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# Thoughts on Bureaucratic Barriers: A Brief from Chile, Colombia, Ecuador, and Peru

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## ABSTRACT

This article aims to reflect on the legal and economic problems caused by the presence of bureaucratic barriers in Ecuador. The bureaucratic barriers

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- 5 This journal article is associated with the Universidad Autónoma de Chile, Chile (Facultad de Derecho - Línea de Investigación Reforma y Modernización del Estado y

or obstacles in this paper are understood as the result of rigid bureaucratic structures that require a person to fit the structure rather than vice versa<sup>6</sup>. In that order of ideas, it brings up some relevant thoughts extracted from regional experiences. Furthermore, methodologically, it proposes a descriptive and preliminary characterization of local systems, providing the reader with a versatile review without affecting its rigorosity. It also proposes to review part of the relevant Ecuadorian regulations for the future implementation of a robust and modern system for the elimination of bureaucratic barriers. This jurisdiction was selected due to its initial stage of development about other more "advanced" experiences in the region such as Mexico, Colombia, Chile, and Peru. Finally, the article aims to describe "regulatory improvement" actions complementary to those currently in force, such as those contained in the Organic Law for the Optimization and Efficiency of Administrative Procedures of Ecuador.

**Keywords:** Bureaucratic Barriers, Regulatory System, Institutional Strengthening, Legal-Economic Rationality.

## Algunas consideraciones sobre las barreras burocráticas: un estudio de Chile, Colombia, Ecuador y Perú

### RESUMEN

Este artículo tiene como objetivo principal reflexionar sobre los problemas jurídico-económicos que conlleva la presencia de barreras burocráticas en el Ecuador. En ese orden de ideas, trae a colación algunas ideas relevantes extraídas de las experiencias chilena, colombiana y peruana. En ese sentido, metodológicamente propone una caracterización de estos sistemas de carácter descriptivo y preliminar permitiendo al lector una revisión versátil, pero sin afectar su rigurosidad. Asimismo, y a manera de un ejemplo, se revisa parte de la normativa ecuatoriana relevante para la futura implementación

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6 Sue Maynard Campbell, and Alice Maynard Lupton. *Bureaucratic Barriers to Normal Day-to-Day Activities*, 2000. Available at: [https://disability-studies.leeds.ac.uk/library/titles/B/?cds\\_page=2](https://disability-studies.leeds.ac.uk/library/titles/B/?cds_page=2)

de un robusto y moderno sistema de eliminación de barreras burocráticas. Esta jurisdicción fue seleccionada debido a su estadio de desarrollo inicial en relación con otras experiencias más "avanzadas" de la región, como la mexicana, la colombiana, la chilena y la peruana. Finalmente, el artículo apunta a describir acciones de "mejora regulatoria" complementarias a las actualmente vigentes, como las contenidas en la Ley Orgánica para la Optimización y Eficiencia de Trámites Administrativos del Ecuador.

**Palabras clave:** barreras burocráticas, sistema normativo, fortalecimiento institucional, racionalidad jurídico-económica.

## INTRODUCTION

The State is the main body responsible for the efficient and effective protection of the rights of citizens<sup>7</sup> as stated in Article 75 of the Constitution of the Republic of Ecuador. To perform this task, it uses tools such as ordinances, regulations, agreements, and resolutions, which are normative powers granted to public sector entities. However, it is not only the lack of legislative technique in these provisions that opposes the principles dictated in the Organic Administrative Code (COA), namely: effectiveness; Art. 3, efficiency; Art. 4, quality; Art. 5, hierarchy; Art. 6, coordination; Art. 9, proportionality; Art. 16, simplification, and others. This therefore generates scenarios that limit the full exercise of rights.

The doctrine refers to these limitations by the administration as *bureaucratic barriers*. These barriers involve the establishment of demands, requirements, limitations, or prohibitions that entail impositions by administrative entities with a conditioning and/or irrational effect, *i. e.*, they restrict or hinder the access and/or permanence of natural or legal persons in the market<sup>8</sup>. In other words, following the work of Maynard Campbell and Maynard Lupton<sup>9</sup>, bureaucratic barriers are examples of obstacles resulting from rigid bureaucratic structures that require a person to fit the structure rather than vice versa<sup>10</sup>.

7 Nathalia Lescano Galeas, Mayra Cristina Mena Mena y Rubén Méndez Reátegui, "Eficacia, eficiencia y efectividad en la resolución de conflictos transigibles de niñez y adolescencia en el Ecuador", *Revista de Derecho de la UNED (RDUNED)*, num. 18, 2016. Also: Rubén Méndez Reátegui. *Law and Economics: Institutional Coordination and Legal Theory*. Quito: Centro de Publicaciones PUCE, 2019.

8 Indecopi. *Manual on prevention and elimination of burden barriers*, 2017, available at: <https://www.indecopi.gob.pe/documents/20182/0/barreras+vol+1.pdf/eee38b85-5dd9-b947-ea26-533c6cdb4d10> [visited June 1, 2003].

9 Sue Maynard Campbell and Alice Maynard Lupton, *Bureaucratic Barriers to Normal Day-to-Day Activities*, 2000. Available at: [https://disability-studies.leeds.ac.uk/library/titles/B/?cds\\_page=2](https://disability-studies.leeds.ac.uk/library/titles/B/?cds_page=2)

10 The Peruvian National Institute for the Defense of Competition and the Protection

Likewise, this type of barrier affects the administrators in the development of acts such as the processing of administrative procedures, despite being governed by the simplification principle included in the "Whereas" of the Administrative Organic Code.

