser considerada como tal, debe acomodarse al paradigma de las ciencias naturals (monismo metodológico, método físico-matemático y predicción de resultados y generación de leyes). **Representantes** Hume, Comte, Bacon, James, Mill.	Positivismo lógico (círculo de Viena)	**Postulados** En ciencia todo conocimiento debe someterse a verificación lógica y experimental. El lenguaje de la ciencia debe ser universal. **Principales representantes**: Carnap,Schick y Wittgenstein	Las revoluciones científicas. Thomas Kuhn. Énfasis en los paradigmas científicos. La metodología de programas de investigación. ImreLakatos. Competencias entre programas de investigación.
	Postulados Plantean autonomía de las ciencias sociales respecto a las ciencias naturales. Hacen énfasis en la		**Postulados:** Propone la falsación y no la verificación para la validez de la ciencia. La ciencia se construye mediante el método	La anarquía del método. Paul Feyerabend. Para crear conocimiento, no hay método único en la ciencia.

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Hermenéuticos	intersubjetividad en oposición a la objetividad. Proponen el método de la comprensión en oposición de la explicación. **Representantes** Dilthey, Droysen, Weber, Windelband, Rickert, Croce y Collingwood.	Racionalismocritico	deductivo y se valida con la crítica. La ciencia es conocimiento hipotético-conjetural. **Representante:** K. Popper.	El pensamiento complejo y la integración del conocimiento. Edgar Morin. Propone pensar la realidad como una entidad compleja y pluridimensional. El conocimiento científico es una forma de conocer la realidad, pero no la única.
		Teoríacrítica	La ciencia debe estar al servicio de la sociedad y no de un sistema. El conocimiento debe ser emancipador y no razón instrumental. **Principales representantes:** Horkheimer, Adorno, Habermas, Apel, Marcuse y Fromm.	

Fuente: Elaboración propia (2021), basada en los aportes de Bernal (2010)

Positivistas versus hermenéuticos: El debate entre defensores del positivismo y la hermenéutica se desarrolla en torno al reduccionismo positivista y la autonomía hermenéutica. Mientras que los positivistas Hume, Comte, Bacon, James, Mill, entre otros, defienden la idea de implantar un modelo científico universal, con un lenguaje común para todas las ciencias (naturales y sociales), los hermenéuticos, Dilthey, Droysen, Weber, Windelband, Rickert, Croce y Collingwood) apuestan por la autonomía de las ciencias sociales respecto a las ciencias naturales; hacen énfasis en la intersubjetividad en oposición a la objetividad y proponen el método de la comprensión en oposición al de la explicación. (Bernal 2010; Hurtado 2010; Barrera 2010)

Positivismo lógico, racionalismo crítico y teoría crítica: Los debates entre positivistas y hermenéuticos dieron origen a una postura crítica en torno al extremismo epistemológico de ambos enfoques. Los acuerdos establecidos en el círculo de Viena por Carnap, Schick y Wittgenstein, flexibilizan el radicalismo positivista, marcando algunas diferencias entre investigación social e investigación en ciencias naturales, no obstante, mantienen su posición de implantar un lenguaje universal de las ciencias, y de que todo conocimiento debe someterse a verificación lógica y experimental. (Bernal 2010; Hurtado 2010; Barrera 2010).

En oposición a los acuerdos de Viena, nace el racionalismo crítico representado en las ideas de Karl Popper, quien propone la falsación, en contraposición con la verificación para la validez de la ciencia. Plantea que la ciencia se construye mediante el método deductivo y se valida con la crítica, es decir, que se concibe como conocimiento hipotético- conjetural. Lugo emerge la teoría crítica representada bajo las ideas de Horkheimer, Adorno, Habermas, Apel, Marcuse y Fromm, quienes defienden un concepto de ciencia más social y menos instrumental, afirmando que la ciencia debe estar al servicio de la sociedad y no de un sistema; que el conocimiento debe ser emancipador y no razón instrumental. (Bernal 2010; Hurtado 2010; Barrera 2010)

Epistemologías integracionistas: Los debates entre racionalistas y humanistas aportaron al acervo científico un concepto de ciencia más holístico dando origen a las denominadas epistemologías integracionistas entre las que destacan, las revoluciones científicas de Thomas Kuhn, quien hace énfasis en los paradigmas científicos y su caducidad; la metodología de programas de investigación de Imre Lakatos, quien refiere a las competencias entre programas de investigación; la anarquía del método planteada por Paul Feyerabend, quien establece que para crear conocimiento, no hay método único en la ciencia; el pensamiento complejo y la integración del conocimiento de Edgar Morin, quien propone pensar la realidad como una entidad compleja y pluridimensional (Morín, 2000), Todos estos enfoques epistemológicos conciben el conocimiento científico como una forma de conocer la realidad, pero no la única. (Bernal 2010; Hurtado 2010; Barrera 2010)

Enfoques teóricos que fundamentan la integración de saberes para la búsqueda de soluciones creativas y holísticas favorables a la resolución de problemas

Estos enfoques propenden por la integración de las ciencias; complementan la investigación disciplinar asignándole un carácter cooperativo. Plantean la necesidad de articular los procesos investigación a programas, planes y proyectos científicos, donde el investigador individual *"no tienen razón de ser"* (Bernal 2010: 53). El abordaje y selección de enfoques de investigación dependerá de las

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características del tema, del problema y objetivo de la investigación por realizar, o de la hipótesis por probar. Así, el enfoque integracionista, demandan un riguroso conocimiento de los diferentes enfoques de investigación por las personas responsables de llevar a cabo procesos de investigación con el propósito de tomar decisiones bien fundamentadas para tal efecto. (Bernal 2010). Entre ellos destacan,

b) Concordismo

Representa un Criterio orientado a identificar concordancia entre la verdad científica y la religiosa (dogmas), y el colectivismo, que consiste en buscar puntos comunes o que puedan compartirse entre las distintas disciplinas. (Bernal, 2010)

c) La multidisciplinariedad

Refiere al diálogo entre las ciencias en el que cada disciplina se mantiene dentro de su enfoque, métodos, categorías y especialidad, "*sin más compromiso que la exposición de su punto de vista sobre un tema"*, en una exposición de conocimientos. Bernal (2010: 52).

d) Conectivismo

Su representante, George Siemens, propone el conectivismo como teoría de aprendizaje para la era digital. Esta teoría se vincula a todos los aspectos de la vida, puesto que ofrece orientaciones sobre temas relacionados con la administración del conocimiento personal en relación con la administración del conocimiento organizacional y el diseño de ambientes de aprendizaje (Siemens, 2004). Representa la integración de principios explorados por las teorías de caos, redes, complejidad y auto-organización que a continuación se analizan a fin de comprender sus aportes (Bohórquez, 2020; Bohórquez, Cabarcas y Ávila 2020).

e) Teoría de sistemas

Representa una dimensión específica de la Teoría General de sistemas (TGS) planteada por el Alemán Ludwig von Bertalanffy entre los años 1950 – 1968.

Sus supuestos básicos destacan que existe una clara tendencia hacia la integración de diversas ciencias naturales y sociales; esa integración parece encaminarse hacia una teoría de sistemas; la teoría de sistemas puede facilitar una manera más amplia de estudiar los campos no físicos del conocimiento científico relacionados con las ciencias sociales. (Bohórquez, 2020)

En ese sentido, se considera que la teoría de sistemas puede llegar a unificar las ciencias mediante la formulación de principios que transversalicen los universos particulares de cada campo del conocimiento, generando la integración - articulación en la educación científica. Así, la teoría general de sistemas plantea las propiedades de los sistemas como supuestos cuya comprensión es posible cuando se estudia el sistema en su totalidad (Bohórquez, 2020; Bohórquez, Cabarcas y Ávila 2020).

f) Complejidad

Ante una realidad compleja, caracterizada por la integralidad, sensibilidad a las condiciones iniciales, inestabilidad, incertidumbre, caos, fluctuaciones, turbulencias, autoorganización, estructuras disipativas, azar, indeterminismo, fractalidad (imposibilidad de orden, determinismo, estabilidad, causalidad, linealidad o previsibilidad), Edgar Morín plantea la teoría de la complejidad (Morín, 2000; Bernal, 2010).

La epistemología de la complejidad plantea que el conocimiento científico representa solo una de las diversas formas de conocer el mundo, pero no la única. (Bernal, 2010); en ese sentido, el concepto de saber es más pertinente que el concepto de conocimiento y más todavía que el de conocimiento científico. (Bernal, 2010). Esta postura invita a desarrollar una especial capacidad de escuchar a los demás, de comprender sus puntos de vista, de superar las visiones unilaterales, unidimensionales y convergentes. (Bernal, 2010).

Además, Plantea la necesidad de un enfoque integracionista y holístico de la ciencia para estudiar la realidad; el abordaje y la solución de problemas, este enfoque ha venido desarrollándose en un proceso evolutivo; iniciando primero con estudios multidisciplinarios, luego, estudios interdisciplinarios y, finalmente, estudios transdisciplinarios o metadisciplinarios; es decir, investigaciones con énfasis en la confluencia de saberes, en su interacción e integración recíprocas, o en su transformación y superación. (Bernal, 2010).

Interdisciplinariedad: Gusdorf (1998), citado en Bernal (2010: 53) concibe la interdisciplinariedad como *"unidad e integración del conocimiento disciplinar"*. Es decir, como razón de unidad, de relaciones y de acciones recíprocas, y de interpretaciones entre diversas ramas del conocimiento llamadas disciplinas científicas, sin desconocer los límites propios de cada disciplina. A partir de estas condiciones se plantea un intercambio recíproco de resultados científicos en un desarrollo mutuo de las diversas disciplinas, comprendida la nueva disciplina que nace del propio intercambio. (Nikolaevitch 1998, citado en Bernal 2010: 53)

Transdisciplinariedad: Se concibe como la "*integración entre los campos del conocimiento"*; la trascendencia, regulación de las disciplinas mediante principios u objetivos que integran el horizonte del saber. Metalenguaje, metaciencia, metaconocimiento (Gusdorf 1998, citado en Bernal 2010: 53).

III. Metodología

El artículo representa el producto de una investigación cualitativa – interpretativa de revisión

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documental, orientado bajo métodos y técnicas inherentes al análisis documental y la hermenéutica. Se emplearon técnicas de análisis de datos como codificación, categorización y triangulación de la información; siendo necesaria la utilización de fichas de registro y análisis documental; y portafolios digitales.

Se organizó y sistematizó con estilo original el contenido recopilado de fuentes bibliográficas y electrónicas vinculadas a la temática investigada y los resultados del análisis de contenido efectuado. (Rodríguez 2007; Yuni y Urbano 2006; Martínez, 2012; Áreas 2012; Corbetta, 2010; Henández Fernandez y Baptista 2014). Los aportes mostrados en este documento muestran la interpretación hermenéutica del material analizado.

IV. Análisis y Resultados

Al analizar los fundamentos del pensamiento científico en la era del conocimiento, subyacen dos aspectos fundamentales a considerar; Crisis de la modernidad y los fundamentos epistemológicos del pensamiento científico moderno; y la emergencia de enfoques con énfasis en integración de saberes para la búsqueda de soluciones creativas y holísticas favorables a la resolución de problemas complejos. Ambos aspectos están vinculados entre sí.

Cuadro 2: Fundamentos epistemológicos - gnoseológicos del pensamiento científico en la era del conocimiento

<table>
<tr><td rowspan="9">Fundamentos epistemológicos - gnoseológicos del pensamiento científico en la era del conocimiento</td><td rowspan="5">Crisis de la modernidad y los fundamentos epistemológicos del pensamiento científico moderno.</td><td rowspan="4">Incapacidad de respuesta ante los fenómenos de un mundo global dinámico y complejo</td><td>Globalización</td></tr>
<tr><td>Interdependencia</td></tr>
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<tr><td rowspan="3">Evolución del concepto de ciencia social</td><td>Período racionalista del conocimiento científico (1941 – 1970). Positivistas versus hermenéuticos:</td></tr>
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<tr><td rowspan="4">La emergencia de teorías y enfoques epistemológicos con énfasis en la integración de saberes para la búsqueda de soluciones creativas y holísticas favorables a la resolución de problemas.</td><td colspan="2">Concordismo Multidisciplinariedad Conectivismo Sistemas complejidad</td></tr>
<tr><td rowspan="3">Implicaciones prácticas</td><td>Pluralidad de métodos</td></tr>
<tr><td>Complementariedad de métodos</td></tr>
<tr><td>Trabajo sinérgico (cooperación, colaboración), entre investigadores, comunidades de investigadores y centros de investigación.</td></tr>
<tr><td></td><td></td><td>Organización del trabajo investigativo en planes, programas y proyectos de investigación.</td></tr>
</table>

Fuente: elaboración propia (2021)

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Para Bernal (2010), la crisis de la modernidad está asociada a la evolución del concepto de ciencia social, estimulada por la incapacidad de respuesta del pensamiento científico moderno ante los fenómenos de un mundo global, dinámico y complejo. Dicha evolución está representada en tres períodos: racionalista (1941 – 1970), humanista (1970 – 2010) y evolucionista (2010 con proyección al 2030); en ellos se vislumbra como la comunidad científica ha madurado en orden a la concepción de las ciencias sociales y los procesos de investigación en ese campo.

En efecto, las disputas e ideas enfrentadas entre racionalistas, humanistas y críticos sociales, aportaron un marco epistemológico que sirvió de base para consolidar una visión ontológica más realista, es decir, inclusiva, plural y complementaria que origina la emergencia y consideración de teorías y enfoques epistemológicos con énfasis en la integración de saberes para la búsqueda de soluciones creativas y holísticas favorables a la resolución de problemas. (Hurtado 2010; Barrera, 2010) Entre estos enfoques destacan, el concordismo, multidisciplinariedad, Conectivismo, sistemas y complejidad.

Cuadro 3: Pensamiento científico en la era del conocimiento e implicaciones prácticas en la investigación

<table>
<tr><th></th><th></th><th>Enfoques</th><th>Métodos</th><th>Técnicas</th><th>Instrumentos</th></tr>
<tr><td rowspan="4">Pensamiento científico en la era del conocimiento e implicaciones prácticas en la investigación.</td><td rowspan="2">Pluralidad de métodos o enfoques para la construcción o producción de conocimiento científico. (Bernal, 2010)</td><td>Cuantitativo</td><td>Empírico – inductivo.
Hipotético – deductivo.
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Yarlequé et. al. (2011).</td></tr>
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<tr><td colspan="5">No hay supremacía de un método o enfoque respecto a otro, sino que cada uno tiene sus propias fortalezas y debilidades, además que la tendencia en la ciencia actual es la complementariedad entre éstos. (Bernal, 2010)</td></tr>
<tr><td colspan="5">Ninguno de los métodos de investigación (inductivo, deductivo, inductivo-deductivo, hipotético-deductivo, analítico, sintético, analítico sintético, histórico-comparativo, cualitativo y cuantitativo) por sí solo tiene validez universal para resolver satisfactoriamente los problemas de investigación. (Bernal, 2010)</td></tr>
</table>

Fuente: elaboración propia (2021)

Tales enfoques han generado implicaciones prácticas vinculadas a la pluralidad y complementariedad de métodos de investigación. De manera que en la actualidad, en universidades y centros de investigación, existe apertura para emplear diversidad de métodos para accesar al conocimiento (Yarlequé et. al. 2011). Además, es garantía de rigurosidad científica la complementariedad o integración de diversos métodos en los trabajos de investigación.

Otra de las implicaciones prácticas originada a partir de la consideración de enfoques epistemológicos integracionistas es el trabajo sinérgico (cooperación, colaboración), entre investigadores, comunidades de investigadores y centros de investigación, quienes investigan organizados en planes, programas y proyectos de investigación. (Hurtado, 2010; Barrera, 2010)

V. Conclusiones

El pensamiento científico en la era del conocimiento se configura ante la necesidad de pensar el mundo desde un nuevo paradigma capaz de responder a los retos de la sociedad del conocimiento vinculados a la globalización, interdependencia, incertidumbre y relativismo. Esta necesidad estimula la resignificación del concepto de ciencia social, asignándole un carácter holístico, y la emergencia de enfoques con énfasis en integración de saberes para la búsqueda de soluciones creativas y holísticas favorables a la resolución de problemas complejos.

La adopción de dicho pensamiento ha originado un conjunto de implicaciones prácticas en los procesos y métodos de investigación que actualmente cuenta con el respaldo comunidad científicas mundial, entre ellas destacan, 1. Pluralidad de métodos, 2. Complementariedad de métodos, 3. Trabajo sinérgico (cooperación, colaboración), entre investigadores,

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comunidades de científicos y centros de investigación; y, 5. Organización del trabajo investigativo en planes, programas y proyectos.

En lo que refiere a la pluralidad y complementariedad de métodos destaca la integración de enfoques de investigación cualitativa y cuantitativa, con sus métodos, técnicas e instrumentos. Cabe destacar, este proceso integrador requiere estar gobernado por la lógica y la racionalidad en orden a la naturaleza de la investigación y sus propósitos, de manera que, la integración de métodos, técnicas e instrumentos de investigación debe responder coherentemente a cada objetivo específico. Demanda un riguroso conocimiento de los diferentes enfoques de investigación por parte de los investigadores, quienes deberán tomar decisiones bien fundamentadas para tal efecto (Bernal, 2010).

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Demographic and Clinical Characteristics of Patients with a Molecular Diagnosis of Covid-19, Treated at the Panama Social Security Facility in the Period from June to November 2020

By Jose Cedeno

Universidad Americana de Panamá

Resume- The first case of 2019-nCoV, was registered in December 2019 in Hubei, China; It was declared a pandemic by the WHO on March 11, 2020. The SARS-CoV-2 virus, or COVID-19 disease, has exponentially impacted Panama.

We proceeded to analyze the demographic and clinical characteristics of patients with molecular detection of SARS-CoV-2, treated at the CSS in the period from June to November 2020; identifying the number of detected and undetected patients, age, sex, patient status, health region, symptoms, comorbidity and detection period.

From a retrospective-analytical-descriptive approach, the study included 146,020 patients with demographic and clinical characteristics, provided by the data entered in the Modulab system of the Molecular Biology Laboratory and NAT of the Dr. Arnulfo Arias Madrid Hospital Complex.

Keywords: coronavirus; SARS-CoV-2; Covid-19; epidemiology; RT-PCR.

GJHSS-H Classification: DDC Code: 614.5 LCC Code: RA644.S17

DEMOGRAPHICANDCLINICALCHARACTERISTICSOFPATIENTSWITHAMOLECULARDIAGNOSISOFCOVID19TREATEDATTHEPANAMASOCIALSECURITYFACILITYINTHEPERIODFROMJUNETONOVEMBER2020

Strictly as per the compliance and regulations of:

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Demographic and Clinical Characteristics of Patients with a Molecular Diagnosis of Covid-19, Treated at the Panama Social Security Facility in the Period from June to November 2020

Características Demográficas y Clínicas de Pacientes Con Diagnostico Molecular de Covid-19, Atendidos en la Caja de Seguro Social de Panamá en el Periodo de Junio a Noviembre de 2020

Jose Cedeno

Resumen- El primer caso de 2019-nCoV, se registró en diciembre de 2019 en Hubei, China; fue declarada pandemia por la OMS el 11 de marzo de 2020. El virus SARS-CoV-2, o enfermedad COVID-19, ha impactado exponencialmente a Panamá.

Se procedió a analizar las características demográficas y clínicas de pacientes con detección molecular de SARS-CoV-2, atendidos en la CSS en el periodo de junio a noviembre de 2020; identificando el número de pacientes detectados y no detectados, edad, sexo, estado del paciente, región de salud, síntomas, comorbilidad y periodo de detección.

Desde un enfoque retrospectivo-analítico-descriptivo, el estudio incluyó 146 020 pacientes con características demográficas y clínicas, proporcionada por los datos ingresados en el sistema Modulab del Laboratorio de Biología Molecular y NAT del Complejo Hospitalario Dr. Arnulfo Arias Madrid.

De los 146 020 pacientes, el 31% resultaron detectados para COVID-19 por RT-PCR y 69% no detectado. Entre los pacientes detectados, el 62% eran sintomáticos con hallazgos clínicos frecuentes, como fiebre, tos y rinorrea, y 38%, asintomáticos. El 20% de los casos COVID-19 positivo, presentaban alguna comorbilidad. La mediana del periodo de detección desde la fecha de inicio de síntomas hasta la detección por RT-PCR de SARS-CoV-2, fue de 4 días.

Esta investigación aporta información epidemiológica no antes descrita sobre los casos detectados por SARS-CoV-2 de la población panameña asegurada.

Palabras clave: coronavirus; SARS-COV-2; Covid-19; epidemiología; RT-PCR.

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From a retrospective-analytical-descriptive approach, the study included 146,020 patients with demographic and clinical characteristics, provided by the data entered in the Modulab system of the Molecular Biology Laboratory and NAT of the Dr. Arnulfo Arias Madrid Hospital Complex.

Of the 146,020 patients, 31% were detected for COVID-19 by RT-PCR and 69% were not detected. Among the detected patients, 62% were symptomatic with frequent clinical findings, such as fever, cough, and rhinorrhea, and 38% were asymptomatic. 20% of the positive COVID-19 cases had some comorbidity. The median detection period from the date of symptom onset to detection by RT-PCR of SARS-CoV-2 was 4 days.

This investigation provides epidemiological information not previously described on the cases detected by SARS-CoV-2 of the insured Panamanian population.

Keywords: coronavirus; SARS-CoV-2; Covid-19; epidemiology; RT-PCR.

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I. Introduccion

En diciembre del 2019, un síndrome respiratorio de etiología desconocida provocó un brote en Wuhan, provincia de Hubei, China. Las personas afectadas tenían en común la visita al mercado de mariscos de Huanan, y por las características atípicas del cuadro clínico que presentaban estos pacientes y el desconocimiento del agente etiológico, las autoridades de salud pública iniciaron las respectivas investigaciones; de esta manera, se describe un nuevo patógeno humano con afinidad al sistema respiratorio, conocido de manera provisional como Nuevo Coronavirus de 2019 (2019-nCoV), y unas semanas después al síndrome clínico se le llamó Enfermedad por Coronavirus de 2019 (COVID-19). Al agente etiológico oficialmente se le denominó Coronavirus Tipo 2 del Síndrome Respiratorio Agudo Severo (SARS-CoV2).[1] (Millán-Oñate et al., 2020)

El 11 de marzo de 2020 la OMS declara COVID-19 como pandemia mundial.[2] (OPS/OMS. 2020f). Panamá, mediante un comunicado emitido el 9 de

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marzo de 2020 a las 7:50 p.m., confirma el primer caso de COVID-19, una mujer panameña, de 40 años, que ingresó al país en el vuelo 6339 de Iberia, procedente de Barajas, España.[3] (MINSA, 2020)

El origen de los coronavirus de importancia médica, incluidos los coronavirus humanos, parece ser zoonótico. En particular, los betacoronavirus zoonóticos están filogenéticamente relacionados con coronavirus de murciélagos, los cuales podrían haber sido su fuente para el hombre, ya sea directamente o a través de un hospedero intermediario; dicho intermediario para el SARS-CoV fue la civeta, un animal silvestre del grupo de los vivérridos, y para el MERS-CoV fue el dromedario. Aún no es claro cuál pudo haber sido el intermediario para el SARS- CoV-2, o si pasó directamente del murciélago al humano.[4] (Lu et al., 2020)

Los síntomas clínicos más frecuentemente descritos han sido fiebre, tos (con/sin expectoración) y malestar general. Se han descrito otros síntomas con frecuencias variables entre los que se encuentran disnea, cefalea, astenia, mialgias, odinofagia, congestión/secreción nasal, anosmia, ageusia, síncope, confusión, síntomas neurológicos, síntomas oftalmológicos (conjuntivitis y ojo seco) y cutáneos (rash y erupciones). Un porcentaje de pacientes refieren como síntomas relevantes la presencia de diarrea, vómitos y dolor abdominal.[5] (Rubio-Pérez et al., 2020)

Hasta el momento la principal forma de transmisión de la COVID-19 parece ser el contacto cercano de persona a persona, ya sea a través de contacto directo o a través de las gotitas respiratorias que se esparcen cuando una persona infectada tose o estornuda. Estas se transmiten por el aire a corta distancia y se depositan en las membranas mucosas de la boca, nariz u ojos de las personas que estén expuestas. Ciertos autores también hablan de que la transmisión indirecta a través de fómites, objetos y superficies contaminadas juega un papel vital en la propagación del virus. Es importante considerar que el virus puede sobrevivir en el ambiente, desde varias horas hasta varios días, dependiendo del tipo de superficie al cual se adhiera y esto repercute sobre su capacidad de transmisión.[6] (The New England Journal of Medicine, 2020)

Para disminuir la diseminación del virus SARS-CoV-2, recomiendan el distanciamiento social, lo cual describen como evitar las multitudes y mantener un espacio de 2 metros.[7] (Guo et al., 2020)

Los Centros para el Control y la Prevención de Enfermedades (CDC) también recomienda el lavado frecuente de las manos como medida preventiva. La permanencia viable del virus en superficies se ha estimado hasta de 3 días, dependiendo del inóculo, muy similar a la del virus causante del SARS.[6] (The New England Journal of Medicine, 2020)

En la infección respiratoria aguda, la técnica de Biología Molecular RT-PCR se usa habitualmente para detectar virus causales de secreciones respiratorias. Anteriormente hemos demostrado la viabilidad de introducir tecnología de detección robusta basada en RT-PCR en tiempo real, en situaciones de emergencias sanitarias por coordinación entre laboratorios públicos y académicos de salud pública.[8] (Corman et al., 2016)

El propósito de este estudio es aportar información epidemiológica y clínica de pacientes panameños asegurados que ingresaron a la Caja de Seguro Social con sospecha de COVID-19 (sintomáticos-asintomáticos) en el periodo de estudio de octubre a noviembre 2020; a los cuales se les aplicó la prueba molecular RT-PCR tiempo Real para la detección de SARS-CoV-2. Esta investigación, se realizó con los objetivos de identificar el número de pacientes detectados y no detectados para SARS-CoV-2 en el periodo estudiado, así como determinar la frecuencia de SARS-CoV-2 según edad, sexo, estado del paciente y región de salud. Describir el periodo de detección del SARS-CoV-2 según la fecha de inicio de los síntomas y conocer el número de pacientes COVID-19 positivo que presentan comorbilidades.

