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Application of Alternative Means of Dispute Resolution in the Crime of Fraud

Aplicación De Los Medios Alternativos De Solución De Conflictos En El Delito De Estafa

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Abstract

This article examines the importance of Alternative Dispute Resolution in the administration of justice. They focus on fostering dialogue and cooperation between the parties, seeking solutions that come closer to the real interests and needs of the people involved, rather than relying solely on the law. Speed in dispute resolution, prompt settlement or comprehensive redress, continuity in the implementation of agreed agreements, review by the competent authority, confidentiality of the parties and focus on the economy of the process are highlighted as fundamental aspects of ADR, there is a lack of clarity in its application in cases of fraud. The research employs a mixed approach, including surveys and bibliographical analysis, and concludes that the lack of regulation of conciliation in cases of fraud harms the victims. Expert methods and theoretical analysis were used to process the information.

Keywords: *Alternative Means of Dispute Resolution, Fraud, Crime.*

Resumen

Este artículo examina la importancia de los Medios Alternativos de Solución de Conflictos en la administración de justicia. Se centran en fomentar el diálogo y la cooperación entre las partes, buscando soluciones que se acerquen a los intereses y necesidades reales de las personas involucradas, en lugar de basarse únicamente en la ley. Se destaca la rapidez en la resolución de disputas, la pronta solución o reparación integral, la continuidad en la implementación de los acuerdos pactados, la revisión por parte de la autoridad competente, la confidencialidad de las partes y el enfoque en la economía del proceso como aspectos fundamentales de los MAS, existe una falta de claridad en su aplicación en casos de estafa. La investigación utiliza un enfoque mixto, incluyendo encuestas y análisis bibliográfico, y concluye que la falta de regulación de la conciliación en casos de estafa ocasiona perjuicio a las víctimas. Se emplearon métodos de expertos y análisis teórico para procesar la información.

Palabras Clave: *Medios Alternativos de Solución de Conflicto, Estafa, Delito.*

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Introduction

The main objective of Alternative Means of Conflict Resolution is to highlight the importance of dialogue and cooperation between the parties, instead of focusing on conflictive debate, and to guarantee that the solution reached is close to the real interests and needs of the people involved, instead of relying solely on what the law dictates. (Díaz, 2019 cited in Rivadeneira, 2022)

Such Alternative Means of Dispute Resolution in a globalized manner has become one of the most effective instruments when administering justice, thanks to the fact that when an agreement is reached between the parties, the procedure is shortened and manages to fulfill its sole and pure purpose, which is the administration of justice.

As a result, the swiftness in resolving disputes, prompt and comprehensive solutions, continuity in the implementation of agreed-upon settlements, review by the competent authority according to the alternative method used, the confidentiality of the parties, and a focus on process efficiency are fundamental aspects that underscore the importance and relevance of Alternative Dispute Resolution (ADR). (Rivadeneira, 2022)

The aim of resolving a conflict, in addition to all the surrounding characteristics, one fundamental aspect is the speed at which it can be resolved. This doesn't mean inappropriately rushing the process. On the contrary, swiftness focuses on using as little time as possible, ensuring that delayed solutions do not negatively affect the victim in any way.

In the judicial and procedural context of Ecuador and Latin America, conciliation is not a novelty in our codes and laws. This approach was suggested by the United Nations General Assembly in 1985, in the "Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power." In this declaration, it is established that informal mechanisms should be used, when appropriate, to resolve disputes, such as mediation, arbitration, and customary or indigenous justice practices, to facilitate conciliation and reparation for the benefit of victims (United Nations General Assembly, 1985, as cited in Rivadeneira, 2022).

In the context of our country, although the crime of fraud implies a custodial sentence exceeding five years and it is clearly stated that conciliation is not applicable, there is a significant contradiction, lack of regulation, and a lack of clarification regarding the feasibility of conciliation. The first clause prohibits conciliation, while the third clause allows it, but the direct interpretation of the judges based on the first restriction related to the five-year custodial sentence prevails. This leads to the conclusion that it is impossible to reach a conciliation agreement in cases of fraud, despite the existence of a provision that explicitly permits it. Prosecutors and criminal or multi-competent judicial units reject any conciliation proposal, citing Article 663, Clause 1 of the COIP (Criminal Organic Integral Code). (Rivadeneira, 2022)

Materials and Methods

The research methodology employed in this study was of a mixed nature, involving a qualitative perspective that was derived from surveys conducted among legal professionals in private practice in the city of Tulcán. This qualitative approach allowed us to describe that the Ecuadorian criminal legal framework does not establish conciliation as an alternative means of conflict resolution in cases of fraud, which results in significant harm to the victim.