Considering the above, the implementation of a specialized entity (independent and/or attached to the Ecuadorian Superintendence of Economic Competition), in charge of eliminating or preventing bureaucratic barriers, would help avoid affecting citizens' rights. It would also complement the work of other public sector agencies, and provide a subsequent level of control to avoid prolongation of the limitation of the rights of the administered.

Therefore, this article reflects on the legal and economic problems associated with the presence of bureaucratic barriers in Ecuador. It also reviews part of the national regulations related to the potential implementation of a system for the elimination of bureaucratic barriers. The purpose of this is to avoid the consequences of illegal barriers. Finally, a transversal comparison between the Chilean, Colombian, Peruvian, and Ecuadorian experiences is introduced. This is to propose "regulatory improvement" actions complementary to those currently in force, such as those contained in the Organic Law for the Optimization and Efficiency of Administrative Procedures.

## 1. BRIEF DEVELOPMENT OF ECUADORIAN REGULATIONS

A study of Ecuador's administrative regulations reveals several shortcomings. In general, such regulations are issued without an adequate legislative technique that would allow us to foresee, in the first place, their effects and consequences and to reach an adequate degree of harmonization and/or integration.

of Intellectual Property - Indecopi (2017, p. 5) describes as examples of bureaucratic barriers: (1) The requirement for a home moving certificate or other proof of a similar nature; (2) The requirements to obtain an operating license; (3) The imposition of a specific validity period on an operating license, when the administrator does not do so; (4) The impediment to present writings or requests; and (5) The right to process a procedure to obtain authorization for the location of advertising advertisements on public roads.

Likewise, Indecopi in 2017 (p. 7) pointed out that were examples of "illegal bureaucratic barriers": (a) The requirement to obtain an operating license that is not contained in the list of requirements that at most can be requested by article 7 of Law num. 28976, Operating License Framework Law; and (b) The collection of processing fees based on the value of the work to obtain a building license, since article 31 of Law num. 29090, Law for the Regulation of Urban Facilities and Buildings, establishes that Processing fees must be determined by the provision of the service. Indecopi. *Manual on prevention and elimination of burden barriers*, 2017. Available at: <https://www.indecopi.gob.pe/documentos/20182/0/barreras+vol+1.pdf/eee38b85-5dd9-b947-ea26-533c6cdb4d10>.

Furthermore, they lack legal-economic rationality (*i. e.*, they consider elements such as opportunity costs, and social efficiency, among others) and this situation affects their regulatory "function", turning them into tools for the policing activity of the administration that may involve a potential affectation to the strength of the institutional framework in a country where constitutionally legal and regulatory security is pursued. This problem transcends merely formal issues and in practice ends up affecting all citizens at the different levels of government within the country<sup>11</sup>.

This situation influences the appearance of regulatory risk (and its perverse effects) if we consider that the Organic Code of Territorial Organization, Autonomy, and Decentralization in Art. 5 recognizes the existence of regulatory powers for all decentralized autonomous governments. In other words, these autonomous governments can issue regulations regarding the activities carried out within their territory, such as ordinances, without complying with a process that accredits an adequate quality standard.

Therefore, these 'tools' may not be very efficient in terms of systemic impact, slowing down any diligence to be carried out by the administrated parties. An example of this can be found in the high number of requirements for the exercise of formal commercial activity that is usually established to satisfy the administration of a territory. Moreover, these same requirements must be resubmitted from time to time for the renewal of operating licenses or the concession of public spaces (which involve the processing of permits for the publication of posters with commercial names). These measures slow down any activity that those administered need to carry out legally in each territory and increase its opportunity cost (economic cost), sowing the seed that gives birth to the underground or extralegal economy.

These requirements, which lack legal-economic rationality, and slow down the activities required by the administrated parties, are known as bureaucratic barriers. Their existence is one of the causes if we think about the limitations to the growth and development of the country and relate it to the hindrance of economic exchange and mercantile dynamism.

#### 1.1. REGULATION AND PREVENTION OF BUREAUCRATIC BARRIERS

Ecuadorian regulations, precisely those derived from the introduction of the Constitution of Montecristi, do not foresee the recurrent use of administrative simplification as a tool -extended- to grant a better service to the administered at any level of government. This 'legal precariousness' generates inconveniences in our normative system, affecting the factual transcendence of the Constitution and its development norms, in proper attention to the

11 Art. 242 of the Constitution of the Republic of Ecuador.

principle of hierarchy<sup>12</sup> and the notion of preservation of the legal-legal ecosystem of the country<sup>13</sup>.

This is the case since administrative simplification generates a set of mechanisms that regulate the organization of the administration for dealing with the administered, and these mechanisms seek to make any procedure or process with the administration simple to carry out (consolidating democratic access and true equality before the law). According to the OECD<sup>14</sup>, a timely relationship between those administered and the administration in turn leads to the emergence of positive externalities that end up favoring innovation and entrepreneurial initiatives.

Let us recall that a modern and efficient State also requires respect for the principle of rationality. This means that administrative actions must follow the reality of a given society. Furthermore, it must consider other laws applicable to the case, in order not to establish contradictions. And if the administrative actions imply a cost or fee, this must be 'reasonable' (reflecting the fixed costs of the administration) and not excessive (*i. e.*, without any 'profit motive'), since this would be detrimental to those who are administered<sup>15</sup>.

Despite the introduction of a new legal framework such as the Organic Administrative Code (COA), which was intended to solve some conflicts of specialty and hierarchy, it began to generate problems almost immediately. This led to a search for new mechanisms that would *promote, protect, and guarantee* the rights of the administered. With this purpose, the Law for the Optimization and Efficiency of Administrative Procedures was published in 2018, which largely develops the principles of rationality, simplification, and celerity, among others. This represented an important contribution in support of the rights of the administered.