II. Metodos

Se realizó un estudio de tipo retrospectivo-analítico-descriptivo. Analizamos variables como edad, sexo, región de salud, estado del paciente (sintomático-asintomático) hallazgos clínicos, región demográfica, comorbilidades, periodo de detección del virus, detectados y no detectados por RT-PCR para SARS-COV2. El total del universo estudiado estuvo representado por los 147,666 formularios de los pacientes atendidos en la Caja de Seguro Social de Panamá (CSS), con sospecha de SARS-CoV-2 en el periodo de 01 de junio al 30 de noviembre de 2020. Estos formularios fueron ingresados en el sistema informático Modulab en el Laboratorio de Biología Molecular y Técnicas de Amplificación de Ácidos Nucleicos (NAT) del Complejo Hospitalario Dr. Arnulfo Arias Madrid (CHDrAAM). Obtuvimos una muestra de 146,020 formularios (98.9% del universo), los cuales cumplían con las variables del estudio. El 1.1% de los formularios fueron excluidos por información incompleta. El proceso para la recolección de la información se realizó previa autorización por las autoridades de la CSS, Registro y Seguimiento de Investigación para la Salud (RESEGIS) y Comité Nacional de Bioética de la Investigación de Panamá (CNBI). Posteriormente, se solicitó al Laboratorio de Biología Molecular y NAT del CHDrAAM los datos con la información de los pacientes atendidos en la CSS con sospecha de SARS-CoV-2 en el periodo del 01 de junio al 30 de noviembre de 2020. Se utilizaron los resultados de muestras de hisopado nasal en medios de transporte viral (MTV), a las cuales se les realiza extracción de ARN, luego amplificación del ácido nucleico mediante la técnica de RT-PCR en tiempo real

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que contiene cebadores y sondas específicas para la detección de SARS-CoV-2. La mezcla de reacción de PCR se amplificó en un termociclador de tiempo real Rotor Gene Q. Cabe destacar, que se utilizaron diferentes kits de casas comerciales. A partir del 6 de junio, se complementa la detección del SARS-CoV-2 con la prueba de cobas® SARS-CoV-2 (Roche Molecular Systems, 2020) para su uso en el analizador automatizado COBAS 6800. Este equipo realiza pruebas de RT-PCR en tiempo real y procedimientos de diagnóstico in vitro. Los resultados de las corridas de PCR son tabulados en la plataforma Microsoft Excel, archivo que reposa en el Laboratorio de Biología Molecular y NAT del CHDrAAM. Para la realización de este estudio, aceptamos cumplir con los principio éticos y morales que deben regir toda investigación que involucra sujetos humanos como los son: Declaración de Helsinki, Informe Belmont, Buenas Prácticas Clínicas y las normas y criterios éticos establecidos en los códigos nacionales de ética y/o leyes vigentes. Además, cumplimos con la resolución ministerial 373 de 13 de abril de 2020, para esto solicitamos aprobación al CNBI, comité facultado para hacer la aprobación de los protocolos que tienen relación con el COVID-19. Después de la recolección de la información en el programa Microsoft Excel, procedimos a analizar los datos y variables del estudio por frecuencia y porcentajes, utilizando tablas y figuras.

III. Resultados

Tabla 1: Resultados de la prueba RT-PCR para COVID-19 de pacientes estudiados. Caja de Seguro Social, Panamá. Junio a noviembre de 2020.

Resultado de la prueba	Número de Casos	Porcentaje (%)
Detectado	45 701	31
No Detectado	100 319	69
Total	146 020	100

Fuente: Base de datos. Laboratorio de Biología Molecular y NAT del CHDrAAM. CSS. Panamá 2020.

Tabla 2: Características demográficas y clínicas de pacientes estudiados. Caja de Seguro Social, Panamá. Junio a noviembre de 2020.

Variables	Detectados	Detectados (%)
Mes		
Junio	7 668	17
Julio	11 091	24
Agosto	5 891	13
Septiembre	4 716	10
Octubre	6 017	13
Noviembre	10 318	23
Edad		
< 20 años	5 935	13
20 - 39 años	18 344	40
40 - 59 años	14 715	32
60 - 79 años	5 688	13
> 80 años	1 019	2
Sexo		
Femenino	22 401	49
Masculino	23 300	51
Región de salud		
Panamá Oeste	14 421	32
Metropolitana	9 593	21
San Miguelito	4 971	11
Colón	4 066	8.9
Chiriquí	3 232	7.1
Panamá Norte	2 787	6.1
Panamá Este	2 050	4.5
Coclé	1 761	3.9
Veraguas	1 272	2.8

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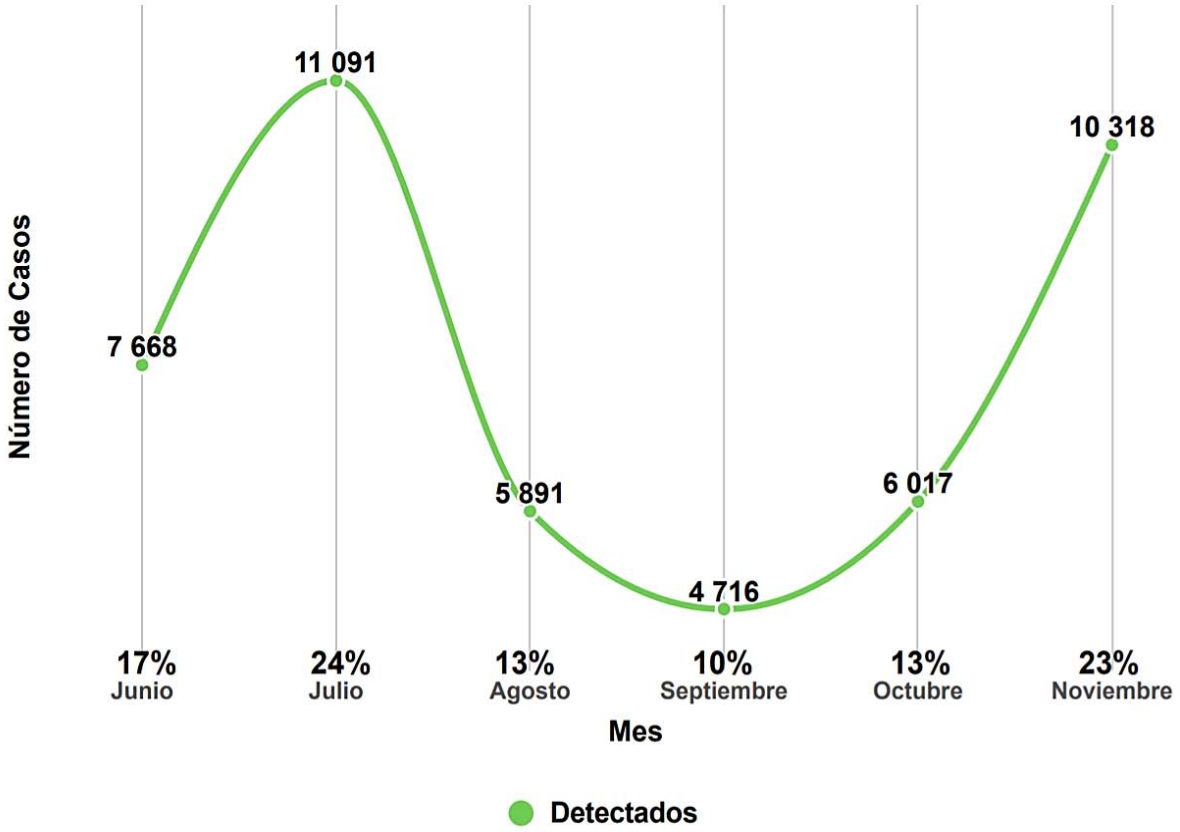
Bocas del Toro	715	1.6
Herrera	659	1.4
Los Santos	106	0.2
Ngäbe Buglé	47	0.1
Darién	16	0.04
Guna Yala	5	0.01
Estado del paciente		
Sintomático	28 243	62
Asintomático	17 458	38
Comorbilidad		
Presente	9 361	20
Ausente	36 340	80
Periodo de detección		
0 - 7 días	26 180	93%
8 - 14 días	1 764	6.2%
15 - 21 días	227	0.8%
22 - 28 días	70	0.2%
> 28 días	2	0.01%
Total de sintomáticos	28 243	100

Fuente: Base de datos. Laboratorio de Biología Molecular y NAT del CHDrAAM. CSS. Panamá 2020.



Fuente: Base de datos. Laboratorio de Biología Molecular y NAT del CHDrAAM. CSS. Panamá 2020.

Figura 1: Distribución de pacientes detectados según los meses estudiados. Caja de Seguro Social, Panamá. Junio a noviembre de 2020.

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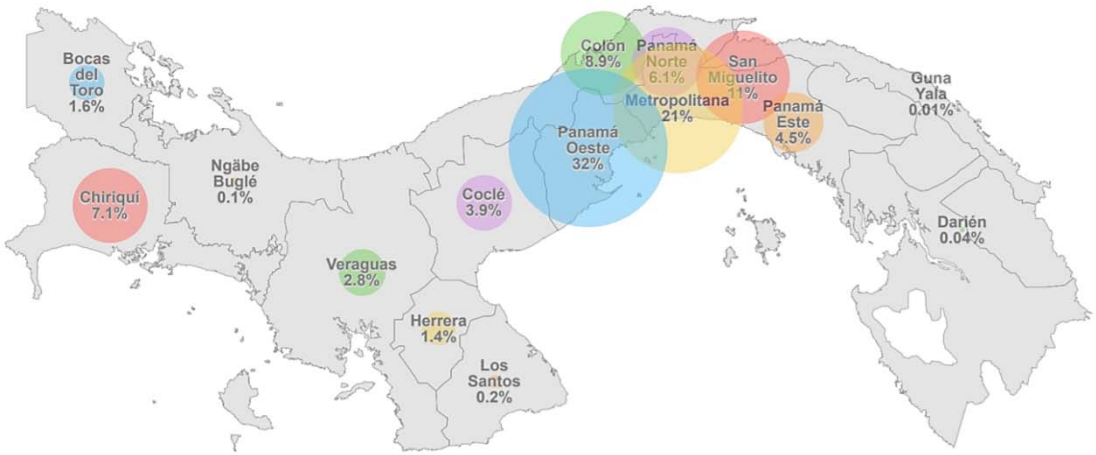
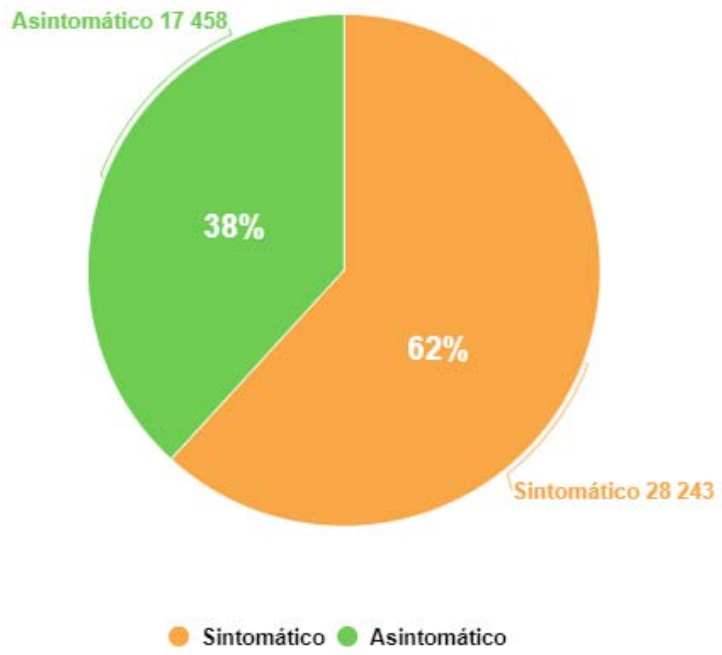


Fuente: Base de datos. Laboratorio de Biología Molecular y NAT del CHDrAAM. CSS. Panamá 2020.

Figura 2: Distribución de pacientes detectados según región de salud. Caja de Seguro Social, Panamá. Junio a noviembre de 2020.



Fuente: Base de datos. Laboratorio de Biología Molecular y NAT del CHDrAAM. CSS. Panamá 2020.

Figura 3: Clasificación de pacientes detectados según estado del paciente. Caja de Seguro Social, Panamá. Junio a noviembre de 2020.

Tabla 3: Clasificación de pacientes sintomáticos. Caja de Seguro Social. Junio a noviembre de 2020.

Sintomáticos	Número de Casos	Porcentaje (%)
Total con fecha de inicio de síntomas	26 706	95
Total con síntomas descritos	1 537	5
Total	28 243	100

Fuente: Base de datos. Laboratorio de Biología Molecular y NAT del CHDrAAM. CSS. Panamá 2020.

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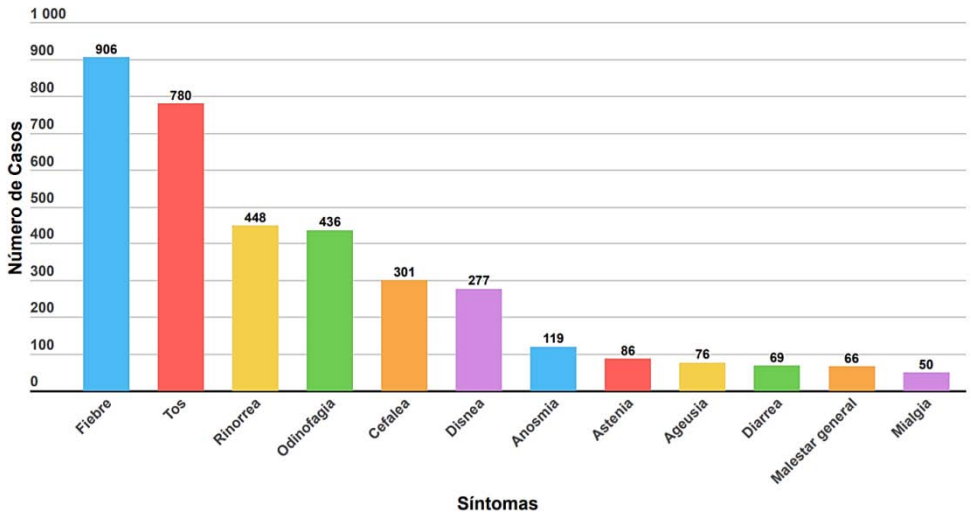
Tabla 4: Hallazgos clínicos asociados a casos detectados.
Caja de Seguro Social. Junio a noviembre de 2020.

Hallazgo Clínico	Número de Casos	Porcentaje (%)
Más Frecuentes		
Fiebre	906	59%
Tos	780	51%
Rinorrea	448	29%
Odinofagia	436	28%
Cefalea	301	20%
Disnea	277	18%
Anosmia	119	7.7%
Astenia	86	5.6%
Ageusia	76	4.9%
Diarrea	69	4.5%
Malestar general	66	4.3%
Mialgia	50	3.3%
Menos Frecuentes		
Emesis	23	1.5%
Artralgia	12	0.8%
Hiporexia	9	0.6%
Dolor torácico	8	0.5%
Rinitis	7	0.5%
Otros	37	2.4%
Total con síntomas descritos	1 537	

Fuente: Base de datos. Laboratorio de Biología Molecular y NAT del CHDrAAM. CSS. Panamá 2020.



Fuente: Base de datos. Laboratorio de Biología Molecular y NAT del CHDrAAM. CSS. Panamá 2020.

Figura 4: Hallazgos clínicos más frecuentes asociados a casos detectados.
Caja de Seguro Social. Junio a noviembre de 2020.

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Tabla 5: Frecuencia de las Comorbilidades en los pacientes detectados. Caja de Seguro Social, Panamá. Junio a noviembre de 2020.

Diagnóstico Clínico	Número de Casos	Porcentaje (%)
Hipertensión Arterial	5 176	55
Diabetes	2 112	23
Obesidad	1 529	16
Asma	515	5.5
Alcoholismo	515	5.5
Tabaquismo	321	3.4
Inmunosuprimido	225	2.4
Otras	2 034	22
Total con diagnóstico clínico presente	9 361	

Fuente: Base de datos. Laboratorio de Biología Molecular y NAT del CHDrAAM. CSS. Panamá 2020.

IV. Discusion

Durante el período de estudio de junio a noviembre de 2020, ingresaron 147 666 pacientes asegurados que se sometieron a la prueba de RT-PCR para el SARS-CoV-2. De estos pacientes, 1 646 fueron excluidos por no cumplir los criterios de inclusión y analizamos un total de 146 020 pacientes.

Del total de pacientes incluidos en el estudio, 45 701 (31%) resultaron detectados y 100 319 (69%) no detectados (Ver tabla 1). La Organización Panamericana de la Salud (OPS) reportó 150 120 (18%) casos confirmados y 678 964 (82%) casos no detectados de un total de 829 085 pacientes a través de informes sobre la situación actual en Panamá en el período del 3 de junio al 29 de noviembre de 2020.[9,10] (OPS/OMS, 2020c, 2020b). El aumento del 12% en los casos detectados de pacientes asegurados en relación con la población panameña en general, puede deberse a la alta sensibilidad de la prueba utilizada en la detección de COVID 19 para los pacientes asegurados; que, en el período examinado, fue únicamente la RT-PCR en tiempo real.

En la tabla 2 y figura 1, observamos un aumento de pacientes detectados en los meses de julio y noviembre; y, en los meses de agosto, septiembre y octubre, se presentaron menos casos. Esta distribución es similar a lo presentado en los informes de la OPS para ese periodo.[9,10] (OPS/OMS, 2020c, 2020b). Suponemos que este aumento de casos se debió al levantamiento de la medida de cuarentena por bloque en los meses de mayo y octubre del 2020.[11] (OPS/OMS, 2020d).

El mayor porcentaje de pacientes detectados por grupo de edad se alcanzó en los pacientes entre 20 - 39 años (40%) y entre 40 - 59 años (32%) (Ver tabla 2). En un estudio realizado en Wuhan, China, se obtuvo una edad promedio de 58 años para pacientes detectados.[12] (Xiao et al., 2020). En México, 41. 8 años, que es similar a los resultados de nuestro estudio según los grupos de edad más afectados.[13] (Salinas Aguirre et al., 2020). Esto puede ser atribuible a que estos grupos de edad tienen más interacción social y laboralmente más activos, lo que conduce a una mayor exposición al virus.

De los pacientes detectados, 23 300 (51%) eran hombres y 22 401 (49%) eran mujeres (Ver tabla 2). Estudios realizados en México con 17 479 pacientes detectados con COVID-19, obtuvieron 8 720 mujeres (49,9%) y 8 759 hombres (50,1%). (Salinas Aguirre et al., 2020). Al igual que un estudio realizado en Wuhan, China, reflejó que el 51,2% eran hombres y el 48,8% mujeres.[12] (Xiao et al., 2020). Al comparar los resultados de estos estudios de México y China con el nuestro, reafirmamos que no hay evidencia significativa de que el sexo sea una predisposición a la infección por COVID-19.

En la variable de región de salud, se obtuvo que entre las más afectadas se encontraban: Panamá Oeste con 14 421 (32%), el área Metropolitana 9 593 (21%) y San Miguelito 4 971 (11%) (Ver tabla 2 y figura 2). Estos resultados son similares a lo reportado por la OPS en los informes de la población total de Panamá.[9,10] (OPS/OMS, 2020c, 2020b). Esto puede deberse a que la densidad de población en esas regiones es más elevada, presentan una gran cantidad de empleadores y que una alta cantidad de población utiliza el transporte colectivo lo cual podría aumentar el contagio comunitario del COVID-19.

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Entre los pacientes detectados incluidos en el estudio, 28 243 (62%) fueron pacientes sintomáticos y 17 458 (38%) fueron pacientes asintomáticos (Ver tabla 2 y figura 3). Un estudio realizado en Colombia reporta que, de los pacientes detectados para SARS-CoV-2, el 68,67% son asintomáticos y 31,43% son casos sintomáticos.[14] (Malagón-Rojas et al., 2020). En el estudio realizado en Cataluña, 66,1% fueron pacientes detectados asintomáticos. (de Miguel et al., 2021). En el barco Diamond Princess, cuarentenado en Japón, en el que se realizaron pruebas diagnósticas a 3 700 pasajeros, el 50% de los que tuvieron resultados positivos estaban asintomáticos. Posteriormente, tras 14 días de observación, la mayoría desarrollaron síntomas, siendo el porcentaje de verdaderos asintomáticos de 18%.[15] (Mizumoto et al., 2020).

No hay información clara de estudios sobre los pacientes asintomáticos y los resultados varían según los países. Algunos casos de pacientes que obtienen resultado detectado en el momento de la prueba de RT-PCR no presentan síntomas, pero después de unos días se vuelven sintomáticos, lo que no se contempla en nuestro estudio. Estos datos pueden variar, ya que no todos los estudios utilizan las mismas estrategias para seleccionar a los pacientes sintomáticos, teniendo en cuenta el hecho de que se ha clasificado como un paciente sintomático el que describió síntomas y los que tenían fecha de inicio de síntomas. (Ver tabla 3)

En el informe de la misión de la OMS en China se describen los síntomas y signos más frecuentes de casos confirmados por laboratorio, que incluyen: fiebre (87,9%), tos seca (67,7%), astenia (38,1%), expectoración (33,4%), disnea (18,6%), dolor de garganta (13,9%), cefalea (13,6%), mialgia o artralgia (14,8%), escalofríos (11,4%), náuseas o vómitos (5 %), congestión nasal (4,8%), diarrea (3,7%), hemoptisis (0,9%) y congestión conjuntival (0,8%).[16] (WHO, 2020a). En otros estudios, Cuba informa como síntoma más frecuente la fiebre en un 98,6% de los pacientes, seguido por fatiga (69,6%), tos seca (59,4%) y disnea (32,2%).[17] (Urquiza-Yero et al., 2020). A comparación de nuestra investigación, los síntomas más descritos fueron fiebre (59%), tos (51%) rinorrea (29%), dolor de garganta (26%), cefalea (20%), disnea (18%) y otros de menor manifestación en la población (Ver tabla 4 y figura 4).

De los pacientes con resultado detectado del estudio, se obtuvo que 9 361 (20%) presentaron al menos una (1) comorbilidad y 36 340 (80%), no mostraron comorbilidad (Ver tabla 2). Las comorbilidades más frecuentes en los pacientes detectados fueron hipertensión arterial, diabetes y obesidad (Ver tabla 5). En el reporte de la OPS, el 62% de los pacientes tenían presencia de al menos una comorbilidad. Las comorbilidades más comunes que se han informado fueron la diabetes (40%), las enfermedades cardíacas (37%) y las enfermedades pulmonares (12%).[18] (OPS/OMS, 2020a). Por otro lado, el estudio en Cuba ha obtenido que, entre las principales comorbilidades enunciadas, se encuentran la hipertensión arterial, la enfermedad cardiovascular y diabetes.[17] (Urquiza-Yero et al., 2020).

La mediana del periodo de detección desde la fecha de inicio de síntomas hasta el resultado positivo de RT-PCR de SARS-CoV-2 fue de 4 días y la mayoría de los pacientes sintomáticos se detectaron en el intervalo de 0 – 7 días (93%) (Ver tabla 2). En un estudio de Wuhan, China, la mediana del periodo desde la fecha de inicio de los síntomas hasta el primer ensayo de RT-PCR fue de 8 días. Este mismo estudio obtuvo que la tasa positiva de ensayo de RT-PCR fue mayor en el intervalo de 0 – 7 días (97.9%).[12] (Xiao et al., 2020).

Entre las limitaciones que debemos consideradas en este estudio tenemos:

- No poder tomar en cuenta los primeros meses de la Pandemia COVID-19 en Panamá de Enero a mayo 2020, ya que la base de datos del sistema informático previo no contemplaba alguna de las variables que analizamos en este estudio como la fecha de inicio de los síntomas.
- Formularios incompletos de pacientes ingresados al sistema Modulab, los cuales fueron excluidos en estudio.

V. Conclusiones

- La Pandemia de COVID-19 ha representado un reto para todas las instancias de salud, y Panamá no se escapa de esta realidad. Este estudio sobre las características demográficas y clínicas asociadas a la COVID-19 con información recopilada en la base de datos del sistema informático Modulab del Laboratorio de Biología Molecular y NAT del Complejo Hospitalario Dr. Arnulfo Arias Madrid, ha permitido conocer la afectación de esta pandemia a la población asegurada de Panamá entre los meses de junio a noviembre 2020, definiendo importantes hallazgos epidemiológicos.
- El grupo de edad más afectado fue de 20 a 39 años; según el sexo, el masculino. Las regiones de salud con más casos detectados fueron: Panamá Oeste, área metropolitana y San Miguelito. Entre los pacientes detectados, el 62% era sintomático con hallazgos clínicos frecuentes, como fiebre, tos y rinorrea, y 38%, asintomáticos. Además, se evidencia la presencia de pacientes asintomáticos por SARS-CoV-2. El 20% de los casos descritos han presentado alguna comorbilidad, donde las más comunes fueron hipertensión arterial, diabetes y obesidad. La mediana del periodo de detección desde la fecha de inicio de síntomas hasta la detección por RT-PCR de SARS-CoV-2, fue de 4 días. La mayoría de los pacientes sintomáticos se detectaron en el intervalo de 0 a 7 días.

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- La identificación de los pacientes asintomáticos con resultado positivo desempeña un papel importante en el control de la enfermedad, debido al alto porcentaje de pacientes asintomáticos detectados que representan un riesgo de transmisión del virus.
- Esta investigación muestra información epidemiológica no antes descrita sobre los casos detectados por SARS-CoV-2 en la población panameña asegurada.

VI. Recomendaciones

- Confeccionar y utilizar un único formulario a nivel nacional para la solicitud de la prueba COVID-19, ya sea PCR, antígeno o serológica.
- Capacitar al personal de Salud en el llenado correcto de este formulario y la transferencia de los datos al sistema Modulab, para que de esta forma no perdamos información importante sobre el comportamiento de la Pandemia en Panamá.

Agradecimientos

A todo el personal del Laboratorio Clínico y de la Sección de Genética del CHDRAAM que desde el inicio de la Pandemia en Panamá, han estado procesando diariamente las muestras de Hisopado Nasofaríngeo para la detección molecular del SARS-CoV-2.

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Situation of Restorative Justice Two Decades after the Criminal Procedure Reform in Chile

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Abstract- The objective of this chapter is to analyze the current situation of restorative justice two decades after the transition from the inquisitive criminal procedural system to an accusatory one in Latin America and especially in Chile. The reform to the criminal procedural system that began in 2000 in Chile, incorporating the principle of opportunity to criminal action and thereby allowing the application of alternative solutions, of shortened and simplified processes to replace the oral trial, which allowed the use of restorative mechanisms in the treatment of crimes. For this research, a qualitative and dogmatic methodology was used, with a descriptive and exploratory design. Faced with the conclusion that without prejudice to the fact that, in some Latin American countries, restorative mechanisms were regulated by law, such as criminal mediation, even at the constitutional level, it has not had an influence on the resolution of criminal conflicts that would have occurred.

Keywords: *restorative justice - criminal procedure reform - treatment of the criminal conflict.*

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Situation of Restorative Justice Two Decades after the Criminal Procedure Reform in Chile

Situación de la Justicia Restaurativa a Dos Décadas de la Reforma Procesal Penal en Chile

Isabel Ximena González Ramírez

Resumen- El presente artículo tiene como objetivo analizar la situación actual de la justicia restaurativa, a dos décadas de la transición del sistema procesal penal inquisitivo a uno acusatorio en Chile. La reforma al sistema procesal penal que se inició el año 2000 en Chile, incorporando el principio de oportunidad a la acción penal y con esto la aplicación de las salidas alternativas, los procesos abreviados y los simplificados en reemplazo del juicio oral, lo que permitió el uso de mecanismos restaurativos en el tratamiento de los delitos. Para esta investigación se ocupó una metodología cualitativa, empirica y dogmática, con un diseño de carácter descriptivo y exploratorio. Frente a lo que se concluye que sin perjuicio de que, en algunos países de Latinoamérica, se regularon normativamente mecanismos restaurativos, como la mediación penal, incluso a rango constitucional, esta no ha tenido la influencia en la solución de los conflictos penales que se hubiera esperado, con un incipiente uso en delitos de escaza gravedad, confundiéndose estos mecanismos con las salidas alternativas, donde la participación de la víctima es prácticamente inexistente y no cumplen hoy con los fines que contempló su diseño, focalizándose estas en la descongestión judicial, mas, que en ofrecer soluciones acordes a las necesidades de justicia de la ciudadanía y reparación del daño causado por el delito.

Palabras claves: justicia restaurativa – reforma procesal penal – tratamiento del conflicto penal.

Abstract- The objective of this chapter is to analyze the current situation of restorative justice two decades after the transition from the inquisitive criminal procedural system to an accusatory one in Latin America and especially in Chile. The reform to the criminal procedural system that began in 2000 in Chile, incorporating the principle of opportunity to criminal action and thereby allowing the application of alternative solutions, of shortened and simplified processes to replace the oral trial, which allowed the use of restorative mechanisms in the treatment of crimes. For this research, a qualitative and dogmatic methodology was used, with a descriptive and exploratory design. Faced with the conclusion that without prejudice to the fact that, in some Latin American countries, restorative mechanisms were regulated by law, such as criminal mediation, even at the constitutional level, it has not had an influence on the resolution of criminal conflicts that would have occurred. expected, with an incipient use and in crimes of little seriousness, confusing these with alternative outlets, where the participation of the victim is practically non-existent and today they do not fulfill the purposes contemplated in their design, focusing these on judicial decongestion, more, that in offering solutions according to the needs of justice of the citizens and reparation of the damage caused by crime.