It has a cross-sectional design, as it observed the current problem and subsequently measured the characteristics of the two identified variables within the problem, which are the application of alternative dispute resolution methods and the crime of fraud.

Two types were used: the bibliographic type, as information was gathered from scientific articles and certified digital texts, which allowed the acquisition of scientific knowledge, and action research, because, based on what Sampieri (2018) referred to, a sample of twenty experts was established, using non-probabilistic and convenience sampling, and ultimately surveying five legal professionals who are lawyers in private practice specializing in criminal law. The data was collected using a questionnaire with open-ended questions and bibliographic inquiry from five authors.

A descriptive research scope was developed to form a characterization of the situation, of how it affects the Ecuadorian criminal legal system that conciliation is not established as an alternative means of conflict resolution in fraud crimes.

The methods used to process the information were the expert method, gathering information from legal professionals in private practice who are constantly dealing with the reality of the criminal procedure for fraud, and the theoretical method in which an analytical-synthetic approach was used to subject the results to a detailed analysis of the information considered to reach a conclusion.

Results

Regarding the surveys conducted with practicing lawyers, the following information was obtained:

1. How do you Evaluate the Role of the Ecuadorian Criminal Legal System in Resolving Conflicts Related to Fraud Crimes?

Lawyer 1: Comments that 90% effectiveness could be evaluated since it is a more efficient and agile process to be able to finish the criminal procedure and thus the administration of justice could be helped.

2. What is your Opinion About the Lack of Establishment of Conciliation as an Alternative Means of Dispute Resolution in Fraud Crimes in The Ecuadorian Criminal Legal System?

Lawyer 1: Talks about the lack of establishment of alternative means of conflict resolution, in the case of fraud crimes, these are not applied for conciliation; however, they are processed through the standard procedure.

3. Do You Think that the Absence of Conciliation as an Alternative for Dispute Resolution in Fraud Crimes Causes Significant Harm to Victims? why?

Lawyer 1: Yes, they cause harm since the victims need to recover what they invested; this is how the victim makes the procedural push.

4. Are there Other Alternatives or Mechanisms That You Consider More Effective to Resolve Disputes in Fraud Crimes that Could Be Implemented in the Ecuadorian Criminal Legal System?

Lawyer 1: A transactional document can be made to put an end to the litigation.

5. What Changes or Reforms do you Consider Necessary in the Ecuadorian Criminal Legal System to Guarantee Better Protection of the Rights of Victims of Fraud Crimes?

Lawyer 1: From an analysis of the last reform, I can say that there is protection for the rights of victims since fraud and force are stipulated.

6. How do you Think the Lack of Conciliation in Fraud Crimes Affects the Effectiveness and Speed of the Ecuadorian Judicial System?

Lawyer 1: The Ecuadorian judicial system seeks to comply with legal principles such as procedural speed, resulting in compensation to the victim in addition to helping to avoid custodial sanctions in certain cases that would only further delay the reparation of the victim.

7. Do you Consider that the Inclusion of Conciliation as an Alternative Means of Dispute Resolution in Fraud Crimes Could Contribute to Reducing the Procedural Burden in Ecuadorian Courts? why?

Lawyer 1: Yes, the procedural burden can be reduced since alternative means of dispute resolution help the legal system to put an end to the process more quickly, and thus the procedural burden can be reduced in the Ecuadorian courts.

8. What Impact do you Think the Implementation of Conciliation in Fraud Crimes would have in Terms of Agility and Efficiency in the Resolution of Cases?

Lawyer 1: Yes, it would have a good impact on society since implementing conciliation would be a more agile and effective process since the litigation can end there.

9. In your Professional Experience, have you Encountered Situations in which the Lack of Conciliation in Fraud Crimes has Negatively Affected the Victims? Could you Share any Examples?

Lawyer 1: In my professional experience with fraud cases, there is a lack of conciliation if it negatively affects the victim. In a particular case, the fraud investigation was left pending, and it had a negative impact on the victim.

10. What would be your Main Recommendation to Improve Conflict Resolution in Fraud Crimes Within the Ecuadorian Criminal Legal System?

Lawyer 1: The recommendation I would give is that when it comes to alternative means of dispute resolution in fraud crimes, they should improve or put it into practice since it is more agile to be able to finish the process.

With respect to the investigation of books, the following can be summarized:

For Vazquez (2010) the alternative dispute resolution methods in criminal matters represent a significant advancement in the rights of crime victims. These mechanisms allow victims to receive compensation for the harm suffered quickly and without the need for a criminal proceeding. Furthermore, the existence of these alternative methods ensures social peace because by resolving their issues and obtaining concrete restitution, victims gain confidence in the institutions and in the new accusatory criminal processing system, which includes oral trials.