However, through this rule, the legislator failed to foresee a factual mechanism to achieve the objectives of the legal provision and thus improve the welfare of the administered. A rule of mandatory compliance was introduced, which, despite outlining administrative actions at all levels, was not accompanied by a specialized organization or the projection and emergence of a system that would ensure its due and effective compliance. This situation has not been altered despite the existence of other devices such as Executive

12 Lucía López de Castro y Gaspar Ariño. *La competencia en sectores regulados: Regulación empresarial y mercados de empresas*. Granada: Comares, 2003.

13 Although an attempt is currently being made to reverse this situation, at the time the COA was issued in 2017, the principle of administrative simplification was not sufficiently and expressly developed.

14 OECD. *OECD study on regulatory policy in Colombia: beyond administrative simplification*. Paris: OECD, 2019.

15 Jaime Rodríguez-Arana. *Derecho administrativo español*. Oleiros, La Coruña: Netbiblo, 2008.

Decree 372 that declared State policy, and the improvement and simplification of procedures (norm published in the Official Gazette Supplement 234 of May 4, 2018).

## 1.2 VIOLATION OF THE PRINCIPLE OF LEGALITY

The principle of legality is based on the pre-existence of norms that regulate human behavior and the power exercised by the State through all its entities at the level of all government. Moreover, according to Cassagne<sup>16</sup>, it is possible to base positive or negative actions on general principles of law or on human rights that underlie such behavior.

This 'manifestation of legality' within the legal system is called the "rule of law", *i. e.*, it is required that the government -on duty- and the State see their actions based on faculties and powers recognized by laws issued within a context of the strictest respect for order and normative or institutional coordination<sup>17</sup>. These powers of the agent that embodies the administration will also be 'parameterized' by the degree of affectation towards third parties or citizens in general<sup>18</sup>.

The above becomes even more relevant if we consider the many cases in which, because of the issuance of anti-technical administrative regulations that contravene the provisions of laws of higher hierarchy, the right of the administered to have a non-contradictory and uniform legal system has been violated. As we have tried to emphasize, these anti-technical rules produce bureaucratic barriers that greatly hinder the economy of a territory and the country in general. Likewise, because of their existence, a great 'bottleneck' has been generated in the administrative litigation procedure, since numerous are the administered who act when they consider themselves affected by the administrative decisions that determine the introduction of new formalities and irrational fees.

## 1.3. BUREAUCRATIC BARRIERS AND ADMINISTRATION

Bureaucratic barriers affect not only the people towards whom the rules or policies are directed, but also the functioning of the bureaucratic apparatus, since the central administration, which issues the rules through which powers

16 Juan Carlos Cassagne. *The great principles of public law (constitutional and administrative)*. Madrid: Reus, 2016.

17 Rubén Méndez Reátegui. *Essays on institutions, coordination, and legal theory*. Quito: Centro de Publicaciones PUCE, 2017. Also: Rubén. Méndez Reátegui. *Law and Economics: institutional coordination and legal theory*. Quito: Centro de Publicaciones PUCE, 2019.

18 Rodolfo Luis Vigo. *Constitucionalización y judicialización del Derecho: del Estado de Derecho legal al Estado de Derecho constitucional*. Mexico: Porrúa, 2013.



are granted to various public sector entities, assumes the cost of the negative external effect generated by the inefficient actions of the other levels of government.

By granting various competencies to other entities, and not doing so in a coordinated manner, inconsistencies begin to emerge within the system due to the diversity of ways of approaching competencies and heterogeneous actions by the decentralized administrations. And to complicate matters, these competencies are often challenged by third governmental entities at the same 'hierarchical level'. In this way, the organs of the administration are exposed to a permanent conflict of interests in which more than one wishes to show that it holds ownership of the powers that have been recognized or granted to them. Although these 'conflicts' can be resolved through the hierarchically superior body, in certain cases they do not lead to effective corrections but rather imply the preservation of unscathed ('contradictory') powers by different entities, especially control entities. This adds to the appearance of complex scenarios of exposure to perverse intra-governmental incentives and the emergence of the nefarious 'institutional capture'.

A clear example that occurs within the control bodies is in tax and accounting matters, as, although the Internal Revenue Service (SRI) has the legal obligation to control the economic activities developed in Ecuador and the power to review the balance sheets presented by the subjects of commerce, this power is also held by the Superintendence of Companies, Securities, and Insurance (Supercias). This, in addition to being an example of operational opposition, also constitutes a significant bureaucratic barrier. Let us remember that both entities are managed with a different accounting system and people who want to associate for the formation of a company do not do so due to the administrative procedures that must be presented to keep their balances legal and without delays. Consequently, people are now associating with 'civil companies' because the only control entity in charge of overseeing these companies is the IRS and, therefore, the amount of paperwork presented is lessened by only dealing with a single institution.

As we have argued, in good faith, the sufferings of the administered originate -at least in part- due to a problem of legal opposition and lack of harmonization and integration of the regulatory bodies. In this case, the administration has tried to settle the conflicts by calling for dialogue so that the incorporation of companies does not become a practice in disuse. It follows that the administration can introduce temporary solutions such as trying to adhere to the principle of coherence and coordination, trying to unify the procedures in a single system, and making the incorporation of companies 'viable'. However, we are faced with a *second-best* proposal. The optimal solution would be to legally allow the IRS to continue exercising its tax collection powers and the Supercias to consolidate its powers (beyond that of control over the companies) to those essential for the fulfillment of its mission.

