

10

PROPOSAL

**DE LA PARTICIPACIÓN DEL BANANO EN LAS
EXPORTACIONES AGROPECUARIAS DEL ECUADOR PERIODO
2015-2019**

PROPOSAL

FOR INTERNATIONAL CRIMINAL PROCEDURE UNIFICATION

PROPUESTA DE UNIFICACIÓN PROCESAL PENAL INTERNACIONAL

Marily Rafaela Fuentes-Águila¹

E-mail: mfuentes@umet.edu.ec

ORCID: <https://orcid.org/0000-0003-4242-8593>

Alejandra Anahis Tello-Suárez¹

E-mail: alejandratello96@outlook.com

ORCID: <https://orcid.org/0000-0001-6691-1462>

¹ Universidad Metropolitana. Ecuador.

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ABSTRACT

This research addresses the issue of the unification of the criminal process, based on the idea of many intellectuals of being able to build an international legal order that harmonizes the procedural norms by virtue of which it is necessary to investigate, accuse and judge the people who commit in conducts that can be considered crimes. Although the proposal may have defenders and detractors, nowadays so many doctrinal foundations are not required to support the claim to unify the Law. The universe has shown signs of legal unity in Latin America and Europe, and international instruments on human rights and model procedural codes have also been approved, which serve as the basis for the creation of procedural codes in the states. In the procedural sphere, there is consensus that the problems of crime in the international community are similar and the general rules of criminal procedure with which crime must be faced are similar. At the beginning of the research, the relationship between Comparative Law and procedural Unification is referred to and finally a proposal of methodological and structural principles that can contribute to the alleged legal unity is made.

Keywords:

Comparative law, procedural unification, principles of law, international legal order, procedural reforms.

RESUMEN

El presente estudio aborda el tema de la unificación del proceso penal, a partir de la idea de muchos intelectuales de poder construir un orden jurídico internacional que armonice las normas procesales en virtud de las cuales se debe investigar, acusar y juzgar a las personas que incurran en conductas que puedan ser consideradas delitos. Aunque la propuesta puede tener defensores y detractores, ya hoy no se requieren tantos fundamentos doctrinales para sustentar la pretensión de unificación del Derecho. Se han dado muestras de unidad jurídica en América Latina y en Europa y también se han aprobado los instrumentos internacionales de derechos humanos y códigos procesales modelos que sirven de base para la conformación de códigos procesales unificados. En el ámbito procesal hay consenso en que los problemas de la criminalidad en la comunidad internacional son similares y son parecidas las reglas generales de procedimiento penal con que debe enfrentarse el crimen. En un primer momento de la investigación se alude a la relación entre Derecho comparado y unificación procesal y finalmente se realiza una propuesta de principios metodológicos y estructurales que pueden contribuir a la pretendida unidad jurídica.

Palabras clave:

Unificación procesal, principios del derecho, orden jurídico internacional, reformas procesales.

INTRODUCTION

Whereas crime is internationalized, crosses borders, circumvents national and international controls, *“it unfolds with accelerated transformation and improves its intervention formats”* as expressed by Rivera & Bravo (2020, p. 9), the Law continues to be there, locked up or framed in some territories and spaces that man has created for his political, economic and exercise of power purposes. Consequently, many acts go unpunished in some States while in other territories innocent people go to jail because the rights of the defendant are not respected.

Justice, as commented Farfán (2019), when carrying out a study on the Ecuadorian legal system, continues to suffer from unexpected delay, of the unreasonable term; there are still some inquisitive judges, locked up in semi-hidden places, dispensing a justice that people do not understand, with a procedure that continues to be strange, passing sentences with convoluted language and unnecessary rhetoric. It is very important to eradicate these obstacles by choosing the best process to make it unique, through which it is possible to offer transparent and effective justice to people.

