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Contractual Solidarity in Colombia and Italy: an Exercise in Comparative Law

El solidarismo contractual en Colombia e Italia: Un ejercicio de Derecho Comparado

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Abstract

The purpose of this article is to analyze how contractual solidarism has permeated the legal systems of Colombia and Italy, and how it has redefined the role of the judge when settling disputes under private law. Likewise, it aims to show how the application of contractual solidarism in Colombia, although implemented by the Constitutional Court, still generates resistance, which has led to an inharmonious and sometimes contradictory development. In contrast, this article seeks to expose how in the italian case, the contractual solidarity has enjoyed more common acceptance which has resulted in the strengthening of the community ties of the italian society. For this purpose, a comparative analysis of the application of contractual solidarism between the cases of Colombia and Italy will be made, where a qualitative approach will be used as the main component of this research, through the review of bibliographical sources referring to the concept of solidarity applied to contractual relations, accompanied by a jurisprudential and normative analysis.

Keywords

Private autonomy, social rule of law, contractual solidarism, constitutionalization of private law, comparative law.

Resumen

En este artículo se pretende analizar cómo el solidarismo contractual ha permeado los ordenamientos jurídicos de Colombia e Italia y ha redefinido el papel del juez al momento de dirimir sobre controversias en el marco del derecho privado. Así mismo, tiene el fin de mostrar cómo la aplicación del solidarismo contractual en Colombia, si bien ha sido implementado de la mano de la Corte Constitucional en la mayoría de los casos, aún genera resistencia, lo cual ha derivado en un desarrollo poco armonioso y, a veces, contradictorio. En contraposición, se buscará exponer cómo en el caso italiano el solidarismo contractual sí ha gozado de una aceptación común, lo cual ha derivado en el fortalecimiento de los lazos comunitarios de la sociedad italiana. Para esto se hará un análisis comparativo de la aplicación del solidarismo contractual entre los casos de Colombia e Italia, en el que se usará como componente principal de esta investigación un enfoque cualitativo mediante la revisión de fuentes bibliográficas referentes al concepto de solidaridad aplicado a las relaciones contractuales, acompañado de un análisis jurisprudencial y normativo.

Palabras clave

Autonomía privada, Estado social de derecho, solidarismo contractual, constitucionalización del derecho privado, derecho comparado.

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INTRODUCTION

Since the French Revolution and the subsequent implementation of the French Civil Code of 1804, private law has been guided by guiding principles such as freedom of contract, freedom of will, and formal equality. State intervention was minimal, and only limited to protecting legal certainty, maintaining public order, and preserving good customs. This scenario, which also permeated Colombian law since the adoption of Andrés Bello's Civil Code in 1873, did not allow judges to intervene beyond passive work and an exegetical interpretation of contracts and the law (Mantilla, 2011).

However, since the end of the 19th century, the deep imbalances existing in the socio-legal relations of individuals gave birth to the *principle of solidarity*, especially in France, with doctrinaires such as Denis Mazeuad and Leon Bourgeois.

Although the *principle of solidarity*, later known as *contractual solidarism*, has been considered a rather conflictive concept, as it represents a possible factor of *disarticulation of* the classical normative system (Mantilla, 2011), its origin tends to the correction of contractual inequalities and inequity, through a greater exercise of the interpretative power of the judge in the framework of the legal relations of the subjects. Thus, its application has sought to limit the principle of private autonomy in certain events and to give greater prevalence to the social and economic context of the subjects, above the formalism characteristic of the classical liberal conception of private law (Bernal-Fandiño, 2007).

In Colombia, the concept of *solidarity* began to take on great relevance, not just from the 1991 Constitution, but also from the gestation of a deeper process called the *constitutionalization of private law* (Calderón, 2007). This implied a confluence between public and private law, which suggests a more active judicial intervention in the legal-contractual relations of individuals to redefine the scope and application of the classic postulates of private law, to comply with the principles and values that were embodied in the *Magna Carta* of 1991 (Calderón, 2007). As a consequence of the aforementioned, concepts such as *solidarity*, in addition to having been embodied in the Colombian Constitutional Charter as a principle, were also the starting point for transforming contractual relations between individuals, giving shape to *contractual solidarism* in our country (Calderón, 2007).

In contrast to the Colombian process, in Italy, since the issuance of the Civil Code of 1942 and the Italian Constitution of 1947, the principle of solidarity in the framework of private law was based on classical postulates such as equity and good faith, as well as on the hand of several jurisprudential developments of the Italian Supreme Court of Justice. This resulted in a broader

interpretative power of the judges, especially those of the Civil Court, which avoided falling into the duality that exists nowadays between branches of the judiciary, as it is, in the Colombian case, between the Supreme Court of Justice and the Constitutional Court. This fact has allowed, in recent Italian history, greater legal harmony in the application of constitutional postulates in contractual matters (Mattiei & Quarta, 2020).

It is for this reason that the research used for this paper has been fundamental to understanding the origin of the concept of solidarism in private law, as well as its application and development, still somewhat marginal in the Colombian legal canon. To that extent, authors such as Mariana Bernal-Fandiño contribute to this understanding by clearly describing the background of this figure, as well as the general fields of application that this concept has had in Colombia and its benefits.