Keywords: restorative justice - criminal procedure reform - treatment of the criminal conflict.

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I. Introducción

La transición de los procesos penales, desde un sistema inquisitivo a uno acusatorio, en Latinoamérica, comenzó a instaurarse hace más de veinte años, con una historia procesal inquisitiva la que evolucionó a sistemas procesales penales de tipo acusatorio: orales, públicos, con una marcada influencia de tradición continental.

Con la reforma procesal penal, el año 2000, Chile incorporó el sistema acusatorio en la justicia penal, implementándolo por etapas en las diversas regiones del país.

Este importante cambio en la justicia penal, separa las funciones del juez penal que hasta entonces era instructor, acusador, y sentenciador, creando la institución del Ministerio Publico a nivel constitucional, como un poder independiente a los poderes del Estado: ejecutivo, judicial y legislativo, dotando al fiscal de la facultad de decidir sobre la acción penal, pero dentro de márgenes restringido por la ley.

Se instaura con esto, el principio de oportunidad que otorga flexibilidad a la aplicación del principio de obligatoriedad de acción frente al delito, con respeto al principio de legalidad procesal.

Adicionalmente, transita el sistema procesal penal de largos juicios escritos y secretos a juicios orales, públicos y transparentes, incorporando procesos breves de tratamiento del delito denominados abreviados y simplificados y formas de termino alternativas al juicio oral como las salidas alternativas, terminando también las investigaciones con archivo provisional o facultad de no investigar del fiscal.

Las salidas alternativas son una consecuencia de la aplicación del principio de oportunidad en el sistema penal, las que permiten incorporar en Latinoamérica procesos restaurativos, que actúan en

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forma complementaria a estas salidas, como una metodología colaborativa para el tratamiento y logro de acuerdos como alternativas al juicio.

Frente a lo cual nos planteamos como problema y pregunta de investigación: ¿Cómo han operado los mecanismos restaurativos en el sistema procesal penal acusatorio, después de la reforma al proceso penal en Chile?

Frente a lo que surge como hipótesis la siguiente: Los países de Latinoamérica con la transición de sistema inquisitivo al acusatorio, si bien incorporaron en sus sistemas procesales penales, en forma reglamentaria, legal e incluso constitucional, mecanismos restaurativos en el tratamiento del delito, su uso en Chile es todavía insipiente, sometido a la voluntad de los fiscales, aplicado a faltas y delitos de baja gravedad, de escaza notoriedad social y no totalmente valorado por los operadores jurídicos penales.

Chile en la actualidad es uno de los países en Latinoamérica que menor aplicación le da a los mecanismos restaurativos, salvo por la escaza aplicación de la mediación penal, al comienzo del período de la reforma procesal y hoy en algunos espacio de responsabilidad penal juvenil, todavía como programas pilotos y proyectos de ley, sin normativa al respecto y con un decreciente entusiasmo en su aplicación en adultos.

Los fiscales y jueces han demostrado poco estimulo en derivar a centros especializados de mediación penal, el tratamiento de delitos que pueden ser resueltos mediante salidas alternativas al juicio oral. Valorando estos mecanismos solo como descongestión judicial, en delitos de baja pena y cuando no existen antecedentes necesarios para una condena. Lo que se justifica por la falta de una explicita y autónoma regulación de los mecanismos restaurativos como salida alternativa al juicio oral, en un país tan legalista como lo es Chile, no se aprovechó el incorporarlos en la reforma al nuevo sistema procesal, como ocurrió en otros países de Latinoamérica.

Para este estudio se ocupó una metodología cualitativa de análisis hermenéutico, con un diseño de carácter descriptivo y exploratorio. Para lo cual se usó fuentes de información secundarias, tales como normativa jurídica, estudios, recomendaciones de organismos internacionales, doctrina y experiencias comparadas.

El objetivo de este artículo, es analizar la situación actual de la justicia restaurativa a dos décadas de la transición del sistema procesal penal inquisitivo a uno acusatorio en Chile.

Su estructura contiene cinco apartados, el 1° trata sobre el sistema acusatorio en Chile y los principios de la acción penal; el 2° da una mirada actual a las consecuencias de la transición del sistema inquisitivo al acusatorio; el 3° estudia las formas de solución del conflicto penal en Chile; el 4° observa la incorporación de mecanismos restaurativos en un sistema acusatorio; y el 5° identifica la evolución de las salidas alternativas y las estrategias necesarias para una implementación de mecanismos restaurativos como la mediación penal en Chile, que cumpla con los estándares exigidos en materia penal para el tratamiento del delito. Terminando con las conclusiones y hallazgos encontrados en este estudio.

Este artículo permite analizar como la modernización del sistema procesal penal en Chile, ha desaprovechado esta importante reforma, como una oportunidad de implementar el uso de sistemas restaurativos para la solución de los conflictos penales y que se encuentra pendiente un importante desafío en cuanto a la calidad del tratamiento y formas de termino colaborativas de los procesos penales, para lo cual es útil observar algunas buenas prácticas usadas en países de la región Latinoamericana.

II. El Sistema Acusatorio en Chile y la Aplicación de Los Principios de la Acción Penal

La transición del sistema inquisitivo al acusatorio en materia procesal penal en los países de Latinoamérica, se vinculan a un cambio en los énfasis que se dan a los principios propios de la acción penal.[1]

Dicha transición tuvo su inicio en Chile el año 2000, con la reforma procesal penal que otorgó al fiscal la facultad de tomar decisiones sobre la acción penal en un marco legal, la cual abrió la oportunidad de incorporar activamente mecanismos restaurativos en el tratamiento de los delitos, como forma de gestionar las salidas alternativas y los juicios abreviados y simplificados.

La acción penal es un presupuesto necesario de la jurisdicción, y consiste en el derecho público y subjetivo de exigir al tribunal la dictación de una decisión fundada y congruente cuando su titular el Ministerio Público, ejerce el monopolio de la potestad persecutora, la que realiza en cumplimiento de un deber constitucional de naturaleza pública, obligatoria, irrevocable, indivisible, e indisponible[2], razón por la que el régimen de la acción penal y las normas relativas a ella conforman una legislación de contenido político que da legitimación al Estado y le entrega el monopolio de la persecución penal.[3]

Así, el sistema penal no tiene otra opción que ser selectivo y que por economía procesal debe centrarse en los delitos más graves, donde se ha optado por aplicar mecanismos propios del principio de oportunidad, como las salidas alternativas, con

[1] MARQUEZ (2007), pp. 201-212.
[2] MALAMUD (2013), pp. 139- 161.
[3] ANITÚA (2019), pp. 239-25.

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soluciones mucho más civilizadas que el ejercicio de la acción penal, donde el proceso penal se orientan hacia una diversidad de respuestas frente al conflicto jurídico.

Según Binder, la acción pública debe ser diseñada de modo más complejo dado que hay casos en que, aun cuando existe interés social en ella, el Estado no debe encargarse de forma excluyente de la persecución penal, dejando fuera a la víctima, para abandonarla después por estar sobrepasado.[4]

En este contexto es que podemos afirmar que en casi ningún ordenamiento constitucional latinoamericano se exige en forma irrestricta acoger el principio de obligatoriedad de la acción penal, ni prohíbe o excluye el de discrecionalidad en su ejercicio, sin embargo, exige al legislador determinar los márgenes de discrecionalidad con los que ese órgano desarrollará su labor persecutoria.[5]

El principio de oportunidad se ha entendido como la facultad entregada al órgano persecutor de no iniciar, suspender, interrumpir o hacer cesar el curso de la persecución penal, cuando así lo aconsejan motivos de utilidad social o razones político-criminales.[6]

Este principio, constituye una excepción en los sistemas de corte continental, por esta razón, en Latinoamérica se afirma la persecución de oficio y la víctima se observa desapoderada de su papel en el proceso. Se considera todavía el delito no como una lesión hacia el afectado, sino que más bien contra el orden establecido.[7]

Para Hassemer, el principio de oportunidad supone una implementación selectiva y oportunista de normas jurídicas materiales en el proceso penal, lo que reviste una forma de debilitar estas normas a largo plazo. Si el Derecho Penal material se implementa desigualmente en el proceso penal, ello repercute negativamente en el sistema jurídico criminal, sobre todo cuando sus presupuestos de aplicación no están bien definidos.

Por ello, las decisiones de las autoridades instructoras de no perseguir un delito no puede controlarse eficazmente, salvo si hay participación del tribunal competente o juez instructor, así la mixtura entre legalidad y oportunidad dependerá de la ética de las autoridades, tribunales y del control y confianza de la población.[8]

Sin embargo, ninguna sociedad puede permitirse una regla de procesamiento automático para todos los casos y cada delincuente. Por esta razón, la tarea en la mayoría de los sistemas jurídicos ha sido la consecución de un equilibrio entre la protección del estado de derecho y la escasez de recursos públicos, lo que inevitablemente ha llevado a institucionalizar ciertos criterios de selectividad en las persecuciones.[9]

En cuanto al principio de legalidad procesal, se sostiene que uno de sus fundamentos principales sería la igualdad ante la ley, ya que sus fines serían evitar arbitrariedades y discriminaciones en la persecución de los delitos.[10] Adicionalmente, como señala Roxin, tras el principio de legalidad es posible encontrar la idea de retribución, según la cual el Estado, para la realización de la justicia absoluta, tiene que castigar sin excepción toda violación a la ley penal.[11] No obstante, Elías Neuman, expresa que tal principio ha sido cuestionado, y que es tendencia mundial que no sea entendido de forma tan rigurosa como antaño, por la dificultad de tratar de conciliarlo con los fines preventivos de la pena.[12] Así, desde una perspectiva económica y política, es poco razonable obligar de la misma manera a las autoridades instructoras al esclarecimiento de todos los delitos.

La retirada del principio de legalidad aplicado en términos absolutos puede apreciarse en la transición del proceso penal latinoamericano, que pasó a valorar la eficacia de la persecución, donde difícilmente se repara a la víctima, la que no es oída en su voluntad resarcitoria o en su vana pretensión de que se haga justicia. Sin embargo, se trata entonces de una nueva victimización, esta vez legal.[13] Por ello, la protección de las personas es previa y justificante en la función de perseguir y reprimir los delitos, donde la justicia restaurativa atiende como primer objetivo a la resolución del conflicto a la reparación de daños vulnerados y paz social.

Buteler admitió la deslegitimación del principio de legalidad procesal en términos absolutos y su tensión con el de oportunidad.[14] Es por ello que sugiere moderar el primero incluyendo al segundo. En el mismo sentido para Zarate, M. (2002,135) el principio de legalidad procesal prescribe que: cuando el órgano persecutor toma conocimiento de un hecho que reviste el carácter de delito, promoverá la persecución penal, sin que pueda suspender, interrumpir o hacer cesar su curso, salvo los casos previstos en la ley, con criterios de discrecionalidad estricta y reglada.[15]

Este principio, añade un sistema de control a la discrecionalidad en la persecución penal, en el que subyace una noción paternalista del ente persecutor con matices del antiguo y autoritario sistema inquisitivo, como transición hacia el sistema acusatorio.[16]

[4] BINDER (2009),
[5] BORDALÍ (2011), pp. 513-545.
[6] HORVITZ Y LOPEZ (2002), p.48.
[7] ANITÚA (2004), pp. 65-102
[8] HASSEMER (1988), pp. 8-11
[9] LANGBEIN (1974), pp. 439.467
[10] LANGBEIN (1974), pp. 439.467
[11] ROXIN (2001), p.89.
[12] NEUMAN (2005), p.97
[13] MARQUEZ (2007), pp. 201-212.
[14] BUTELER (1998), p.17.
[15] ZARATE (2002) paginas?
[16] LANGBEIN (1974), pp. 439.467

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Así, el paso de un procedimiento de tipo inquisitivo a uno acusatorio mantuvo lo que se consideró las metas principales del proceso en el sistema continental europeo: la persecución penal pública y la búsqueda objetiva de la verdad histórica como fin inmediato del proceso. Si embargo para Carnevali, también corresponde al derecho penal sustantivo determinar en qué casos el sistema penal no debe intervenir y no debe imponer una pena, donde las salidas alternativas, no suponen una pena y apuntan más bien a procurar la verdad procesal más que a la histórica.[17]

Es así como se ha entendido que a los derechos materiales le corresponderá dar directrices sobre todos los individuos en forma duradera y general. En cambio, al derecho procesal le corresponderá dirigir conductas de los sujetos procesales. El primero determina la ilicitud y el segundo lo eficaz o ineficaz. En ese sentido, el principio de legalidad procesal hace énfasis en la idea del derecho como justicia y la oportunidad como efectividad.

En este contexto, el régimen de la acción penal y las normas relativas a ella conforman una legislación de contenido político que lo transforman en uno de los elementos fundamentales de soporte de la legitimación del Estado en el proceso penal. Al asumir éste el poder de requerir y por otro el poder de juzgar, se garantiza el monopolio de la persecución penal.[18]

Al respecto, Maier, sostiene que la obligación persecutoria durante muchos siglos no existió. En su lugar, primó el modelo privado de persecución penal. Específicamente, dicha situación ocurrió antes del desarrollo del Estado moderno, por lo que la persecución penal pública es sólo un modelo posible no el único.[19]

Para Binder, la acción penal pública debe ser diseñada de modo más complejo, dado que hay casos que, aun existiendo interés social, el Estado no debe encargarse de forma excluyente de la persecución penal.[20]

Es así como la relación entre la acción privada y pública debe ser dinámica, y por ello carece de sentido que el Estado asuma sólo el ejercicio de esta acción, deje fuera a la víctima y la abandone luego por estar sobrepasado.[21]

a) Mirada actual a las consecuencias de la transición del sistema inquisitivo al acusatorio

Las consecuencias de esta gran reforma a la justicia penal, que ya hace años se había venido produciendo en la mayoría de los países de Europa, se propuso eliminar las deficiencias del antiguo sistema, tales como: procesos secretos y largos, falta absoluta de inmediación del juez que lleva la causa y servicios de defensa precarios para los imputados de escasos recursos.

Otro de los avances de las reformas fue la creación del Ministerio Público. Este organismo investiga los delitos junto a la Policías, mientras que la Defensoría Penal Pública posibilita una defensa de calidad y en igualdad de condiciones para todos los ciudadanos.

Estas reformas representaron para Latinoamérica el aumento de la oferta de atención judicial, la modificación de los tiempos procesales, la creación de programas de atención a víctimas y testigos, y nuevas alternativas para resolver los casos. Además, dieron una nueva cara a la justicia penal, con la sustitución de un sistema antiguo, inquisitivo y burocrático, con serias deficiencias estructurales en la persecución criminal y en la cautela de las garantías individuales, por un sistema acusatorio oral y público, que pretende ser más ágil y humano, el que se propone conservar el principio de legalidad sustantivo y flexibilizar el de legalidad procesal.[22]

En su estructura, el nuevo sistema evidencia ser más moderno y efectivo. Sin embargo, cabe preguntarse si ¿ha cambiado realmente el sistema de administración de justicia de acuerdo a las expectativas que se tuvieron?

Para evaluar los cambios producidos por la reforma procesal penal en sus inicios, se realizaron en Chile dos estudios ampliamente reconocidos[23]: el estudio del Ministerio Público, a cargo del *Vera Institute of Justice* de Nueva York (2003)[24] y el efectuado por los juristas Baytelman y Duce (2003)[25].

Los resultados señalaron que el nuevo sistema de enjuiciamiento penal estaba cerrando más casos en un tiempo razonable, lo que al mismo tiempo generaba una tasa más alta de sentencias condenatorias en comparación al antiguo sistema (Ministerio Público de Chile 2004, 3-20). La reforma comenzó mostrando

[17] CARNEVALI (2005), pp. 122-132
[18] BINDER (2009), pp. 213-225
[19] MAIER (2008), pp. 343-365
[20] BINDER (2009), pp. 213-225
[21] ANITÚA (2002) paginas?

[22] BAYTELMAN Y DUCE (2003), p.18
[23] Estudio de la Fundación Paz Ciudadana, *Proyecto de Evaluación Empírica de la Reforma Procesal Penal,* del Ministerio de Justicia, Santiago, Chile 2005; Informe de la Comisión de Constitución, Legislación y Justicia de la Cámara de Diputados del Código Procesal Penal, Chile, 2001, p. 104; Ministerio Público de Chile División de Estudios, Evaluación, Control y Desarrollo de la Gestión y Vera Institute of Justice de Nueva York, Estudio Nuevo sistema penal en Chile, 2004, pp. 3-20; Estudio empírico; Estudios estadísticos y Memorias anuales del Ministerio Público y la Defensoría Penal Pública; instructivos del Fiscal Nacional.
[24] El 2003, se hizo una comparación estadística de la forma en que el nuevo y el antiguo sistema de justicia criminal resuelven los casos judiciales, analizándose alrededor de 7.000 causas ingresadas en el año 2002.
[25] Estos estudios han sido realizados durante los primeros años de implementación de la Reforma Procesal Penal, con el objeto de medir en un mismo período, ciudades que funcionaban con y sin Reforma.

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mayor eficacia en la resolución de casos y una mayor celeridad.

Los estudios señalan que existen también diferencias en la proporción de casos en los cuales hubo detenciones. El 14,5% de los casos del antiguo sistema involucró detenciones, mientras que con la reforma la proporción de casos con detenidos sólo alcanzó un 4%. Lo que explicaría esta gran diferencia es el mayor énfasis que ahora se pone en el principio de presunción de inocencia, "investigar para detener" y no de "detener para investigar" como ocurría en el sistema antiguo.[26]

En el comienzo de las reformas procesales, el alto número de término de casos en lapsos de tiempo relativamente breves fue motivo de preocupación para algunos, especialmente por la utilización de las facultades de los fiscales para aplicar salidas de tipo más bien administrativas como el archivo provisional o el principio de oportunidad.

Se preguntaba la comunidad, ¿si con la judicialización de la causa o más tiempo de investigación, estos casos podrían producir una salida procesal diferente, incluso una condena?, ¿si el nuevo sistema obtiene niveles más altos de productividad a expensas de una menor eficacia en la persecución penal?. Sin embargo, la evidencia indica que el antiguo sistema era "menos sancionador" que el nuevo sistema de enjuiciamiento penal[27]. Ello, sin perjuicio de que la condena no es el único resultado del proceso judicial y que no siempre será el indicador más importante al momento de evaluar la calidad del proceso penal (Bustos J., 2007).

Es así como la incorporación de las salidas alternativas al juicio oral, que se orientan a la búsqueda de una solución rápida y eficaz al conflicto antes que, a la imposición de una sanción penal, muestran como resultados un proceso rápido, que puede ir de la mano con el cumplimiento de los derechos y garantías de los intervinientes.

El nuevo sistema ha significado un incremento de los derechos y servicios tanto de las víctimas como de los imputados. La víctima, se debía transformar en un actor más relevante en la medida en que es consultada sobre decisiones del proceso por jueces y fiscales, lo que no sucedía antes, pero aun su participación en el proceso es absolutamente insuficiente.

En cuanto a los derechos de los imputados, hoy cuentan con un abogado profesional desde la primera actuación del proceso y que comparece personalmente a cada una de las audiencias. Defensores que están organizado institucionalmente en la Defensoría Penal Pública, dependiente del Ministerio de Justicia y Derechos Humanos.

Piedrabuena Richards (2006,) afirmaba que falta información en la ciudadanía respecto de los nuevos mecanismos de salidas alternativas, juicios simplificados, procedimientos abreviados y rol de los fiscales frente a los jueces, víctimas e imputados, falencia que hoy pasados veinte años todavía se observa en los juicios de la ciudadanía.

Se aprecia también disconformidad con los principios rectores de la reforma al proceso penal, en la mayoría de los países Latinoamericanos que la han vivido. Esta crítica ha provenido de sectores punitivistas, que aspiran a que todos los imputados estén encarcelados y que ven en las salidas alternativas y procedimientos abreviados, una grave negligencia en las actuaciones de los fiscales y los jueces.[28]

El problema de la seguridad ciudadana y la delincuencia es un tema que ha crecido como preocupación ciudadana desde el siglo pasado, y hoy con la globalización y uso de redes sociales se intensifica el temor frente al delito, responsabilizando a las reformas procesales penales y al uso de las salidas alternativas y renuncia a la acción penal del aumento de la delincuencia.[29]

Así, el ente persecutor, debió enfrentar desde los primeros tiempos de la reforma y aún hoy a críticas por ser un "sistema muy garantista", que "desecha los delitos de menor cuantía", con gran presión de la ciudadanía, medios de comunicación y de los políticos para aumentar la severidad penal.

Existe hoy un fuerte debate en torno a la eficacia de la persecución penal por delitos de mediana gravedad, y cuestionamientos sobre las medidas cautelares que no involucran prisión preventiva y por la falta de severidad en el castigo. promoviéndose los últimos años múltiples leyes con objetivos populistas, las que endurecen las penas, como la ley de control de armas, los "hurtos hormiga", los delitos de agresión contra los policías, y Ley de Violencia Intrafamiliar, que creó el delito de violencia reiterada o maltrato habitual, Ley Emilia de muerte por manejo en estado de ebriedad. En contraposición a esto nos encontramos con la tesis de los estudiosos del derecho penal mínimo, que favorece las salidas alternativas.[30]

Quizás por estas razones es que en las instrucciones del Ministerio Público se advierte un cambio desde los primeros años de la reforma, en que se favorecían las salidas alternativas y se concebía al fiscal como un componedor más que un represor penal, restringiéndose algunas salidas alternativas y dando mayor severidad en las penas.[31]

Así, la reforma al proceso penal en la mayoría de los países de la Región ha debido hacerse cargo de

[26] BAYTELMAN Y DUCE (2003), p. 18
[27] BAYTELMAN Y DUCE (2009), pp. 180.189
[28] BUSTOS (2011) paginas?
[29] MUÑOZ (2007), pp. 266-268
[30] CESANO (2010), p. paginas?
[31] GONZALEZ (2019), pp. 119-153

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las expectativas de seguridad ciudadana, las que inicialmente no se definieron como su ámbito de competencia. Siendo evaluada hoy por su capacidad de incidir en la denunciabilidad frente al delito, la reducción del temor y la victimización en la ciudadanía.[32]

Las investigaciones recientes en el área desmitifican estas críticas a la reforma en ambos sentidos. No hay evidencia que permita atribuirle algún efecto sobre la victimización, ni tampoco sobre el incremento o disminución de la comisión de delitos.[33] Tampoco su denunciabilidad varía, producto de la mejor evaluación de los procesos, con lo que no se reduce la cifra negra de delitos, como sería esperable.

Los informes de evaluación de los países latinoamericanos con reforma, según el Informe de la Américas (2018), revelan que las salidas alternativas no han sido totalmente implementadas y, donde lo han sido, no hay información significativa sobre su aplicabilidad.

b) La resolución de los conflictos penales en un sistema acusatorio

Según datos del boletín del Ministerio Publico, de enero a diciembre del año 2020, ingresaron en Chile 1.660.488 delitos, de los que 970.321, (58,44%) tienen imputado conocido y 690.187 (41,57%) con imputado desconocido. Así, al comparar las cifras de los casos que ingresaron a la Fiscalía con imputado conocido a 20 años de implementación de la reforma, podemos ver que solo el 58,44% tiene la posibilidad real de resolución por la vía formal, ya que cuentan con una contraparte identificada que responde frente al hecho punible y esto solo en el caso en que efectivamente se resuelva el conflicto con el ingreso de ambas partes al sistema penal.

Por otra parte, de 1.660.488 delitos terminados el año 2020, 652.846 tuvieron termino judicial esto es el 39,32%, y con términos no judiciales 887,089 equivalente al 53,42%, y por otras causas de término 120.553 (7,26%). De los con imputado conocido 60,19% tuvieron términos judiciales y no judicial, el 32,40 % y de los sin imputado conocido tuvieron términos judiciales un 9,98% un 82,98 % salida no judicial. Lo que da cuenta de que la mayoría de los casos con imputado conocido se resuelven por vía judicial terminando sin proceso judicial cuando el imputado no es conocido.

Tabla N°6: Términos aplicados por tipo de imputado. Período: 01 enero - 31 diciembre 2020.[34]

TIPO DE TÉRMINOS(1)	IMPUTAOS(2)				
	Imputado conocido (IC)	% Conocido	Imputado Desconocido (ID)	% Desconocido	Total
SENTENCIA DEFINITIVA CONDENATORIA	358.914	39,95%	0	0,00%	358.914
SENTENCIA DEFINITIVA ABSOLUTORIA	7.800	0,87%	0	0,00%	7.800
S OBRESEIMIENTO DEFINITIVO	41.223	4,59%	5.488	0,86%	46.711
SOBRESEIMIENTO TEMPORAL	7.850	0,87%	0	0,00%	7.850
SUSPENSIÓN CONDICIONAL DEL PROCEDIMIENTO	57.965	6,45%	0	0,00%	57.965
SOBRESEIMIENTO DEFINITIVO 240	46.641	5,19%	12	0,00%	46.653
ACUERDO REPARATORIO	17.816	1,98%	0	0,00%	17.816
FACULTAD DE NO INVESTIGAR	45.787	5,10%	63.350	9,87%	109.137
SUBTOTAL POR SALIDA JUDICIAL	583.996	65,01%	68.850	10,73%	652.846
ARCHIVO PROVISIONAL	181.512	20,20%	536.455	83,62%	717.967
DECISIÓN DE NO PERSEVERAR	48.557	5,40%	9.729	1,52%	58.286
PRINCIPIO DE OPORTUNIDAD	80.837	9,00%	24.638	3,84%	105.475
INCOMPETENCIA	3.472	0,39%	1.889	0,29%	5.361

[32] JIMENEZ et al. (2019) paginas?
[33] COVARRUBIAS Y MOHOR (2006) paginas?
[34] BOLETIN ANUAL FISCALIA (2020)

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SUBTOTAL POR SALIDA NO JUDICIAL	314.378	34,99%	572.711	89,27%	887.089
ANULACIÓN ADMINISTRATIVA	5.541	0,00%	1.550	0,00%	7.091
AGRUPACIÓN A OTRO CASO	61.230	0,00%	46.752	0,00%	107.982
OTRAS CAUSALES DE TÉRMINO	3.131	0,00%	323	0,00%	3.454
OTRAS CAUSALES DE SUSPENSIÓN	2.025	0,00%	1	0,00%	2.026
SUBTOTAL POR OTROS TÉRMINOS	71.927	0,00%	48.626	0,00%	120.553
TOTAL NACIONAL	970.301	100,00%	690.187	100,00%	1.660.488

El año 2000, los acuerdos reparatorios marcaron un porcentaje de términos mayor que la suspensión condicional del procedimiento y en la actualidad van decreciendo en forma inversamente proporcional, representando hoy los acuerdos un 1,98%, menos de la mitad de las suspensiones que llegan al 6,48% (Boletín anual Fiscalía, 2020), por el actuar menos componedor de los fiscales.

En Chile se observa que la solución de los conflictos puede lograrse no solo a través de un juicio oral, sino mediante el procedimiento abreviado y simplificados, siempre que exista acuerdo entre el fiscal y el imputado, que este reconozca su responsabilidad en el delito y concurran los demás requisitos previstos, por ejemplo, en el artículo 406 y siguientes del Código Procesal Penal chileno.