Verdezoto (2016) considers fraud as a crime in which a person deceives, abuses trust, or uses deceit to induce another person to deliver something of value. This act is considered unlawful

and not only affects property but also the victim's freedom of choice. In many cases, the parties involved wish to reach an agreement or reconciliation, but the current law does not allow it in fraud cases, except in cases of crimes against public administration or the State. That's why I propose an amendment to Article 186 of the Comprehensive Organic Penal Code to allow conciliation in cases of fraud when both parties agree.

For Troy & Orellana (2022), the lack of application of Alternative Dispute Resolution Methods (ADRs) in cases of fraud is considered a violation of the principle of minimum criminal intervention. According to the research conducted, it is concluded that there should be an amendment that allows the application of ADRs in fraud cases whenever the parties are interested, and the crime does not involve large sums of money or has affected multiple individuals. Although the non-application of ADRs in its entirety is considered a violation, it is argued that access to justice and the proper use of the legal system should not be sacrificed to protect the rights of the victims.

For Chevez (2021) The principle of minimum intervention in fraud cases means that conciliation should be applied as an alternative method for resolving conflicts instead of reporting directly to the criminal justice system. In the study conducted, it has been demonstrated that fraud victims primarily seek the return of the economic damage suffered when filing a complaint, which can be achieved through conciliation.

For Tivan (2019) in the crime of fraud, conciliation is seen as a feasible and permissible option. Conciliation is considered viable when comprehensive reparation and satisfaction for the victim are achieved. In this sense, if the victim has been adequately compensated, a lengthy legal process may be considered unnecessary. It should be noted that conciliation can only occur if there is previously a voluntary agreement between the parties involved.

Discussion

The results obtained from surveys of practicing lawyers reveal various perspectives and opinions regarding the role of the Ecuadorian legal framework in the resolution of conflicts related to fraud offenses. In general, the efficiency and agility of the criminal process are highlighted as positive factors, although the absence of conciliation as an alternative means of conflict resolution in such cases is acknowledged.

The lawyers surveyed consider that the absence of conciliation produces significant harm to victims, who need to recover what they invested. The lack of conciliation affects the effectiveness and speed of the Ecuadorian judicial system since it can delay reparation for victims and give rise to unnecessary custodial sanctions.

Regarding possible alternatives or more effective mechanisms to resolve conflicts in fraud crimes, the implementation of a transactional act is proposed as an option that could put an end to the litigation. Furthermore, the importance of implementing changes or reforms in the criminal legal system is highlighted to guarantee better protection of the rights of victims of fraud crimes, although it is noted that in the latest reform aspects of protection have already been stipulated, such as deceit and force.

The consulted authors in the investigation from books offer different perspectives on conciliation in cases of fraud. It is highlighted that alternative means of conflict resolution in criminal matters represent an advancement in victims' rights, allowing for swift compensation and avoiding the need for a criminal process. However, there is a proposal for reform to enable

the application of these mechanisms in cases of fraud, provided that both parties agree, and the crime does not involve large sums of money or multiple individuals. It is argued that access to justice and the proper use of the legal system should not be sacrificed to protect the rights of victims.

In summary, the results indicate a concern about the lack of establishing conciliation as an alternative means of conflict resolution in cases of fraud in the Ecuadorian criminal justice system. The efficiency and speed of the criminal process are highlighted, but there is a recognition of the need for changes and reforms to ensure better protection of victims' rights. Alternative mechanisms for conflict resolution, such as conciliation, are seen as viable options that could expedite case resolution and reduce the caseload in the courts.

Conclusions

Alternative Dispute Resolution (ADR) methods are effective instruments in the administration of justice, as they promote dialogue and cooperation between the parties, seeking solutions that align with their interests and real needs. These methods enable quicker agreements and help avoid judicial confrontation.

The speed in resolving disputes, the prompt and comprehensive solution or reparation, the continuity in the implementation of agreements, the review by the competent authority according to the alternative method used, confidentiality, and the focus on the cost-effectiveness of the process are fundamental aspects that highlight the importance of ADR methods.

In the context of fraud crimes, the lack of establishment of conciliation as an alternative means of conflict resolution in the Ecuadorian criminal legal system generates significant harm to victims. The absence of conciliation delays the reparation of the victims and can result in unnecessary custodial sentences.

There is a need to implement changes and reforms in the Ecuadorian criminal legal system to guarantee better protection of the rights of victims of fraud crimes. The inclusion of conciliation as a viable option and the application of transactional minutes could speed up and improve efficiency in the resolution of cases, reducing the procedural burden in the courts.

In general, the importance of promoting and recognizing ADR as a valid alternative in conflict resolution is emphasized, especially in cases of fraud, where conciliation can provide faster and more satisfactory solutions for the parties involved.

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