



## SOCIAL DAMAGE AND THE NEED FOR THE FIGURE OF THE SOCIAL ACTOR

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### ABSTRACT

The acts of corruption of public officials in Peru generate damages to supra-individual interests, because the right to "social welfare" of the citizens is violated (art. 44 of the Constitution) which the State guarantees, and therefore the obligation to compensate arises (art. 35 of the United Nations Convention Against Corruption), and to determine who would intervene as a legitimate subject would be the anti-corruption public prosecutor, in such a way that the violated interest that only has a diffuse existence and not in the individuality of the persons is guaranteed.

**Keywords:** Social damage; Corruption; Peru; Social welfare.

## DANOS SOCIAIS E A NECESSIDADE DA FIGURA DO ATOR SOCIAL

### RESUMO

Os atos de corrupção de funcionários públicos no Peru geram danos a interesses supra-individuais, pois o direito ao "bem-estar social" dos cidadãos é violado (art. 44 da Constituição) que o Estado garante e, portanto, surge a obrigação de compensar (art. 35 da Convenção das Nações Unidas contra a Corrupção), e de determinar quem interviria como sujeito legítimo seria o promotor público anticorrupção, de tal forma que o interesse violado que só tem existência difusa e não na individualidade das pessoas é garantido.

**Palavras-chave:** Danos sociais, Corrupção, Peru, Bem-estar social.



## 1 INTRODUCTION

A country with free, honest and just men, would be a great State (BALAGUER, 2022); however, corruption is immersed in the historical evolution of man and States; but this does not mean that we resign ourselves to not fighting this evil, because it is necessary to implement measures focused on children from their earliest age and also on citizens from the role in which they develop to combat them (BARRIOS MEDINA, 2019).

Corruption seems to be a very diffuse term in the minds of the citizens of Latin American countries, where there is no trust in the administration of justice, nor in public officials at all levels (OLIVA et al., 2020).

Corrupt acts or omissions generate substantial losses, which not only affect an institution, a district, a province, a region, but also a country. What characterizes the majority of corrupt acts is that they violate collective rights as usually occurs with the crimes of corruption of officials (BOCANEGRA & CERA, 2021).

Given the radius of action of the damage it causes, and reviewing foreign jurisprudence, especially that of Costa Rica, where the need to qualify or introduce in any case a legitimate subject capable of claiming social damages in criminal proceedings is briefly developed.

### 1.1 Corruption

Corruption seems to be present in all the existence of the States and of the same being. It could be said that the first documented case of corruption was recorded in a papyrus dating back to the XX Dynasty, during the reign of Ramses IX (1142-1123 B.C.). Here Peser, a mayor of Egypt, denounced another high-ranking official close to the Pharaoh who had colluded with some tomb desecrators. It was difficult for him to justify his patrimony (AVENDAÑO ORTIZ, 2015, p. 3) For this reason, one of the 8 accused Amenpanefer confessed that they were dedicated to the looting of tombs and when they were arrested, he paid the scribe Khaemope of the district of Tameniu, and that he let them free. (TARANCÓN HUARTE, 2016, p. 21).

Another case of corruption can be found in Athens during the government of Pericles, where he bribed the king of Sparta Pleistoanax (he was paid 20 talents of silver), so that the latter would withdraw his army from the borders so that it would not



invade and destroy Athens. Socrates criticized the corrupt behaviors of Pericles because he bribed kings and brutalized the population. For our philosopher, a State is built with free, brave and honest men, and one cannot receive that which does not correspond to the State. (KRAUS, 1941, pp. 40-62).

Rome was no stranger to corruption, there was bribery, electoral crimes, illicit enrichment, among others. The case of Lucius Catiline, whom Sallust refers to as a man endowed with great strength, but with an evil and depraved inclination. (SALUSTIUS, 1999, pp. 17-18) who could carry out any conduct to take over the republic. In the face of corruption, laws against corruption were passed, such as the *Lex Calpurnia (149 B.C.)*, among other laws.

In the Inca empire, it seems that it fell like a sand castle, "which was not because of the superiority of the Spaniards, but because during the government of Huayna Capac there were symptoms of corruption" (Porrás Barrenechea, 1935). (PORRAS BARRENECHEA, 1935).

With the Spanish conquest, colonial reforms were proposed, in which abuses, corruption, smuggling, etc., existed (Quiroz Norris, 2013). (QUIROZ NORRIS, 2013). And the same happened with the early republic, until today, as the most recent cases of Alberto Fujimori, Odebrecht, among others. The losses due to corruption are millionaire, and the corruption index is also, for example, by 2019 65% of the population believes that corruption has increased. (Gestión, 2019).