Different authors have currently been pronouncing themselves in favor of the unification of Procedural Law (Levene, 1967; Fairén, 1992; García, 2014; Caballero et al., 2018), criteria that have given way to the convenience of building an international legal order in procedural matters. Due process has become a universal guarantee that has united practically all procedural legal systems at the international level. In this sense, principles have been established regarding how the criminal process should be throughout the world.

The international community, the instruments of Human Rights and the modern democratic constitutions search for a criminal process that guarantees and respects the rights of man before the penal power of the State. Processes based on torture, the presumption of guilt, the violation of the right to defense, or the consideration of the confession as the queen of evidence, among other aspects that characterized the archaic inquisitive system, have been left behind (Busts, 2017).

Even when in practice there are still difficulties in complying with the principles of orality, publicity, contradiction, immediacy, equality of arms, objectivity, presumption of innocence, in dubio pro reo, prohibition of double jeopardy, non-self-incrimination or non reformatio in peius, the truth is that the laws in the normative order have preserved the rights and guarantees of the person subjected to criminal proceedings. This has been the consequence of the battles of the peoples to limit the *ius puniendi* (Ecuador. Asamblea Nacional, 2014).

The power of the State historically used force and arbitrariness to impose itself on its citizens; humanity has witnessed the abuses committed in the name of justice. It was

not spontaneously that the demands of the international community to put an end to this arbitrary use of force arose and it will not be an easy task either to unify Procedural Law that will allow, definitively, to harmonize an entire normative construction that guarantees to face up to penal power of the State.

What has been achieved in terms of the protection of persons in the criminal process deserves to be generalized regardless of the geographical location, the type of government, the religion, beliefs or culture of a country. There are rights that are universally applicable and must be applied to every human being, just for the fact of being human, because they enclose values such as dignity, freedom, fair trial, together with a whole set of fundamental rights that do not depend on the place or system in which one lives.

Latin America has shown signs of being immersed in the process of unification of Procedural Law, an example of which are the procedural reforms at the end of the last century that were developed in Argentina, Mexico, Guatemala, Ecuador, Colombia, Venezuela, among other countries of the area. In this regard, there have been pronouncements (Riego, 2007; Vargas, 2008; Zambrano, 2009; Rivera & Bravo, 2020) who have supported the transition to a fairer modern accusatory procedural system that had the Code Model Procedure as a paradigm for Ibero-America (Ibero-American Institute of Procedural Law, 1989).

Ecuador was not left out of this process, since the Comprehensive Criminal Organic Code (Ecuador. Asamblea Nacional, 2014) has included in its legal precepts the most advanced facts of the modern criminal process. The aspiration to have a single criminal process in all of Latin America is an excellent way to overcome many inconveniences that seriously and similarly affect all the peoples of the region.

The problems that affect Criminal Law in Latin America and in the rest of the world, harm societies in a similar way; violence, drug trafficking, organized crime, citizen insecurity, deaths, disappearances, organ and arms trafficking, human trafficking are universal phenomena that require similar and even joint procedures to face them.

It is not a question of achieving the unity of Law by a mere procedural claim of modernity, but of balancing citizen security and guaranteeing the well-being of present and future generations, while respecting the procedural norms imposed by democratic societies for investigation, accusation and trial of people in the modern accusatory system.

Of course, the idea of unification implies going through a complex process, which stands out as reasonable oppositions such as Sánchez (2012), who expresses that *“common law not only requires a law, principles and a common mentality, but also, and this is much worrying, a unique thought and a common culture too.”* From this

context, the following question arises: How is it possible to contribute from the theoretical and methodological point of view to the unification of the criminal procedural legal order to be able to face the crime that similarly affects the international community?

The path to achieve this will be long, but not impossible, some steps are already being taken and, even though in procedural legal systems in criminal matters there are multiple variants to the oral and public trial and alternative forms for conflict resolution, it is practically no longer discussed about the right to a fair trial, but how to achieve integration or unification of Procedural Law?