Podemos observar que existe una importante cifra de conflictos a los que no se les da una solución satisfactoria para las partes, dentro de los que están los términos no judiciales, facultativos del Ministerio Público, que incluyen el archivo provisional, la decisión de no perseverar, la incompetencia y el principio de oportunidad en sentido restringido.

En cambio, las dos formas principales de término de las causas judicializadas que alcanzan el año 2020 un 48.38% corresponden a las condenas y a las salidas alternativas, las que si pueden ofrecer una respuesta a la víctima. Esta últimas, pueden ser aplicadas en la mayoría de los delitos denunciados, las que requieren contar con una forma restaurativa e institucionalizada de tratar los conflictos a diferencia del proceso rápido y superficial que les da hoy la Fiscalía, con el fin de dar pronto termino el proceso.

c) *La incorporación de mecanismos restaurativos en un sistema acusatorio*

En Latinoamérica, el principio de oportunidad dio al proceso penal plena cabida a las formas autocompositivas de solución del conflicto respecto de los delitos de acción penal pública, las que en el antiguo proceso penal solo se reconocían en los delitos de acción privada a través del perdón de la parte ofendida.[35]

Los mecanismos restaurativos como la mediación penal pueden ser formales o informales, dependiendo si está reglada por la ley y se establece en forma previa, pública y transparente los criterios de selectividad de los delitos, lo que permite relativizar la afección al principio de legalidad procesal.

El enfoque del principio de oportunidad en el sistema continental, propicia la mediación para determinados tipos de delitos, mientras que en el sistema del *Common Law* el *plea bargaining* puede utilizarse en todo delito. Sin embargo, este por sí solo, no es un mecanismo propiamente restaurativo ya que el imputado muchas veces acepta responsabilidad para lograr una pena menor, que son más bien formas de juicio abreviado o simplificado, con condena, donde no hay participación activa de la víctima.

Los mecanismos restaurativos como la mediación penal, en su inicio se enfrentan a criticas como un "desvío" que al depender de la voluntad del delincuente, el Estado puede caer en un incumplimiento de su deber de evitar la arbitrariedad y la discriminación en la persecución de los delitos.[36]

Por esto, dice Fellegi, que las intervenciones de justicia restaurativa deben ser "llevadas a cabo dentro de una práctica centralizada y uniforme con el objetivo de garantizar la igualdad ante la ley, es decir, garantizar que los mismos protocolos y garantías se proporcionen para todos los perseguidos".[37]

Exigiendo Morris que "las prácticas sobre la justicia restaurativa, comprendan nociones como; la Igualdad de trato, consistencia y equidad, como un medio para garantizar que los resultados para los ofensores no sean desproporcionados con respecto a su culpabilidad".[38]

El sistema restaurativo, es un aporte al principio penal de *ultima ratio*, subsidiariedad de la ley penal, como el sistema de justicia penal holandés que incluye prácticas que no tienen una intención punitiva, sino más bien el desarrollo personal y social del delincuente. Y Bélgica que reorienta sus sentencias hacia un enfoque más reparador.[39]

[35] ANITÚA (2019), pp. 239-251

[36] HARTMANN (2010), p. 205
[37] FELLEGI (2010), p. 51
[38] MORRIS (2003), p. 469
[39] BLAD (2003), p. 196

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Entendemos por justicia restaurativa: un sistema de justicia, el que, mediante el uso de valores democráticos y procesos colaborativos, trata los conflictos jurídicos penales en forma colaborativa y conduce a resultados reparadores, a través de métodos que promueven la participación activa y voluntaria de la comunidad y las partes, a las que reintegra socialmente".[40]

Un programa restaurativo a nivel Latinoamericano debe determinar legalmente el marco dentro del cual debiese incorporarse, dentro de una salida alternativa, o bien como una vía independiente y autónoma, qué resguarde las garantías procesales.[41]

Cualquiera de las dos alternativas mencionadas constituye una mejor forma de regulación que la que se da hoy en Chile, donde su aplicación es ocasional y se inserta como mediación penal, en el contexto del archivo de los antecedentes, sin que exista un reconocimiento, ni control judicial de esta herramienta y, en el mejor de los casos, en una salida alternativa como el acuerdo reparatorio.

Entendemos por mediación penal: "Un mecanismo restaurativo en que una parte neutral, con carácter técnico, independiente de los actores institucionales del proceso penal, e imparcial, ayuda a las personas implicadas en un delito o falta, en calidad de víctima e infractor, a comprender el origen del conflicto, sus causas y consecuencias, a confrontar sus puntos de vista y a elaborar acuerdos sobre el modo de reparación, tanto material como simbólica".[42] En estos procesos, las partes no se encuentran solas, sino que existe un mediador que protege al sistema de los abusos y un juez que homologa los acuerdos con forma de sentencia ejecutoriada.

Mera, afirma que en la medida en que la participación de los procesos de mediación penal es voluntaria, siempre subsistiría la posibilidad de renunciar a ella y someter el asunto a un proceso judicial, no debiera preocuparnos tanto el cumplimiento estricto de garantías del debido proceso. Las que, sin embargo, son parte importante de los principios del proceso de mediación.[43]

Dentro de las corrientes más innovadoras están quienes esgrimen que el campo de acción de la mediación penal debiera definirse sobre la base de la vulnerabilidad y peligrosidad de las partes, realizada por instrumentos técnicos psicosociales, junto con del reconocimiento de la intención de este último de reparar el daño.[44] Excluyendo entonces, la gravedad del delito como un criterio de definición para aplicar un mecanismo restaurativo.[45]

Además, debiera incorporarse al ámbito de acción de la mediación situaciones conflictivas donde existe quiebre relacional, daño, y relaciones sociales permanentes en el tiempo, a las que el sistema penal no da una solución adecuada.

Es así como existen importantes ventajas en el funcionamiento de un sistema de mediación penal, relacionadas con la protección y promoción de los intereses de la víctima y la oportunidad de contar con mecanismos que permitan ofrecer respuestas diversas y adecuadas a cada situación particular.[46] Se da la oportunidad a la víctima de ser reconocida en su dolor, además de encontrar una solución rápida y acorde a su necesidad ante la situación generada por el delito, lo que le permite beneficios tanto psicológicos como materiales o económicos.[47]

En el ámbito psicológico, permite a la víctima, bajar sus niveles de temor difuso y ansiedad frente al imputado al tener la oportunidad de comunicación con éste, descubrimiendo de su identidad y su motivación al delinquir.[48] Lo que tendría un efecto pedagógico en el ofensor, evitando la reincidencia y lo haría partícipe de la reparación.[49] Por último, permite a la Defensoría obtener acuerdos más beneficiosos para sus defendidos e implica menos costos de tiempo y esfuerzo de sus defensores y menos costos para el Estado y contribuye a que la ciudadanía tenga una mejor percepción de la justicia.[50]

d) Las salidas alternativas y las estrategias para una adecuada implementación de mecanismos restaurativos en Chile

En algunos países de Latinoamérica, como manifestación de la disponibilidad de la acción penal y el principio de oportunidad, se han incorporado las salidas alternativas al proceso penal, las que no siempre son las mismas ni se denominan de la misma manera, pero en general tienen los mismos objetivos. No existe consenso acerca de cuáles son éstas.[51] Algunos incluyen, el principio de oportunidad en sentido amplio y el procedimiento abreviado y simplificado.

El sistema penal por medio de las salidas alternativas, utilizando criterios que tienden primordialmente a su eficiencia, intenta autorizar mecanismos auto-compositivos, con participación de la víctima y del imputado en caso de que el interés público existente en la sanción penal sea menor, dado que los criterios preventivos no exigen la imposición de una pena. Definiendolas como: "mecanismos de solución de conflictos, que buscan que las partes alcancen acuerdos con el fin de evitar dirimir los problemas en el sistema penal".[52]

[40] GONZALEZ (2018), p.p 300-335
[41] MERA (2009), p.p 165-195
[42] GONZALEZ (2009), p. 25
[43] MERA (2009), p.p 165-195
[44] GUTIERREZ (2009), 241-258
[45] DUNKEL ET AL. (2015), paginas?
[46] GONZALEZ (2019), p.p 119-153
[47] EIRAS (2010 0 2005) paginas?
[48] PAVLICH (2005), p. 27
[49] NEUMAN (2005), p. 47
[50] PABLIC (2012), paginas?
[51] CESANO (2010), paginas?
[52] HORVITZ Y LOPEZ (2002), p. 50

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La tendencia a la privatización del proceso que ofrecen las salidas alternativas ha dado lugar a injustificadas críticas.[53] Sin embargo, estos sistemas no implican una disolución de la administración pública de justicia en los delitos de mayor gravedad y tampoco dan lugar a la pérdida de la bilateralidad de la audiencia y derechos de las víctimas, la que se evidencia en la posibilidad que tiene ésta de recurrir de apelación.[54]

Entre los objetivos políticos criminales planteados en la creación de las salidas alternativas estaban dar mayor protagonismo a la víctima en el proceso, posibilitar la resolución del conflicto penal-criminal, evitar los efectos criminógenos del procedimiento penal y la prisión preventiva respecto de los imputados por delitos menores y de bajo compromiso delictual, así como conciliar los intereses de las partes en conflicto.[55] Estas, son compatibles con una política criminal de mínima intervención penal, que sostiene que la pena privativa de libertad no es el instrumento principal para responder a la criminalidad, sino que, por contrario[56], el mayor nivel de desarrollo y de igualdad social de un país se expresa en su capacidad de resolver los conflictos con el menor uso de los instrumentos coactivos.[57]

Según los mensajes de los Códigos Procesales Penales Latinoamericanos, las ventajas de introducir estas salidas en el ordenamiento procesal penal son múltiples, entre las que cabe destacar, que son una solución rápida y eficaz del conflicto penal, que pueden aplicarse en forma temprana, cercanas a la comisión del hecho ilícito, adoptándose en la audiencia de formalización de la investigación.[58]

Con estas salidas no se produce la estigmatización del imputado, lo que disminuye la posibilidad de que sea privado de libertad mientras la investigación se desarrolla y otorga opción al ofensor de acceder a una medida destinada a su reinserción social que le permite aparecer sin antecedentes de una condena. Estas ofrecen fórmulas de solución al delito diferenciadas según su naturaleza y gravedad, distintas al sistema antiguo de justicia penal de estructura lineal, que da a los ilícitos una misma respuesta.[59]

Otra ventaja que tienen estos mecanismos es que presentan aspectos funcionales a los intereses de la seguridad pública.[60] Por ejemplo, la suspensión condicional del procedimiento, reconocen sus antecedentes en los beneficios alternativos a la pena privativa de libertad como son la remisión condicional de la pena, la libertad vigilada y la reclusión nocturna.[61]

Sostienen algunos autores, que las salidas alternativas posibilitan que el imputado, se reincorpore como ciudadano útil, no quedando marginado de la dinámica social. Permitiendo al grupo social y familiar más cercano, apoyarlo evitando el trauma social y económico que les causaría la aplicación de una respuesta punitiva.[62]

Por otra parte, se aprecia que las personas que salen del sistema penal, por alguna de estas salidas, no presentan niveles de reincidencia superiores al 10%, lo que contrasta con los niveles que presentan quienes han cumplido sus penas privados de libertad, los que superan el 60%.[63]

El Informe "Reincidencia de los imputados atendidos por la Defensoría Penal Pública", primer estudio que se realizó sobre el universo de condenados durante la Reforma en Chile, entre los años 2001 y 2006, da cuenta de que los imputado que salen por 1° vez con salida alternativa, que tienen mayor oportunidad de reincidir por tener mayor grado de libertad ambulatoria, tienen menor nivel de reincidencia que los primerizos que han cumplido penas privativas de libertad.[64]

Entre las dos salidas alternativas más comunes en los países de la región, podemos mencionar la suspensión condicional del procedimiento y los acuerdos reparatorios, las que en algunos países se denominan de forma distinta.

(a) *La suspensión condicional del procedimiento:* Es un medio auto-compositivo de carácter judicial, bilateral y no asistido, celebrado entre el fiscal y el imputado dentro del proceso penal, que requiere ser homologado por el juez de garantía. Este tiene como finalidad específica suspender el procedimiento y conducir al término de litigio penal por un delito de acción penal pública, en caso de cumplirse los requisitos y condiciones establecidos por el Juez.[65]

En esta salida alternativa, no es necesaria la concurrencia del querellante ni de la víctima, dado que sólo se contempla el derecho para que éstos sean oídos en la audiencia en caso de haber asistido, sin perjuicio de poder impugnar posteriormente esta resolución.

Se requiere para su procedencia que el imputado no haya sido condenado anteriormente por crimen o simple delito; que la pena que pudiese imponersele al imputado, en caso que fuera condenado, no sea superior a tres años de presidio o

[53] VAN NESS Y STRONG (2015) paginas?
[54] RAMIREZ (2012), paginas?
[55] GONZALEZ (2018), p.p 300-335.
[56] BARATTA (2004) paginas?
[57] GAVRIELIDES (2018), paginas?
[58] LARRAURI (2007 o 1996) p. 32
[59] GONZALEZ (cual año) paginas?
[60] CARNEVALI (2017), p.p 122-132.
[61] Ley N°18.216 , de 1983.
[62] DELGADO Y CARNVALI (2020), p.p 1-24.
[63] BOLETIN N°4321-07 (2007) paginas?
[64] DEFENSORIA PENAL PUBLICA (2007) paginas?
[65] RIEGO (2007) paginas?

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reclusión menores en su grado medio y que no se encuentre vigente otra suspensión condicional del procedimiento al momento de los hechos. Pese a que el Codigo Procesal Penal no lo incluye como un requisito, el acuerdo del imputado para aceptar esta salida es una condición indispensable. Esta aceptación debe hacerse libre y con pleno conocimiento de las consecuencias jurídicas que le afectara, lo que debe ser verificado por el respectivo juez de garantía. Esto significa, como minimo, verificar que el imputado conoce sus derechos –entre ellos el derecho a un juicio oral, publico y contradictorio-entiende los términos del acuerdo y los efectos o consecuencias del mismo.[66]

En cuanto a su oportunidad y de conformidad con el articulo 245 CPP, la suspensión condicional del procedimiento se podrá solicitar en la audiencia de formalización de la investigación y hasta la audiencia de preparacion de juicio oral. Sin perjuicio de lo anterior, resulta curiosa su aplicación y oportunidad en el procedimiento simplificado. En efecto, pese a que el legislador guardo silencio respecto a esta salida alternativa para el procedimiento simplificado, no existiria razón valedera que impida declarar la suspensión condicional del procedimiento cuando se ha dado cumplimiento a los requisitos generales de procedencia de dicho instituto.[67] Considerando que el articulo 389 CPP ordena expresamente la aplicación supletoria de las normas del Libro Segundo del Codigo, es decir, las del procedimiento ordinario. Lo anterior a permitido, que se puedan celebrar suspensiones condicionales del procedimiento no solo desde la audiencia de requerimiento de procedimiento simplificado, sino también -ya como una practica asentada en nuestros tribunales- en la audiencia de juicio oral.

Respecto a las condiciones que deberá cumplir el imputado, el articulo 238 CPP establece un catalogo no taxativo de obligaciones tales como: el residir o no residir en un luga determinado; la prohibición de acercarse a determinados lugares o personas; el someterse a un tratamiendo medico o psicológico; firma mensual, etc. El control del cumplimiento de estas condiciones estará a cargo del Ministerio Publico, quien deberá llevar un registro de personas sujetas a esta salida alternativa.

Si el imputado incumpliera sus condiciones de manera injustificada, grave o reiterada, o fuere objeto de una nueva formalización de la investigación por hechos distintos. respecto a esta ultima, se debe admitir que una nueva formalización de la investigación solo puede provocar la revocación de la suspension condicional del procedimiento cuando se funda en antecedentes plausibles. De lo contrario, para la revocación de una suspensión bastaría con que el fiscal abusivamente formalizara una investigación por cualquier hecho, aunque careciera completamente de fundamento, y sin que los mecanismos de reclamo contra la actuación abusiva del fiscal representen remedio suficiente, pues solo tiene efectos disciplinarios y no, o al menos no directamente, procesales.

el juez a petición del fiscal o de la victima, revocara la suspensión condicional del procedimiento, continuando el procedimiento de acuerdo a las reglas generales. Por el contrario, transcurrido el plazo que el tribunal hubiere fijado, sin que la suspensión fuere revocada, se extinguirá la acción penal, debiendo el tribinal dictar de oficio o a petición de parte el sobreseimiento definitivo.

Desde el la perspectiva del imputado, las ventajas que otorga optar por la suspensión condicional de procedimiento por sobre el ejercer el legitimo derecho a un juicio oral, pueden resumirse en términos de "costo-beneficio", es decir, se tiene la apreciación de que aun siendo inocente podría ser enjuiciado, lo que acarrearía dificultades en términos de tiempo, de imagen, económicas, etc.[68] También resulta atractivo para el imputado, el hecho de que la aceptación de la suspensión no constituye una declaración de culpabilidad, lo que permite mantener sus antecedentes "limpio" de condena alguna.

Desde la otra vereda, para la victima, también la suspensión condicional del procedimiento puede tratarse de una forma menos burocratica y mas efectiva para obtener una reparación al daño sufrido. Asi por ejemplo, el articulo 238 CPP contempla el pago de una suma a titulo de indemnización, permitiendo obtener una compensación pecuniaria sin tener que recurrir a sede civil, el cual resulta muchas veces resulta engorroso y dilatorio. Por otro lado, en los casos de violencia intrafamiliar en que el agresor esta iniciando en conductas violentas, permite que este pueda someterse a un tratamiento medico o psicoogico que permita una convivencia pacifica con la victima.

(b) *Los Acuerdos Reparatorios:* Consisten en un acuerdo libre e informado entre imputado y víctima, en virtud del cual el primero se obliga a reparar los efectos lesivos de la comisión de un hecho punible en aquellos casos en que se trate de delitos que afectaren bienes jurídicos disponibles de carácter patrimonial, lesiones menos graves o delitos culposos, y que no exista interés público prevalente en la persecución penal. Requiere de la formalización previa de la investigación por parte del fiscal.[69].

Al respecto se ha entendido por delitos que afectan bienes jurídicos de carácter patrimonial, en general, todos los que atentan contra la propiedad, el patrimonio y, en fin, contra intereses económicos

[66] BLANCO ET AL. (2005), p.23.
[67] BLANCO ET AL. (2005), p.21.
[68] Centro de Documentacion Defensoria Penal Publica (2004) p.14
[69] DUCE Y RIEGO (2009), p.p 177-219.

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individuales, sin embargo, no procedería respecto del delito de robo con violencia o intimidación al lesionar otros bienes jurídicos distintos tales como la salud o la seguridad individual, o la libertad personal.[70]

Por otro lado, la procedencia de los acuerdos reparatorios respecto de las lesiones menos graves sugiere que la disponibilidad de un bien jurídico, puede admitir una graduación, al considerar la afectación de la salud individual solo cuando se trata de lesiones leves o menos graves, pero no asi de las mutilaciones, lesiones graves o gravísimas; ni tampoco cuando constituyen a la vez delitos contra el orden publico o atentados contra la autoridad como los delitos de maltrato de obra contemplados en el Codigo de Justicia Militar.[71]

En cuanto a los delitos culposos, los acuerdos reparatorios proceden siempre, sin limitaciones en cuanto a la gravedad de los efectos del delito[72]. En caso de muerte o impedimento de la víctima, los acuerdos deben ser celebrados por las personas que ocupan su lugar conforme al articulo 108 del CPP.

El mensaje del Codigo Procesal Penal fundamenta el establecimiento de los acuerdos reparatorios como forma de terminación de los procedimientos que busca reconocer el interés preponderante de la victima por sobre la acción persecutoria del Estado, en aquellos delitos que afectan bienes que el sistema jurídico reconoce como disponibles.[73] No obsante, el juez debe rechazar el acuerdo reparatorio cuando en la especie existe un interés público prevalente en la persecución penal. En términos generales puede afirmarse que se trata de hipótesis en las cuales la satisfacción del interés de la víctima no alcanza a justificar la declinación de la pretensión punitiva estatal

Producido el acuerdo, debe someterse a la aprobación del juez de garantía, quien debe citar a todos los intervinientes a una audiencia. Sin embargo, en la práctica las partes no negocian directamente sino a través del fiscal y no se priorizan sus necesidades.

De la misma forma que en el caso de la suspensión condicional del procedimiento, se requiere de la formalización previa de la investigación por parte del Fiscal, pudiendo decretarse hasta la audiencia de preparación de juicio oral.

Los efectos penales de los acuerdos reparatorios operan generalmente una vez cumplidas las obligaciones contraídas por el imputado en el acuerdo o garantizadas debidamente a satisfacción de la víctima.[74]

Se favorece la celebración de un acuerdo reparatorio cuando se trata de hurtos, usurpaciones no violentas, algunas figuras penales de fraude y falsificación. Además, en los casos de lesiones menos graves y delitos culposos, incluido el homicidio y lesiones, robos con fuerza en lugar no habitado, las violaciones de domicilio, la usura o los delitos contra la propiedad intelectual, entre otros.[75] Pero no todos los casos en que lo permite la ley, el fiscal solicita esta medida, dado que algunos Instructivo, les recomiendan oponerse a su aprobación de los delitos que afectan la vida, la salud y la libertad, seguridad colectiva, administración pública y delitos sexuales, por la conmoción social que tienen estos delitos.[76]

Según algunas investigaciones, los fiscales tienden a proponer la suspensión condicional cuando el imputado es joven y para decretarla los jueces de garantía evalúan si el fiscal tiene fundamentos razonables para solicitar una condena, para resguardar las garantías del imputado.[77]

Los acuerdos reparatorios finalizan generalmente, de tres formas: la más frecuente con una reparación económica del daño (78%), seguida por la firma por un período de tiempo (12%), y, por último, la presentación formal de disculpas a la víctima (10%).[78]

El mecanismo colaborativo que nos parece más pertinente de ser utilizado en los acuerdos reparatorios es la mediación penal, ya que las partes deciden libre y voluntariamente los términos del acuerdo, sin la necesidad de verse influidos por la opinión de un tercero. En la suspensión condicional, en cambio, es el juez quien propone las bases para el acuerdo, lo que es más acorde a un proceso de conciliación.

Cuando se decretan salidas alternativas, un elemento positivo es que no corresponden largas prisiones preventivas como ocurría en el sistema inquisitivo. Solo el 10% de los formalizados la cumplieron y en general de menos de 30 días, con objeto de proteger a la víctima.[79]

Las condiciones y acuerdos más frecuentes corresponden a: obligación de presentarse al Ministerio Público a firmar (78%), obligación de fijar el domicilio (60%), pagar una indemnización a la víctima (24%), prohibición de frecuentar algunos lugares o personas (24%). En cambio, las que importan obligaciones que implican deberes educacionales, laborales o de salud, cuyo objeto es mejorar las condiciones de vulnerabilidad de los imputados son las que se imponen con menor frecuencia, porque tienen dificultades institucionales y de recursos en su aplicación.[80]

[70] BLANCO ET AL. (2005), p. 57.
[71] BLANCO ET AL. (2005), p. 66.
[72] MATURANA AL. (2009), p. 311
[73] Centro de Documentacion Defensoria Penal Publica (2004), p.22.
[74] ZARATE (2004), p.p125-146.
[75] GONZALEZ Y FUENTEALBA (2013), p.p 175-210.
[76] MATURANA Y MONTERO (2010), paginas?
[77] (CESOP, 2004),
[78] GONZALEZ et al. (2015 0 2017), paginas?
[79] DEFENSORI PENAL PUBLICA (2019)
[80] (CESOP, 2004),

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Otra modalidad de obligación que se ha establecido es pagar una cierta cantidad de dinero a beneficio de alguna institución o a la víctima en cuotas, especialmente en los delitos por manejo en estado de ebriedad.[81] Lo que plantea un desigualdad de trato con las personas de menos medios económicos.

Finalmente, los actores y usuarios de las salidas alternativas, valoran haber tenido una exitosa experiencia gracias a las respuestas más satisfactorias para las víctimas y menos gravosas para el imputado, y coinciden en que deben tener un uso más extendido, no solo en caso de delitos leves como lo prevé la ley.

De la misma manera, se sostiene que para tratar las salida alternativa debiera usarse mecanismos restaurativos, como la mediación penal, ya que ésta daría opción a la participación de la víctima con efectos jurídicos concretos. Personalmente, estoy convencida que en todas las salidas alternativas debiese ocuparse mecanismos restaurativo, al menos debieran ser ofrecidos y explicado sus principios y objetivos.[82]

El acotado uso de mecanismos restaurativos como la mediación penal en países Latinoamericanos que no la regulan legalmente, quizás no disminuye la cantidad de casos que terminan como salidas alternativas, pero si la calidad de estas y la validación que hace de ellas la ciudadanía, dado que al no existir un tratamiento colaborativo, los acuerdos de las salidas alternativas pierden sustentabilidad, como podemos ver en las estadísticas de incumplimientos de sus acuerdos y condiciones, los que en la primera década de su vigencia se cumplían en un 85%, aumentando hoy su índice de incumplimiento.[83]

Así, se requiere que estas salidas jueguen un rol mucho más importante que el actual, y constituyan, mediante el uso de mecanismos colaborativos, una verdadera forma integral y reparadora para tratar los delitos más frecuentes[84], como el robo sin violencia, el hurto, los cuasidelitos, delitos de tránsito y lesiones.

En las salidas alternativas es posible encontrar algunos de los principios propios de los mecanismos restaurativos, tales como el de voluntariedad de las partes, el derecho a ser escuchadas e informadas, el de oralidad, de concentración y confidencialidad.

Sin embargo, en el tratamiento de estas salidas, priman las posiciones de poder en que se encuentran las partes para negociar, en contraposición al proceso de mayor profundidad que requiere el conflicto penal, en el que parece mucho más adecuado un tratamiento como el de la mediación penal, combinado con otros sistemas colaborativos que integran a la comunidad, donde priman principios tales como el equilibrio de poderes entre las partes, su protagonismo y la imparcialidad del tercero que interviene.

Un importante desafío para la mediación penal u otros mecanismos restaurativos en los países de Latinoamérica, es ampliar su restringida aplicación y fortalecer su sistema de reparación, el que aún es muy básico y depende de las facultades y redes personales del imputado. Lo que puede explicarse por la inexistencia en estos países de redes institucionales para ofrecer trabajos remunerados a los imputados que les permitan ofrecer reparación a los afectados, además de posibilidades de realizar trabajos comunitarios para reparaciones simbólicas a la víctima y sociedad.

A ello, se suma la existencia de posibilidades de tratamientos médicos necesarios para asegurar un futuro buen comportamiento del infractor, como parte de sus compromiso, como control de ira, alcoholismo, drogadicción y comportamientos autoritarios o narcisistas.[85] Un ejemplo de buena práctica, son los programas municipales que se utilizan en Colombia para reparar los daños producidos por los delitos en los sistemas restaurativos aplicados a jóvenes.

Finalmente, otra de las falencias que enfrenta la mediación penal en Latinoamérica es que no existen criterios uniformes que determinen la derivación de delitos a mediación, parámetros de evaluación y herramientas de control de sus lineamientos técnicos, ni un claro flujograma sobre las etapas del proceso de derivación[86], como el modelo que de Argentina, que tiene elementos sistémicos, jurídicos y psico-sociales, donde existe una organización que permite derivar los casos a centros de mediación dentro del mismo sistema que acoge las denuncias.[87]

En Buenos Aires, la mediación se encuentra prevista en el código de procedimiento[88]. Es una instancia oficial que se da en el marco de un proceso ya iniciado y de aceptación voluntaria, procede respecto de delitos de acción pública dependientes de instancia privada y aquellos perseguibles de oficio en los que pueda arribarse a una mejor solución para las partes.

Conforme al Centro de Estudios de Justicia de las Américas en 2017[89], Latinoamérica debe avanzar en la incorporación de modalidades de justicia restaurativa. Para ello, se podría rescatar la experiencia de mediación en familia y los Tribunales de Tratamiento de Drogas.