## 2. BUREAUCRATIC BARRIERS AND INFRINGEMENT OF RIGHTS

From a conception of institutionalization of the 'social contract', there are several rights that have been granted to the administration by the citizens, and as a result the Ecuadorian State must promote and ensure compliance with these rights. This bidirectional transfer targets the generation of greater intra-systemic social efficiency. Therefore, the proposal for the institutionalization of the 'social contract' aims at a subsequent allocation of powers under a scheme of equilibrium within which each entity sees its "operational needs" satisfied. In other words, the State must manifest itself factually through mechanisms (intra-systemic responsiveness) that -in theory- pursue a high degree of satisfaction (net utility) on the part of the administered.

However, the above theoretical assumptions are not entirely fulfilled in the Ecuadorian state. Undoubtedly, it is possible to argue the validity of the right to access effective and efficient public services if we mention the provisions of art. 66.25 of the Constitution. However, this type of assumption only expresses what is provided by the legal basis and not the factual scenario that assumes the existence of bureaucratic barriers (*lack of respect* and prevalence of custom *contra legem*). This becomes worse if we assume that, with the approval of more legal bodies (*legislative, administrative, and regulatory inflation*), the number of bureaucratic barriers has only multiplied exponentially. This structural effect on Ecuador's regulatory system requires an urgent response from the State, which helps to overcome the -factual- context of a violation of the rights of the administered since their actions are limited in any matter subject to control or review by administrative bodies.

The administration's failure to comply with the existing rules has led to an increasing attempt to make up for this problem with more laws that provide for the inclusion of further principles and the application of more mandatory rules. But no efficient mechanism is foreseen to control administrative actions, ex-ante, and ex-post. These controls should be carried out to promptly study the conflicts that may arise because of the administrative actions of the state<sup>19</sup>.

### 2.1. ADMINISTRATIVE ACTIONS AND THE PRINCIPLE OF SIMPLIFICATION

Within the instruments used by administrative bodies at all levels of government, we can mainly distinguish two generic groups according to their scope: Those of general scope and those of specific scope. These two scopes will be analyzed below.

19 Jack Rabin. *Encyclopedia of public administration and public policy*. New York: Taylor & Francis, 2008.

The instruments of general scope used by administrative bodies have an *erga omnes effect*, which means that all persons, in general, are obliged to comply with them, regardless of their condition. These kinds of instruments are the ones that generate a great number of bureaucratic barriers since they hinder the free development of the activities of the administered and dictate several unnecessary requirements for the processing of any process that wants to be carried out<sup>20</sup>.

This problem is most evident in the field of economic development since there are many unnecessary and unreasonable requirements to either incorporate or legalize a company, which hinder these processes. The instruments of specific scope are used to settle conflicts between the administered and the administration of an entity; precisely for this reason, such instruments are called resolutions, although many times they are also aimed at a plurality of persons. This plurality of persons, both natural and juridical, is always pigeonholed within a set of commercial sectors such as the textile industry, automotive industry, export industry, and others<sup>21</sup>.

Despite the timely use of these instruments, many times they continue to cause conflicts since they do not adhere to the principle of simplification, which is understood as the way to carry out administrative acts simply and concisely so as not to demand a long and dilatory process within the administrative processes necessary to carry out the legalization or legitimization of an activity subject to control by the administrative institutions. In this way, all the rights that have been recognized to the administered are violated to a great extent. Furthermore, the objectives set by the administrative bodies to carry out the processes requested by the administered parties simply and quickly are not fulfilled either.

## 2.2. ADMINISTRATIVE BODIES AND THE PRINCIPLE OF CELERITY

Another major problem that has arisen within the administrative bodies is that the instruments, both general and specific in scope, do not provide for the principle of celerity. The principle of celerity dictates that the authorities are obliged to have the necessary resources, procedures, and momentum to guarantee the greatest agility and fluidity in the public legal relations established between the administration and the administered<sup>22</sup>.

20 Javier Barcelona. *Ejecutividad, ejecutoriedad y ejecución forzosa de los actos administrativos*. Santander: University of Cantabria, 1995.

21 *Ibidem*.

22 Mario Molano López. *Transformación de la función administrativa: evolución de la administración pública*. Bogotá: Pontificia Universidad Javeriana, Facultad de Ciencias Jurídicas, 2005.

Despite the enactments of the Organic Administrative Code, under this guiding principle within the public administration, little improvement has been made in these aspects, despite the sanctioning nature of the principle of admonishing the actions of officials outside the time dictated by the entity<sup>23</sup>. This problem is reflected in the general instruments, which continue to maintain unnecessary requirements for the approval or acceptance of any procedure. It can also be seen in the general dissatisfaction on the part of users, who must invest a great deal of their time to carry out all the necessary procedures and comply with all the requirements.

One of the main problems that has arisen is the lack of application of the norms that reflect this principle, and one of the most relevant and important norms is the Law for the Simplification of Administrative Procedures. Despite the specialization with which this law treats administrative actions, there has not been a substantial change in the situation of the administrated parties.

This situation can be seen as evidenced by Art. 32.13 of the law for the optimization and efficiency of administrative procedures, in which it is established that the procedures when a voting certificate is not needed will be defined, but, despite its enactment on October 16, 2018, to date the procedures that will no longer need this requirement have not yet been established.

Although this law provides that the governing body for administrative simplification within all government entities is the Ministry of Telecommunications, Electronic Government, and Information Society, it does not provide any other mechanism to achieve speed and simplification. The mechanism to exercise stewardship, provided by this law, is the *ex officio* action, which is understood as the action of reviewing events that are within its competence, by its own will<sup>24</sup>. This represents a great problem of factual order since an entity that is responsible for reviewing the requirements and actions by its means will be slowed down since there are no efficient evidentiary means to help this stewardship.

