



Is full reparation in the constitutional context a fundamental right: general analytical references?

¿La reparación integral en el contexto constitucional, es un derecho fundamental?: referencias analíticas generales

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ABSTRACT

The history of law has shown us that although there are certain institutions that have appeared throughout its development in certain branches of law, it is no less true that in the course of its development other areas have incorporated them to their field of action. This is what presents the current situation of integral reparation in the constitutional context, which has conditioned its most elementary needs in its fulfillment of concrete designs like any other sector of the Law. Due to the characteristics of this juridical institution that starts in Private Law, but that nevertheless the constitutional law also takes it and imposes its own functions on it, we do not hesitate to affirm that reparation is a constitutional right.

Resumen

La Historia del Derecho nos ha demostrado que si bien existen ciertas instituciones que han aparecido a lo largo de su desarrollo en

determinadas ramas de aquel, no es menos cierto que en su transcurso otras áreas las han incorporado a su campo de acción. Es lo que presenta la actualidad de la reparación integral en el contexto constitucional, que la ha acondicionado sus más elementales necesidades en su cumplimiento de designios concretos como cualquier otro sector del Derecho. Por las características que reúne esta institución jurídica que parte en el Derecho Privado, pero que sin embargo el constitucional lo toma también y le impone funciones propias, es que no dudamos en afirmar que la reparación es un derecho constitucional.

Keywords / Palabras clave

Constitutional Law, damages, Comprehensive Redress

Derecho Constitucional, daños, Reparación Integral

Introduction

Since the time of the Roman Empire, the State had as a fundamental attribute the supreme power over its governed, and this theory prevailed until the middle of the 19th century, which implied absolute irresponsibility. This implied absolute irresponsibility (The King can not do wrong), since it was a superior entity, because due to its objectives based on the general interest, it justified its actions. The eventual damages caused to individuals were legitimate risks to be suffered by them.

However, certain exceptions stand out in French legislation, in anticipation of auspicious changes, empowering, for example, citizens who have suffered damages, against the public official who caused the damage, after a pronouncement by the Council of State.

Indeed, in Napoleonic France, with a totally interventionist State, its multiple activities were a source of constant injury to the rights of individuals. In these circumstances, the thesis arose that the State should be liable for the damages it caused. The Civil Code (of 1804) was then consulted as a legal resource to serve as a basis for this obligation (Arts. 1383 and 1384, of said code, relating to vicarious liability).

This situation that arises as a result of the application of the aforementioned provisions, produced bitter controversies with those who proclaimed the impossibility of applying such articles, based - among others - on the fact that the drafters of the Civil Code, if they had wanted to extend them to persons under Public Law, would have so stated without reservation. On the other hand, the differences arising from the relationships of individuals are based on the principle of free will, which in itself is opposed to the relationships emanating from the public power, which need to be governed by rules of public law.

It will mark a great advance in the jurisprudence of that time, the recognition, no longer as a simple right, but with regulation of explicit rules of the public sector, as a result of the famous *Arret Blanco* decision of the French Court of Conflicts of February 8, 1873, through which it was pronounced that state liability cannot be regulated by the rules of the Civil Code, but, subject to its activities.

In North America, a different orientation will have the institution of reparation (always manifested through one of its forms, compensation), already strictly regulated in the Constitution, and it will be the United States in 1787, which will establish the right to compensation, when an expropriation has been carried out.

In South America, although through a special law (Law 24 of 1854), Venezuela declared the abolition of slavery upon payment of compensation to the owners of freed slaves. Argentina, with similar scope, will regulate later (1860), but directly through its Magna Carta.

For its part, the twentieth century from its beginnings, outlines the concern for regulating reparation in the constitutional sphere; it does so by covering diverse aspects that reached other horizons in the protection of the components of the legal sphere of the human being. Thus, the Chilean Constitution of 1925, demonstrating a great advance for the time, would point out:

"Any individual in favor of whom a judgment of acquittal is rendered or who is definitively acquitted shall be entitled to compensation, in the manner determined by law, for the actual or merely moral damages they have unjustly suffered".

It should be pointed out -with respect to the above quotation- that said legislation referred at that time to two types of compensation: that is, physical damages, on the one hand, and moral damages, on the other.

From then on, other constitutions are also concerned with the subject: Peru, in 1933, like the Chilean Constitution, will regulate compensation for judicial error in the criminal field. Japan, in 1947, points to the right to compensation for damages resulting from the illegal acts of public officials, among others.