On the other hand, doctrinaires such as Juan Jacobo Calderón, who has taken a clear picture of the process of constitutionalization of the legal-private relations in Colombia, has shown how the referred process has represented the ideal opportunity to promote principles to other fields of private law, such as solidarism, and, thus, be able to put forward new proposals to face the socioeconomic and legal difficulties in Colombia. This is not without controversy and conflicts, especially in the Colombian case, as Professor Fabricio Mantilla will highlight. Finally, there will be visions of Italian jurists such as Francesco Macario and Mattiei and Quarta, who have made it possible to understand how contractual solidarism has been applied in Italian jurisprudence in recent years, more harmoniously and courageously.

In line with this, the main objective of this article is to analyze the development of the principle of solidarity in private law, and then, to carry out a comparative analysis between the Colombian and Italian cases. Finally, it will determine the challenges and advantages of this figure for the Colombian legal system.

In order to achieve this objective, the following questions will be answered: What is the constitutionalization of private law in Colombia and how was the principle of solidarity in contracts applied? How is the principle of contractual solidarity constituted in Italy and what is its scope of application? And, finally, what are the jurisprudential references in Colombia and Italy regarding the principle of solidarity in the framework of contractual relations within the framework of private law?

To resolve the questions raised above, first, a summary will be made of the key elements of the process of constitutionalization of private law; the limits that this poses for the classic exercise of postulates such as contractual freedom, equality, and private autonomy; and how the prin-

ciple of solidarity is reflected in the Colombian Charter. Secondly, a brief account will be made of the jurisprudential development of the Colombian Constitutional Court on the principle or duty of solidarity applied to specific cases of private law to present the constitutional guidelines that have been established around contractual solidarism.

Thirdly, a synthesis of the structure and application of contractual solidarity in Italian contract law will be made, and then, the most relevant case law of the Cassation Chamber of the Italian Supreme Court regarding the application of the duty of contractual solidarity will be summarized. Finally, both systems are compared the light of the concept of contractual solidarism, highlighting the need to unify and harmonize the principle of solidarity in Colombian law, both in its application and judicial interpretation. To this end, the analysis will be complemented with the presentation of the case of commercial lease contracts in the context of Covid-19.

BACKGROUND OF CONTRACTUAL SOLIDARISM

Since the French Revolution and the absolute rejection of the *Ancien Régime*, the new French order sought to protect the individual liberties recently conquered by the people, and to give primacy to the rationalist fervor of the moment, enacting laws whose contents had a clear and understandable interpretation for any member of society. With this new order, the key postulates of what would become liberal legal positivism were established, such as formal equality and the autonomy of the will. This later gave rise to the French Civil Code of 1804 (Mantilla, 2011).

Given the traditional connivance that existed between the judiciary and the monarchy before the Revolution, the role of the judge was totally relegated to a passive legal operator, whose powers did not involve the interpretation of the law, since the codified laws were sufficient in themselves, being the product of reason and popular sentiment, represented in the legislative branch (Mantilla, 2011).

However, at the end of the 19th century, politicians and thinkers such as Leon Bourgeois showed how French society, which was the standard bearer of liberal legal positivism, cultivated profound material inequalities that resulted in high rates of labor precariousness and abuses in the fulfillment of manifestly unequal contractual conditions between the parties, which led to higher rates of poverty and social inequality (Bernal-Fandiño, 2007).

Among the most common causes of this inequity -or, also, social imbalance- Bourgeois found that one of the most evident reasons lay specifically in the fallacy implied by formal equality and absolute freedom when applied to the practical world, especially in the socio-legal relations of individuals. This author understood that there were no equal subjects in the context of the mar-

ket or the framework of a business relationship —an aspect that was later taken up by Noriot and Diguit—. To that extent, power, selfishness, and the will of the strongest prevailed, particularly with the use of contractual figures such as adhesion contracts, whose rise was exponential in the context of the industrial era, and whose scope implied -even today, to a lesser extent- the submission of the weaker party to more rigid contractual conditions and whose content was unilaterally defined (Bernal-Fandiño, 2007).

This is how Leon Burgeois, in his work *Solidarity*, founded the need for a new vision of contractual and legal relations in the private sphere, taking, as a key postulate, the ideas of the philosopher and sociologist Auguste Comte. These ideas pointed to the need to formulate a legal doctrine that was more aware of the social duties that each individual had in society, where the legal universe - meaning the legal systems that governed relations between individuals in the industrial era - had a more direct connection with the socioeconomic reality of the parties and the social context in which they were circumscribed (Bernal-Fandiño, 2007).

In other words, the purpose of this proposal was to offer a reasonable limit to the abuses of law, and a control to the imbalances that may arise when complying with the contractual obligations derived from an agreement, without this meaning for the weaker party a sacrifice of its economic position, in order to comply with contractual obligations. Thus, the *solidarity* concept is created as a solution and counterweight to this phenomenon (Bernal-Fandiño, 2007).