The objective of this article is to propose a set of methodological principles that should guide any attempt to unify the criminal process. The procedural unification, perhaps in the end, will allow, as a whole, that all the peoples will find a better alternative than jail to amend the behavior of the persons, perhaps it will be possible to eradicate from reality the measures of torture or coercion at the moment of investigating the suspected of a crime, that the statement of the processed person is for all means of proof, or that imprisonment without trial is repealed from all codes.

METHODOLOGY

In the present study, the legal research methodology was applied following the criteria of Eco (1998); Briones (2002); Villabella (2012); García (2015); De la Fuente et al. (2019); Romero (2021). Classic methods of the Social Sciences were used, such as analysis and synthesis, induction, deduction, as well as those ones of the science of Law.

The legal dogmatic method allowed us to evaluate the oldest and most recent theoretical facts around procedural unification, and the differences between Comparative Law and procedural unification in the field. At the same time, the historical method made it possible to carry out a retrospective study within the evolution of procedural thought and to recognize the defenders of the ideas of unification, especially from the procedural reforms that began in Latin America in the second half of the 20th century and that spread in a very similar way throughout the region.

The analytical exegetical method made it possible to delve into the legal norms and characterize the constitutions, the procedural codes and the Model Procedural Code for Ibero-America, corroborating that there is surely uniformity in the procedural laws in criminal matters that leave no doubt about the unifying tendency of the Latin American systems in this matter.

Through the method of Comparative Law or legal comparison, the criminal procedural norms in force in the region were contrasted with the Model Procedural Code for Ibero-America and the Integral Organic Criminal Code of Ecuador, verifying the interrelation and similarity between

them, which constitutes an important precedent for a proposal for procedural unification in the region.

Deductive reasoning, together with the rules of logic as well as bibliographic research and review techniques, were part of the inquiry process on the unification of Criminal Procedure Law that ultimately, paved the way for the construction of a theory, which should and can be accepted for the future of the criminal process.

DEVELOPMENT

Perhaps the criminal lawyers were the last persons to realize the convenience of procedural and substantive unity. Many lawyers in this field still think that this is a problem that affects more mercantilists, financiers, civilians or that private law is more feasible, however, it is worth reconsidering these attitudes and evaluating the considerations for and against the unifying process.

One of the obstacles that have been pointed out by opponents of unification is the existence of differences between procedural systems, especially those linked to the Common Law of the Anglo-Saxon area. It differs from many other countries in the world based on the Civil Law system. Another inconvenience has been the fear of the States of seeing their sovereignty affected or the fear of the organs of economic power of the intervention of Criminal Law in their businesses, in the opinion of Perera (1999), some criteria are based in reality on the reluctance of those who hold economic power who fear the intervention of Criminal Law in their businesses.

The enemies of the unification of Law are based on the fact that it is a European tendency and describe it as “Eurocentric” based on continental Law, however, the Eurocentrism of Comparative Law is not a geographical issue, but rather comes from the historical relationship of Europe with the rest of the world. During the 19th century and the beginning of the 20th century, Europe, in fact, was an exporter of legal systems to less economically developed countries and the latter saw those systems as a model. Today, Latin American penal and procedural thought marks a trend towards the unification of Law in the matter.

No one doubts the convenience of unifying the Economic Criminal Law of the different States. What's more: The growing activity of multinational companies, money laundering problems, consumer protection at the international level, environmental pollution problems, etc., suppose this unification necessary to effectively fight crime (Perera, 1999).

It is not uncommon to see quotations from Italian, German or Spanish authors in Latin textbooks; even in sentences handed down by judges in Latin America, considerations made on the basis of the thought of one or another European author appear. It is true that, on occasions, the idea to be conveyed is taken out of context and doctrines that do not conform to reality are common, but the Latin

judge reads, studies and feed off foreign law (Saavedra, 2018).