It is important to address and solve this problem. One of the most efficient and effective solutions found so far is the creation of a control body for the review before and after the enactment of an instrument of general scope, so that it can hear other acts or requirements that are claimed by individuals, *i. e.*, at the request of a party, to achieve the invalidation of the instrument of a general or specific nature, due to its commission of rights for those administered.

23 *Ibidem*.

24 Juan Rafael Benítez Yébenes. *El procedimiento de actuación ante los órganos de la jurisdicción de vigilancia penitenciaria*. Madrid: Dykinson, 2017.

### 2.3. AMBIGUITY, NORMATIVITY, AND THE PRINCIPLE OF SIMPLIFICATION

An endless number of laws have been passed in Ecuador in recent years. However, there has been an evident problem concerning these laws, since, although they establish new rights that represent a significant advance at a social level, they do not provide effective mechanisms for the recognition and defense of these rights for the administered.

The ambiguity in the laws reflects the obscurity with which they were written, mainly the use of phrases or words that are presented or are susceptible to being understood in more than one sense. This "obscurity" is one of its major defects<sup>25</sup>. The ambiguity of the law also comes from the scarce or non-existent precision with which legal-administrative topics are approached, which often leaves aside important topics regulated by the same institutions that they are intended to regulate.

This contravention of Art. 2 of the COA, which establishes that administrative actions shall follow the principles that each institution has foreseen for its actions, generates noteworthy negative consequences at the level of the legal contra position. This article, while defending administrative simplification by granting the power to the entities to carry out their administrative actions as they find more convenient and, in time, decide, also states that the administrative actions must have an established term that they cannot exceed without justification. However, it does not indicate if this rule will be subject to any kind of supervision. Nor does it state whether any entity will oversee overseeing the administrative processes that do not have an extremely long duration.

Despite being the subject of a more specialized normative instrument, such as regulations, within the general provisions it is not established that regulation governing the competent authorities of any entity must exist. Therefore, we can defend the thesis -partially- that the deficient actions of the administrative bodies are also due to the normative gaps left by the laws that are enacted without due foresight on certain issues.

### 3. THE CHILEAN, COLOMBIAN, AND PERUVIAN EXPERIENCES WITH BUREAUCRATIC BARRIERS: A SUMMARY

At the international level, we can say that there has been a great innovation in the prevention of bureaucratic barriers, due to the existence of international support organizations, such as the Organization for Economic Cooperation and Development (OECD). The purpose of this organization is to cooperate

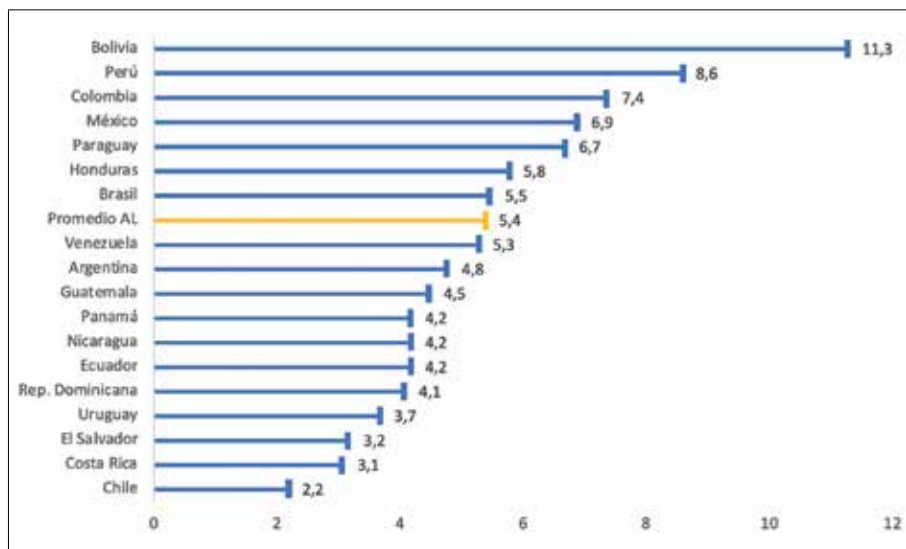
25 Lorenzo Arrazola *et al.* "Nuevo teatro universal de la legislación de España e Indias", *Revista de Legislación y Jurisprudencia*, num. 4, 1870.

internationally with various countries to improve market conditions, addressing problems from an economic and regulatory point of view.

These interdisciplinary studies complement each other in a way that does not violate the rights of either natural or legal persons, and promotes development in environmental, economic, and governance aspects. In this article, we take the development of governance to be an important pillar, as, in 2009, the OECD itself commented on issues of bureaucratic barriers through the publication of a book entitled *Overcoming Barriers to Administrative Simplification Strategies: Guidance for Policy Makers*<sup>26</sup>.

This publication provides a very complete tool, about the existence of bureaucratic barriers in all countries within their respective administrative constructions and provides guidelines for improvement within the administrations to eliminate and prevent bureaucratic barriers that hinder the system. Through these innovations that other countries are starting to implement, results begin to be seen almost immediately, as the market becomes more dynamic due to the elimination of irrational requirements that slow down the free development of the administered within the economic field. Many of these countries have also signed international agreements that oblige them, bilaterally, to prevent and eliminate bureaucratic barriers.

Graph 1: Average hours needed to carry out an administrative procedure by LATAM country



Source: Banco Interamericano de Desarrollo and Latinobarómetro 2017. Own elaboration.

26 OECD. *Overcoming Barriers to Administrative Simplification Strategies: Guidance for Policy Makers*. Paris: OECD Publishing, 2009.