Faced with this situation, States have signed treaties against corruption such as the United Nations. Peru, in order to achieve the immediate reparation of damages produced by corruption cases, has approved Law N° 30737 (Law that ensures the immediate payment of civil reparation in favor of the Peruvian State in cases of corruption and related crimes).

Corruption implies that officials, being in the duty to look after the interests of the State and act in accordance with the law, act within the State or at its expense, to supply their own interests or those of third parties (SALINAS, 2021).

Corruption [...] means that administrative or political decisions by governmental authorities are bought, instead of being adopted on the basis of legality in procedures legally for that purpose. Corruption follows the unofficial laws of the market, thus evading the rule of law.(p. 27) (PETERS, 2018, p. 27).



## 1.2 Social damage in the context of corruption of public officials

Corruption of officials is present in all times, countries so far, for the most part, have not been able to fight it, for which countries have been integrated for its frontal fight through treaties (VILLORIA, 2019).

Jurists have the perception that corruption is empirically verifiable, because it generates losses of opportunity, development, access to a decent quality of life, education, health, loss of life, environmental contamination, underdevelopment, extreme poverty, etc. Even some dedicated to human rights postulate that corruptions directly or indirectly violate human rights since these are obliged to ensure optimal conditions to guarantee and promote human rights and thus provide a better quality of life to its citizens (VÉRTIZ, 2021).

What matters to us is that all countries, or most of them, have been constantly struggling to sanction violations of the individual rights of subjects that can be identified without major problems and therefore to repair them; but the problem does not lie in the violations of individual interests or rights, but in subjects that are violated en masse, even in some cases all the inhabitants of a country are violated and are unidentifiable. Let's look at an example:

When a subject "X" steals a cell phone from "Y" he takes the property of an individual subject, which is reproachable by society, it is true, but this does not affect the generality or the whole nation; But when a public official, for example, buys masks, without quality standards and with excess cost, and these are destined to doctors, policemen, who attend to the population, and if these are infected with COVID-19, they will infect innumerable groups of the population which will surely generate damages to the health and deaths to an undetermined group, with which it is not generated an individual damage but to a collectivity.

In view of this fact, corruption of public officials causes damages, which gives rise to the obligation to make reparations. If the violations of identifiable and individual subjects have development both in doctrine and jurisprudence for the purpose of quantifying the damages, and the same do not become difficult; however, the immaterial or material reparation caused to the population seems forgotten, as "the case of political and social damage caused by Corruption" (FEINGEBLATT, 2019, p. 26).



It has become evident that corruption causes damage to the population, and not only to the State as an institution, in view of which the figure of social damage arises, which would include damage to diffuse and collective interests in processes of corruption of public officials.

### 1.3 Institutions related to the object of study

*Prima facie*, collective interests, diffuse and social damage seem to refer to the same thing, but in reality they keep certain differences, although how not to accept that they present common areas as, for example, in these institutions plural rights are protected, but not always specifiable in the case (FERNÁNDEZ et al, 2019).

For greater precision in this section, let us study them:

- **Collective interests**

It is characterized because before any affectation there is already a legal bond between the members, the same are determinable and are circumscribed for some institution, for example, the medical association, the architects association, etc.

- **Diffuse interests**

This institution is characterized because it frames the interests of an indeterminate group of persons, either because they are in the same situation, circumstance, time, in which their rights or interests have been violated. Here there is no legal link ex ante to the infringing act, but rather the situation or common interest to have their right repaired becomes ex post, which puts them in the same situation.

In the civil procedural regulations this institution is regulated by article 82, making reference to diffuse interests under which the environment, consumer rights, cultural or historical patrimony would be protected, and in the same article the legitimized subjects are framed, which must have legal status.

- **Collective damage**

It occurs when a collectivity is affected, and the injured parties are damaged because they are part of this collectivity, and therefore affect the interests of a group of society. (AGUIRRE GARABITO & SIBAJA LÓPEZ, 2010, p. 123). The harmful event is characterized by the fact that it arises from a lawful or unlawful source, while the social harm only arises from an unlawful damage, and these tend to the realization of



principles such as justice and social peace. (AGUIRRE GARABITO & SIBAJA LÓPEZ, 2010, p. 123).this requires the existence of an effect on a collective right (FEINGEBLATT, 2019, p. 15)..