Pérez Daza (2013), affirms that the unification has advantages in the application of the Law, such as *“facilitating the consultation of the laws as they are gathered in a single text, the setting of evidence standards to establish arrest warrants, the potentiation of legal certainty, among others”* (p. 60). On the other hand, Lerner (2004), has published an article “On Harmonization, Comparative Law and the Relationship between both of them” where he has defined this process as harmonization:

Harmonization is a process by which the barriers between legal systems tend to disappear and legal systems incorporate common or similar standards. It is a process that occurs at different levels, in different fields of law and governed by different guidelines and principles. This process develops in stages: it starts with the acceptance of institutes, then solutions are approached until finally the differences are limited to technical aspects. The last phase would be the adoption of common standards, on the basis of unification projects.

As can be seen Lerner (2004), he calls unification “harmonization” because he believes that this is a gradual process in which unification would be the moment in which the process has evolved the most and legal systems are based on a same legal rule. He means that the unification of the criminal process should not be done abruptly, or all at once, but rather it should take place at times and subject some rites or steps to experimentation in order to later generalize them definitively.

Fernández (1999), offers a recommendation based on International Law; In this sense, he expresses: *“the objective of the unification or harmonization of the conflicting or material Law, can be obtained through different instances and regulatory records. In the first place, uniform law may be the result of the unilateral activity of the state legislator. The material incorporation or by reference of international conventions in internal legislation, is one of the instruments that allows an approximation between the laws of different States on a specific matter, even from an international text that has not been ratified by any State”*. (p.29)

The Unidroit principles were prepared by the Rome-based Institute for the Unification of Law and constitute a unitary sample of Law (Mordechai & Lerner, 2003). The Vienna Convention on International Purchase and Sale (Galán, 2004); model codes such as the Model Civil Procedure Code for Ibero-America (1988), the Model Code of Collective Procedures for Ibero-America (2004) and the Model Criminal Procedure Code for Ibero-America (1989); constitute norms that seek harmonization, or unification and it is also in these that Comparative Law reaches its maximum expression, because it starts from the search for a common denominator that serves as the basis for a common transnational legislation.

It can be seen that the differences between legal systems are less and less marked. Every day there is more talk about ways of proceeding and common codes; and although this is not a process that has to be achieved at once, on the contrary, it will be necessary to assess coincidences in the realities and then evaluate whether the same rules can be applied in different territories, there are no longer few followers of the unifying process.

Relevant figures in Latin American Law such as Maier & Binder (1989); Zaffaroni (1995); Binder (2007); were involved in the proposal to modify the criminal process and conceived it in a uniform way for Latin America. The so-called procedural reforms reached the entire region, and the implementers of these reforms have participated for decades in controlling the implementation of these new procedural systems. Even seeing the vicissitudes in the progress of the reform, they did not give up in the unity of Procedural Law and in enforcing its basic principles, through conferences, training, editions of procedural texts, presentations, participating in bills and enunciating the theories of procedural guarantee for the world.

The Model Criminal Procedure Code for Ibero-America, inspired by European procedural codes, has been the fundamental and deepest basis for the transformation of criminal proceedings in Latin America, which includes the Ecuadorian Comprehensive Organic Criminal Code, which, apart from the limitations in its practical application, it conforms to the basic guidelines of the accusatory procedural system. Although these reforms have not been identical in all countries, they are very similar, and experts describe them as a move from an inquisitive to an accusatory system.

According to what has been analyzed, it is possible to pave the way towards the unification, harmonization, integration or globalization of Procedural Law or towards the creation of a legal text that universalizes the most advanced forms of due process. From the moment that there is a legal text that serves all nations to solve their criminal conflicts, Procedural Law will have been universalized.

A series of methodological guidelines are presented below for the materialization of the idea of unification, based on a sequence of principles that must be followed by the people who are willing to participate in this process. It contains the ideas derived from a reflective study about the way in which this task should be assumed, starting from the conviction that it is only possible to take it to factual paths, step by step, just as it has been moving from the inquisitive to the accusatory modern system.