In turn, doctrines such as Denis Mazeaud, to find a solution to the already exposed *contractual imbalances*, began to structure what would be properly called *contractual solidarism*, which aimed to propose a new model of interpretation for judges about contracts, in which solidarity —and not only good faith or equity between the parties, among other classic postulates— would be indispensable for any legal relationship of a private nature. To this extent, Mazeaud asserted that the principle of solidarity as applied to contracts could be summarized as follows:

> [...] a requirement of contractual civility that translates, for each contracting party, into taking into account and respecting the legitimate interest of his contracting party. This contractual ethic manifests itself concretely, among other things, through the notions of altruism, decency, coherence, proportionality and cooperation, and excludes selfishness, indifference, indolence and cynicism. (quoted in Mantilla, 2011, p. 198)

In this way, Mazeaud gave primacy to the duties of coherence, loyalty, and proportionality in all stages of contracts, and conceived the need to assess the socioeconomic and factual circumstances of the parties involved in any contractual relationship, against possible disproportionate imbalances that could arise in the fulfillment of the agreed obligations. These pro-

posals gave rise to a more direct questioning of legal certainty, the autonomy of the will, and the application of a purely formalistic vision of the law (Mazeaud, 2004).

Along the same lines, for doctrinaires such as Eric Savaux, contractual solidarism "attacks the classical, individualistic, and spiritualistic conception of the contract, as well as the neo-liberal theory that is content to limit its excesses" (quoted in Mantilla, 2011, p. 198). Finally, authors such as Mantilla (2011) conclude that a main feature of contractual solidarism, contrary to what has been established since the French Revolution, implies that "it is the judge who is called upon to verify that these ideals of justice, dignity, balance, solidarity, and good faith are crystallized in contracts" (Mantilla, 2011, p. 203).

THE CONSTITUTIONALIZATION OF PRIVATE LAW IN COLOMBIA AS A DOOR TO CONTRACTUAL SOLIDARISM

Now, it is not possible to study the duty or principle of solidarity applied to civil and commercial contracts in Colombia, without delving, briefly, into what entails the process of constitutionalization of private law.

For doctrinaires such as Juan Jacobo Calderón, the process of constitutionalization has its original antecedent in the 1991 Constitution itself, which gave the different branches of public power and judges the authority to abstract the principles, rights, and values of the *Magna Carta* to apply them to the practical and business field. For this purpose, the starting point was a key article regarding the hierarchy of sources of the Colombian legal system: Article 4 of the Constitution (Calderón, 2007). This article, which has served as a structural and transversal basis for judges, has allowed the projection of decisions and postulates to the present day, with a profound constitutional influence on the institutions and classic rules of private law. It has also served to reinterpret the scope of judicial power, according to the different cases considered in terms of respect for constitutional norms, especially what Calderón called the *iusfundamental rights*.

As a consequence of the aforementioned, the major constitutionalization processes in Colombia took the initiative to apply the present postulates from two fields: 1) through legislative bodies focused on creating constitutional mandates of optimization to regulate aspects of private law, especially in the legal-mercantile field, and 2) through judicial decisions with a very high component of interpretative abstraction, empowered by the Constitution itself (Calderón, 2007).

In this sense, the broad scope of the constitutionalization of private law, guided mainly by judicial decisions of the constitutional order, has had special relevance in defining the constitutional significance of classic commercial or civil rules, to solve problems of a private or particular nature. In addition to this, it has also served to bring other controversies to the fully constitutional

field and to resolve them according to the principles embodied therein. This has exponentially increased the interpretative and decision-making powers of the judicial authority. The most exemplary case can be seen in the mechanism of the tutela action regulated in Decree 2951 of 1991, in the framework of contractual relations at the time of an alleged violation of a particular fundamental right, or in the case of public actions of unconstitutionality against rules of commercial content, whose development, in many cases, has redefined the scope of such rules based on an analysis by the Constitutional Court (Calderón, 2007).

In the private sector, the constitutionalization process has also involved a dual strategy:

1. To recognize the freedoms and classic postulates of liberal law within the Magna Carta itself, such as freedom of contract (art. 333), equality (art. 13), and the right of association (art. 38), among many others, and to endow them with a constitutional source.

2. The recognition of classic private rights, and qualify their meaning and scope by other constitutional norms, and, especially, within fundamental rights. Thus, freedom of contract or private autonomy are generally unalterable, unless their scope may violate other principles of higher constitutional rank. Therein arises their reinterpretation and limitation, in particular through a more active action of the judiciary (Bernal-Fandiño, 2016).

Doctrinists such as Fabricio Mantilla (2011) agree that the constitutionalization of contracts, especially in Colombia, has as a determining feature to grant a more active role to the judge in the resolution of disputes in contractual matters to exercise stricter control over the contractual conditions between parties, and even to redefine the scope of these, or add new obligations, even during the execution of the contract, despite of what was voluntarily agreed by the parties (Mantilla, 2011).

This is not without controversy, since for authors such as Mantilla (2011), although law moves between the written world of laws and the world of practical facts, where the norm will not always be sufficient to provide a solution to all life scenarios, the use of principles such as solidarity to fill possible legal gaps could be even more problematic.

