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Review Article

Nature, Structure and Limits of The Indigenous Special Jurisdiction in Colombia

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Abstract

The native communities do not necessarily share the same of understanding of laws, rules and norms that the rest of the populations does. Because of this is necessary to analyse how the juridical system can approach these communities, especially regarding criminal law and its application; as in it we can see that the concepts that the doctrine has created for it can be adapted to keep its purpose but adapted to a community that historically has suffered from the other social groups.

Keywords: Native population; Criminal Law; Constitutional Law; Jurisdiction

Introduction

From the recognization, the Special Indigenous Jurisdiction (JEI by its name in Spanish) [1], as a collective right of the indigenous population and as part of the legal order, they are allowed to manage justice at the interior of its safeguards, having as limits the Constitution, especially the fundamental rights [2]. This recognition implies that the Aboriginal population is vested with criminal jurisdiction, under which the actions carried out and that causes an injury to a protected legal asset can be judged according to its norms and customs after evaluating whether, based on certain criteria, the jurisdiction of the JEI is enabled or if on the contrary, the judgment will be in charge of ordinary jurisdiction.

When determining what is the procedure to follow to carry out the trial according to law, the judge must take into account to determine whether or not the indigenous jurisdiction is enabled the following requirements: first, if the typical conduct is sanctioned only by national law, could say that in principle the judges of the Republic are competent to take up the matter, but because we are in the presence of a culturally distinct individual, must determine whether at the time of the commission of the conduct understood that his acting was illegal. Second, the judge, can found "an Indian who accidentally became involved with a person from another community" and that their way of interpreting the world was not possible to understand that his actions in another judicial or social order can be considered reprehensible. In this case, the legal operator " should consider returning the individual to their cultural environment, to preserve its special ethnic consciousness". On the contrary, it may happen that the "subject who, due to his special relationship with the majority community, knew the harmful nature of the activities sanctioned by the national legal system," and in this event, jurisdiction must be assumed by ordinary justice [3].

Finally, the judge must identify whether the typical conduct is sanctioned in both legal systems, making it clear that their cultural difference cannot be a determining factor in preaching that they were unaware of the illegality of their conduct. However, the judge must take into account "the ethnic conscience of the subject and the degree of isolation of the culture to which he belongs", to define whether it is convenient for him to be tried by the ordinary jurisdiction or by the JEI [4].

Indigenous Criminal Jurisdiction

The criminal jurisdiction has been developed as a consequence of the recognition of the principle of jurisdictional autonomy of the aboriginal peoples and signifies for the indigenous the granting of a

subjective right that allows them to determine the criminal matters according to the norms of their community. Simultaneously, this exception guarantees the protection of their awareness of ethnic and cultural diversity and materialise the JEI [5]. The criminal jurisdiction " enables the jurisdiction of the JEI" and this, in turn, should ensure the protection of both individual and collective rights [5]. For the application of the jurisdiction to be possible, the indigenous identity of the accused is not enough, but rather it is necessary to meet some criteria developed by the Constitutional Court: the personal, the territorial, the institutional or organic and the objective [6]. These criteria determine the competence of the Special Indigenous Jurisdiction to ensure that aboriginal is judged by their natural judge.

The personal criteria correspond to that, according to which an indigenous person by the mere fact of belonging to a determined ethnic community enjoys the right to be judged according to its norms and customs. The territorial criterion implies that the punitive conduct under investigation has occurred within the territorial scope of the reserve. For these reasons, for the Constitutional Court, this criterion is closely related to the institutional sphere, because it also gives it an " expansive effect of the territory"; it does not limit the territory to the geographical area where the indigenous culture develops, but allows that the criminal behaviour or "socially harmful" occurred outside the to the territorial scope of the group that is referred for their prosecution, is carried out by the indigenous communities [7].

The institutional criteria configure the existence of authorities, customs and traditional procedures of the community. In this sense, the institutionality supposes that there is a power of social coercion on the part of the traditional authorities and that there is a generic concept of social harmfulness. Additionally, this element would be satisfied by [three] criteria of interpretation: "The institutionalization is an essential budget for the effectiveness of the due process for the benefit of the defendant, the preservation of customs and ancestral instruments on conflict resolution and satisfaction of the rights of victims "[8]. And, finally, the objective criterion refers to nature or the object on which the conduct falls [7].

The Constitutional Court has established that these criteria should not be concurrent, however, when any of them are lacking, a conflict of jurisdiction is caused between the JEI and the ordinary jurisdiction. There the judge in charge of settling the conflict must take into account the criteria as "the degree of acculturation of the subject or the isolation level of the community. "

From the evaluation of the criteria, it is concluded whether the aboriginal is indeed the holder of the criminal jurisdiction, or if, on the contrary, the specific case must be processed by the ordinary jurisdiction. If the decision is that the case falls within the jurisdiction of the ordinary jurisdiction, it is necessary to provide the aboriginal with a series of applicable guarantees in the criminal process, when the investigation and trial are carried out within the ordinary criminal jurisdiction [9]. On multiple occasions, the Constitutional Court has asked whether the aboriginal should be considered as unimpeachable due to cultural diversity, or if in his improper act he incurs an invincible error of prohibition.

The Unimputability for Cultural Diversity and the Invincible Error Ban

From the study of the theory of the crime, it has been suggested that for a behaviour to be considered as a punishable must attend own characteristics s to allow for completion if the externalization of behaviour is relevant in the legal world and, concretely, in the criminal law must make a judgment value is to analyze in detail if this meets the provisions described in the constitution and the criminal law. At present, a tripartite analysis of the punishable conduct is made [10], composed of the following elements: the typicality [10]; the unlawfulness [10]; and guilt [10]. E l judgment made in each of these categories of crime leads us to determine criminal responsibility.