### 3.1. THE CHILEAN AND PERUVIAN EXPERIENCES IN THE ELIMINATION AND PREVENTION OF BUREAUCRATIC BARRIERS

One of the closest examples we have of the latest regulatory innovations come from Chile<sup>27</sup> and Peru<sup>28</sup>. These countries have achieved a high level of economic growth in recent years, particularly in very important industries such as textiles and food<sup>29</sup>. However, this growth has been hindered by the introduction of new bureaucratic barriers by the various levels of administration that exist throughout the Peruvian territory. These barriers have not allowed new companies to fully position themselves in the market. Whereas in the Chilean scenario, despite shrinking growth and economic performance in recent years, the country has achieved rank as the country with the lowest average hours needed to carry out an administrative procedure as shown in graph 1.

For Peru, this problem has been addressed with two tools, which have been proposed by the OECD<sup>30</sup> to improve regulatory quality and encourage the introduction of foreign investment and the creation of new companies. The first tool proposed is the regulatory impact analysis, which proposes an ex-ante analysis of the issuance of any regulatory instrument. To foresee the legal errors that these instruments may contain, and thus improve the legislative and resolution technique, both legislative bodies and the entities possess regulatory and resolution capacity<sup>31</sup>.

In the analysis of the regulatory impact, an accurate cost-benefit weighting is sought. Regarding the norms to be implemented by the institutions, the issued resolutions above all constitute an administrative act. And when this is challenged, the contentious-administrative judicial process is congested.

The second tool is the prevention and elimination of bureaucratic barriers, which consists of the elimination of irrational requirements that hinder the correct development of any activity carried out by those administered.

27 OECD. *Chile Evaluation Report: Regulatory Impact Assessment 2017*. Paris: OECD Publishing, 2017; OECD/CAF. OECD. *OECD Regulatory Policy Outlook 2021*. Paris: OECD Publishing, 2021.

28 Óscar Alejos y Alejandra Suárez, "Las barreras del procedimiento de eliminación de barreras burocráticas para acceder al mercado. Una revisión del modelo de control administrativo", *Revista Digital de Derecho Administrativo*, num. 28, 2022, pp. 201-222.

29 Klaus Schmidt-Hebbel, "Chile's Economic Growth", *Cuadernos de Economía*, num. 43(127), pp. 5-48, 2006. Shane Hunt. *The formation of the Peruvian economy: distribution and growth in the history of Peru and Latin America*. Lima: Instituto de Estudios Peruanos, 2011.

30 OECD. *Building an Institutional Framework for Regulatory Impact Analysis (RIA): Guidance for Policy Makers*. Paris: OECD, 2008. (OECD, 2008).

31 Eduardo Quintana Sánchez. *Regulatory Impact Analysis in the Peruvian Regulation of Public Services*. Lima: Pontificia Universidad Católica del Perú (PUCP), 2016.

In addition, correct criteria are provided to prevent the construction of a new bureaucratic barrier<sup>32</sup>.

A particularity of this tool is the participation of the administered, since this kind of barrier commonly directly affects the administered, who are also responsible for overseeing action against a bureaucratic barrier before a competent entity. Finally, this tool also includes the creation of a competent entity to deal with bureaucratic barriers and to oversee being able to receive actions presented by the administered to achieve the elimination and invalidation of such barriers. In this way, it will be without effect and will not be used in future cases.

Peru has also created a commission attached to the National Institute for the Defense of Competition and Protection of Intellectual Property (Indecopi), called the Commission for the Elimination of Bureaucratic Barriers (Comisión de Eliminación de Barreras Burocráticas). This entity is empowered to hear actions filed against administrative acts or prohibitions, to guarantee the permanence and introduction of trade agents within the country. In addition, it can perform subsequent control over administrative simplification rules issued by state entities<sup>33</sup>.

These powers have been granted by Legislative Decree num. 1256, which approves the Law for the Prevention and Elimination of Bureaucratic Barriers. This law details the powers of the commission. One of the important powers granted to the commission is to hear claims at the request of a party. That the persons administered can act in case they find an impediment to the free development of their activities. Peru has taken a great step, to allow better economic development by the issuance of new policies that allow and encourage the introduction of new companies within the country and the permanence of new companies. In this way, the rights of both companies and individuals are effectively taken care of.

### 3.2. THE COLOMBIAN EXPERIENCE IN ELIMINATING BUREAUCRATIC BARRIERS

In Colombia, several problems have arisen from bureaucratic barriers 'instituted' throughout the administrative apparatus. And despite the country's economic growth, these have still hindered its development and growth to a great extent. One example is the 'hindering' by the administration of the incorporation of new ventures in the market<sup>34</sup>.

32 OECD. *Overcoming Barriers to Administrative Simplification Strategies: Guidance for Policy Makers*. Paris: OECD Publishing, 2009.

33 Eduardo Quintana Sánchez. *Regulatory Impact Analysis in the Peruvian Regulation of Public Services*. Lima: Pontificia Universidad Católica del Perú (PUCP), 2016.

34 Tobias Querbach, y Christiane Arndt. *Regulatory policy in Latin America: An analysis of the current situation*. Paris: OECD Publishing, 2017.



Therefore, Colombia has not yet become a country that institutionally and optimally favors national and foreign investment, which would improve its current positioning in regional and global markets. This is partly because the country still suffers from a bureaucratic apparatus that demands numerous procedures and imposes excessive requirements to legalize and incorporate a company<sup>35</sup>. The above is supported by data from the Inter-American Development Bank (IDB). This entity conducted a study on bureaucracy at the Latin American level and the amount of time invested in carrying out any procedure in any administrative entity. Within this research, the countries where the greatest amount of time must be invested were determined. Colombia is the third country with the third highest amount of time invested in the completion of procedures, with 7.4 hours required, on average, for any given procedure<sup>36</sup>.