> The aforementioned principles, as they are formulated, present two important characteristics: a great indeterminacy -both of the alleged fact and of the sanction- and a very high emotive content. Their generalized application can lead to serious situations of legal uncertainty and anxiety. To make this clear, it is enough to ask oneself a few simple questions: what is the factual assumption of the principle that requires me to act in good faith or in solidarity? By virtue of the famous contractual duties, what behavior do I have to assume, what precise acts must I carry out, and what would be the consequences of not doing so, what sanction would I receive, and how much would

> it cost me not to act in this way (in what way?), how to discuss an argument that claims to be equitable and supportive, how to oppose *default interest, compromissory clauses and penalty clauses to freedom, equality and justice?* (Mantilla, 2011, p. 208)

This would imply that the use of principles by the legal operator to solve legal loopholes could lead to two disadvantages: 1) greater legal uncertainty in the application of precise rules; and 2) an application of justice based on intuitive and emotional assessments (Mantilla 2011).

OUTLINE OF CONSTITUTIONAL JURISPRUDENCE ON CONTRACTUAL SOLIDARISM IN COLOMBIA

In addition to the previously described process of constitutionalization of law, the 1991 Constitution embodies, in Articles 1, 2, and 95, the principle of solidarity *in abstracto*. This is an intrinsic principle and value applicable to any legal relationship, focused on the general interest, social welfare, and respect for the rights, principles, and values of the Charter. Its mandatory compliance, according to Article 4, implies an imperative of conduct for any citizen when entering into any legal act.

In this sense, the Constitutional Court, using the tools and scope of the constitutionalization process, as well as the historical heritage behind the concept of solidarism, interpreted the constitutional norms relevant to the principle of solidarity, and expanded its scope and necessity as a guiding principle of the Colombian State:

> This Corporation has emphasized that the Constituent of 1991 established the principle of solidarity as an essential element of the Social State of Law, as expressed in Article 1 of the Charter. In this sense, the Court has defined the principle of solidarity as: *"a duty, imposed on every person by the mere fact of belonging to the social conglomerate, consisting of the linking of one's own effort and activity for the benefit or support of other associates or in the collective interest". The dimension of solidarity as a duty, imposes on the members of society the obligation to cooperate with their fellow members to make their rights effective, especially when dealing with people in a situation of manifest weakness, due to their economic, physical or mental condition* [12]. (Constitutional Court of Colombia, 2014, p. 40)

However, there have been landmark judgments that have set the guidelines and scope of the principle of solidarity in the contractual framework, and have brought it out of abstraction, to apply it to concrete cases. And, although for several positions, the constitutionalization of private law and contractual solidarism are two concepts against which it is intended to make a separation in meaning and scope, as they fulfill two different functions (López-Castro, 2016), here, it is considered that one phenomenon is a necessary consequence of the other. Thus, the

constitutionalization of commercial relations is what potentiated the application of the duty of solidarity *in abstracto* to the particular contractual field, and redefined it, as it is currently known, as a new duty of conduct that in a more general field is defined as *contractual solidarism*.

Thus, Ruling T-520 of 2003 of the Constitutional Court exposes the emblematic case of how a German immigrant living in Colombia, after having acquired a cattle ranch in Barranca de Upía, through two loans with Banco de Bogotá and BBVA-Ganadero, was kidnapped from his ranch in 1997 by the extinct Farc-EP, which prevented him from continuing to pay the monthly installments of the loans he had taken on. After several months in captivity, for his release, his family and friends had to resort to extreme measures to raise more than 500 million Colombian pesos to pay the ransom. They acquired successive loans credited using promissory notes, checks, also proceeds from the sale of various family assets. However, this calamitous event, after his release in 1998, was compounded by the subsequent kidnapping of his brother-in-law, the bankruptcy of several businesses under his control, and health problems.

This chain of events left the plaintiff and his family with almost no economic solvency to cover the debts still owed to the financial entities. In essence, he was left in a state of defenselessness and considerable insolvency.

Notwithstanding the foregoing, despite being fully aware of this context, the banking entities refused to refinance the loans owed by the plaintiff, and they initiated the respective executive proceedings with the application of acceleration clauses, which demanded the full payment of the loans, according to the credit agreement established before the seizure. This led the plaintiff to file a tutela action against the banking entities, appealing to the right to life with dignity and the free development of personality, among others. To this fact was added the refusal of both the Civil Chamber of the Superior Court of Bogota and the Civil Chamber of the Supreme Court of Justice to accept the debtor's claims.

When the Constitutional Court assessed the specific case and the context of the contractual relationship that existed between the financial institution and the debtor, it found that there was all the legal justification on the part of the institution to demand compliance with the payment of the debt within the established terms, as well as the power to initiate the subsequent coercive process. However, it set forth several essential elements of a constitutional nature that were not considered by the financial entities about what the Court called the *duty of solidarity*. Thus, in the reasoning of the Tutela judgment, the Court stated the following:

a. That the duty of solidarity, in the social rule of law, was a duty of conduct ***in abstracto***, which had to be complied with for every legal action within the framework of society by Articles 1, 2, and 95 of the Constitution.

b. As a consequence of these duties embodied in the Charter, as well as Article 4 of the Political Constitution of Colombia, the Court had the obligation to correct the inequalities and injustices of society, trying to equalize them and give them greater relevance in the constitutional norms.

c. As a consequence, since the bank service was an essential public service, it was also subject to a social function. For this reason, the debtor could not be excluded from the financial market, or coercive measures could not be exercised without taking into consideration the context that gave rise to the non-payment.

d. That the plaintiff was in a state of subordination and defenselessness vis-à-vis the banking entities, as a consequence of his kidnapping and the subsequent events that took place.

e. In this specific case, the rulings issued by the Civil Chamber of the Superior Court of Bogotá and by the Civil Chamber of the Supreme Court of Justice were reversed.

f. The coercive processes were ordered to be suspended, and the obligation to novate the credit contracts initially signed and to renegotiate a new payment agreement from the moment in which the tutelary was sequestered was imposed.