In spite of all the progress made in this area at the beginning of the 20th century, it is not too much to say that if reparation as a constitutional institution has not reached an adequate expansion (especially in Latin America), it has been due, among other explanations, to the lack of concern for organizing solid models through the legal systems. In short, they have not gone beyond mere declarations lacking any practicality.

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Over time, these constitutionalizations were extended to other fields. Thus, the Japanese fundamental charter of 1947 itself stands out, extending protection to other rights that go beyond miscarriage of justice.

These new dedications to discipline in this way, indispensable situations that concern to ensure full respect for subjective rights, will cover issues concerning not only generic aspects, but also specific problems; even of social conglomerates, with which International Law takes direct participation, decisively influencing Domestic Law (in the constitutional), with primordial guidelines.

Such inclinations refer to problems related to honor, damages caused by the State on the occasion of the public exercise. At the collective level, in principle, issues such as environmental matters have become important.

Just to cite a few cases, we mention certain constitutions that have regulated punctualities:

The Bolivian Constitution, which not only condemns abuses of power, but also requires compensation (subject to other legal requirements) to persons harmed by such acts (Art. 15).

On the other hand, the constitutions of El Salvador (Art. 20); Uruguay (Art. 35), order compensations for the non-observance of the rights related to the inviolability of property, in its different manifestations.

Those of Colombia (Art. 80); Costa Rica (Art. 50), among others, regulate the adoption of compensation for damages caused to the environment.

In any case, and taking as a reference the Universal Declaration on Human Rights of 1948; the American Declaration on Human Rights, also of 1948 -among others-, this hierarchy of subjective rights has become generalized and has become part of the constitutions of the world. It will represent an evolution in the societies that have been turning into rights, aspects such as those already denoted, which today are a subject of deep concern, hence its problematic. Therefore, giving sufficient grounds to be elevated to the constitutional category of its regulations.

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Materials and Methods

Some time ago, through our doctoral thesis, we set out to propose new perspectives on integral reparation, as a fundamental right of the individual, and all that this legally implies.

This, in view of the problem that these rights are increasingly exposed, in the social interrelationship of individuals and the State, to be violated. Otherwise, although there are institutionalized mechanisms and legal figures, they lack the required sufficiency.

We propose -supported by analytical bases- that the constitutional sector (although recent), does not escape the consequences of social development; therefore, today it is obliged to regulate expressly and efficiently, rights such as the right to reparation and with its own visions.

Our objectives were to demonstrate that reparation, applied by the constitutional sphere, has been assigned its own functions. That being the Political Constitution, which dictates the basic outlines that imperatively must be observed by all secondary laws; the social phenomenon, on its part, also requires it to comply with private duties, as any of them.

That, personally, so to speak, it must deal with the aspects proper to its field, not only by establishing indispensable principles or criteria to be followed by lower-ranking laws, but also by establishing concrete solutions to the non-observance or violation of the basic rights that protect them. To this end, it must avail itself of its own institutions, adequate procedures and a specific jurisdictional body. Only in this

way will it comply not with a simple expectation, but with an unavoidable and imperative duty of these times: the respect and guarantee of the aforementioned rights.

Results

Within these parameters, we formulate proposals that undoubtedly have to be considered as far as the evolution of forms and modalities is concerned; in the same way that we conclude the need for a specific jurisdictional body, as we will now consider:

1.- Considering that reparation is a fundamental right, it is necessary to attribute particular characteristics to it, according to the needs of the constitutional order.

Such action is undoubtedly an obligation of the supreme Law, not only because of an unalterable requirement, but also due to the designs of modern legal principles, conventions and international treaties that persuade to this strict compliance.

We established these arguments within the framework that there are no institutions exclusive to a branch of law, since each one gives it unmistakable nuances, and that the constitutional sector is no exception to this maxim.

Regarding the role of the State with respect to such rights, it is evident that it cannot limit itself to respecting them, or to (lyrically) "guaranteeing" them; it is committed to acting pragmatically, establishing and promoting mechanisms to protect them from infringement, and when such infringement occurs, offering the individual simple and rapid procedures for a full and satisfactory reparation.

This, without considering its patrimonial responsibility in the specific scenario of the non-observance of fundamental rights in particular, a situation in which and for the acts of its agents and that of the autonomous public agencies, when these have caused damage either in the person itself or in their property to individuals due to the exercise of administrative activity, they must respond as one more in the context of a given legal system.