En Chile como en otros países de Latinoamérica, ni en el Código Procesal Penal ni en ley penal alguna existe una mención expresa a la justicia restaurativa, ni a su mecanismo más difundido que es la

[81] (CESOP, 2004),
[82] HIGHTON Y ALVAREZ (2005), paginas?
[83] GONZALEZ (2019), p.p 119-153.
[84] MERTZ (2013), paginas?
[85] GONZALEZ et al. (2016 0 2015),
[86] GONZALEZ (2018), p.p 300-335.
[87] EIRAS (2005), paginas?
[88] Ley N°2303, de 2007
[89] CEJA (2017), paginas?

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mediación penal.[90] Así esta se ha aplicado de manera informal, y mayormente en los acuerdos reparatorios mediante un sistema precario.

En el estudio de CEJA, se destaca la necesidad de una mayor participación de la víctima en las audiencias, ya que en Chile el 2015 hubo solo una presencia 4,58% de víctimas en el total de audiencias, sumado a que su participación es formal, limitándose a su individualización y a responder sí o no a las preguntas que se le formulan. Sumado a la deficitaria política de comunicación que usa la fiscalíapara al comunicar por carta tipo, el archivo de una causa, la que es vista por los usuarios como indolentes y poco empáticas.[91]. Lo que no es coherente con el articulo 6° del Codigo Procesal Penal, que establece la obligación del Ministerio Publico de velar por la protección de la vicgtima en todas las etapas del proceso, lo mismo que debe hacer el juez, garantizando sus derechos.[92]

Respecto del imputado, se plantea una situación similar, interviene en ocasiones en el proceso, sin aportar información sustantiva al debate. También se observa la necesidad de fortalecer la instancia de la entrevista inicial del imputado y su defensor, por resultar determinante en materia de calidad del servicio. Debido a que no se verifica entre ellos una relación de confianza, que deje claro al imputado su situación procesal.[93]

Así el imputado que participa en una salida alternativa, no entienden sus resultados, quedando con la convicción de que el caso termino en nada y la víctima entiende que hubo falta de justicia, llamándolos a veces puerta giratoria y pasividad del órgano persecutor.

En cambio, con el uso de procesos colaborativos hay convicción en la ciudadanía de que se les ofreció una respuesta digna a la víctima por el Estado y no se desechó su caso con una salida rápida, donde no se les escucho, ni se resolvió el conflicto.

El informe de CEJA, afirma que se ha utilizado las salidas alternativas con fines distintos a los previstos por ley. Estas no han sido empleadas con la finalidad prevista por ley de resolver un conflicto, sino que como una forma de descongestión.[94] Por su parte, los acuerdos reparatorios se presentan en espacios reducidos de aplicación.[95]

En la misma línea, se ha normalizado el agendamiento de audiencias sin un motivo debidamente justificado, lo que posterga su las audiencias y hace optar a los fiscales por no usar un proceso restaurativo como la mediación, debido a que su acuerdo debe ser después ratificado en audiencia.

Finalmente, el escaso números de derivaciones a mediación penal que se aprecian los últimos 15 años es de 4.764 casos. De éstos, la gran mayoría fue derivado por el Ministerio Público. Del total de casos derivados, los efectivamente mediados fue de 61,2%[96]. Y el promedio de acuerdos alcanzados, sobre el total de casos mediados, fue de 59,1%, por la baja calidad en las derivaciones, que en su mayoría son casos desechables, donde además la ubicación del imputado es difícil.[97]

III. Conclusiones

Frente al negativo diagnóstico de la aplicación del sistema restaurativo en Chile, una de las estrategias para la optimización de su uso, propone la necesidad de una modificación legal que incorpore la justicia restaurativa como una salida alternativa autónoma con criterios bien definidos, a diferencia de la metodología con la que opera hoy, dependiendo su uso de la voluntad de los fiscales.

La justicia restaurativa y su mecanismo más usado en Latinoamérica, la mediación penal, se encuentra regulado normativamente en reglamentos, leyes, o en la constitución, en la mayoría de los países de la región, tales como en: Argentina, Brasil, Colombia, Ecuador, México, Paragua, El Salvador, República Dominicana, Guatemala, Nicaragua, y Venezuela, a diferencia de países sin regulación como Chile, Perú, Bolivia, Uruguay, Cuba y Honduras.

Su regulación normativa, ha permitido un mayor uso y desarrollo de estos mecanismos. Además ha mejorado el acceso a la justicia, al diversificar los procesos de resolución de conflictos penales, con un mejor uso de la información disponible, evitando el tener que investigar tan exhaustivamente causas que pueden tener mejor solución desde las necesidades de las partes. Además, permite un control de legalidad de los casos que se derivan al sistema restaurativo, tanto en su selección, procedimiento y en sus acuerdos, los que exigen homologación del juez de garantía, a diferencia de cuando su uso es parte de archivo provisional o facultad de no investigar, donde no se hace referencia al mecanismo usado, ni al acuerdo en la resolución del juez de garantía que sobresee la causa.

Por otra parte, el éxito del sistema restaurativo, se ve entorpecido por la ausencia de una política pública e institucional que la valide como una forma de resolución de conflictos penales, que no dependa solo de la voluntad del ente persecutor, como en el sistema de justicia familiar, que ofrece un servicio legitimado por sus actores, donde las partes deben escuchar la oferta de mediación, que opera con calidad y un presupuesto nacional.

[90] GONZALEZ (2017), p.p 60-106.
[91] CEJA (2017), p.p 7-8
[92] Ley N°19696, de 2000
[93] CEJA (2017), p.8.
[94] CEJA (2017), p.8.
[95] CEJA (2017), p.9.
[96] MINJU (2015), paginas?
[97] DIAZ Y NAVARRO (2018), p.p 1-67.

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Desde nuestra perspectiva este mecanismo debe consignarse en el Código Procesal Penal, como ley, aplicable a todos los delitos, salvo los expresamente excluidos o cuando las circunstancias personales de las partes les impidan participar voluntaria y autónomamente en la gestión del conflicto.

Su derivación y oferta a un proceso restaurativo, debiera depender de un órgano neutral e imparcial, que colabore con el órgano persecutor y poder judicial, luego de una previa investigación de la fiscalía, que permita identificar a las partes que participaron en el delito y la ocurrencia del hecho ilicito, que esté obligado a justificar su negativa a derivar. Así se limita la discrecional facultad del Estado de someter o no a investigación, formalización o juzgamiento un hecho que reviste los caracteres de delito, a la vez, que establece criterios uniformes para la derivación a sistemas restaurativos. Lo que permite fortalecer la aplicación del principio de oportunidad, diversifica el tratamiento del delito, respetando el principio de igualdad de todos los ciudadanos y mejora el acceso a la justicia.

Para asegurar la validez de los acuerdos, los mediadores deben poseer facultad de ministros de fe respecto de la suscripción del acuerdo por las partes, como ocurre en Chile en materia de familia, no siendo necesario la ratificación de las partes en audiencia judicial pero debiendo someterse el acuerdo a la aprobación del Tribunal.

Finalmente, un importante desafío para la justicia restaurativa, en los países de Latinoamérica, es ampliar su restringida aplicación a delitos de mayor gravedad que son en los que más requieren las partes de su aplicación y fortalecer su sistema de reparación.

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The Urgent Need to Revolutionize African Law

By Mupendana Pierre Claver

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Abstract- Africa lives in the middle of conflict. Some seek to identify the causes. This article attempts to demonstrate that one of the main causes is the legal system that colonization has bequeathed to it. After showing the differences between Western law and African traditional law, the researcher highlights the main characteristics of African traditional law before the colonial period and those of the law bequeathed by the colonizers. On the basis of an in-depth analysis, the author of the article notes that African traditional law played an integrating and conciliatory role, while remaining perfectly realistic. The one bequeathed to the African peoples by colonization can be qualified as the Law of the minority, the Law of exploitation, the Law instituting segregation and discrimination, the disorganizing Law, the Law of mimicry and finally the Law negating the African traditional Law. This raises the question of the real future of African law.

Keywords: traditional law, customary law, western law, african traditional law, minority law, mimicry law, conciliatory law, exploitation law, reconstructive law, conciliatory law.

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The Urgent Need to Revolutionize African Law

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Abstract- Africa lives in the middle of conflict. Some seek to identify the causes. This article attempts to demonstrate that one of the main causes is the legal system that colonization has bequeathed to it. After showing the differences between Western law and African traditional law, the researcher highlights the main characteristics of African traditional law before the colonial period and those of the law bequeathed by the colonizers. On the basis of an in-depth analysis, the author of the article notes that African traditional law played an integrating and conciliatory role, while remaining perfectly realistic. The one bequeathed to the African peoples by colonization can be qualified as the Law of the minority, the Law of exploitation, the Law instituting segregation and discrimination, the disorganizing Law, the Law of mimicry and finally the Law negating the African traditional Law. This raises the question of the real future of African law. This question leads to a quadripartite answer: First, it is imperative to resort to the real Africanization of the legal systems in force in Africa. Second, a refinement of these systems must be undertaken. In third position, the researcher invokes an in-depth reform of the teaching of Law in Africa. Finally, this reformed African Law will be able to play its reconstructive role.

Keywords: traditional law, customary law, western law, african traditional law, minority law, mimicry law, conciliatory law, exploitation law, reconstructive law, conciliatory law.

Résumé- L'Afrique vit au milieu de conflit. D'aucuns cherchent en déceler les causes. Le présent article tente de démontrer que l'une et principale de ces causes n'est rien d'autre que le système juridique que la colonisation lui a légué. Après avoir montré les différences qui existent entre le Droit occidental et le Droit traditionnel africain, le chercheur met en exergue les principales caractéristiques du Droit traditionnel africain d'avant la période coloniale et celles du Droit légué par les colonisateurs. Sur base d'une analyse profonde, l'auteur de l'article constate que le Droit traditionnel africain jouait un rôle intégrateur et conciliateur, en restant parfaitement réaliste. Celui légué aux peuples africains par la colonisation peut être qualifié de Droit de la minorité, Droit de l'exploitation, Droit instituant la ségrégation et la discrimination, Droit désorganisateur, Droit du mimétisme et enfin Droit négateur du Droit traditionnel africain. De là se poser légitimement la question sur l'avenir réel du Droit Africain. Cette question mène à une réponse quadripartite : D'abord, il s'avère impérieux de recourir à l'africanisation réelle des systèmes juridiques en vigueur en Afrique. En second lieu, un perfectionnement de ces systèmes doit être entrepris. En troisième position, le chercheur invoque une réforme en profondeur de l'enseignement du Droit en Afrique. Enfin, ce Droit africain réformé pourra jouer son rôle reconstructeur.

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Mots-clés: droit traditionnel, droit coutumier, droit occidental, droit traditionnel africain, droit de la minorité, droit du mimétisme, droit conciliateur, droit de l'exploitation, droit reconstructeur, droit conciliateur.

Резюме- **Африка живет в разгар конфликта. Некоторые стремятся выявить причины. В данной статье делается попытка показать, что одной из основных причин является правовая система, которую оставила после себя колонизация. Показав различия между западным правом и африканским традиционным правом, исследователь выделяет основные характеристики африканского традиционного права до колониального периода и характеристики права, завещанного колонизаторами. На основе глубокого анализа автор статьи отмечает, что африканское традиционное право играло интегрирующую и примиряющую роль, оставаясь при этом совершенно реалистичным. Закон, завещанный африканским народам колонизацией, можно описать как закон меньшинства, закон эксплуатации, закон сегрегации и дискриминации, закон дезорганизации, закон подражания и, наконец, закон, отрицающий традиционное африканское право. В связи с этим закономерно возникает вопрос о реальном будущем африканского права. На этот вопрос можно дать четыре ответа: Во-первых, необходимо прибегнуть к реальной африканизации правовых систем, действующих в Африке. Во-вторых, необходимо провести доработку этих систем. В-третьих, исследователь призывает к основательной реформе преподавания права в Африке. Наконец, этот реформированный африканский закон сможет сыграть свою восстановительную роль.**

Ключевые слова: традиционное право, обычное право, западное право, африканское традиционное право, право меньшинства, мимикрирующее право, примирительное право, эксплуатационное право, реконструктивное право, примирительное право.

Introduction

We are not the first and perhaps not the last to declare that "contemporary African law" is first and foremost the reproduction of a foreign model that hardly responds to the nature of African social relations and that does not even translate these relations into reality; that it is a law of the intellectual minority and of citizens living in African cities; a law that disorganizes the African social system; a law that enshrines segregation and discrimination between citizens of the same country, and even between the latter and Western nationals; a law that enshrines and perpetuates a system of exploitation of African states. In short, it is a law that is at the origin of almost all the disputes, internal and international, that plague African societies. The decline of justice as a whole, the failure of democracy and "good governance", the threats of

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destruction of the traditional African family, the increasingly conflictive management of the natural resources of African countries, the wars that are tearing the continent apart... are in large part the result of this legal system.

We reaffirm that we are not the first to say that the laws and institutions inherited from colonization are at the root of the African catastrophe. The words of Mr. Koffi Annan, the former Secretary General of the United Nations can be quoted at any time. It is a pure but horrible truth that "the colonial laws and institutions that some new states inherited were designed to exploit local divisions, not suppress them...» [*A.KOFFI (2017): par.7*]. In other words, these legal systems did and do nothing but perpetuate and sharpen the divisions of Africans in order to better exploit and control them.

And this is understandable! When the established rules and institutions do not prevent the birth of controversies and conflicts, but on the other hand support and fuel them; when one does not want to prevent that the latter are settled only by violence, one consequently establishes all the premises of the collapse of the society, of the destruction of all the vectors of the socio-economic development and the social cohesion. It follows that one annihilates any authority and any respect to the latter and consequently, one deprives the society of any institution able to settle the disputes and to restore the social peace. In this logic, the Law, as a "system of obligatory rules governing social relations in a human grouping, which the latter can impose the observance by constraint, by its judicial and executive institutions [*M.VANNEL (1968): 16*], is deprived of any organ, any mechanism of conflict resolution. The first mission of the Law is to settle differences in all their forms or to prevent them. In Africa, this Law, being stripped of the traditional Law, becomes distorted and cannot in any case make the relations between people harmonious in an African society still mostly traditional and traditionalist, because a great fringe of the social relations is either ignored in the framework of the concerned relations; or, even if these relations are envisaged, they are called to be regulated by norms which are not the product of the African society. Therefore, before the application of this law is effective, there is already a conflict in the system itself which, in turn, transposes these conflicts into society. Social relations, being dynamic and evolving as society itself is, by trying to organize themselves around these legal norms artificially constituted to govern them, will generate other conflicts or sources of conflict which, in the long term, should explode the entire social system. And this is the beginning of another crucial problem: the artificial construction of a social system, political institutions and legal system incapable of guaranteeing peace, justice and development to all components of African society. On the other hand, on the rubble of this society, dysfunctions, multiform crises, the decline and even the disappearance of the State and all that accompanies it, are established. To use the words of J. Vanderlinden, "these terms only reflect sometimes the modesty, sometimes the fear, sometimes the frankness, sometimes the cautious style, in fact, most often, the personality of those who use them" [*J. VANDRLINDEN (2001): 1*]. There is only one truth behind it: it is imperative to rethink a Law in conformity with African social relations, without which, Africa will only continue its road of progressive degeneration, which will lead it to its destruction and its recolonization.

It is necessary to recall once again that "contemporary African law", this law inherited from the European colonizer, is today the source of the destruction of the post-colonial African State. Indeed, being "a human group fixed on a territory and in which the social, political and legal order is established and maintained by an authority provided with a public power" [*P.C MUPENDANA (1998): 58; H.KELSEN (1926): 561; H.KELSEN (1926): 231 et ss; H. KELSEN (1962)*], it needs, for the maintenance of the order, a whole system of legal norms. However, these norms are in contradiction with the African state, because they are imposed from outside, whereas they should be the creation, the emanation of this state. It follows that the State is, in all its activities, limited by this law. Therefore, a law imposed from outside is in contradiction with the sovereignty of this State and is in conflict with it. This leads to the dysfunction, to the paralysis of its institutions and organs. Now, the dysfunction of this couple "STATE-LAW" leads to the destruction, either of the two at the same time, or of the State; the latter, in such conditions, being obliged to create a Law in conformity with its own realities. The Law that created the African State has already proven its incapacity to maintain its own State in equilibrium because of its foreign origin in relation to the society on which it must be applied.

Is it true that this Law applied by the post-colonial African State is the source of all the conflicts that risk leading to the destruction of all African institutions? In order to give an objective answer to this question, it will be necessary to agree on the use of several legal concepts used in this context such as: Western Law (European Law, Anglo-Saxon Law), African Law, Customary Law, and Traditional Law before seeing if the reconciliation of African Traditional Law and Western Law is possible. In addition, following a historical approach, we will try to find the main characteristics of African Law as it has been applied or is applied in African societies. Finally, we will try to pronounce ourselves on the future of contemporary African Law, if we want it to really serve the interests of Africans. This will require a real Africanization of this Law, a specialization and a perfection of its contents and its systematization and finally a deep reform of the

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teaching of Law in the higher institutions of legal or paralegal training on the Continent.

I. About Some Concepts

When reading the legal literature on Africa, one always uses terms such as European Law, Western Law, African Law, African Customary Law, Traditional Law, etc. Are these concepts understood in the same way? I dare to believe that, by recognizing that the most elementary experience reveals that any human grouping cannot exist without a set of rules that establish order in society and avoid anarchy; this is reflected in the traditional Latin adage closely linked to human groupings: "*Ubi societas, ibi jus*" - (where there is a society, there is a Law) -, one cannot affirm that Law is monocolored. It would also be difficult to deny the multiplicity of systems of Law. Hence, it becomes judicious to oppose Western Law to African Law, and Traditional Law to Customary Law.

a) Opposition between Western Law and African Law

Driberg H. states that "Law is composed of all the rules of conduct that determine the behavior of individuals and communities and that, by maintaining the balance of society, are necessary for it to perpetuate itself as a constituted body" [H.DRIGBERG (1928): 63-72]. Although this definition lacks two essential elements: the obligatory nature of this system of rules and the recognition of the obligatory nature of these rules by the members of the community, it should nevertheless be emphasized that it highlights the diversity of Rights that takes into account the nature of the communities (States, Organizations...) that create, apply and perfect these norms of Law. It is moreover what pushes H. Lévy-Bruhl to remark that "every society is, by definition, juridical..., even the most rudimentary societies that we can observe" [*H.LEVY-BRUHL (1968): 1117*].

On the basis of these appreciations, it would be partly wrong to deny the existence of African and Western law. However, this truth would also be tainted with imperfections. As there is not a single homogeneous, mono-cultural, mono philosophical West, ..., how could one dare to speak of an African Law in such a complex and varied Africa? In our opinion, Western Law and African Law do not exist if we understand them in the objective sense of the term "Law". There are systems of Law on the African continent as there are in Western Law[1].

If one were to take Law to designate the "Science of Law" which has as its object the study of legal rules in their sources, their contents, their consequences [*P.C.MUPENDANA (1998bis): p.5*], one would be able to say at that moment without risk of being mistaken that there is an African Law. In this way, one would be right to oppose them.

Thanks to legal science, we manage to discover the differences between Western and African Law. For example, in African Law, the differentiation is not made between movable and immovable things; but the goods have different names according to their nature or their use: thus they distinguish the *amatungo* (domestic animals); the *ibintu*, generic name that addresses the *rugo*, the *imilima, ubwatsi, imyaka, urutoke, ibiti, intwaro, ibikoresho, imyambaro... [J.VANHOVE (1941): 41]*. In Africa, the rights of passage and access are not private as in the West. The people of the hill can move freely on each other's land. The same is true for livestock, for which special paths are laid out in Western legal practice [*J.VANHOVE (1941): 43*]. Another example, "The European lawyer wants to be quick. This Western legal practice can no longer afford the luxury of inventing for each case. Laws and jurisprudence present ready-made solutions; and this is what we call Law. A lawyer is someone who juggles with solutions. He knows the rule before the facts; whereas the Bantu Solomon starts from the facts to find a rule *[R.DEKKER (1970), 21].*

In the field of property law, the following example is significant. The term "corporate property" would be more appropriate here, since the relationship between the social group and the land cannot be separated in African law from the internal relationship of the members of the group with respect to the same land. The individuals thus enjoy well-defined rights, which coexist with those of the group itself. The chief is everywhere considered as the symbol of the land owned by his group. He plays the role of a sort of universal trustee or administrator of the land towards the group[2]; he distributes portions of the land among the family members, who in turn redistribute it among the individual members of the family group.

Since land is the infrastructural basis of African society, it is appropriate that more attention be paid to it. African customary land law did not have the same notions as European law, even when viewed from the perspective of the English law idea that all the land in the United Kingdom is the property of the crown and that each owner has a right to it. The African chief or king has, even in theory, no comparable right; he exercises only general administrative powers over the lands of the community he governs. If he desires for himself the possession of a piece of land, he must ask its owner for it, and can only obtain it if the owner does not make use of it. It is important to emphasize this point, because some Africans have tended, in the face

[1] En Droit occidental, nous disons qu'il existe le système juridique romano-germanique, le système anglo-saxon, le système russe, le système japonais…

[2] Sur ce point une jurisprudence très fournie d'arrêts du Conseil privé : Amodu Tidjani V Secretary, S.Nigeria (1921), 2 A .C. 399 ; Cf, The journal of Comparative Legislation and International Law. Nov. 1951, vol.33, 3è série, 3è et 4è parties, p.49-55.

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of Europeans who were prospecting for mineral resources and asking them for land concessions for this purpose, to set themselves up falsely as feudatories. Any sum paid to the chief under these conditions would be contrary to the law and could not assure the so-called purchaser of any title of ownership.

Finally, the African landowner cannot alienate his share of land, although he may pledge it to secure a personal debt. He may use his land as he sees fit to make it fruitful, including by transforming its original use, provided only that in so doing he does not prejudice the rights of other members of his family. He may even, under certain circumstances, lease his share of the land and even, subject to the acceptance of the other members of his family, alienate it free of charge or for a consideration. Similarly, his right to the land does not lapse upon his death; it passes to his children.

In short, the only serious restriction is that the land can only be alienated with the prior consent of the family, and that it must be shared among all the rightful claimants, with the interested party having only the share that belongs to him. Everyone is perfectly free to do what he wants with his property. However, as a result of his obligation to look after the future of the children he has given birth to, who still belong to the family, the latter retains a right of supervision over this portion of land. This limits any total alienation of land ownership. For example, in the Bugoyi of Gisenyi in Rwanda, families have leased portions of land for a period of 25 years, without being able to sell them permanently. This same practice is also scrupulously followed among the Nande of North Kivu (in the Democratic Republic of Congo). This again shows the difference between European and African law.

African law is unwritten and lives at the rhythm of society, while writing condemns Western law to a slow evolution and transformation. The notions of property and community of management as understood by European Law are poorly transposable to African Law.

This state of affairs provokes heated discussions between several Western jurists, some of whom want to deny the existence of African Law, because it is not written, while others carefully show that African Law has nothing to envy to Western Law. H.S. Hartland, an ardent defender of African Law, expresses it in the following sentences: "That is why civilized peoples, who are accustomed to link law to a written doctrine, refuse to call the rules to which savage peoples adhere law, and grant them only the quality of customs. But customs which are established and respected by the whole population cannot be distinguished from laws. In our country, the judges of the King's courts have always recognized them as laws and applied them as such, even though they have sometimes been prescribed by no written legislation... Custom is equated with law by its supporters as well as by its detractors *[H.S.HARTLAND (1924): 2].* It is not the writing that makes the Law, but the rigor with which social norms are put into execution. Is not Professor Volodymir Butkevich right when he points out that "to base oneself on the absence of written documents to deny the existence of a people's history, or to prove the existence of a people's legal system, or to prove the impossibility of carrying out scientific research, is an empty and dwarfed argument" *[V.G.BUTKEVICH (1981)].*

In any case, if one were to stick to the assertions of certain Euro-centrist jurists, one would ignore the Law in traditional African societies [M.RAYNAL (1994), 25]. This would not be in conformity with reality and science!

b) Opposition between customary law and traditional law

The problem relating to the opposition of customary law to traditional law seems interesting in the sense that in certain circumstances, these two types of law are confused by jurists. Can this confusion be justified? This is exactly the question that must be answered in these few lines.

The doctrine defines custom as "a rule of law that is formed by repeated practice; it is therefore based on habit, the repetition of a certain way of acting and tradition". It is the "result of the conjunction of an effective practice and the acceptance by the subjects of the law of the legal - and therefore obligatory - character of the conduct constituting such a practice (*opinio juris sive necessitatis) [C.I.J (REC-1996), 253*]. It differs from law in two respects: firstly, custom is not formulated by the public authority, although the State sometimes proceeds to draft customs, in order to avoid any uncertainty as to their content. Secondly, custom has an unconscious origin; it is created by the social environment. Custom seems to come not from above but from below; not from the rulers but from the masses. Finally, customary law does not only contain legal rules applicable to persons, property and society. It also contains religious and magical prescriptions, various recipes, and so on. It forms a disparate but solid whole, which provides solutions to the problems posed by the individual and collective life [*J.VANHOVE (1941*): 5] of all members of society.

Before colonization, customary law was a system that favored negotiation and the settlement of disputes through the strict application of rules. It was more focused on the family and less on the state. Its main objective was to preserve the family, as it was the central axis of life in society. In Africa of the Great Lakes, for example, the kinship is the basic cell in the socio-political organization of kingdoms. It is understood as "an isolated household holding an autonomous property or a group of households having a common ancestor, from which they possess, by way of inheritance, the same property that they share *[A.KAGAME (1952): 27].* In other words, the public power could in no case

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achieve its regalian objectives without relying on the family or the extended family. The military organization in society, the administrative organization as well as the socio-economic organization of these kingdoms always passed through this basic social cell. This is the system that developed spontaneously to cope with new conditions while decisions were made by the family and the community [*A.ARMOTRONG (1999): 256*]. This led early observers of African custom to hastily conclude, but fortunately, that "in African traditional law, there was necessarily a law specific to each caste *[DROIT TRAD (1998): N5]*". This predominance of the family in the creation of a custom is universal, as J. Poirier notes. To this end, he writes "the Law itself is born with the organization of a political power clearly differentiated from hierarchies linked to kinship, but under the influence of the latter [*J.POIRIER (1968): 1094*]".

With the arrival of the colonizers on the African continent, their first reflex was to codify the customs in force at the time. This undertaking in itself was commendable. However, it is to be regretted that, instead of carrying out this project as objectively as possible, they codified a custom that was favourable to their objectives. A. Armstrong deplores this situation by recalling that "the colonial state and the post-independence governments constructed a new kind of customary law in which 'customs' were reduced to rules to be applied in the official courts. As a result of this process, the Customary Law of many African states will become a rigid, biased and sometimes distorted version of the original Customary Law, which often has little relevance to the lives of the people in whose name it was constructed *[A.ARMTRONG (1999): 256].*

The creation of such official Customary Law is taking various forms in African states. In Zimbabwe and Zambia, official customary law was largely created by the courts themselves, when they had difficulty applying customary law to new disputes. In countries formerly colonized by England in Africa, customary law was adapted (often authoritatively) to the mould of English law and legal remedies and moderated by the 'repugnance clause', which stipulated that African customs that were 'repugnant' to colonial judges should not be applied. The great variety of customary laws of the many ethnic groups was reduced to a single customary law of "Africans". Take, for example, the customary law in Zimbabwe, according to which the heir of a deceased man inherits all his property. While it was shown that this practice had never been part of Ndebele customary law, it has been applied by courts throughout the country *[WLSA – Zimbabwe (1994*)]. As the courts applied doctrine and case law, customary law was fixed in time rather than being allowed to evolve.