- **Social damage.**

Institution apparently originating in Costa Rica, where its source would be in the right to a healthy environment of the supreme charter of that nation and art. 38 of the Constitution of this country.

This damage would be framed as an impairment, detriment to social welfare, "[...] caused by an act of corruption, which unjustifiably suffers a plurality of individuals, by producing a material or immaterial affectation of their diffuse or collective interests, before which, arises the duty to repair". (La nación, 2012).

Here the damage is considered given from the affectation on a public interest protected by law. (FEINGEBLATT, 2019, p. 15)The damage is either to diffuse and collective interests, which comes to complement the scope of protection of interests which do not cover in some situations the damage for which it has been empowered to act through representation of diffuse and collective interests, because apart from environmental damage, consumer damage, etc., the existence of social damage is also recognized.

Although the previous institutions have similarities because they do not refer to individual subjects but to a plurality, social damage differs from these because here the "social welfare" is protected, which can cause patrimonial or extra-patrimonial damages, focusing especially on the immaterial ones.

The victim of social damage "is a plurality of subjects who hold the ownership of diffuse or collective interests, inasmuch as they are part of the collectivity" (AGUIRRE GARABITO & SIBAJA LÓPEZ, 2010, p. 102).

Following Costa Rica's guidelines, its configurative elements for its reparo would be:

- **The existence of the damage**

The social damage may be a little difficult to quantify, however, judges can use foreign jurisprudence to do so, although some propose that it be done by an expert specialized in damages, and others that it be done by the judge as an expert of experts, although the latter is a fallacy, since the judge is not an expert of experts, but someone specialized in some notion of law.



In some experiences macroeconomic approaches have been used and in others political and social (FEINGEBLATT, 2019, pp. 21-28).

The way in which the damage is quantified will depend on each State, and this will be at their discretion.

- **The violating agent may be a natural or legal person**

The agent would be the qualified public official and also those persons, whether natural or juridical, acting in complicity, and civil third parties. In some cases, the agent may even be the State itself. (AGUIRRE GARABITO & SIBAJA LÓPEZ, 2010).

- **That the damage is directed to the interests of a plurality of indivisible subjects**

The damage is not configured by the sum of individual interests, but by the interest of collectivity, since it falls on a generality, even on an entire nation.

- **The duty to repair and the duty to obtain compensation.**

This would consist of the "right of the injured parties to receive full reparation for damages and compensation for the harm caused to them" (AGUIRRE GARABITO & SIBAJA LÓPEZ, 2010, p. 136).

In international law, the United Nations Convention Against Corruption, art. 35, requires States to adopt the necessary measures to compensate for damages caused by corruption and likewise demands that they have the right to have access to any legal remedy for such purposes against those responsible.

Under this article, States are obliged to adopt the necessary measures to repair damages resulting from corruption, especially those derived from the criminal acts of public officials.

As Peru is a party to this convention, the Peruvian State is obliged to comply in good faith, in this sense, it has the obligation to guarantee the protection of the rights of all affected parties and to ensure that they make an effective defense through the existing channels.

- **The legitimate agent.**

The latter is only the subject legitimized to intervene in any process to watch over the social damages against the active subject.



For our legal system it will be discussed below who could be the entity to protect and ensure the reparation caused by the social damage.

#### 1.4 Social welfare law

This well-being cannot be understood as merely economic aspects or in terms of income, but includes material or immaterial satisfaction which produce conditions for the subjects to enjoy certain rights, health, education, infrastructure, security, etc. (AGUIRRE GARABITO & SIBAJA LÓPEZ, 2010, p. 125).

We ask ourselves, does this implicit right to welfare exist in our legal system?

Article 44 of the Supreme Charter states that one of the duties of the State is to protect *the general welfare [...] and the integral development* and balance of the nation.

Consequently, the State is obliged to guarantee social cohesion through the general welfare, which is not the responsibility of the individual but of the whole nation, however, this desired or existing welfare is disturbed or impaired at a certain time and space, which is why it is necessary that this impairment produced by an unlawful act be repaired, to a greater extent when it affects the *res publica*. The affectation becomes more reproachable when the injury comes from those qualified subjects who have special duties towards the State, such as protection, promotion, preservation of goods, either holistically or atomically.

Therefore, the figure of social damage finds its basis in art. 44, and not in the right to the environment as in the case of Costa Rica, this is because the Court has closed this possibility by establishing the essential content of the latter right where the right to a healthy environment and its preservation is guaranteed.