Faced with this scenario, the Colombian government decided to initiate a long process for administrative simplification that began with the implementation of regulatory impact analysis within the levels of administration to reduce the number of hours invested and improve the regulatory technique in the entities, which also aimed to effectively safeguard the rights of the administered<sup>37</sup>.

It is important to highlight the relevance of the decision taken by Colombia to improve its system for carrying out procedures since several goals have been set to reduce the time required to carry out procedures. Although it is a long road, it has been fully initiated. Awareness of the problem has been raised and a plan for the improvement of the administrative service has been proposed.

Within the whole process of streamlining the Colombian administration, important steps have been taken to achieve objectives. First, it has been recognized that there is a major problem regarding the excessive slowing down of any administrative procedure.

Second, regulatory impact analysis has been implemented as an *ex-post* control tool to control the production of regulations. Third, a compilation of the regulations issued by the administration bodies, both central and decentralized, has been carried out<sup>38</sup>. Finally, it has been proposed to increase the use of Information and Communication Technologies within the institutions to reduce the need for agents within the institutions to carry out a procedure and instead aim to digitalize various processes.

35 *Ibidem*.

36 Benjamin Roseth *et al.* *The end of the eternal paperwork*. Washington D.C.: Inter-American Development Bank, 2018.

37 OECD. *OECD study on regulatory policy in Colombia: beyond administrative simplification*. Paris: OECD, 2019.

38 Claudia Patricia Díaz Baquero. *Iniciativas de simplificación administrativa para la eliminación de barreras burocráticas en Colombia*. Colombia: Función Pública, 2015.

The above represents an important step towards institutional change that other countries in Latin America should consider given the rapid progression of the digital revolution. Therefore, it is relevant and necessary to embrace these tools for administrative simplification. In this way, aspects such as the investment of time (costs) for the fulfillment of procedures decrease significantly. Colombia has taken an important step in administrative simplification by identifying the problem and proposing an action plan with a series of steps to be followed. This highlights the importance of correctly recognizing the conceptual problem and solving it with consistent and pragmatic methodology, in a way that benefits those who are administered and the development of the social and economic system.

### 3.3. THE ECUADORIAN SYSTEM AND THE ELIMINATION OF BUREAUCRATIC BARRIERS

In Ecuador, it has not been possible to verify significant degrees of innovation in the processes involving the design, approval, and implementation of systems that contribute to the simple and fast completion of procedures and the prevention of bureaucratic barriers. This is even though there is a clear need at all levels of the administration to become more dynamic and thus benefit the citizens. This type of action becomes more relevant if we consider contributions such as the study of the Inter-American Development Bank, in which Ecuador ranks 13th, with an average time per procedure of up to four hours<sup>39</sup>.

Through a lack of initiatives or implementation of strategies with a transcendent level of impact in terms of administrative simplification tools or the prevention or elimination of bureaucratic barriers, Ecuador is affected in its levels of institutional competitiveness, especially if we compare it with the country neighbors in the Andean Community (CAN) and even Unasur.

Although the Law for the Optimization and Efficiency of Administrative Procedures and Executive Decree 372 have been issued, these are still insufficient to radically impact the efficiency of the administration. Despite containing several rules that seek dynamism at all levels, it does not establish a governing and/or coordinating entity capable of hearing conflicts or resolving disputes that affect the rights of free exercise of the administered.<sup>40</sup> In other words, the absence of an entity to monitor the relevance and reasonableness of the requirements to carry out a procedure and to initiate *ex officio*

39 Benjamin Roseth et al. *The end of the eternal paperwork*. Washington D.C.: Inter-American Development Bank, 2018.

40 OECD/CAF. *OECD study on regulatory policy in Colombia: beyond administrative simplification*. Paris: OECD, 2019.

corrective procedures or issue a report is felt, and makes the prevalence of bureaucratic barriers in the country endemic.

In other words, although Ecuador recognizes the problem of the lack of regulatory quality and the existence of bureaucratic barriers, it has not formulated a plan for the introduction of effective mechanisms to make the administrative system more dynamic. Overcoming this situation also requires a broader, and not merely conceptual, perspective. In this order of ideas, the executive branch must expand its measures and stop considering that -at times- the anchor of the administration will be lifted when most of the procedures can be carried out online.

The use of telematic tools is a wise decision in principle, since it implies the transfer to new technological environments that require the use of digital media to promote the procedures. However, a big problem arises in the methodology, since no specific plan has been proposed for the streamlining of procedures at the administrative level. In the country there has not been a thorough and sufficiently broad study to determine which procedures can be carried out online. That is, there is no consensus on which are the 'simplest' and do not require complex systems of greater control by the administrative entities.

Therefore, to date, Ecuador has not yet proposed a structured plan to reduce the time invested by those wishing to undertake official actions and eliminate the irrationality of the requirements in certain procedures. Nor has it assigned a binding and sanctioning power to a governing body, capable of becoming the expert on these procedures and their management problems. In short, Ecuador's attempt to reduce the requirements for formalities and simplify them has been unsuccessful and has not achieved the same results as other countries in the region, such as Colombia and Peru.

### 3.4. THOUGHTS ON ECUADOR

For Ecuador, a country that has not yet adopted an aggressive policy regarding administrative simplification and the elimination of bureaucratic barriers, it is important to form practical proposals that fully collaborate with the administration. In first place, it would be convenient to create a stand-alone governing body, or assign responsibility to the Superintendence for Economic Competition (SCPM), so that a single entity oversees reviews of the regulations of the administrative institutions' *ex officio*. In addition, it should be able to identify the problems that the regulations cause to the administrated parties at the request of a third party (suspending the unreasonable requirements that are requested for the plaintiff, within an administrative procedure). This governing body should also be extended sanctioning and suspensive power so that it may sanction the administrative entities for non-compliance with the rules that provide for speed and simplification.