According to the previous case, in analogous incidents, such as the Tutela rulings T-419 of 2004 and T-170 of 2005, the Constitutional Court applied the same principle of solidarity in the following manner:

1. Setting special behavioral guidelines.

2. Providing new interpretation criteria for actions or omissions of individuals.

3. Establishing limits to economic and contractual rights of financial entities, as is the case of Ruling T-520 of 2003, which focused on delimiting the scope of contractual freedom and private autonomy (Calderón, 2007).

On the other hand, although the study carried out by the high civil corporation of Colombia has deepened in aspects such as contractual review or the examination of good faith in the scope of private autonomy, there has not been a complete harmonization with the principle of solidarity promulgated in the Constitution. Nor has contractual solidarism been established as a valid

form of analysis of contractual conflicts arising from a possible contractual imbalance in case of law, such as those already cited. This may be a reflection of the current tension that exists between the formalist visions of Law defended by the Supreme Court of Justice in its Civil Cassation Chamber, and a more iusfundamental and social vision, led by the Constitutional Court of Colombia. All this has led a corporation such as the Constitutional Court to play a leading role in the implementation and development of contractual solidarism in Colombia.

CONTRACTUAL SOLIDARISM IN ITALIAN LAW

Unlike the Colombian case, contractual solidarism is not a novelty in the Italian legal system. Although there was a precedent called *corporate solidarism*, whose gestation is due to the former Fascist regime, after World War II, and since the session of the Constituent Assembly of 1947, which gave rise to the current Italian Constitution (Mattiei & Quarta, 2020), the concept of *solidarity or solidarism* was taken up again in Article 2, when it states that solidarity must be directly applied in any social, legal, and economic obligation:

> The Republic recognizes and guarantees the inviolable rights of man, both as an individual and within the social formations where he develops his personality, and it demands the fulfillment of the inexcusable duties of political, economic, and social solidarity. (Italian Republic, 1947)

In this sense, contractual solidarism in Italian law represents a duty of conduct that is enforceable on each individual of the community, insofar as it serves as a complement, not only to the social pact made between the members of a community but also the principle of the given word —Pacta *sunt servanda*—, within the framework of a contractual relationship (Mattiei & Quarta, 2020).

For this reason, Italian society has built business and contractual practices in tune with community ties. This means that, like the French proposal of the late nineteenth and early twentieth centuries made known by Leon Bourgeois in his work *Solidarity* (Bernal-Fandiño, 2007), there is a close interrelation between the social context, the exchange and circulation of wealth, and the pacts between individuals. This, if ignored by any of the individuals of the Italian society, would imply serious events of contractual imbalance, which would translate, in turn, into social injustices and material inequalities that would be subject to judicial reproach and subsequent control. This has meant that the application of the concept of *solidarity* has had a deeper scope both in the drafting of positive rules within the Italian legal system, as is the case of the Civil Code of 1942, as well as in the fact that it has given a greater scope to the interpretative role that the Italian judge has and that its decisions have a broader character when it comes to settling conflicts of a private nature and, especially, of contractual disputes (Mattie & Quarta, 2020).

Therefore, for authors such as Mattiei and Quarta (2020), this community and also the constitutional duty is complemented by the postulates of good faith and equity established in the Italian Civil Code of 1942, such as the following:

1. Article 1175 of the Italian Civil Code embodied the duty of equity as a fundamental pillar of any contractual relationship. “Thus, the debtor and the creditor must behave by the rules of equity”.

2. Article 1337 of the Italian Civil Code provides that “the parties, in the conduct of negotiations and the formation of the contract, must behave in good faith”.

3. Article 1375 of the Italian Civil Code establishes, between the parties, the obligation “that every contract must be performed in good faith”.

It is for the previous reasons that the general clauses of the correctness of contracts established in Italy and the interpretative work of the judge must ensure compliance with the duty of conduct in good faith, equity, and, above all, solidarity at all stages of the contractual relationship (Mattiei & Quarta, 2020). This conclusion is shared by doctrinaires and professors, among them Dr. Fernando Hinestrosa (2015), who stated:

> It is the codice civile: honest and diligent behavior in the credit relationship does not only concern the debtor, even if he bears the greatest burden for the satisfaction of the debt, but also the creditor (art. 1175 cod. civ.); in the progress of negotiations and in the formation of the contract the parties must behave in good faith (art. 1337 cod. civ.); the contract must be performed in good faith (art. 1375 cod. civ.). These are strict and opportune admonitions, which, by the way, are not limited to prohibiting fraud, cheating or aggression, but go further, by highlighting the duty of active behavior to facilitate the development of activities and the achievement of the common result; in a word, to ensure the validity of solidarism or social solidarity. (p. 5)

The foregoing suggests that, in Italian private law, there is, to a greater extent:

1. A more versatile, harmonized, and social application of the legal system with a view toward contractual review or termination based on the general clauses of equity, good faith, and compliance with the constitutional duty of solidarity, in the context of any contractual imbalance and possible excessive onerousness within the performance of obligations by the debtor (Macario, 2016).