Within the guidelines to achieve the unification of the criminal process, it is necessary to know that the unification thought must be developed through a measured and continuing process that implies gradually erasing the differences between the different legal systems to build a single

legal text that accepts the most positive of the procedural rules in use.

Enough has already been written about the cultural, economic, political and social differences between the territories and the negative impact that the processes of imposing legal norms that are not in accordance with the socioeconomic reality of certain territories have had. It is not, then, a question of imposing norms but of integrating institutions, norms, traditions, customs, and gradually codifying them or thinking of mechanisms other than codifications, such as establishing ways of proceeding, doing things in a similar way, or that experiment with ideas before coding.

Regarding the complexity and time of the process Hinestrosa (2018), he points out, *“another thing is that the codification work is arduous, slow and must be pluralistic, debated and depurated. The simile is attractive and useful: no one seeks or loves surgery for himself, which does not take away the indispensability of this technique; The operating room is only reached once the efforts of the therapy have been exhausted and failed; the intervention cannot be improvised, except for emergency operations; The operating team must be made up of highly competent professionals, chosen with exquisite care, and success presupposes the coordination and harmony of all its members”*. (p. 15)

There is a difference between comparatists and harmonizers or unifiers of Law. The comparatists choose or select the legal systems that they must compare, the unifiers have to go further, they have to look within the legal systems for what is the common denominator and in this, there are some important issues that have to do with the methodology and with the use of language (Lerner, 2004).

Methodologically, the comparatist builds a kind of theory from the similarities and differences of different legal systems, the unifiers take the theories of the comparatists as a starting point and draw on them to choose one of the characteristics of the legal systems and generalize it; The unifier chooses from among several ways to resolve conflicts the best variant, according to his consideration, and then, this can be submitted to different forms of validation, done by experts or by other means.

In these processes, comparison is put at the service of unification. As a result of the need to agree or integrate legal systems, comparative law has been directed more to find the similarities than the differences, which is very important in the integration process. An example, which is almost identical in the procedural and substantive order, are the processes derived from damages caused by illegal acts.

Another issue to evaluate is the topic of language, the problem is finding the exact word for legal systems that have language differences. You have to choose the most appropriate language to develop the integration process,

remember that everything must go through a consensus. It is good to translate the proposals that are made into several languages and also take special care that what is translated is understandable. In this sense Lerner (2004), it is considered that *“translating harmonization projects into as many languages as possible is a wise decision”* (p.5) and suggests serious and in-depth comparative work to lay the foundations of a common legal culture, which is ultimately the axis around which the harmonization process revolves.

When making the comparison of legal systems as a basis for unification, the way in which judges resolve the situations that arise must be evaluated. In this sense, it is necessary to verify the way in which they interpret legal institutions, since many times, the differences that are observed do not come from the activity of the legislator but from judicial practice.

Sometimes, the same law does not guarantee the unity of the regulation, in many places the superior justice bodies do not attend to the unification of the provisions of the law, nor are there uniform criteria regarding certain issues. Jurisprudence should not be set aside in the unification process, since it provides transcendental elements on the behavior of a legal phenomenon in reality; It constitutes a kind of empirical result that becomes a source of information for the process of unification or harmonization of Law.

The procedural integration or unification aims to create a text, a body of rules, norms or ways of proceeding to give a solution as similar as possible to the conflicts. For this reason, there is talk of harmonizing, integrating, unifying topics that are universally applicable in criminal proceedings, but preparing a text that strives for unifying the Law of different States also requires contextualizing.

Harmonization must be performed without forgetting that there are diverse economic, cultural, political and social contexts, which will force interpreters of laws and especially judges to carry out their analysis of cases taking into account the peculiarities of each country. In the process of integrating or harmonizing, it will always be a better option to establish more general than specific guidelines, so that when applying a standard specifically, there is the possibility of contextualizing it (Lerner, 2004).