Secondly, the tax classification of less complex procedures that can be carried out online should be generated in a unified manner and gradually expanded. In this way, the use of technological tools and the Internet will be promoted, and the amount of time required to complete an administrative procedure will be greatly reduced. Finally, through this plan, the improvement of the administrative system and the reduction of time costs, such as those involved in the completion of procedures, objectives, and goals for the short, medium, and long term will be established. In this way, an efficient and effective bureaucratic apparatus will be 'built', and, over the years, the positive external effects derived from a greater satisfaction on the part of those administered will become evident.

## CONCLUSIONS

It is necessary to keep improving the regulatory quality of both the legislative power and the rules issued by the administrative entities and this statement is valid for Chile, Colombia, Ecuador, and Peru. This is to avoid producing scenarios like the harmful effects derived from the existence of antinomies or legal loopholes. It is also necessary to implement a more technical vision of the factual role of a rule in the country so as to prevent and eliminate bureaucratic barriers efficiently and effectively. In short, the regulations issued must reflect an effective materialization of the principles of legality, coherence, and simplification, to achieve socially efficient goals (public order, and respect for the general interest, among others) in the short, medium, and long term.

Despite the difference in terms of degree and impact assessment of the results related to bureaucratic barriers and other related matters for Chile<sup>41</sup>, Colombia<sup>42</sup>, Ecuador<sup>43</sup>, and Peru<sup>44</sup>, the bureaucratic barriers issue must be

41 Camila Carrasco Donoso, Florencia Canales Gana y Andrés Osorio Tocornal. *Guía Chilena para una Buena Regulación*, 2019. Available at [https://open.economia.cl/wp-content/uploads/2019/04/Guia-Chilena-2019\\_25abril.pdf](https://open.economia.cl/wp-content/uploads/2019/04/Guia-Chilena-2019_25abril.pdf)

42 Departamento Nacional de Planeación. *Mejora Normativa*, 2023. Available at [https://www.dnp.gov.co/LaEntidad\\_/subdireccion-general-prospectiva-desarrollo-nacional/direccion-gobierno-ddhh-paz/Paginas/que-es-la-mejora-normativa.aspx](https://www.dnp.gov.co/LaEntidad_/subdireccion-general-prospectiva-desarrollo-nacional/direccion-gobierno-ddhh-paz/Paginas/que-es-la-mejora-normativa.aspx)

43 Servicio Ecuatoriano de Normalización INEN. *Mejora Regulatoria*, 2023. Available at <https://www.normalizacion.gob.ec/mejora-regulatoria/>

44 In Peru, the executive branch recently published Legislative Decree num. 1565. This regulation approves the General Law for the Improvement of Regulatory Quality, which aims to optimize competitiveness and sustainable and inclusive economic and social growth in the country. In this sense, the aim is to (1) strengthen the advances made in the design of standards that effectively solve public problems and therefore improve the quality of life of citizens. (2) Likewise, strengthen the mandatory use of Regulatory Impact Analysis (AIR), the use of evidence and exchange of information

quickly and effectively mitigated to avoid undermining the rights of citizens. The administration must also be protected from those who seek to escape its control threshold by resorting to acts of corruption (*e. g.*, institutional capture). Therefore, 'examinations' of the rules must be carried out to prevent the perverse effects of bureaucratic barriers. These controls can be *ex-ante* and *ex-post*, *i.e.*, they can be carried out before or after their issuance to mitigate any -potential- detrimental effects of their impact on society.

Therefore, it is important that the actions of the administration for all the reviewed countries, both in regulatory and decisional matters, are attached to the principle of simplification to avoid slowing down the free development of the administered parties. It is also pertinent that the regulation further obliges the administrative entities to commit and adhere to the principle of celerity. As a result, the time spent, and the costs involved in the completion of any administrative procedure will be reduced. Likewise, it is necessary that the rules that reflect the principle of simplification, which binds administrative entities, be more specific and do not leave legal loopholes that disassociate administrative actions from the rule itself. Moreover, it is pertinent to consider the tools proposed by international organizations to establish an institutionally competitive legal system. In short, it is essential to consider the 'innovations' made by neighboring countries that face the same kind of complications.

It is timely for the country to materialize an operational plan that addresses the conceptual and methodological perspective of quality and regulatory improvement and the lifting of bureaucratic barriers. The aim is to promptly solve, for example, the slowdown in the processing of administrative processes at the level of centralized and decentralized bodies. This means that a prompt response is required from the authorities in charge of controlling the administrative apparatus and guaranteeing the rights of the administration. Therefore, the prevention and elimination of bureaucratic barriers are important as the body in charge of reviewing the regulations of the administrative institutions can sanction *ex officio*, and at the request of a party, procedures that demand requirements which go beyond the sphere of what is reasonable and pertinent.

for decision-making; in addition to elevating the roles and responsibilities within the entities for its application to the rank of law. (3) Also, the Regulatory Quality Improvement Officer is designated as responsible for coordinating, articulating, and ensuring the adequate organization of the process and implementation of the corresponding instruments in the entities of the Executive Branch. (4) In addition, citizen participation is promoted in the evaluation of approved regulations, through the creation of the Advisory Commission for the Improvement of Ex Post-Regulatory Quality. (5) Finally, the role of the Public Management Secretariat of the Presidency of the Council of Ministers is strengthened as the governing body of the Administrative System for the Modernization of Public Management and responsible for promoting the improvement of the processes in the country. Available at: <https://acortar.link/R31fQl>

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