2. A greater unification of criteria around the applicable law implies a necessary correlation between general clauses of private law, such as good faith and equity, with constitutional principles such as solidarity. Its result, far from affecting legal certainty around the resolution of a

possible contractual conflict, expands the certainty of both the legal operator and the parties of the applicable legal framework (Macario, 2016).

Additionally, in contractual matters, this principle implies that, outside the inherent interests of any party, and the obligations embodied in a contractual agreement, in the existence of excessive onerousness or economic imbalance between the parties, or the emergence of a dominant position in one of them, the contractual burdens must be reevaluated for the benefit, not only of the weaker party to the contractual relationship but also of the purposes proposed by the Constitution itself, in guarantee of the general interest by the judicial authority. This, again, recalls the community ties set out by the various French authors who gave rise to this concept and what is embodied in the Italian Constitution.

Now, a determining factor in the application process of constitutional postulates in Italian contract law owes its development to the jurisprudential decisions of the Supreme Court of Justice, Italian Civil Cassation Chamber, in the eighties and nineties (Macario, 2016). The aforementioned, given that within this corporation of justice, a process has been given birth, one that has been called by authors such as Francesco Macario (2016) as a "rereading" of the Civil Code of 1942 by the judicial authority. This implies a limit to private autonomy by giving it a broader interpretation, and correlating it with constitutional principles such as solidarity, concerning the clause of good faith and equity established in articles 1337, 1375, and 1175 of the Italian Civil Code, in the face of those contractual relationships of a commercial nature considered inequitable by the said corporation (Macario, 2016).

> Since the history of jurisprudence is made by lawyers - in this case, Supreme Court justices, with their own cultural background, formed over decades of study, and, at the same time, concrete application of the rules - we cannot fail to recall, with a view to a correct historical reconstruction of the evolutionary process under consideration, that the cassation solution (which will undoubtedly be considered innovative, in comparison with the previous orientation detectable by the decisions of legality concerning the effectiveness of the general clause of good faith) [43], was welcomed by a scholar who, subsequently (acting as a judge extender, for articulate and elegant reasons), would have marked some of the most significant stages of the subsequent development of jurisprudence. (p. 9)

On the other hand, the interpretation based on constitutional principles, in judgments such as 10.511 and 18.128 of the Cassation Chamber of the Italian Supreme Court, has made a rereading of articles such as 1384 of the Italian Civil Code, regarding the reduction of the economic penalty or the claims owed by debtors in conditions of insolvency or economic difficulties, in the following cases: 1) when the principal obligation has been partially fulfilled, and 2) when the amount of the penalty is excessive, so stipulated in the contract, especially in terms of the

interest that the creditor of the obligation had. This is to protect the general interest and ensure fairness in contractual relations.

Therefore, due to the judicial work that gives application to constitutional postulates in the private framework of principles such as solidarity, what is called an application of *living law* has been configured in the Italian Civil Code:

> The jurisprudential experience of the last twenty years highlights an interpretative trend of the norm expressing the principle of correctness in contractual relations, on the one hand, in search of the link with the axiological indexes of the Constitution, on the other hand, characterized by an increasing familiarity with general clauses, read and applied, it has been said, in relation to constitutional principles, starting with the fundamental one of solidarity, as proof of the awareness now acquired, on the part of judges, of their (also) "creative" function (and therefore not mere or, if one prefers, mechanical application of *ius scriptum*) [38]. Moreover, it is difficult to question the conviction according to which the correct use of general clauses allows enhancing the rights of the subject operating in a given socio-economic context, independently, not only of their prior legislative provision and regulation, but also of contractual agreements in which private autonomy is expressed. (Macario, 2016, p. 9)

This postulate represents a *living* integration of the traditional concepts of private law, with the constitutional principles established in clauses such as the 2nd of the Italian Constitution, to give rise to a new dynamic of interpretation and application of the law in the framework of a judicial process, resulting in a creative and conscientious exercise, capable of overcoming the formalism that had prevailed in the application of the law in contractual matters (Macario, 2016).