Now, although the reparation in institutionalized form has its origin in Private Law, which has provided its characterizations and in whose field it has developed, since the ancient Roman Law. Even in this area

of Law its evolution has been immense; for, if before it was recognized as a kind of sanction, therefore oriented to the person causing the damage, today modern doctrine argues that in order to apply it concretely, the damage must be assumed from the victim's point of view. This implies reasoning that the damage -as some sectors point out- is in itself an anti-juridical damage; a qualification that has no relation whatsoever with the conduct of its author, although it may coincide with this also being anti-juridical (based on this point of view, it has been supported that the reparation operates only for having caused a damage that the individual was not obliged to bear).

This is the justification for why the obligation to repair damages includes both those arising from unlawful acts and those arising from lawful acts.

However, in accordance with social evolution, other areas of law not only made room for this figure, but also assigned specific roles to it, and it has managed to differentiate itself in a remarkable way.

Regarding the constitutional level, we maintain that reparation as an institution is destined to fulfill a precise and determined role. That is to say, it must have its own application (in this trend, given its recent evolution, the same doctrine has identified forms of manifestation that are not so precise through laws, which will certainly become more detailed with the passage of time).

As we have already said, in this environment, it acquires its own characteristics, which in turn allows it to be dimensioned in an unthinkable way, since it has no limits as to its forms of manifestation. It has become an elementary right and we believe it is constantly being explored.

Indeed, in order to achieve the aforementioned purposes, there are forms and modalities that reparation acquires in the constitutional sphere, having to mention as a specific characteristic, that they do not act in an exclusive manner; that is to say, they can complement each other. Thus, it is the Inter-American Court that has disseminated their operability, highlighting among the aforementioned: restitution, compensation, measures of satisfaction and guarantees of non-repetition.

We must reiterate that the aforementioned forms and modalities are not unique, but extend (and will continue to do so) with the

appearance of new natural rights that are threatened or not observed, according to the prevailing social scenarios.

Similarly, in the doctrinal field, it is the 61st Commission on Human Rights (presented to the United Nations General Assembly, through resolution 2005/35), which has offered the referred pattern, which, incidentally, does nothing more than reflect the reality of social evolution as stated in our doctoral thesis.

It is therefore positive to differentiate between considering it as a principle or as an institutionalized right. In the latter case, within its breadth, it takes on defined forms, which can only be enhanced in the constitutional sphere. This is where it attains its full dimensions as a fundamental right.

Without fear of being mistaken, we are at the beginning of the process of making reparation in the constitutional sphere to become that prevailing elementary right, which through its various forms of manifestation is called to be established, and hopefully in the shortest possible time.

In the purpose of safeguarding and guaranteeing the fundamental rights, the specific jurisdictional body must necessarily be considered; this, because if the constitutional sector deals directly with the aforementioned purpose, it is understood that the need for specialized judges dedicated exclusively to this purpose is not alien, and why not with appropriate, fast, simple procedures, divorced from dilatory solemnities, always bearing in mind that a systematized protection of those rights needs a true constitutional justice.

The need for a specialized court to hear and resolve these legal situations is justified inasmuch as - on the one hand - there is a subjective and personal interest on the part of the victim in having his or her violated rights redressed in an accurate and prompt manner. As it happens in the ordinary judicial system, who else but the constitutional justice to interpret this plethora of aspects of special regulation.

On the other hand, it is in the State's interest to establish trust in the public authorities by demonstrating their effectiveness through a fast and efficient statutory system.

The claim to the states, which the American Convention on Human Rights, for example, specifies, for quick, simple and effective remedies,

would be in vain if the victim's desired objective is not echoed in the organs of justice, which must comply with such fundamental prescriptions. That is, to achieve through them, an adequate reparation (if possible), and for this the need for a court that turns all its efforts to these objectives.

In short -we argue- that the knowledge of these matters justifies the existence of constitutional judges dedicated to their resolution with appropriate powers. In this sense, in the absence of this natural addition, the supreme protection of these rights would be an allegory.

Conclusions

From the foregoing it is possible to point out that the constitutional field has in reparation an express and determining element in its protectionist purposes and in ensuring the fulfillment of the fundamental rights of individuals; not for this reason it must not be forgotten how much is lacking in its development. However, it will be the same pleiad of those rights that will establish its consolidation as such.

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