Starting with the 1991 Constitution, which consolidated the constitutionalization of criminal law based on fundamental principles, values, and rights that " condition the understanding of the criminal structure" [11], and which enshrined human dignity [1] and to the individual as the centre of the state, on which you must turn the entire state structure [12,13]; Based on these assumptions, the principles of legality, due process [1] was endorsed, from which the principle of guilt, the principles of rationality and the proportionality of the sentence and, especially, protection of the freedoms, which implies a guarantee for the individual before the application of the power of the state overflowed. For the criminal law, the constitutionalization, in addition to guiding all the actions of the legislator and the legal operator, by recognizing human dignity, and the presumption of innocence, enshrined the principle of guilt and therefore the prevalence of the criminal law of act [14].

The criminal law of action requires that sanctions are only applied to external acts that generate damage legally on an individual or society (harmfulness), and also, the legal right should be protected by the criminal law. With the criminal act of act, the personality, character and internal attitude of the accused person ceased to be the object of analysis, thereby prohibiting any form of strict liability [10]. Extinguish and requires the individual to act with guilt. The culpability is the "[...] Foundation of the penalty because no one can deduct punitive responsibility if you have not done culpably behaviour typical and unlawful " [15]. From the perspective of the finalism to Hans Welzel "the reproach of guilt presupposes that the author could have been motivated r according to the standard" and therefore indicates that the guilt you Jan three

premises: imputability; the possibility of understanding the unfair; and the enforceability of the conduct according to the law [16].

The imputability indicates the capacity to act with culpability, that is to say, of one who "can understand the unfairness of the act and determine his will following that understanding." It is said that when an individual cannot understand the illegality of their actions or cannot be determined according to their understanding, we are facing an unimpeachable and therefore we cannot carry out a criminal responsibility trial. The criminal legal order has established that it is possible to be unimpeachable for psychological immaturity, mental disorder, sociocultural diversity or similar conditions [10]. Therefore we can say that to who acted characteristic unlawful manner, but not guilty because he does not understand the wrongfulness of his act, it can not be imposed a penalty. In this event, it was considered that the criminal law establishes two regimes of criminal responsibility order: the first, for whom with knowledge the wrongfulness of his conduct, which is determined following the possibility of understanding, that is that they behave per the knowledge that their actions are violating a norm. And for them, it has been established that a penalty must be imposed for resocialization or rehabilitation, prevention and compensation. The second, operate only for those who can not act "culpably", this means those who cannot determine the wrongfulness of his behaviour (not criminally responsible). For these, their conduct is typical, unlawful and no grounds for exclusion of liability are possible. In this case, there is a special treatment that consists of the imposition of security measures for guardianship, healing or protection [17].

According to the above, the Aborigins have traditionally been considered criminally non-responsible in grounds of cultural diversity [18], as it has sought to protect its differential worldview and, in this way, the cultural pluralism enshrined in the constitution means that the illicit act is typical and unlawful because in them can not be preached guilt, since, at the time of the commission of the conduct does not have the capacity to understand the wrongfulness of his act (volitional aspect) or be determined in the same way as the majority culture does.

In the judgment C 370 of 2002 of the Constitutional Court, which they studied the Criminal Code regarding criminal responsibility for cultural diversity and therefore the sanctions that established the Code for them, he determines that the imputability by sociocultural diversity it was exequible, but a mentioned some rules that must be considered if an aboriginal was declared unimpeachable because clearly by the fact that belongs Aboriginal to a different culture to the majority not to be considered the only criterion to identify it automatically unimputable. Such rules are (i) that the unimputability does not derive from an incapacity but from a different worldview and, (ii) that in cases of invincible error of prohibition originating from that cultural diversity, the person must be acquitted and not declared unimpeachable.

Similarly, the judgment notes that the judge should start by establishing whether or not there was a causal exempt from criminal liability, particularly if there was an invincible error ban [18], which occurs "when the author, by acting with due diligence, would not have been able to understand the unlawfulness of his injustice, that is, it is a mistake that anyone in the author's situation would have suffered " [19]. If, effectively, the active subject of the unjust erred, then has the legal effect of absolution.

It is necessary to point out that before the aforementioned judgment, when the indigenous was declared unimpeachable due to cultural diversity, a security measure was imposed as a sanction for protection purposes, consisting of reintegration to their cultural environment. This ruling declared or unconstitutional the following provisions: paragraph 4 of Article s 69 and 73 of Law 599 of 2000 and Article 378 of Law 600 of 2000, considering that it was unaware of the principle of equality, whereas, another individual under the same conditions was acquitted, and for being indigenous was declared unimpeachable and put a safety measure, affecting the very purpose of the existence of the figure of criminal responsibility for cultural diversity [17]. By Judgment T - 496 of 1996, it stated that the declaration of non-imputability of the aborigins cannot have a pejorative nature of "incapable". This qualitative and not pejorative differentiation would end special protection as mandated by the Constitution (article 8 1991) and, therefore, the security measure was imposed could not have "a punitive character, or rehabilitation or healing, but has exclusively, in these cases, a purpose of protection and guardianship of those who are culturally diverse " [17,20].

In Conclusion

After analyzing all the legal and judicial arguments, we can conclude that the existence of a native jurisdiction inside the legal system of Colombia, configures the protection of these communities in respect with their unique understanding of the world and the rules of the majority of the population in the country, keeping a criminal system but adapting it to the special requirements of the different social groups that form the country.

In this respect, two objectives are fulfilled: The protection of the native individuals in front of the possible problems that they can face because of their different cultural understanding of the world, but this special jurisdiction allows that the criminal acts are judged and punished if found guilty and with this, the trust of the social contract in the government and the country is kept by all members of the society.

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