It is worth mentioning the conclusion drawn by Fernando Hinestrosa (2015) regarding the harmonized conception that exists around constitutional principles, such as the duty of solidarity and its application within contractual relations, also widely marked by private autonomy:

> It is, then, evident that the Italian civil code, beyond its marked solidarist orientation, a position specified by the Republican Constitution, and which has put it in a vanguard position, meant a substantial progress, compared to the codes of the nineteenth century, in the conception and technique in terms of principles and discipline of the law of obligations and contracts, which has allowed solving many problems posed by the contemporary economy with agility, wisdom and sense of fairness. (Hinestrosa, 2015, p. 6)

Thus, in rulings such as 10.511 of September 24, 1999, of the Italian Supreme Court of Justice, in its First Chamber of Civil Cassation; 18.128 of September 13, 2005, of the Italian Supreme Court of Justice, in its Second Chamber of Cassation; and 9140 of May 16, 2016, of the same corporation, it has been this same Civil Cassation Chamber that has exercised a work of living and free

constitutionalization of contractual relations and has established a series of limits to private autonomy, protected by constitutional and social principles such as the duty of solidarity, without this representing a conflict between different corporations of justice (Macario, 2016).

In that sense, the application of the second article (solidarity) of the Italian Constitution by the Cassation Chamber, in recent years, has focused on issues of great national relevance such as 1) regulation of abusive clauses in the framework of consumer contracts; 2) regulation of contracts between individuals, when there is a situation of economic dependence of one of the parties to the contract; 3) regulation or re-reading of insurance contracts; 4) regulation or reduction of penalty clauses about contractual obligations, and 5) in general, the renegotiation and/or novation of monetary obligations, the amount of which, if excessively high, may generate an economic imbalance to the detriment of the non-performing party.

Finally, another clear example of how the solidarist tendency in Italian positive law – unlike the Colombian case – has shown to have an innovative vision when it comes to mitigating imbalances in contracts can be seen in Articles 1256, 1258, 1464 and 1467 of the Italian Civil Code, as well as in Article 27 of Law No. 392 of July 27, 1978 on the Regulation of Rental of Urban Properties of the Italian Republic, presented by the author Tarantino (2020).

The aforementioned analysis details how the Italian positive legal system has proposed a series of regulatory mechanisms aimed at resolving possible contractual imbalances, especially in commercial and industrial premises lease contracts (Tarantino, 2020), without prejudice to what has been agreed by the parties. Like this:

1. Article 27 of Law 392 of 1978 on the Regulation of Rental of Urban Properties of the Italian Republic allows the lessee to terminate the commercial lease contract with the occurrence of serious reasons which may affect the execution of his obligation.

2. Articles 1256 and 1258 of the Italian Civil Code open the possibility in detail that the affected party may extinguish or partially fulfill its contractual obligation, in the event of the occurrence of total or partial supervening impossibilities that may affect the fulfillment of the debtor's main service.

On the other hand, Articles 1464 and 1467 of the Italian Civil Code make it possible to partially comply with the payment or terminate contracts of continuous or periodic performance by the affected party, in the event of an excessive and unforeseeable onerous performance in the per-

formance of the service, as was the case with the Covid-19 emergency (Tarantino, 2020). The foregoing, as long as the payment or fulfillment of the obligation due has not materialized. Specifically, Article 1467 of the Civil Code of 1942 allows the parties to collaborate mutually, within the framework of transversal postulates such as equity, solidarity and good faith, to change the terms of the contract for the benefit of the most affected party and thus avoid the termination of the contract.

CONTRACTUAL SOLIDARISM AND THE CASE OF COMMERCIAL LEASE CONTRACTS

In Colombia, commercial lease contracts exemplify the need to deepen contractual solidarism in the national legal system. In this type of agreement, although the parties can agree on termination or renegotiation clauses to mitigate unforeseen events, and the legal system - in principle - has legal tools to deal with extraordinary situations, such as force majeure or the theory of unforeseeability, Covid-19 evidenced the fragility of the current legal system when facing a crisis of such magnitude (Bauer and Bernal-Fandiño, 2021).

On the one hand, the pandemic represented a completely new situation for the parties, impossible to foresee in the original agreements. The isolation measures and the difficulties in fulfilling contractual obligations, especially for tenants, generated doubts about the ability of landlords and tenants to negotiate to mitigate their effects. On the other hand, for Colombian jurisprudence, the theory of unforeseeability, provided for in Article 868 of the Commercial Code, only applies when there are significant imbalances in the benefits for both parties, which makes it difficult to apply it when the lessee loses the ability to pay the royalties under the established terms, since this risk would be only in the latter (Bauer and Bernal-Fandiño, 2021).

In addition, although the pandemic and the confinement measures were unforeseeable and irresistible events that initially affected the ability of the parties to comply with their obligations, the temporary nature of the measures decreed in the context of the emergency, as well as the possibility - in some cases - of partially using commercial premises, made it difficult to classify these events as force majeure (Bauer and Bernal-Fandiño, 2021). In response, the Government issued measures such as Emergency Decree No. 797 of 2020, which allowed tenants of commercial premises to unilaterally terminate contracts with a payment equivalent to one third of the agreed penalty clause. However, this measure was declared unenforceable by Judgment C-409 of 2020 of the Constitutional Court, further increasing the existing legal uncertainty, especially in the face of those parties that had already made use of these extraordinary and temporary powers.

In this context, the impact of the pandemic on contractual relations in Colombia would have been significantly different if, by virtue of the social function of the State and contractual solidarity, specific rules had been included in the Commercial Code to regulate situations of excessive supervening and unforeseeable onerousness in the fulfillment of the obligations of a commercial lease contract. Such rules would have offered greater protection in the face of extraordinary circumstances, as do Articles 1464 and 1467 of the Italian Civil Code, which provide for mechanisms of adaptation and/or contractual termination to restore balance in times of crisis, thus promoting a more equitable and supportive legal framework.