In other countries, official customary law was created in the form of codifications or reformulations. In Losotho, in 1903, a commission was set up to record the customary laws of the Basotho in the form of the Lerotholi Law [*P.LETUKA et alii (1954; S. POULTER (1979)]*. This document is used in the courts of Lesotho today as the final word on customary law. While the Lerotholi Laws may have accurately reflected the customs of the Basotho in 1903, they hardly reflect the customs of the Basotho in 2003. Similarly, the reduction of Customary Law to written rules ignores the spirit of negotiation and compromise that allowed for the peaceful resolution of disputes within the community and family context.

Moreover, Lethoroli Laws and other semi-codifications of customary law, such as the re-formulation of Tswana Family Law *[S.ROBERT (1972)],* cannot truly represent the popular customs at the time of their writing. Firstly, the sources used for these written documents invariably involved oral testimony by men who thought they were informed about the custom. This fact alone shows that the testimony of half the population, the women, was omitted, thus skewing the testimony in favor of male rights. Second, most of the experts called as witnesses were of a certain age, and the rights of the old were emphasized over those of the young. Third, the witnesses were often those with power in the traditional hierarchical authority; the results might have been very different if testimony from those without authority had been considered. Fourth, the codifiers were white, i.e., Europeans who may have interpreted the depositions in accordance with their own understanding of family law, property, obligations, political institutions, and other issues such as women's rights. Finally, the creation of these written documents of customary law must be seen as a political process, influenced by the agendas of those who took the depositions and those who gave them. As Rwezaura states:

> *What the elders and other witnesses gave as testimony of Customary Law was a distorted and rigid version of it, expressing their conception of what the law should have been and not what it actually was... Their versions were largely influenced by the anger and frustration of the elders at the loss of their political power and the challenges then posed to them by the women and young men [M. RWEZAURA (1992); A. ARMSTRONG (1993)].*

In view of the above, it is difficult to argue that African law codified in this way is really its own customary law. If one goes even further, one would conclude that this law considered as African customary law is a distorted version of true African customary law. Hence, it is logical that in order to differentiate this falsified Customary Law from the one in which African peoples find themselves and their past and present in order to re-examine the future of their society, African peoples should return to their Traditional Law. This traditional Law will help Africans to rediscover the true values and principles of their original Law, will lead them to seek and give themselves an objective place in the universal society in order to better participate in the

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building of the universal civilization. A people whose past is poorly known by its own members cannot contribute anything to other peoples. One gives what one has, especially when one knows that one has it. Anyone who wants to acquire the legal knowledge of another legal system must first master his own before venturing into other legal systems. If one does not know oneself well enough, what joy will one have in knowing others and sharing with them what they do not know? Know yourself, and you will get to know others better. And in this way, you will complete yourselves in order to walk together.

II. The Characteristics of African Law

The advent of colonization was rather felt as a putting on hold of the African legal manifestations, while political and legal institutions inspired by the imported values were installed. Colonization occurred in Black Africa at a time when this part of the world was undergoing a profound internal transformation, affecting the vital elements of the existence of men and ethnic communities, in their socio-cultural and economic-political institutions. As Tshiyembe Mwayila notes, "everywhere on the continent, new political entities, based on the federation of multiple ethnic groups covering important geographical dimensions, were being created and destroyed either by peaceful means or by force of arms *[M. TSHIYEMBE (1990):* 15]. This colonization had a devastating effect, because it reduced to nothing the participation of Africa in international life, preventing the development of political ideas, the evolution of concepts and principles *[MUTOY MUBIALA (1989): 104; A. NDAM DJOYA (1986): 24]*. To be convinced of this, it will suffice to analyze the characteristics of this law during the ante-colonial period and compare them to those of the colonial and post-colonial periods.

a) Ante-colonial African law

Ante-colonial African law was, to varying degrees, an integrating, realistic and conciliatory law.

i. *An integrating law*

If we say that pre-colonial African law was integrating, it is because, because of its organizational function, it aimed at unifying and progressively consolidating the social system, starting from and based on the family, by means of appropriate mechanisms. This integrating role appears very clearly in the management of the land or in the education of children.

There is no need to recall that land, in traditional African societies, was above all an object of social cohesion, at once sacred [*M. RAYNAL (1994): 188*] (a means of communication between the dead and the living), a factor of social cohesion *[J.GATALDY; http:// www.foncier.org*], and an essential factor of production in its economic forms. For these populations, the land was not something to be appropriated, but an asset from which the bare minimum was demanded for the survival of the group, and which inspired a profound respect. Belonging to a terroir gave the individual and his descendants priority access to the land in the form of a transmissible right of use or usufruct *[MOHAMED DOUCOURE: http://www.foncier.org].* In such a system, tradition rejected any manifestation of individual ownership, which would constitute a challenge to social balance. The solidarity within the clan, guaranteeing security, required collective behavior, itself organized with a view to the renewal of the resource. The tradition or traditional law enshrined exactly those principles that protected the cohesion between members and always encouraged them to work for the progress of the group. This was reflected, for example, in the solidarity that characterized traditional society and the pride of belonging to a family. Outside of the family, man is nothing in his society and they can hardly bear to lose even one of its members. To confirm this idea, the former Rector of the University of Lubumbashi, Mr. René Dekkers said: "the Bantu is not individualistic, like the European. What would become of the individual in Africa left to himself, without the help of society? On pain of perishing, he must adhere to a group, family or tribal, to be able to defend himself against nature. Thus, a Bantu dispute is never between two individuals, but between two groups [*M.DEKKERS (1970): 19*].

The education of its members, of its children, was the foundation, the cornerstone. The first African customary principle was that the child belonged to the family and to its parents. The whole society had the great responsibility of looking after the future of its children. In other words, according to ancestral customs, the child did not only belong to its parents; it belonged to the community, to the lineage. Thus, the weaning of the child marked its taking in charge by the rest of the family group; the siblings, the aunts and uncles, the grandparents, the cousins... but also, any adult of the community and of the parents' generation. This collective care is based on the principle of "diffuse education" as described by Ezembé: "it takes place in two spaces: inside the house where the father reigns, and outside the house where the children are under the supervision of all the adults. In this educational system, a certain logic privileged social kinship and took precedence over biological kinship [*F. EZEMBE (1995): 60-70*]. Indeed, "one is not the son of such and such, but of all those of the generation of the father and the mother". The logical consequence of this social kinship is that the child will call without exception "daddy" or "mommy" all those of his parents' generation and not by their names or first names as is often the case in the West. If he has to refer to someone, he will say daddy "such and such" or mommy "such and such", uncle "such and such" or auntie "such and such" to show respect and to make the difference with his friends and

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classmates. Calling an adult by his or her name without first calling him or her "Mommy" or "Daddy" or "Uncle" or "Auntie" may result in a penalty.

In traditional African societies, this punishment was not to be confused with ill-treatment, because African cultures did not tolerate gratuitous abuse and violence against children. Moreover, C. Ngoura, B. Seck, O. Ly Kane, P. Lambert, M. Gueye and others rightly note that "corporal punishment is well delimited and the community has a right to watch and interfere in the way these sanctions are administered [*C.NGOURA et alii (1995); B. SECK"et alii (1994)*]

Punishment was "legal" in African customary law as long as it was administered for the good of the child and without exaggeration, because customary law repressed excesses even if it tolerated such practices. Thus, a child who was unjustly punished could seek refuge with his aunt or uncle and tell them that he had been the victim of an unjust punishment. To this end, the father had the duty to go and look for the child, but would only take him back if he had just paid a fine if it was confirmed that the punishment had been exaggerated or that it would not have been inflicted on the child who was declared innocent.

The punishments inflicted on children were always based on cultural and educational rigidity, using as pedagogical techniques: physical abuse, food deprivation, mockery, sarcasm... in order to inculcate in children the hierarchy of values proper to the society [*J.P TSALA TSALA (1991), 11-120)*]. For example, in pre-colonial Rwandan society, during the training of men, the elders used to provoke contradictory debates in order to accustom young men to tight argumentation, to reply promptly but always calmly. If one of them, in the heat of the discussion, gave way to a movement of anger, to an indelicate or hurtful word, the assembly had the duty to boo and humiliate him, sometimes he was even chased away from the place of the meeting, if he reared up under the blow of these mockeries. This was done in order to teach him self-control. No one was ever to have respect for them, and these humiliations were not regarded as offenses. No one escaped it. Whether he was a prince or a child of a serf, all were subjected to such a system of sanctions [*A. KAGAME (1952), 25-26*].

These sanctions were willingly part of a maturing and structuring physical or moral pain that prepared the children to endure the pains in a world where slavery, colonization with their procession of frustrations and humiliations were predominant, and where famines, wars and a hostile environment where only the bravest could get out. This opinion is still generally shared by the whole social body, legitimized by the administrative, judicial and school authorities. For this reason, a teacher will not be taken to court for "kicking the butt" of a recalcitrant student three times. On the contrary, the latter will receive another beating from his parents at home to maintain consistency in the community's educational discourse. Thus, anyone in the socio-educational environment can correct a child, even if he or she is not the parent, as soon as it is established that the child has committed a fault that deserves punishment. However, Western law is teaching us other things by individualizing the formerly collective life in Africa. In this way, we are witnessing the destruction of African society, because it is losing more and more of its foundations, with African law losing its integrating role.

ii. *A realistic Law*

If it is said that ante-colonial African law was realistic, it is because it was more practical than theoretical. It was more attached to daily life. And the justice that was rendered was not mechanical. Each case that presented itself did not have one and only one solution, which was identical to itself.

This realism was rooted in the fact that it was based on judicial bodies, in accordance with the socio-political organization of the country. The central authority of the king or traditional chief was usually based on such elements as control of the military force, the power to appoint and dismiss subordinate chiefs in charge of regional administrative functions and judges (whether or not they were members of his family), and the mystical aspect that the popular imagination attributed to his functions. Such a chief was the administrative and judicial ruler of a particular territorial section, and had complete economic and legal control over the entire territory of his jurisdiction. In other words, the Head of State was a territorial ruler *[T. E. OLAWALE (1998): 28*]. However, in order that this organization did not lead to monarchical absolutism or political tyranny, certain mechanisms had been developed, such as the royal council of chiefs, the court of the queen mother, religious officials playing a decisive role in the investiture of the King, secret societies in which the King was only an equal member and the inevitable devolution of power to local and regional chiefs. All these elements, together with the intangible but effective factor of public opinion, helped to protect law and custom by controlling royal power [A. KAGAME (1952)].

Thus, in the Kingdom of Bangassou (in CAR), "At the King's side stand the judges. Not just anyone can be a judge. He must belong to the noble lineage (Bandia), or be an elderly person with great authority and wisdom; only worthy people with sound reasoning who are respected by all can take on this task [*M.RAYNAL (1994): 201*]. If a king abuses his power, his subordinate chiefs have the right to succession, or to depose him. In Yonoubaland, Nigeria, the chiefs used to ask him to open the calabash, i.e. to commit suicide by drinking poison, or to go into exile [*P.C. LLOYD (1953): 327-334*]. Similarly, if subordinate chiefs tyrannized their people or disobeyed their superiors, the latter could, in collaboration with other subordinate chiefs, remove them from office and punish them.

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Custom in some Islamic parts of Africa was influenced by Qur'anic law. In each misside, for example, there was a judge chosen by the chief and the notables; he had three assessors with whom he held hearings. The parties had the right to appeal to the tribunal of Labé. The tribunal of Labé was presided over by a judge chosen by the chief and the notables, assisted by ten assessors; crimes that could lead to the death penalty as well as assault and battery causing bloodshed were within his jurisdiction. Decisions in matters of civil status, inheritance, property, etc. were dictated by custom, which was itself inspired, to a greater or lesser extent, depending on the subject, by Koranic law [*A. DEMOUGEOT (1944: 48*)]. Judges accepted gifts. As everywhere in Africa, justice was free.

A justice that applied the Law created and lived by a people, a justice rendered free of charge by those in power, a justice that took into account the economy of the country and the social structure, a justice governed by a Law that adapted to the daily life of the people, could only be dominated by realism.

iii. *A Conciliatory Law*

Ante-colonial African law was conciliatory in the sense that those who had to use it to settle conflicts had the strict duty to examine all aspects of the conflict, to elucidate the issues in dispute, to gather for this purpose all useful information and to propose to the parties the terms of settlement that seemed best suited to restoring balance in society. Everywhere, in traditional African societies, conflict management was based on this principle, because reconciling two individuals was nothing more than restoring trust between two families. And this is what Mr. René Dekkers, former Rector of the University of Lubumbashi wrote in these terms: "In Africa, the group takes the place of a technique in the struggle for life. Also, a Bantu dispute never opposes two individuals, but two groups. And one discusses from group to group: it is the famous palaver which sometimes lasts hours, days, and weeks. Why? Because the Bantu lives in a less restricted, very well organized and stable society. The people involved in this long debate have known each other for a long time, and are condemned to live together. Therefore, an inappropriate word carries much more weight than in Europe. This will be remembered. One insult will lead to another, and life in this small society will become a living hell. Therefore, in the discussion, it is necessary to spare the future. In addition, one wishes to find a solution that satisfies everyone. One tries to obtain the adhesion of all. They are looking for unanimity. What happens if a minority has to bow to a majority? The dispute would leave some feeling proud and others feeling bitter. And that would make this society hell *[R. DEKKERS (1970), 19].*

In pre-colonial Rwanda, in the event of a dispute over land, the dispute is brought before the chief of the hill, who goes to the site and, after hearing the witnesses and the council of elders, decides between the parties [*J.VANHONE (1942): 43*]. To this end, "those who had to settle the dispute did not do so all at once. He consulted the elders, the notables; he informed himself of the precedents without submitting to them. In the end, the good chief, the good judge, the wise judge was the one who managed to pacify the parties [W. VAN GERVEN (1983): 93].

Almost everywhere in Africa, "the normal means of ensuring the proper functioning of society and the harmony of social relations did not lie in the promulgation of laws. These laws, with their abstract character, could not take into account the infinite variety of possible situations and their strict application would risk undermining man's innate sense of justice [R. DAVID (1966): 531).

In the traditional legal philosophy of the Africans, "the solution of today is therefore binding on the future and must guarantee a common life in good understanding. If the groups in dispute do not reach a satisfactory solution, then, but only then, will they turn to a higher authority, generally the chief of the tribe. But the Chief will not make an authoritative decision. He too will be patient. He too will seek a solution that will win all the votes. And the good leader is the Solomon who finds it. He will listen to the explanations of the families involved, he will consult the elders, he will find out if there are precedents. But even if there are, he will not feel bound. For the purpose is not to cling to a pre-established rule, as do the Courts of European origin, but to seal the peace. Instead of putting a ready-made garment on the dispute, the good chief will know how to make him a garment made to measure *[R. DEKKERS (1970): 90]* ".

If integrating, realistic and conciliatory as it was and remains for the great majority of the African population, the colonial and post-colonial law had as main mission only to undermine, to destroy the foundations of it

b) Colonial and post-colonial law

Colonial and post-colonial African law is the result of an amalgam of European law and African law favorable to the colonial enterprise. As Tshiyembe Mwayila happily points out, "torn by two contradictory wills, the colonial enterprise could neither revalorize the institutions produced by African civilization, which would have emptied the "civilizing mission [*M.O. MNATSAKANYAN (1976)*] " of its sustenance, nor systematically replace it with the democratic institutions produced by European civilization, which would have led to the rupture of the bond of sovereignty placing the colony under the legal tutelage of the metropolis [*M. TSHIYEMBE (1990*): 16]. From this, it is important to conclude that current African Law is the result of two historicities: the African and the European [*TOURAINE (1973): 531*)]. The post-colonial African Law finds itself

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then at the horse of two civilizations whose evolution it does not control perfectly. It has in fact lost the compass that grasps and interprets the capacity of action of the society on itself, leaving the legal regulation of African social relations atrophied by the clash of civilizations to the prey of conflicts between the indigenous Law and the European Law, the crises inherent to colonization and especially to the management of a State that is not the result of the natural evolution of African societies. This could only lead to deep internal rifts. The legal system that was to be applied in these societies was then only to be a Right of the minority, because it only answered to the interests of the colonizer and of the one who succeeded him by resorting to the same weapon; a Right of exploitation, because thanks to it, the colonizer as well as the African will put on their legal costume by ensuring the monopoly of the exploitation of the goods and services of the people subjected to the colonial yoke and its semblance of African modern State; a Right instituting the segregation and the discrimination; a Right disorganizing the African society; a Right of the mimicry and finally a Right negating the African traditional Right

i. *A law of the minority*

It was said earlier that with the arrival of the colonizers, there was a juxtaposition of two systems of law, one traditional, which governed social relations in African society, and the other imposed by the colonial power, which was used only when a conflict in which the colonizer or his agent was involved had to be settled. Everywhere, tradition and custom occupied a predominant place in the management of society. Custom is still very present. No one can ignore it when it comes to establishing a system that affects a land that is still mythical and largely controlled by traditional organizational structures. According to this custom, rights are attached to a parcel, a portion of land, as well as to a person or to any group with a personality (family, village), even if this notion of personality is not legally defined or codified. This law is juxtaposed with land law, which has nothing in common with customary law, either in its origin or in its essence. Thus, for example, traditional land law is communalist, in the sense that the land belongs in common to the whole family, clan or lineage and the management of this land responds to evolving social norms recognized as obligatory and binding by and for all members of this social organism. Whereas the Land Law behaves like a system of norms imposed by a foreign power or the small minority that has learned to handle it and to juggle with its content and form, at the expense of the great popular majority. Consensualism and communalism are supplanted by dictatorship, individualism and the privatization of land.

This disparity can also be seen in the area of business law. This is indeed a field in which exogenous law is actualized in some countries, but it must also be admitted that this part of the law is of little interest to the populations as a whole. This is likely to be the case with regard to the exogenous mechanisms put in place by OHADA; but, as J. Vanderlinden points out, "of course, there is no doubt that this is a field in which exogenous law is being applied in some countries. Vanderlinden, "once again, they are of little interest to the great mass of those subject to the law, and it is candid, to say the least, to see in them a tool that will enable the populations to escape from the state of great material and moral misery in which they are currently struggling [*J.VANDERLINDEN (2001): 3-4*].

Law is the social discipline par excellence, and it is fortunate that society needs the right to rice or beans. "It is thus observed - and the observation is almost unanimous - that, in Africa today, normative networks have been created, based on all sorts of personal solidarities and on the emergence of personalities to whom individuals have turned more or less spontaneously to satisfy their need for justice in their daily lives. A large number of normative networks are thus juxtaposed, complementary or competing (including that of the postcolonial state in some cases), which contribute precisely to the constitution, on the part of individuals, of situations characteristic of legal pluralism [*J. VANDERLINDEN (2001): 3*]. The positivists will undoubtedly object that this is not a question of law -- the kind they like to write with a capital letter -- insofar as the State, an artificial creation of the colonizer, is not part of these multiple normative networks. This is not the place to start a discussion, without doubt without end, about these cream pies of the conflict between positivists and pluralists. It is however necessary to specify that African societies are subject to a pluralism of Law, whose origins differ, and are therefore very often contradictory to the point of being at the origin of several conflicts that we witness day and night. The post-colonial State does not master this whole set of rights, and to impose its will, resorts to violence rather than conviction. This can be seen, for example, in the Ivorian practice where, in 1960, the Ivorian Constitution decided that the property regime is a matter of law - and therefore of State competence - at a time when the President of the Republic was asserting the unwritten precept according to which "the land belongs to the one who develops it", which is still respected.

As long as history, human geography, customs and modes of social organization are not taken into account [*J. GASTALDI- http://www.foncier.org/liste*] in the elaboration, adoption and implementation of legal norms intended to maintain harmonious relations in politically organized society, it will be risky to declare that the Law in force in Africa is truly African. Is it not the lawyers trained in the legal mold of the ex-colonizer who conceive and impose the implementation of the Law currently applied in Africa? Is it not the rules adopted by the intellectual minority that presides over the destiny of

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the African people at a time when the latter live in another traditional legal system, specific to them and different from the one imposed on them? The price attached to the inheritance, the historical content of the whole patrimony, the social security... the predominance of the family in the management of the social relations are relegated to the background for the benefit of the minority which dominates the African society. It is therefore urgent that this anomaly cease and be replaced by the democratic rule according to which society must be directed by taking into account the will of the majority, without which it is and will remain as long as no legal revolution is made, a Law of exploitation.

ii. *A Law of Exploitation*

Colonial and post-colonial law is qualified as a law that has laid the foundations for the exploitation of African wealth and labor. From the 14th century to the present day, the Western powers have never ceased to initiate laws defending their interests on the continent. To begin with, the right of ownership was taken away from the Africans. Only the State, the omnipotent overlord, at the beginning of colonization, sought to appropriate everything through a system of direct administration, with an attitude tinged with innocence, humanism and compassion. This strategy was aimed at the sole objective of attracting Africans, making them "friends", in order to better tame them in order to better snatch their goods. It was the recourse to the African principle that instructs that "whoever wants to slaughter a bull, caress it first". In this way, they will manage to appropriate the soil and the subsoil in Africa. The possession of the subsoil thus returned of right to the suzerain since this one virtually imposed its authority to those of the conquered native monarchs. How then to be surprised by the poverty which strikes without pity more than 90% of the African populations?

Subsequently, from 1792, when Urdaneta, Minister of the Treasury of Santa Fe, was sent to the site by the Crown to inspect the methods of production and to inquire about the real results of the exploitation, laws were enacted to "put an end to the fraud on the charges and dues and to fight against the smuggling that deprived it of an important part of the expected rent". Thanks to these provisions, all the monopolies were entrusted to civil servants paid by the State in charge of supervising and rationalizing if necessary the production techniques. This reform was the first step in the preliminary definition of a Mining Law[3]. All the fruit of the work went to the crown, as in the Belgian Congo, where "the act of constitution of June 19, 1900, provided that two thirds of the profits of exploitation should be paid to the State and one third to the Katanga Company, a company financed by the private capital of his Majesty the King of the Belgians *[LEOPOLD II (2000)]*.

The aborigines, constituting the free labor force for the exploitation, were not allowed to move freely on the national territory. In this way, "the movements of the Congolese outside the chiefdom of origin are regulated. An absence of more than one month is subject to obtaining a "transfer passport" issued by the chief and stamped by the administrative district chief. This limitation on freedom of movement remained in force for a long time (even after independence) in several African states *[L. B. PROYART (1776)]*.

In the field of trade, the principle of freedom of trade was established. From the outset, one would think that this freedom was universal. Only the so-called "civilized" nations could enjoy it. The Berlin Conference provided that "in the Congo Basin, the trade of all nations shall enjoy complete freedom and all flags, without distinction of nationality, shall have free access to the whole coastline of the territories enumerated (in the Act) above, to the rivers flowing into the sea to all the waters of the Congo and its tributaries, including the lakes, to all the ports situated on the banks of the waters, as well as to all the canals which may be dug in the future with the object of connecting the rivers or lakes included in the whole extent of the territories described in the first article. They may undertake all kinds of transport and exercise maritime and river cabotage as well as inland navigation, on the same footing as nationals, and finally, goods of any origin imported into these territories under any flag whatsoever, by river or land, shall not be subject to any other taxes than those which may be levied as equitable compensation for expenses useful to commerce and which, in this respect, shall be borne equally by nationals and foreigners of all nationalities. All differential treatment is forbidden with regard to ships as well as to goods *[ACTE GENERAL DE BERLIN: 1885; P.VAN ZUYLEN (1959), 107; J.L.MIEGE (1973):151; R.P.ROEKENS (1950): 28; A.CHEREDAME (1905): 148; H.BRUNSCHWIG (1971): 21)]*. Finally, the signatory powers of the General Act of the Berlin Conference recognized the obligation to ensure, in the territories occupied by them, on the coasts of the African continent, the existence of an authority sufficient to ensure the respect of acquired rights and, if necessary, the freedom of trade and transit under the conditions in which it would be stipulated [ACTE DE BERLIN: ARTICLE 35]. In view of the above, it should be noted that only the Western powers benefited from the exploitation of the natural resources of the African countries placed under the colonial yoke without the local population benefiting in any way.

This situation persisted even after independence, since the colonial laws and institutions that some new states inherited were designed to exploit local divisions, not to suppress them. Moreover, as the UN Secretary General reminds us, "the patterns of trade relations instituted by the colonial powers have caused

[3] La naissance du droit d'exploitation minière, http://www.parallelpage.free.fr/page/droit/htm

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long-term distortions in the political economy of Africa. Transport networks and related infrastructure were designed to meet the needs of trade with the metropolis, not to promote balanced growth of the local economy *[A. KOFFI (2017): §. 9]*. Economic activities, with their strong emphasis on extractive industries and commodities for export, not only frequently imposed unfavorable terms of trade, but also did little to stimulate demand for upgrading the skills and education of the labor force. The consequences of this pattern of production and trade continued to be felt after independence. To the extent that the struggle for political power was not based on the establishment of viable national economic systems, in many cases it seemed more attractive to use the institutions inherited from the colonial era to serve the interests of one faction or another, very often defending the cause of the former metropolis. Thus, the current law does not defend the interests of the African people, but on the contrary, reinforces today more than yesterday, their exploitation. What should we do with it then? The least rational and civic-minded person would order that one does not cross one's arms or lower them.

iii. *A law instituting segregation and discrimination*

Colonial and post-colonial law in certain areas instituted segregation and discrimination without mercy. This is clearly evident in colonial legal texts. For example, almost all African colonial ordinances provided that customary law should apply primarily [*T. A. OLAWALE (1998): 15-16*], to all matters of marriage, land ownership, inheritance, succession, testamentary dispositions[4], and of course to traditional functions and institutions such as chieftaincies[5]; all other cases in which the parties are Africans, or in which the subject matter of the dispute is not normally subject to English, Belgian or French law, nor subject to English, Belgian or French law in accordance with the will of the parties[6]; where, although one party is an African and the other is not, it would be unfair to apply English, Belgian or French law[7]; and finally, in cases where customary law does not contradict any legal text or the principles of natural justice, equity and good faith. In other words, there is a law for indigenous people and a law for foreign nationals in the same legal system and on the same national territory.

On the other hand, the population itself was categorized according to their race, tribe, ethnicity, etc.... Colonization, for example in Rwanda and Burundi, widened the gap that existed between the different ethnic components of these countries. Thus, during the whole period of German colonization, two great mistakes were made; mistakes that crystallized the relations between the Hutus and the Tutsis [*RESIDENT KANDT (1995): 2*]. First, they based their power on the principle of indirect rule, thus reinforcing the hegemony of the existing administrative and political framework, which was totally Tutsi, over the Hutu majority. Secondly, the Germans favored this ethnic group by creating and running a School for the Sons of Chiefs in Nyanza until 1907. As one can see, the school was founded with the aim of providing the country with leaders who knew how to write and read, and therefore intermediaries between the colonizer and the local authority in order to better establish colonial power. Thus, the Hutu became excluded from this administrative and political machine and therefore, placed under the double domination: that of the colonizer and that of the Tutsi. Their successors, the Belgians, did not do any better to reduce the disparities between the two ethnic groups. In fact, in 1928, they made the same mistake as their predecessors by creating a school - the Groupe Scolaire d'Astrida - where only the children of Tutsi chiefs could study. Since then, everywhere in the country, access to education has been the prerogative of the nobles alone. In a 1928 Report on the Schools of the Vicariate of Rwanda, it is said that French classes in the four missions of Kabgayi, Kigali, Kansi and Save were organized for "young Batutsi"... [*RAPPORT DU VICARIAT (1923): 1; VAN KERKEN (1943): 192*]. Moreover, Belgian colonization maintained the policy of indirect rule, which perpetuated segregation in the management of public affairs [A.DEFAME *(1920): 25-26*].