One of the most widely used alternatives in the process of harmonizing the rules that legal systems must follow is the establishment of principles, which constitute paradigms, easily adaptable to any reality and judges are used to taking them into account. In this task of standardizing the principles, the unifiers also feed on the comparatists.

In the unifying legislation, the casuistry that tries to regulate everything must be discarded, there must always be a margin so that the norm can be applied according to the traditions, culture and customs of each population. Generally, the principles are used by judges as a guide when there are gaps in the Law, in order to resolve issues

submitted to their consideration and perhaps this option of establishing a guide of universal principles prevailingly represents a text of symbolic content, rather than a normative.

From all of the above, it must be established that, even when there is a unified text of procedural rules, the need to take the context into account cannot disappear. Despite the existence of a universal Law, the comparison will continue to exist because there will always be a reality, a legal norm, moral issues, values or other questions that vary according to each country, and it is also known that the unification process will not be easy nor will it happen all of a sudden, so that comparatists are very important in the process of procedural unification.

Comparative Law has been offering unifiers an increasingly finished product, since it systematizes similarities and closes gaps to differences. With the advent of unifying tendencies, Comparative Law has been integrated into the processes of elaboration of legal norms. This has been called the reception of Comparative Law, because it not only provides the process with a unifying character but also because it acquires another relevance in the process of construction and modernization of the new legal system.

It is necessary to recreate the *ius commune* to rework it in the new economic and social conditions; recognize a common foundation and build a new unified version with a new tool that is Comparative Law. This struggle today goes through a pluralism based on an interaction between different traditions. Comparative Law ceases to play a passive role to become the driving force of a new model, it becomes the backbone of a renewing, flexible, specialized, methodological, revolutionary process that aims to provide the theoretical foundation for unification.

Just as in the Middle Ages, universities serve to spread the *ius commune* in the current stage. From the academy it is necessary to direct the intellectual debate to promote critical language, take local discussions towards more comprehensive debates that tend to focus on legal culture, where the national facts play a less decisive role than the configuration of international legal systems.

Although the comparison was born to understand or comprehend the legal systems that were considered diverse, the unification has been impregnating Comparative Law with a more expansive character than has been taking the legal dialogue towards the global. Comparison and unification today complement each other, they need each other, even when each of them travels different paths.

Today, comparison and unification converge, they come together in the same objective: the development of a common, universal, broad legal culture, which corresponds to a time of changes that inevitably leads to the unity of legal systems. Although full of contradictions, society advances

towards the unification and integration of all phenomena, including Law.

CONCLUSIONS

The unification of the criminal process at the international level constitutes a complex task that must be achieved through a gradual process in which all the democratic countries of the world must be immersed and together overcome and confront the crime that similarly affects the different countries.

From the methodological point of view, unification requires compliance and acceptance of certain premises:

- Develop a gradual process that will progressively erase the differences between the different legal systems to build a single legal text.
- Search among the legal systems for a common denominator.
- Use Comparative Law as a theoretical basis for unification.
- Give an adequate solution to the language problem, be it translating into all languages or finding the exact word that fits the different legal systems.
- Pay attention to jurisprudence or judicial practice solutions.
- Contextualize the unified text.
- Develop a new *ius commune*, with a new common and universal legal culture.

The relationship between Comparative Law and the Unification of Procedural Law is essential to interpret and understand Law as a universal cultural phenomenon, as well as to be able to harmonize legal systems.

- Comparison and unification, although they are different, complement each other in the process of building a common destination, which is to harmonize the legal systems of different countries.
- In the complicated process towards unification, Comparative Law plays a transcendental role that is to serve as a guide to be able to continue in this effort.

As a culmination of this study, it is suggested to Law Schools that, within the contents of their study programs, the topics of Comparative Law and Unification of Law should be included, while promoting debate among students, academics, teachers and other professionals.

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