In this scenario, for example, a Colombian lessee who faced excessive onerous liability to comply with the payment of the established fee would have had the option of either partially complying with the payment due or, failing that, terminating the commercial lease contract, as long as he had not yet complied with the payment obligation. Likewise, this option would have allowed tenants to face the impossibility of payment without resorting to judicial processes or government measures that are completely uncertain in the face of its validity, and would have mitigated the socioeconomic effects of the pandemic, whose impacts are still visible today.

CONCLUSIONS

In the first place, contractual solidarism, although it has its conceptual antecedents in French law, from the end of the nineteenth century to the beginning of the twentieth century has been a doctrine whose development permeated countries such as Germany during the first half of the twentieth century, and later, in a more profound way, Colombia and Italy (Bernal-Fandiño, 2016). This doctrine aims to create a correlation between the social context and the economic and legal relations of the different subjects in society, to avoid higher levels of inequality on a social and material scale within civil and commercial contracts.

Even today implies, a *rereading* of the classic concept of the liberal State and strict compliance with the formalistic postulates of Law, as well as a greater interpretative faculty of the judge (Bernal-Fandiño, 2016).

Secondly, in countries such as Colombia, contractual solidarism owes its development mainly to the 1991 Constitution and the subsequent process called the constitutionalization of private law. This, owing to the interpretative powers granted to the judge and the deep irrigation that was given to the concepts of solidarity and the social State in the Colombian regulatory framework, has made a rereading of the scope of fundamental legal principles, such as the principle of solidarity in the framework of contractual relations. Thus, it has generated, in its way, the

creation of a series of limits to private autonomy, and a greater acceptance of a social and equitable vision of contractual relations.

However, the process has not been free of controversy, due to the existing differences with other corporations, especially from the civil branch of the Colombian judiciary. This fact has been demonstrated by the absence of a more direct development of the principle of solidarity by the Supreme Court of Justice, considering that private law is self-sufficient in terms of the solution of possible contractual disputes, in postulates such as good faith and abuse of rights. This has caused, as an effect, that the application of constitutional principles in contractual relations, whether in matters of contracts between individuals with financial or housing entities, has been championed by corporations such as the Constitutional Court, which has created a duality at the time of imparting justice (Calderón, 2007).

In addition to this, these views are supported by authors such as Mantilla (2011), who states that allowing the use of principles such as solidarity to solve cases not provided for in the law, could mean a higher level of legal uncertainty, since it would dilute the application of precise rules and increase judicial decisions, motivated by eminently emotional or intuitive value judgments, reducing the validity and objectivity of the exercise of imparting justice, especially in Colombia.

Thirdly, taking Italian law as a counterpart, constitutional principles such as the duty of solidarity have not only existed since the mid-twentieth century, in all relational aspects of citizens, but, since the nineties, they began to deepen their application, integrating the general postulates of private law established in the Civil Code, such as those of contractual good faith and equity. Such application has been led by the Cassation Chamber of the Italian Supreme Court of Justice, in judgments such as 10.511 of September 24, 1999, against the reduction of the penalty of one of the parties for being considered excessively onerous; 18.128 of September 13, 2005, with facts similar to the first one; and 9140 of May 16, 2016, against the contractual rebalancing in the application of an insurance contract by the postulates of equity and solidarity (Macario, 2016).

Likewise, articles such as 1464 and 1467 of the Italian Civil Code have provided Italian society with additional tools to face unforeseeable and exceptional difficulties, such as the Covid-19 emergency in the context of lease contracts for commercial and industrial premises. Which, far from generating uncertainty and contradictory legal measures, these mechanisms have strengthened the capacity of the Italian legal system to adapt to unforeseen situations, promoting a fair balance and solidarity between the parties and reinforcing legal certainty in times of crisis (Tarantino, 2020).

Therefore, contractual solidarism in Italy has generated a process of rereading the rules of the Civil Code in accordance with constitutional principles, in order to harmonize their application from the field of judicial interpretation, which results in the birth of a *living law*, a law aware of social reality (Macario, 2016).

Finally, this qualitative and jurisprudential analysis poses both a challenge and an invitation to the academic and legal community to explore and apply contractual solidarism in a more open way. This approach could transform the perception of the validity and effectiveness of fundamental legal principles and the role of the judge in the framework of neo-constitutionalism. An irreversible process in systems such as Colombia's, given its link with the principles of a social state of law.

Likewise, contractual solidarism, especially as applied in the Italian case, would provide Colombian society with sufficient and clear tools to face extraordinary events, such as the Covid-19 pandemic. And although controversial, the full adoption of contractual solidarism could be a turning point to address and reduce economic imbalances in legal-private relations in any scenario. The resistance to applying these principles and to conceiving the law as a system adapted to socio-economic contexts only widens the distance between the objectives of justice and equity promoted by the Constitution and practical reality. In this sense, the Italian case emerges as a model worthy of study, in which it is possible to apply precise normative principles and postulates without creating doctrinal or institutional contradictions.

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