In terms of marriage, a white woman who married a black man was subjected to terrible segregation and her children were mistreated by the colonial class. This is what Barthélémy Boganda, the father of the independence of the Republic of Oubangui-Shari (now the Central African Republic) criticized when he denounced the French colonizers who sequestered for two days his white wife and his six and a half month old daughter. The only fact that they were accused of was that the white woman had married a macaque, and his daughter had been born of a macaque [*SANMARCO (1983): 180 -183*].

In the land of their ancestors, Africans have often been prevented from visiting or living in such places. This is confirmed by the policy of apartheid, which advocated separation and separate development in South African society. This form of racial discrimination, institutionalized in South Africa, was based on a policy of total separation of races into

[4] Voir à ce sujet, par exemple, la Section 17, paragraphe 1, de l'Ordonnance de 23 de 1943 de la Cour Suprême du Nigeria.

[5] Par exemple dans l'affaire Eshubgayi contre le Gouvernement nigérien 1931, A.C. 662, p. 673.

[6] Sauf dans les cas où il est juridiquement impossible d'appliquer le droit anglais à certaines situations exclusivement réglementer par le droit coutumier – par exemple le droit d'un individu sur les terres familiales ne peut être transformé en propriété simple selon la conception britannique- les parties à une transaction quelconque peuvent stimuler que le droit anglais sera appliqué.

[7] Par exemple la Section 17(2) de l'Ordonnance de la Cour Suprême du Nigeria, N° 23, 1943

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geographically defined areas for each race. This policy was extended to South West Africa (now Namibia) and the two Rhodesias [*PIERSON-MATHY (1964): 479*]. In addition, in the territories under Belgian colonization, an almost similar policy was established. I remember in my youth reading in the Bikini Hotel and the Palm Beach Hotel in Gisenyi the poster: "NO DOGS OR NEGRIES". This made such an impression on me as a child because I could not understand how a Negro at home could be prevented from going to such and such a place in his country. Moreover, penal laws had been enacted to severely punish anyone who violated these prescriptions. The Piron Code is full of examples.

When the right to vote was established in Black Africa, it is curious to note that it was given only to a minority. Thus, in "Moyen-Congo" (future Congo-Brazzaville), the right to vote was first limited to "literates", then, in 1951, to "all those who possess a certain identity document" [*R. BOUTET (1960)*]. In Belgian Africa, according to Maurice VERSTRAETE, Professor at the Colonial University of Belgium, "following a terminology borrowed from our immediate neighbors, we reserve the denomination of 'Belgians' to those who are Belgians by virtue of the laws of the Kingdom, while we call 'Belgian subjects' or 'Belgians of colonial status' those who acquire, according to the Congolese civil code, the 'Congolese nationality', which became, since the law of 18-10-1908, a Belgian nationality of non-metropolitan status. According to this author, there were at that time some "Belgians of colonial status of white race, in other words white Belgian subjects who were not Belgian citizens" [*M. VERSTRAETE (1947): 470-485*]. Thus, "Belgian subject", "Belgian of colonial status" or "Congolese" was "any individual born on Congolese soil of native parents", with the exception of "the children of foreign parents or of Belgian citizens" [*M. VERSTRAETE (1947): 470-485*]. As a result, "the child of indigenous parents born outside Congolese territory will most often be stateless, because foreign law will rarely grant him the nationality of the place of birth [*BRAUSCH G.E.J.B (1957): 249*]. On the political level, "the Constitution grants the general electorate only to citizens": "Belgian subjects are excluded". "The Congolese natives being Belgian subjects, they enjoy in Belgium the fullness of the civic and public rights; only the political rights were refused to them; they were thus not Belgian citizens and as such were not obliged to the military service [*M. VERSTRAETE (1947): 480-485*]. Curiously, for a long time these texts will remain in force after independence. These are some vulgar examples that show how much the colonial law instituted segregation and therefore rooted it in the habits and customs of Africans.

iv. *A disorganizing law*

It would not be wrong to say that colonial and post-colonial law has played a disorganizing role in African society. Indeed, the first and most harmful influence of colonial and post-colonial law is the suppression of African communalism by Western individualism. On this subject, J. Gastaldi rightly notes that before colonization"..., the notions of individualism, autonomous enterprise, emancipation within the family, and the monetarization of exchanges, conveyed by migration, colonial law and information, take their place in Africa. The resulting behaviors are challenging traditional authorities and hierarchical relationships [*J. GASTALDI- http://www.foncier.or*].

This individualism, which guarantees the right to private property, will not take long to sow dissension and discord between brothers of the same family. The solidarity that traditionally characterized African society deteriorated. The land, the foundation of production relationships and the unity of the African family, becomes a source of discord and multiform conflicts. The memory of the land is disappearing. The role of the chief of the land, of the council of elders, is diminishing. The memory of men, who were the guardians of rights, disappears over the generations [*J. GASTALDI-http://www.foncier.org*]. Traditional law relating to land use is giving way to colonial land law.

If the traditional law relating to land had the mission of guaranteeing social prosperity and balance, colonial land practices wanted, on the other hand, to impose modalities of control of the land. It was necessary for the newcomer to have guarantees of a different nature than those based on recognition of the right by the village authorities alone. Among the new requirements, it seemed convenient to establish the principle of land concessions establishing a right of ownership on a perpetual basis.

In Western societies, private ownership of land is evidenced as soon as there is proof of purchase, and private property, whatever it may be, is legally defined. The registration of this right in a public register, held under the control of the new administrative authority, ensures its enforceability [*J. GASTALDI- http://www.foncier.org]*. In traditional African societies, land belongs to the extended family and its management is its sole responsibility. Any alienation of this land is strictly prohibited. In African societies in transition, the objective of land plans or programs financed by international organizations and former metropolises is to get rural populations to register land that has already been developed. If the real objective was to move towards the European land model, it would be necessary to proceed in a different way, because by undermining this guarantor of family unity, one destroys the unity of the entire nation and thus dooms African societies to the slow and gradual destruction of the basis of their possible development. In the current situation, it is very risky to say towards which land tenure model the majority of African countries will evolve. Clarification would be necessary. It would be necessary to revisit

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certain notions used up to now in order to better translate the thinking of African populations and remove any ambiguity [MOHAMED DOUCOURE: http://www.foncier.org].

In the field of traditional family law, especially in matters of succession, conflicts are likely to destroy African society if we are not careful. Traditionally, the woman theoretically had no inheritance. This does not mean that she was ignored or neglected. In fact, during the redistribution of land upon the death of the head of the family, all the boys received a portion of land. The new head of the family also received, for safekeeping, a portion of land intended to provide for the needs of women born into that family who might be banished from the in-laws and forced to rejoin their family of origin. In this situation, a woman in such a situation would farm all or part of this land. Her children, if the mother had never been endowed, would become full members of their uncles' families and receive the inheritance like everyone else. This state of affairs thus created a cohesion between all the members of the family and made the family accountable to each of its members. Curiously, the introduction of Western law into African society will turn women against their own families. Their claims are based on the equal rights of men and women. Commonly, they declare themselves the weaker sex who need specific protection from society. Nobody is against this equality, but why then should they seek protection from their equals? However, the African traditional law had solved this problem very simply, but effectively. The woman is called to integrate another family which owes her protection and respect. But when she can no longer bear life in this family, she has the right to return to her family of origin which owes her everything until the end of her life or her next remarriage. Should we give in to this pressure of Western Law or should we return to the source, improving it with significant positive foreign contributions?

People have always tried to make us believe that in traditional Africa no pluralism of ideas was known. They always want to prove to us that Africa has never known good governance. Should we continue to believe these heresies? If "good governance includes the following factors: an effective State; a mobilized civil society; an efficient private sector, accountability, transparency, the fight against corruption, participatory management and a favorable legal and judicial framework [T.MKANDAWIRE et Alii (1999); BAD (2000)], how can we dare say that Africa has never known good governance? Were not family meetings, palavers, and the traditional settlement of social conflicts an opportunity to translate this pluralism of ideas and institutions? Colonization only eliminated it from African social life.

In several cases, and most often in the first decade following independence, the post-colonial State did away with the pluralism that had characterized the period of national liberation movements by drafting unifying legislation that no longer left even a space of semi-autonomy for pre-colonial rights; this was the era of family "codes" and redefinitions of land tenure systems that were quickly denounced as constituting more program legislation than forms of law practically applicable to the populations. To these reproaches," notes J. Vanderlinden, "coming largely from legal anthropologists, but also from pure jurists who noted a growing divorce between the Law "in the books" -- which is more appropriate than saying the "dead" Law -- and the "living" Law, the supporters of a legal construction inspired by the colonizer opposed the "necessary progress" of the Law that their legal engineering was supposed to bring about. Insofar, however, as this was limited to the formulation of a purely theoretical tool -- the law -- without concern for the actualization of the legal prescription in the life of the Law, it was, given the environment in which it was supposed to operate, doomed to failure [*J. VANDERLINDEN (2001): 2]*. He continues by affirming with relevance that "the dysfunctions, the crisis, the withering away, even the disappearance of the administration of justice accompanied the identical phenomena noted at the level of the State by the observers of the African worlds. In the legal model imported by the colonizer into Africa, the law has always been so closely associated with the State function that it was impossible for the decline of one to be without incidence on the other and vice versa [*J. VANDERLINDEN (2001):2*]. Contemporary laws have substituted the notion of a domain of sacred origin for that of the domain of the State or the national domain. Strangely enough, this substitution has not been made properly and totally, because in reality, we are still witnessing a juxtaposition of legal systems, one of European origin, minority and imposed by will and force on the great majority of the population; the other purely African, majority, alive, but threatened by the intellectual minority incapable of substituting it with a law capable of regulating all the real and objective relations of the society.

There is a fundamental African reality to which, whether one watches it or not, it will be difficult to circumvent: the African family. "If modernization fragments the lineage and separates the generations, belonging to the fundamental group is always expressed in the difficult moments of life. It is not without guilt that some distance themselves from it, because the relationship with the family and the group of origin have a very strong cultural meaning and role for the African. Those who move away from it quickly find that their system of loyalty is disturbed and they live with the feeling that they are betraying the village and the ancestor [DELACROIX (1994): 1994; D.MBAE MENICK (1995): 174].

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v. *A Law to Mimicry*

Mimicry has been much decried by researchers and practitioners of law and political science in recent decades. Countless books and articles have been devoted to this theme [*Y. MEMY (1993); A. QUIJANO, I. WALLERSTEIN (1992); D. DARBON (1990); A. SCHWARTZ (1974)*]. It is agreed to define institutional mimicry as "a particular mode of social engineering characterized by the more or less massive concrete or diffuse importation of external institutional technologies extirpated from their generating environment, arbitrarily reconstructed and modeled through the exporters' and importers' own codes and having vocation to be inserted in another environment (another encoding system), which will subject them to permanent reinterpretations defined by the political strategies of the competing elites [*A. DARBON (1993): 119-120)*] ".

While the newly independent states of Africa were defending the right to self-determination of the colonial peoples, the first weapon in their struggle having to be the Law, it turned out that they tamed the one that had long subjugated them to fight against those who still harbored the desire to dominate and exploit them. How can one better handle a weapon of which one is not the inventor or of which one knows the handling in a rudimentary way? It is a truth: the colonial powers were led to project onto the occupied territories, subjected to their domination, an original "legal order" combining the law of the colonizing country, that of the colonized country and an original law born of the colonial phenomenon. The rules that were devised, whether applied or not, were in part the result of a "colonial design" that itself mixed contradictory ambitions, and in part the result of practical management, oblivious to any design, or even the result of local initiatives that were organized and received the label of the official authorities a posteriori. It was to be expected that this law would only defend the interests of the colonizer.

The legal model that was presented to African jurists during and after colonization seriously contributed to detach them in appearance from the rights of their fellow citizens, and then to distance them from them. Perhaps no clearer example of this can be found than the avatars that befell many in the Ghanaian legal profession following the rise to power of Jerry Rawlings in their country. As J. Vanderlinden describes, "in the purest common law tradition -- including the wearing of wigs at the bar and in the judiciary -- many lawyers, often of great talent, were forced into exile because of the stigma attached to their profession, which was perceived by the population as exploiting esoteric knowledge for personal gain; This situation is reminiscent, mutatis mutandis, of France and its Canadian colony, where lawyers were, for identical reasons, forbidden to practice in modern times. The parallelism between these two theaters of law production does not end there. Ghanaian aspiring lawyers were trained in an exogenous law -- the Common Law -- in a language that was not their own -- English -- by foreign masters -- from Commonwealth faculties -- just as students tempted by the basoche were taught by other foreigners -- for a long time mostly Italians -- an exogenous law that was five centuries old -- that of imperial Rome -- in a language that was incomprehensible to the population at large -- Latin. This is not to mention, in both cases, the light years separating the exogenous systems cultivated by the jurists from the Rights -- in the plural -- practiced by the populations [*J. VANDERLINDEN (2001): 5]*.

Moreover, it is curious to note that the very solutions that were advocated in the legislative formulations were considered as totally foreign -- which they objectively were -- to local conceptions, but also those who had, in the State system, the responsibility to apply them -- therefore the judges -- saw themselves discredited at first, then ignored by the people. Many jurists, some of whom seemed to believe that the mere production of a so-called development law would transform society, bear a great responsibility for the underdevelopment of African law and, consequently, for the ills affecting the State.

This way of acting has only resulted in the rupture between the law applied by the colonial and post-colonial jurisdictions and the living rights applied, against the will of the defenders of the legislation of colonial origin, by the great majority of African populations. Thus, Edem Kodjo points out, "cut off from his past, projected into a universe shaped from the outside by a civilization that erodes his values, stunned by a cultural invasion that marginalizes him, the distraught African is today the distorted reflection of the image of others" [*E. KODJO (1985):139*]. What is curious and regrettable is that he allows himself to be swept towards an uncertain future where he loses more and more his personality and his identity by seeking at all costs to resemble their colonizer of always. Of always, because, although physically gone, the colonizer continues to laminate our traditional intrinsic values, to destroy all the philosophical foundations of what was to be our African Right, by the Right and the economic system that it does not cease imposing us. To be convinced of this, one only has to see good governance, - as if Africa has never known any in its history -, decentralization, the Structural Adjustment Program... [*MICK MOORE (1993): 39-49*] which were imposed by the Bretton Woods institutions. These programs, these concepts were in fact designed, as Ms. Cynthia Hewitt de Alcantara aptly points out, "not only to shrink the State and the structures of African societies, and to make them increasingly less effective, but also to ensure that power in society shifts from government and the public sector to individuals and private groups [C. HEWITT DE ALCANTARA (1998): 113]. The result of

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these actions was only to be the enthronement of an uncontrollable disorder because born outside and not mastered, both in its origins and in its essence, by the African populations.

This perpetuation of an Overseas Law has only resulted in the mechanical reaction of African legislators to conceive the new African laws through the distorting prism of the political philosophy and the purely Western economic system acquired after several years of colonization. This is how, for example, the system of "land registration" and the "book" or "land register" was established, purely as a mimicry of the system of conquest and, by its very nature, totally artificial in relation to the environment [*J. GASTALDI- http://www.foncier.org*].

vi. *A law that negates traditional law*

The existence of an African law was contested by missionaries, colonial officials, anthropologists and indirectly by the constitutions of the new quasi-independent States.

a. *Missionaries*

Missionaries, especially those of the nineteenth century, usually considered African laws and customs as nothing more than hateful aspects of "paganism" and that their duty was to extirpate them in the name of Christian civilization. Is this not a pure and simple confusion of law and religion by these vehicles of Christian and Western civilization? [*A. S. DIAMOND (1923): 49-53*] They did not hesitate to qualify the African culture as a confused mass of customs, rites and inhuman practices. And from this they concluded that African customary law must be detrimental to a religious enterprise of this kind and must therefore be totally abolished.

More explicit is the testimony of Sir T. Morrisson, who at one time headed the Wachaga District in Kenya, who wrote: "I soon found myself confronted by serious questions of policy, by questions which go to the heart of colonial administration. Should we suppress the native customs, some of which are contrary to our western ethics? The Missionary certainly answers this question without difficulty. They are, in his opinion, pagan customs, and his duty is to destroy them and replace them with a higher law... Some of them, especially in the past, have gone much further and behaved as if they believed that the habits and customs of the English middle class were incorporated in the Sermon on the Mount. The District Chief cannot follow such a simple rule of conduct. In theory, the District Chief declares that his policy is to raise the standard of native customs so that they approach what we believe to be higher standards [T. MORRISON (1933): 141-142]."

b. *Colonial officials*

It should be noted that our colonial official quoted above does not reserve the right to declare that his mission is to raise indigenous customs to a higher level. In other words, although he recognizes the existence of African traditional law, he does not fail to qualify it as inferior to that of the West. In the first place, the colonial official is more concerned with the problem of the punishment of crimes. This leads him to hastily and falsely conclude that African traditional law is only penal. By considering that crimes committed in Africa and those committed in Europe are punished differently, they believe that the two systems are opposed to each other. What wonder that a murder committed in Africa is punished by the murder of some member of the criminal's family and that in Europe, this murder is followed by, for example, life imprisonment, or capital punishment? What is there, in both societies, is the recognition that murder is a negative fact that must be repressed at all costs. The punishment, on the other hand, is taken into account the reality of the socio-economic infrastructure. Killing, as a form of revenge or punishment, because the person killed is considered to be an integral part of a particular society and his death is more of a loss to that society than to the person who was killed. For the European, he conceives that everyone must answer for his actions. For Africans, the being belonging first and foremost to a family, it is the family that must answer and not the individual. The individual predominates in Western philosophy, but in African society it is the community that takes over. Hence it is not surprising that the sanctions are different for the same crime.

This leads us to conclude that African legal systems, like all legal systems, are based on the responsibility of the man or the society to which he belongs and on direct and indirect evidence.

c. *Anthropologists*

The ideas of anthropologists are much more fanciful. Legal anthropologists have formed a false opinion of African traditional law. According to Peget R.T., "thought in tribal society is governed by fetishism, not logic. For the tribe, justice by fetish is good and justice by reason is not... It is futile to look for reason in tribal justice, since it is not rational. It seems that it is not necessary to make any comment on such an erroneous statement [*R. T. PEGET (1951)*". We should confine ourselves essentially to the statement of Lord Proter quoted by T. Olawale Elias: "the common law is a historical development rather than a logical whole, and the fact that any doctrine is not logically consistent with one or more other doctrines does not justify its condemnation [*T. ELIA. OLAWALE (1998): 41*] ". The accuracy of this observation is similar to the famous observation of Olover W. Holmes that "the real life of law is not one of logic but of experience. The necessities felt in every age, the prevailing moral and political theories, the overt or unconscious intuitions of public policy, and even the prejudices which officers of the law share with

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other men, play a far more important part than syllogism in determining the rules of law.[*O. W. HOLMES (1948): 1,213, 312*]

It is fortunate, however, that these anthropologists do not have the same viewpoint. While there are those who assert without reservation that African law does not exist or exists only to a limited extent, and who insist strongly that custom is king [*S. HARTLAND (1924)*], the others assert without ambiguity that in this society the law is distinguished from custom, because the law is imposed directly or indirectly by the community; and moreover, this distinction is recognized by the people *[M. M. GREEN (1947): 78*]; the third, with their knowledge of comparative institutions and contemporary legal thought, recognize that African law is a true law, although there are normal differences between its origin and that of other legal systems, differences linked to the social and economic environment in which this system functions and has evolved [*SCHAPERA (1938).* It is interesting to note that in this last group, one of the defenders of the existence of African traditional law dares to declare that "among the Negroes of Africa, primitive jurisprudence has reached its most complete development.

In precision and extent, their code rivals the Ifugao code, with the difference that the Negroes everywhere practiced a certain procedure before the constituted courts. This testifies to a remarkable taste for legal casuistry and a keen pleasure in judicial eloquence [*R. H. LOWRIE (1921): 404*].

Since it has been confirmed that pre-colonial African societies had developed a legal system that had nothing to envy to that of the colonizing peoples, why should we accept the loss of our own for the benefit of the one that has been imposed on us directly or indirectly?

d. *The constitutions of new quasi-independent states*

In the African tradition, private property was not well known, because the community took precedence over the individual and the communal good prevailed over the individual good. In contradiction with the African tradition, the constitutions of the quasi-independent states enshrined an institution that was ignored by the African people. Curiously, these constitutions were adopted by the People and for the People. This is not surprising, because all these constitutions were a reproduction of the constitutions of the Metropolis.

Thus, in 1960, the Ivorian constitution decided that the property regime was a matter for the law. In addition, there is an unwritten presidential precept that "land belongs to the person who develops it", which is still respected. In other words, it enshrines that land can be privatized when it used to belong to the community. The right to private property is also enshrined in the Cameroonian [*CONSTITUTION CAMEROUN (1996)*] and Senegalese constitutions [*CONSTITUTION SENEGALAISE (2000)*]. The Nigerian Constitution of 1992 establishing private property is innovative. The Rural Code of this country (1993) decides that property can be acquired through both modern and customary law. In particular, it contains specific provisions in favor of transhumant law.

However, while African states are striving to privatize land, Western countries are seriously reducing all prerogatives linked to private property! [M. BACHELET (1968); A. G. KOUASSIGAN (1966): 265]. And it is important to understand this: when one only mimics the rights of others, one always acts late when it comes to correcting or regulating any social relationship. Worse still, the African states continue to improve the law that organizes the exploitation of the African peoples and forget so quickly that yesterday the metropolis used all these means to order and organize the colony. In fact, for the colonizers, "to order" the colonies was to look for the formula that would allow them to animate a common life of the territories situated outside the national borders in order to weld them to the metropolis, temporarily or definitively, either by giving colonization a precise goal, or by thinking of it only as an exercise of definitive domination. To order the colony was to organize it so that it could give the metropolis everything it needed: raw materials, free labor, capital and other cheaper goods. Curiously, this same policy persists, and the African states do nothing to get rid of it. In this way, one wonders about the future of African law.

III. What Future for African Law?

I am deeply convinced that the future of African law remains uncertain as long as concrete actions are not undertaken to liberate it, to make it truly African, to entrust it with its mission of organizing, not destroying, African society. I also have the feeling, in view of almost seven decades of evolution and the current state of both the economic situation and the available resources, that the challenges that await it in terms of the simple material survival of the populations are such that it will be difficult for the convalescent African State to devote a significant portion of its resources to the administration of justice. It is not likely that the complex organizational charts of courts and tribunals or the elaborate statutes of the judiciary concocted by experts who arrive with turnkey solutions will restore the lost confidence of the people in the state jurisdictions or the laws adopted with the pure aim of defending the interests of those in power. In this case, we would be back to the paper law that has caused so much damage after having demonstrated its total inefficiency. "The work, as J. Vanderlinden aptly puts it, -- not to say the real work -- to be accomplished is otherwise complex and long term

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[J. VANDERLINDEN (2001): 4]. To do this, it will be important to think of really Africanizing the African Law and the State by perfecting them by taking into account the African habits, customs and traditions by the teaching and the scientific research in the field. In this way, the new Law will really play a reconstructive role for the interest and the prosperity of the African people.

a) For a real Africanization of African Law

Dare I say, following the example of J. Vanderlinden, that we must have the courage to ask most African jurists, trained - if we can speak in this way - in the image of the Western jurist, to completely renew the conception that the Faculties of Legal Sciences have presented to them of Law and its implementation. Is it not time to convince them that the Western system, the one whose merits the Westerners have praised, is itself in deep crisis in many countries. The congestion of the courts, with its corollary, the extreme slowness of civil justice or the saturation of penitentiary establishments, about which one tends more and more to agree that they contribute very little to a possible social reintegration, when they are not criminogenic, as well as the poverty of the means granted to justice with the consequence that its services are often behind a war compared to certain delinquency in the financial field, are only examples! *[J. VANDERLINDEN (2001): 4]*. Globalization worsens the situation, because it induces more and more an aggravation of inequality and discrimination in the world, Africa being the biggest victim. These inequalities and discriminations are reflected in several cleavages: the cleavage between rural and urban areas, the cleavage between the haves and the have-nots, the imposition of the Rights of the Westernized minority on the Rights of the oppressed majority, reduced to the rank of instruments of production. Does this globalization, a new form of colonization, benefit those who contribute a lot to its success everywhere in the world, namely the workers - in a regular situation or not (migrants, the various categories of domestic workers), the African peasants, and the African researchers forced to emigrate to the West?

One thing is true and at the same time realistic: we must dare to break with the legal colonization of Western countries, by rejecting the legal norms that do not respond to the socio-political and legal philosophy of Africans, and by replacing them with those that would best respond to African realities, precisely by adapting them to the realities of the moment. In this way, we will have participated, in a small way, to the real Africanization of the African Law and to the blossoming of these peoples bruised and exploited during several centuries until today by the Westerners [MONDIALISATION (2000)]. Blind is the one who does not understand this truth.

b) For a perfection of the African Law

The rejection of colonial and post-colonial law, its replacement by a new one and its adaptation to African realities is not an end in itself. It is important to think about its improvement. The latter can only have an effect if it really transcends the will of the people. Indeed, the law is a product - some prefer to say "a construction", an expression which is apparently less materialistic or commercial and which presupposes more talent on the part of the producer - of the human spirit implanted and evolving in a very precise and concrete social environment. This product must however, if one wishes to make it play a social role, be communicable, "communicable" and thus pass from the interior of the producer on the public place. The source of Law is precisely the form that the juridical product takes when it passes from the ideal field to the real field. This source thus contains the will of those who produced it. Now, since society evolves, this product must not be fixed, stagnant. It must evolve with it. And this is where the fundamental role of the State lies, when it is an emanation of the people, in amending outdated legal norms or in revising them when they need to be made more effective, and finally in creating new legal norms, when new social relationships are born and do not find their corollary in the system of regulation of social relationships. Such actions, when they are carried out by institutions born of the will of the people and truly translating this will, perfect African Law and predispose it to the defense of the interests of the Nation.

In this perspective, this Law, well developed in a State well organized according to the will of the people, gives rise to uninhibited relations in relation to that of other States. From there are born the relations of complementarity, of collaboration... in the full equality of the actors in this type of relation. And consequently, colonialist, dominating and imperialist impulses cease to exist, giving way to the equality of peoples in their own independence. What is the very foundation of the right to the self-determination of the peoples.

c) For an in-depth reform of the teaching of Law in Africa

This large-scale undertaking cannot be conceived without the reform of our law teaching system and its content. It is sometimes funny to see a magistrate trying to resolve a family conflict between two spouses living in a village in his country without mastering all the customs and traditions related to marriage. Sometimes we see ridiculous judicial decisions that have nothing to do with reality. Or we often see prosecutors who never manage to understand how the murder of a head of a family, for example, inevitably leads to retaliation. They ignore that the individual in African society is first of all a collective being of the family, the lineage, the tribe, the ethnic

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group, the race, the region, the Nation... Something that does not exist in Western Law where man is only an individual being, left to his own devices. The examples related to this are numerous.

Faced with this situation, it seems to me that it is high time that African legal teachers rebuild their educational model and their knowledge in the image of their society and no longer in the image of their colonizers or neo-colonizers and that they reconcile themselves with their people, even if it means that they admit to give back part of the production of the Law that they tried in vain to confiscate from them during the period after independence *[J. VANDERLINDEN (2001): 5]*.

Borrowing the terms of the jurist Professor J. Vanderlinden, I remain convinced that "such a renovation of the role of the jurist, of his training and, of course, of the very object of his art passes necessarily by his awareness of the environment which surrounds him beyond the texts in which he would be too happy to confine the Law. This is not enough, however, if those who are attached to the reconstruction of the State are not ready for an identical awareness. The question is thus posed to them of the place they are willing to give to a true legal pluralism in the African State of tomorrow *[J. VANDERLINDEN (2001): 5]*.