#### 1.5 Location of social damage in the generation of rights

Rights throughout history have appeared through struggles that have driven the less favored sectors of society and that in a democratic society play an important role, that is why the protection of these rights is increasingly promoted, for example, women's rights, community rights, environmental rights among others (JELIN, 2019).

Therefore, rights are not born and protected when there is no conflict, but their existence is intimately linked to social struggle, but this does not mean that at some point in history a right has not been created without struggle.



Rights have evolved, and they require recognition and protection in accordance with the development of societies. Thus, we can speak of freedom rights (first generation), equality rights (second generation) and finally solidarity rights (third generation).

But before starting with our objective, let us clarify; the classification of rights does not mean that they are presented as separate, but that there is a communicability and fluidity between them, which exist together or in any case are needed for an effective protection of rights (CAMACHO, 2020).

The first two generations promoted and protected the rights of individuals or minority groups, but the issue was the infringement of the rights of large masses of people, for which solidarity rights, which are contained in collective entities, peoples, *inter alia*, the *right to development*, the right to peace, a healthy environment, etc., came to the fore.

These would come "from a certain conception of community life, and can only be achieved by the joint efforts of all those who participate in social life" (AGUIRREZABAL GRÜNSTEIN, 2006, p. 70).

Where the limitations to the access to tutelage are presented to supra-individual interests, the figure of collective and diffuse interests is born for the protection of their interests and how not to add the social damage, the same that is characterized by its supra-individuality. The latter affects not only interests that belong to a single group, but also those that are of interest to the Nation, such as the general welfare, security, proper administration of public affairs, territorial integrity, etc.

### 1.6 The need for the incorporation of social damage and the subject legitimized to claim it

If we review the Peruvian Code of Criminal Procedure, Article 94, paragraph 4, establishes that diffuse and collective interests may be aggrieved as a consequence of a punishable act; therefore, for possible reparation of their interests or assets, they may be constituted in the process.

Collective or diffuse claims insofar as they can be claimed [...] "***provided that the corporate purpose of the same is directly linked to those interests and has been recognized and registered prior to the commission of the crime that is the object of the proceeding.***" [emphasis added].



This section establishes the *condicio sine qua non* is the pre-existence of the non-profit legal person is constituted prior to the commission of the crime and that its corporate purpose is directly related to the interest to be claimed in the process.

In Peru, there are not an infinite number of associations, for example, in an assumption that "X" where a public official has colluded with the manager "Y" of a telephone company called "línea ilimitada S.A.", a concession contract is signed and as a consequence of this contract, which is immersed in corruption, this telephone company enters the market and charges a higher amount than normal, harming thousands of users who opt for this service. Then, when a process for corruption is initiated in this case, as there was no association registered *ex ante* to the punishable act, then this group of users could not enter the process, thus constituting this rule as a serious obstacle to the jurisdictional protection that a State must offer in any conflict of legal relevance.

As it has become evident in all cases, there are no institutions that have a certain object and it is consistent with the object that is being discussed in the process.

The examples would be innumerable, but we are not going to concentrate only on giving examples, in view of which, there is a need to incorporate a legitimized subject that can make up for the shortcomings in our system. This proposed subject must meet the needs in such a way that the State offers the necessary guarantees of access to justice, not only to the individual but also to the plurality of subjects or supra-individual interests. Because in industrial societies the injuries or violations of rights and interests are no longer presented only to a subject but to a determined or indeterminate group.

According to the magistrate of the anti-corruption system Juan Guillermo Piscoya, with whom we agree, the legitimate subject and the one who can defend with effective defense the social damage would be "The anti-corruption prosecutor".

## 2. CONCLUSIONS

- In recent times, what has been of interest to the State in different countries is the reparation of its institutions, but little has been developed with respect to social damage.
- Corruption not only generates individual damages, but there are other greater damages which are the "invisible victims" that cause social damage that falls on collective or diffuse subjects.



- In Peru there is the possibility of suing for social damage, which would find its basis in the right to social welfare art. 44 of our constitutional charter and in the criminal procedural field there would be a door to become a party when article 94 paragraph 4 of the Criminal Procedural Code refers that they can become a party to the process when diffuse and collective interests are affected.
- As for the subject legitimized to intervene in the process of corruption of officials, only those legal persons registered prior to the criminal factum would be entitled to do so, which presents certain shortcomings, for which it is proposed *de lege ferenda* to introduce the figure of the social actor to protect the social damage, which could defend diffuse and collective interests if the latter could not be constituted as a party.

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