Moreover, in this delicate undertaking, it is necessary to take into account the history, geography, customs, traditions, mores and modes of social organization in any request tending to ensure the representation of any nature. The price attached to heritage, the historical content of any heritage, the security that it represents, the family context that permeates it requires that these components be respected. Hence the need for formulas and procedures that integrate these factors, while innovating to respond to the changes in the world and the constraints of the moment.

These innovations could not be possible without being accompanied by well-developed and sector-specific scientific research. Who will lead them? Where will he lead them since few lawyers have "resigned themselves" to remain attached by their umbilical cord to their society of origin? Africa is still lucky to have some holders of African tradition, custom and wisdom. These are the best of the professors who can lead this research on the revalorization of our cultural heritage. With them, the modern jurist worthy of his origins and identity will work and little by little will be able to codify this traditional Law which will be able to be adapted to the realities of the moment.

The creation of specialties in the teaching of law at the master's level will facilitate the realization of this challenge. Thus, those who would like to specialize in purely European Law, such as Air Law, Insurance Law, Business Law, Telecommunications Law, Computer Law, ... will have the freedom to remain linked to the Western civilization from which these Rights were born, while specialists in Family Law, Rural Law, Constitutional Law and Political Institutions, ... will be forced to refer to the source before proposing any norm.

d) The reconstructive role of reformed African law

The reconstruction of the African State is on the lips of several political actors at both the national and international levels. However, those who believe that it is useful, or even necessary, to rebuild the African State are faced with an alternative: either to rebuild it, with certain adjustments to the way it was on the day the colonizers cast off its moorings, leaving it to drift rapidly towards what it is today, or to reinvent it. The first branch of this alternative almost necessarily implies that the State should take back from the people the production of law. This would be a clumsy step, because logically, the people and the State are indissociable. An undifferentiated collective whole, a people only acquires consistency in relation to a problem that its reference is supposed to solve. Now, this reference is nothing else than the State. Moreover, the State cannot in any case not refer to its people. Just as in principle there is no people without a State, neither can there be a State without a people. Therefore, the reconstruction of the State must be accompanied by the in-depth restructuring of the People. This restructuring must pass by its total liberation, -psychological, economic, political, legal, social... As soon as the people lives its freedom, its independence, its blooming..., it produces legal rules to make harmonious the relations between its members and so organizes politically its society which is nothing else than the State. From now on, the State ceases to be a tiger that produces and devours papers. As for reinventing it, it is not possible. One can only reinvent what no longer exists. Now the African state, although in a ghostly way, does exist. What is important is to revive it, to reinvigorate it.

The reconstruction of a solid and authentically African state will only be possible by taking into account what the people themselves have built during this period. And, perhaps, by touching it as little as possible. And it is not the recipes that come or will come from beyond Africa that will rebuild it. Only the people, acting in unison and stripped of all discordant voices professing imperialist or neo-colonialist ideologies, will rebuild their state. Only such a people can envisage another conception of Law, another way of considering the production of this Law, another form of training of its jurists; the conception of a Law proper to Africa, the determination of the way to produce this Law and finally the training of jurists committed to develop this Law constitute concomitant requirements to a reconstruction of the African State. And this is the content of the "Afrojurisophy", this science determined to rebuild the African State and the African Law by taking into account the habits and customs, the traditions, the history, the

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politico-legal philosophy, the culture... of the Africans. IS IT POSSIBLE? YES!

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Benefit

To the institution

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We accept the manuscript submissions in any standard (generic) format.

We typeset manuscripts using advanced typesetting tools like Adobe In Design, CorelDraw, TeXnicCenter, and TeXStudio. We usually recommend authors submit their research using any standard format they are comfortable with, and let Global Journals do the rest.

Alternatively, you can download our basic template from https://globaljournals.org/Template.zip

Authors should submit their complete paper/article, including text illustrations, graphics, conclusions, artwork, and tables. Authors who are not able to submit manuscript using the form above can email the manuscript department at submit@globaljournals.org or get in touch with chiefeditor@globaljournals.org if they wish to send the abstract before submission.

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4. Manuscript to be submitted must include keywords, an abstract, a paper title, co-author(s') names and details (email address, name, phone number, and institution), figures and illustrations in vector format including appropriate captions, tables, including titles and footnotes, a conclusion, results, acknowledgments and references.
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Unless specified in the notification, the Editorial Board's decision on publication of the paper is final and cannot be appealed before making the major change in the manuscript.

Acknowledgments

Contributors to the research other than authors credited should be mentioned in Acknowledgments. The source of funding for the research can be included. Suppliers of resources may be mentioned along with their addresses.

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Authors can submit papers and articles in an acceptable file format: MS Word (doc, docx), LaTeX (.tex, .zip or .rar including all of your files), Adobe PDF (.pdf), rich text format (.rtf), simple text document (.txt), Open Document Text (.odt), and Apple Pages (.pages). Our professional layout editors will format the entire paper according to our official guidelines. This is one of the highlights of publishing with Global Journals—authors should not be concerned about the formatting of their paper. Global Journals accepts articles and manuscripts in every major language, be it Spanish, Chinese, Japanese, Portuguese, Russian, French, German, Dutch, Italian, Greek, or any other national language, but the title, subtitle, and abstract should be in English. This will facilitate indexing and the pre-peer review process.

The following is the official style and template developed for publication of a research paper. Authors are not required to follow this style during the submission of the paper. It is just for reference purposes.

Manuscript Style Instruction (Optional)

- Microsoft Word Document Setting Instructions.
- Font type of all text should be Swis721 Lt BT.
- Page size: 8.27" x 11'", left margin: 0.65, right margin: 0.65, bottom margin: 0.75.
- Paper title should be in one column of font size 24.
- Author name in font size of 11 in one column.
- Abstract: font size 9 with the word "Abstract" in bold italics.
- Main text: font size 10 with two justified columns.
- Two columns with equal column width of 3.38 and spacing of 0.2.
- First character must be three lines drop-capped.
- The paragraph before spacing of 1 pt and after of 0 pt.
- Line spacing of 1 pt.
- Large images must be in one column.
- The names of first main headings (Heading 1) must be in Roman font, capital letters, and font size of 10.
- The names of second main headings (Heading 2) must not include numbers and must be in italics with a font size of 10.

Structure and Format of Manuscript

The recommended size of an original research paper is under 15,000 words and review papers under 7,000 words. Research articles should be less than 10,000 words. Research papers are usually longer than review papers. Review papers are reports of significant research (typically less than 7,000 words, including tables, figures, and references)

A research paper must include:

a) A title which should be relevant to the theme of the paper.
b) A summary, known as an abstract (less than 150 words), containing the major results and conclusions.
c) Up to 10 keywords that precisely identify the paper's subject, purpose, and focus.
d) An introduction, giving fundamental background objectives.
e) Resources and techniques with sufficient complete experimental details (wherever possible by reference) to permit repetition, sources of information must be given, and numerical methods must be specified by reference.
f) Results which should be presented concisely by well-designed tables and figures.
g) Suitable statistical data should also be given.
h) All data must have been gathered with attention to numerical detail in the planning stage.

Design has been recognized to be essential to experiments for a considerable time, and the editor has decided that any paper that appears not to have adequate numerical treatments of the data will be returned unrefereed.

i) Discussion should cover implications and consequences and not just recapitulate the results; conclusions should also be summarized.
j) There should be brief acknowledgments.
k) There ought to be references in the conventional format. Global Journals recommends APA format.

Authors should carefully consider the preparation of papers to ensure that they communicate effectively. Papers are much more likely to be accepted if they are carefully designed and laid out, contain few or no errors, are summarizing, and follow instructions. They will also be published with much fewer delays than those that require much technical and editorial correction.

The Editorial Board reserves the right to make literary corrections and suggestions to improve brevity.

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It is necessary that authors take care in submitting a manuscript that is written in simple language and adheres to published guidelines.

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The title page must carry an informative title that reflects the content, a running title (less than 45 characters together with spaces), names of the authors and co-authors, and the place(s) where the work was carried out.

Author details

The full postal address of any related author(s) must be specified.

Abstract

The abstract is the foundation of the research paper. It should be clear and concise and must contain the objective of the paper and inferences drawn. It is advised to not include big mathematical equations or complicated jargon.

Many researchers searching for information online will use search engines such as Google, Yahoo or others. By optimizing your paper for search engines, you will amplify the chance of someone finding it. In turn, this will make it more likely to be viewed and cited in further works. Global Journals has compiled these guidelines to facilitate you to maximize the web-friendliness of the most public part of your paper.

Keywords

A major lynchpin of research work for the writing of research papers is the keyword search, which one will employ to find both library and internet resources. Up to eleven keywords or very brief phrases have to be given to help data retrieval, mining, and indexing.

One must be persistent and creative in using keywords. An effective keyword search requires a strategy: planning of a list of possible keywords and phrases to try.

Choice of the main keywords is the first tool of writing a research paper. Research paper writing is an art. Keyword search should be as strategic as possible.

One should start brainstorming lists of potential keywords before even beginning searching. Think about the most important concepts related to research work. Ask, “What words would a source have to include to be truly valuable in a research paper?” Then consider synonyms for the important words.

It may take the discovery of only one important paper to steer in the right keyword direction because, in most databases, the keywords under which a research paper is abstracted are listed with the paper.

Numerical Methods

Numerical methods used should be transparent and, where appropriate, supported by references.

Abbreviations

Authors must list all the abbreviations used in the paper at the end of the paper or in a separate table before using them.

Formulas and equations

Authors are advised to submit any mathematical equation using either MathJax, KaTeX, or LaTeX, or in a very high-quality image.

Tables, Figures, and Figure Legends

Tables: Tables should be cautiously designed, uncrowned, and include only essential data. Each must have an Arabic number, e.g., Table 4, a self-explanatory caption, and be on a separate sheet. Authors must submit tables in an editable format and not as images. References to these tables (if any) must be mentioned accurately.

Figures

Figures are supposed to be submitted as separate files. Always include a citation in the text for each figure using Arabic numbers, e.g., Fig. 4. Artwork must be submitted online in vector electronic form or by emailing it.

Preparation of Eletronic Figures for Publication

Although low-quality images are sufficient for review purposes, print publication requires high-quality images to prevent the final product being blurred or fuzzy. Submit (possibly by e-mail) EPS (line art) or TIFF (halftone/ photographs) files only. MS PowerPoint and Word Graphics are unsuitable for printed pictures. Avoid using pixel-oriented software. Scans (TIFF only) should have a resolution of at least 350 dpi (halftone) or 700 to 1100 dpi (line drawings). Please give the data for figures in black and white or submit a Color Work Agreement form. EPS files must be saved with fonts embedded (and with a TIFF preview, if possible).

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Tips for writing a good quality Social Science Research Paper

Techniques for writing a good quality homan social science research paper:

1. Choosing the topic: In most cases, the topic is selected by the interests of the author, but it can also be suggested by the guides. You can have several topics, and then judge which you are most comfortable with. This may be done by asking several questions of yourself, like "Will I be able to carry out a search in this area? Will I find all necessary resources to accomplish the search? Will I be able to find all information in this field area?" If the answer to this type of question is "yes," then you ought to choose that topic. In most cases, you may have to conduct surveys and visit several places. Also, you might have to do a lot of work to find all the rises and falls of the various data on that subject. Sometimes, detailed information plays a vital role, instead of short information. Evaluators are human: The first thing to remember is that evaluators are also human beings. They are not only meant for rejecting a paper. They are here to evaluate your paper. So present your best aspect.

2. Think like evaluators: If you are in confusion or getting demotivated because your paper may not be accepted by the evaluators, then think, and try to evaluate your paper like an evaluator. Try to understand what an evaluator wants in your research paper, and you will automatically have your answer. Make blueprints of paper: The outline is the plan or framework that will help you to arrange your thoughts. It will make your paper logical. But remember that all points of your outline must be related to the topic you have chosen.

3. Ask your guides: If you are having any difficulty with your research, then do not hesitate to share your difficulty with your guide (if you have one). They will surely help you out and resolve your doubts. If you can't clarify what exactly you require for your work, then ask your supervisor to help you with an alternative. He or she might also provide you with a list of essential readings.

4. Use of computer is recommended: As you are doing research in the field of homan social science then this point is quite obvious. Use right software: Always use good quality software packages. If you are not capable of judging good software, then you can lose the quality of your paper unknowingly. There are various programs available to help you which you can get through the internet.

5. Use the internet for help: An excellent start for your paper is using Google. It is a wondrous search engine, where you can have your doubts resolved. You may also read some answers for the frequent question of how to write your research paper or find a model research paper. You can download books from the internet. If you have all the required books, place importance on reading, selecting, and analyzing the specified information. Then sketch out your research paper. Use big pictures: You may use encyclopedias like Wikipedia to get pictures with the best resolution. At Global Journals, you should strictly follow here.

6. Bookmarks are useful: When you read any book or magazine, you generally use bookmarks, right? It is a good habit which helps to not lose your continuity. You should always use bookmarks while searching on the internet also, which will make your search easier.

7. Revise what you wrote: When you write anything, always read it, summarize it, and then finalize it.

8. Make every effort: Make every effort to mention what you are going to write in your paper. That means always have a good start. Try to mention everything in the introduction—what is the need for a particular research paper. Polish your work with good writing skills and always give an evaluator what he wants. Make backups: When you are going to do any important thing like making a research paper, you should always have backup copies of it either on your computer or on paper. This protects you from losing any portion of your important data.

9. Produce good diagrams of your own: Always try to include good charts or diagrams in your paper to improve quality. Using several unnecessary diagrams will degrade the quality of your paper by creating a hodgepodge. So always try to include diagrams which were made by you to improve the readability of your paper. Use of direct quotes: When you do research relevant to literature, history, or current affairs, then use of quotes becomes essential, but if the study is relevant to science, use of quotes is not preferable.

10. Use proper verb tense: Use proper verb tenses in your paper. Use past tense to present those events that have happened. Use present tense to indicate events that are going on. Use future tense to indicate events that will happen in the future. Use of wrong tenses will confuse the evaluator. Avoid sentences that are incomplete.

11. Pick a good study spot: Always try to pick a spot for your research which is quiet. Not every spot is good for studying.

12. Know what you know: Always try to know what you know by making objectives, otherwise you will be confused and unable to achieve your target.

13. Use good grammar: Always use good grammar and words that will have a positive impact on the evaluator; use of good vocabulary does not mean using tough words which the evaluator has to find in a dictionary. Do not fragment sentences. Eliminate one-word sentences. Do not ever use a big word when a smaller one would suffice.

Verbs have to be in agreement with their subjects. In a research paper, do not start sentences with conjunctions or finish them with prepositions. When writing formally, it is advisable to never split an infinitive because someone will (wrongly) complain. Avoid clichés like a disease. Always shun irritating alliteration. Use language which is simple and straightforward. Put together a neat summary.

14. Arrangement of information: Each section of the main body should start with an opening sentence, and there should be a changeover at the end of the section. Give only valid and powerful arguments for your topic. You may also maintain your arguments with records.

15. Never start at the last minute: Always allow enough time for research work. Leaving everything to the last minute will degrade your paper and spoil your work.

16. Multitasking in research is not good: Doing several things at the same time is a bad habit in the case of research activity. Research is an area where everything has a particular time slot. Divide your research work into parts, and do a particular part in a particular time slot.

17. Never copy others' work: Never copy others' work and give it your name because if the evaluator has seen it anywhere, you will be in trouble. Take proper rest and food: No matter how many hours you spend on your research activity, if you are not taking care of your health, then all your efforts will have been in vain. For quality research, take proper rest and food.

18. Go to seminars: Attend seminars if the topic is relevant to your research area. Utilize all your resources.
Refresh your mind after intervals: Try to give your mind a rest by listening to soft music or sleeping in intervals. This will also improve your memory. Acquire colleagues: Always try to acquire colleagues. No matter how sharp you are, if you acquire colleagues, they can give you ideas which will be helpful to your research.

19. Think technically: Always think technically. If anything happens, search for its reasons, benefits, and demerits. Think and then print: When you go to print your paper, check that tables are not split, headings are not detached from their descriptions, and page sequence is maintained.

20. Adding unnecessary information: Do not add unnecessary information like "I have used MS Excel to draw graphs." Irrelevant and inappropriate material is superfluous. Foreign terminology and phrases are not apropos. One should never take a broad view. Analogy is like feathers on a snake. Use words properly, regardless of how others use them. Remove quotations. Puns are for kids, not grunt readers. Never oversimplify: When adding material to your research paper, never go for oversimplification; this will definitely irritate the evaluator. Be specific. Never use rhythmic redundancies. Contractions shouldn't be used in a research paper. Comparisons are as terrible as clichés. Give up ampersands, abbreviations, and so on. Remove commas that are not necessary. Parenthetical words should be between brackets or commas. Understatement is always the best way to put forward earth-shaking thoughts. Give a detailed literary review.

21. Report concluded results: Use concluded results. From raw data, filter the results, and then conclude your studies based on measurements and observations taken. An appropriate number of decimal places should be used. Parenthetical remarks are prohibited here. Proofread carefully at the final stage. At the end, give an outline to your arguments. Spot perspectives of further study of the subject. Justify your conclusion at the bottom sufficiently, which will probably include examples.

22. Upon conclusion: Once you have concluded your research, the next most important step is to present your findings. Presentation is extremely important as it is the definite medium though which your research is going to be in print for the rest of the crowd. Care should be taken to categorize your thoughts well and present them in a logical and neat manner. A good quality research paper format is essential because it serves to highlight your research paper and bring to light all necessary aspects of your research.

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Informal Guidelines of Research Paper Writing

Key points to remember:

- Submit all work in its final form.
- Write your paper in the form which is presented in the guidelines using the template.
- Please note the criteria peer reviewers will use for grading the final paper.

Final points:

One purpose of organizing a research paper is to let people interpret your efforts selectively. The journal requires the following sections, submitted in the order listed, with each section starting on a new page:

The introduction: This will be compiled from reference matter and reflect the design processes or outline of basis that directed you to make a study. As you carry out the process of study, the method and process section will be constructed like that. The results segment will show related statistics in nearly sequential order and direct reviewers to similar intellectual paths throughout the data that you gathered to carry out your study.

The discussion section:

This will provide understanding of the data and projections as to the implications of the results. The use of good quality references throughout the paper will give the effort trustworthiness by representing an alertness to prior workings.

Writing a research paper is not an easy job, no matter how trouble-free the actual research or concept. Practice, excellent preparation, and controlled record-keeping are the only means to make straightforward progression.

General style:

Specific editorial column necessities for compliance of a manuscript will always take over from directions in these general guidelines.

To make a paper clear: Adhere to recommended page limits.

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- Separating a table, chart, or figure—confine each to a single page.
- Submitting a manuscript with pages out of sequence.
- In every section of your document, use standard writing style, including articles ("a" and "the").
- Keep paying attention to the topic of the paper.
- Use paragraphs to split each significant point (excluding the abstract).
- Align the primary line of each section.
- Present your points in sound order.
- Use present tense to report well-accepted matters.
- Use past tense to describe specific results.
- Do not use familiar wording; don't address the reviewer directly. Don't use slang or superlatives.
- Avoid use of extra pictures—include only those figures essential to presenting results.

Title page:

Choose a revealing title. It should be short and include the name(s) and address(es) of all authors. It should not have acronyms or abbreviations or exceed two printed lines.

Abstract: This summary should be two hundred words or less. It should clearly and briefly explain the key findings reported in the manuscript and must have precise statistics. It should not have acronyms or abbreviations. It should be logical in itself. Do not cite references at this point.

An abstract is a brief, distinct paragraph summary of finished work or work in development. In a minute or less, a reviewer can be taught the foundation behind the study, common approaches to the problem, relevant results, and significant conclusions or new questions.

Write your summary when your paper is completed because how can you write the summary of anything which is not yet written? Wealth of terminology is very essential in abstract. Use comprehensive sentences, and do not sacrifice readability for brevity; you can maintain it succinctly by phrasing sentences so that they provide more than a lone rationale. The author can at this moment go straight to shortening the outcome. Sum up the study with the subsequent elements in any summary. Try to limit the initial two items to no more than one line each.

Reason for writing the article—theory, overall issue, purpose.

- Fundamental goal.
- To-the-point depiction of the research.
- Consequences, including definite statistics—if the consequences are quantitative in nature, account for this; results of any numerical analysis should be reported. Significant conclusions or questions that emerge from the research.

Approach:

- Single section and succinct.
- An outline of the job done is always written in past tense.
- Concentrate on shortening results—limit background information to a verdict or two.
- Exact spelling, clarity of sentences and phrases, and appropriate reporting of quantities (proper units, important statistics) are just as significant in an abstract as they are anywhere else.

Introduction:

The introduction should "introduce" the manuscript. The reviewer should be presented with sufficient background information to be capable of comprehending and calculating the purpose of your study without having to refer to other works. The basis for the study should be offered. Give the most important references, but avoid making a comprehensive appraisal of the topic. Describe the problem visibly. If the problem is not acknowledged in a logical, reasonable way, the reviewer will give no attention to your results. Speak in common terms about techniques used to explain the problem, if needed, but do not present any particulars about the protocols here.

The following approach can create a valuable beginning:

- Explain the value (significance) of the study.
- Defend the model—why did you employ this particular system or method? What is its compensation? Remark upon its appropriateness from an abstract point of view as well as pointing out sensible reasons for using it.
- Present a justification. State your particular theory(-ies) or aim(s), and describe the logic that led you to choose them.
- Briefly explain the study's tentative purpose and how it meets the declared objectives.

Approach:

Use past tense except for when referring to recognized facts. After all, the manuscript will be submitted after the entire job is done. Sort out your thoughts; manufacture one key point for every section. If you make the four points listed above, you will need at least four paragraphs. Present surrounding information only when it is necessary to support a situation. The reviewer does not desire to read everything you know about a topic. Shape the theory specifically—do not take a broad view.

As always, give awareness to spelling, simplicity, and correctness of sentences and phrases.

Procedures (methods and materials):

This part is supposed to be the easiest to carve if you have good skills. A soundly written procedures segment allows a capable scientist to replicate your results. Present precise information about your supplies. The suppliers and clarity of reagents can be helpful bits of information. Present methods in sequential order, but linked methodologies can be grouped as a segment. Be concise when relating the protocols. Attempt to give the least amount of information that would permit another capable scientist to replicate your outcome, but be cautious that vital information is integrated. The use of subheadings is suggested and ought to be synchronized with the results section.

When a technique is used that has been well-described in another section, mention the specific item describing the way, but draw the basic principle while stating the situation. The purpose is to show all particular resources and broad procedures so that another person may use some or all of the methods in one more study or referee the scientific value of your work. It is not to be a step-by-step report of the whole thing you did, nor is a methods section a set of orders.

Materials:

Materials may be reported in part of a section or else they may be recognized along with your measures.

Methods:

- Report the method and not the particulars of each process that engaged the same methodology.
- Describe the method entirely.
- To be succinct, present methods under headings dedicated to specific dealings or groups of measures.
- Simplify—detail how procedures were completed, not how they were performed on a particular day.
- If well-known procedures were used, account for the procedure by name, possibly with a reference, and that's all.

Approach:

It is embarrassing to use vigorous voice when documenting methods without using first person, which would focus the reviewer's interest on the researcher rather than the job. As a result, when writing up the methods, most authors use third person passive voice.

Use standard style in this and every other part of the paper—avoid familiar lists, and use full sentences.

What to keep away from:

- Resources and methods are not a set of information.
- Skip all descriptive information and surroundings—save it for the argument.
- Leave out information that is immaterial to a third party.

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Results:

The principle of a results segment is to present and demonstrate your conclusion. Create this part as entirely objective details of the outcome, and save all understanding for the discussion.

The page length of this segment is set by the sum and types of data to be reported. Use statistics and tables, if suitable, to present consequences most efficiently.

You must clearly differentiate material which would usually be incorporated in a study editorial from any unprocessed data or additional appendix matter that would not be available. In fact, such matters should not be submitted at all except if requested by the instructor.

Content:

- Sum up your conclusions in text and demonstrate them, if suitable, with figures and tables.
- In the manuscript, explain each of your consequences, and point the reader to remarks that are most appropriate.
- Present a background, such as by describing the question that was addressed by creation of an exacting study.
- Explain results of control experiments and give remarks that are not accessible in a prescribed figure or table, if appropriate.
- Examine your data, then prepare the analyzed (transformed) data in the form of a figure (graph), table, or manuscript.

What to stay away from:

- Do not discuss or infer your outcome, report surrounding information, or try to explain anything.
- Do not include raw data or intermediate calculations in a research manuscript.
- Do not present similar data more than once.
- A manuscript should complement any figures or tables, not duplicate information.
- Never confuse figures with tables—there is a difference.

Approach:

As always, use past tense when you submit your results, and put the whole thing in a reasonable order.

Put figures and tables, appropriately numbered, in order at the end of the report.

If you desire, you may place your figures and tables properly within the text of your results section.

Figures and tables:

If you put figures and tables at the end of some details, make certain that they are visibly distinguished from any attached appendix materials, such as raw facts. Whatever the position, each table must be titled, numbered one after the other, and include a heading. All figures and tables must be divided from the text.

Discussion:

The discussion is expected to be the trickiest segment to write. A lot of papers submitted to the journal are discarded based on problems with the discussion. There is no rule for how long an argument should be.

Position your understanding of the outcome visibly to lead the reviewer through your conclusions, and then finish the paper with a summing up of the implications of the study. The purpose here is to offer an understanding of your results and support all of your conclusions, using facts from your research and generally accepted information, if suitable. The implication of results should be fully described.

Infer your data in the conversation in suitable depth. This means that when you clarify an observable fact, you must explain mechanisms that may account for the observation. If your results vary from your prospect, make clear why that may have happened. If your results agree, then explain the theory that the proof supported. It is never suitable to just state that the data approved the prospect, and let it drop at that. Make a decision as to whether each premise is supported or discarded or if you cannot make a conclusion with assurance. Do not just dismiss a study or part of a study as "uncertain."

Research papers are not acknowledged if the work is imperfect. Draw what conclusions you can based upon the results that you have, and take care of the study as a finished work.

- You may propose future guidelines, such as how an experiment might be personalized to accomplish a new idea.
- Give details of all of your remarks as much as possible, focusing on mechanisms.
- Make a decision as to whether the tentative design sufficiently addressed the theory and whether or not it was correctly restricted. Try to present substitute explanations if they are sensible alternatives.
- One piece of research will not counter an overall question, so maintain the large picture in mind. Where do you go next? The best studies unlock new avenues of study. What questions remain?
- Recommendations for detailed papers will offer supplementary suggestions.

Approach:

When you refer to information, differentiate data generated by your own studies from other available information. Present work done by specific persons (including you) in past tense.

Describe generally acknowledged facts and main beliefs in present tense.

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	A-B	**C-D**	**E-F**
Abstract	Clear and concise with appropriate content, Correct format. 200 words or below	Unclear summary and no specific data, Incorrect form Above 200 words	No specific data with ambiguous information Above 250 words
Introduction	Containing all background details with clear goal and appropriate details, flow specification, no grammar and spelling mistake, well organized sentence and paragraph, reference cited	Unclear and confusing data, appropriate format, grammar and spelling errors with unorganized matter	Out of place depth and content, hazy format
Methods and Procedures	Clear and to the point with well arranged paragraph, precision and accuracy of facts and figures, well organized subheads	Difficult to comprehend with embarrassed text, too much explanation but completed	Incorrect and unorganized structure with hazy meaning
Result	Well organized, Clear and specific, Correct units with precision, correct data, well structuring of paragraph, no grammar and spelling mistake	Complete and embarrassed text, difficult to comprehend	Irregular format with wrong facts and figures
Discussion	Well organized, meaningful specification, sound conclusion, logical and concise explanation, highly structured paragraph reference cited	Wordy, unclear conclusion, spurious	Conclusion is not cited, unorganized, difficult to comprehend
References	Complete and correct format, well organized	Beside the point, Incomplete	Wrong format and structuring

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